

ISSUES

Whether the claimant was covered by the employer's workers' compensation policy on February 7, 2019.

The claimant's application for hearing in this matter endorsed other issues (including compensability and penalties). However, pursuant to an order issued by the ALJ on October 4, 2019, those additional issues were bifurcated and held in abeyance pending the outcome of the current issue. The only issue before ALJ at this time relates to the coverage of the claimant on February 7, 2019.

STIPULATED FACTS

At hearing, the parties submitted the following stipulated facts:

1. The employer is a limited liability company (LLC).
2. The claimant is a member of the LLC and owns more than 10 percent of the membership interest of the LLC. The claimant controls, supervises, and manages the LLC.
3. The employer obtained a workers' compensation policy with the insurer that was effective on August 8, 2016.
4. On August 9, 2016, the claimant signed a "Rejection of Coverage by Corporate Officers or Members of a Limited Liability Company (LLC)" form.
5. On August 9, 2016, the insurer received the claimant's rejection of coverage.

FINDINGS OF FACT

1. The employer operates a promotion products business. The claimant has operated the employer business for 11 years. The claimant's job duties include everything from accounting, communicating with customers, and delivering product.
2. The claimant testified that prior to August 2019 the employer did not have workers' compensation coverage. The claimant also testified that the employer received notification from the State of Colorado that workers' compensation coverage was required for the company.
3. The claimant contacted his insurance agent, Ken R[Redacted], regarding obtaining such a policy. Mr. R[Redacted] is an agent with the insurer. He informed the claimant that the insurer does provide workers' compensation insurance policies. The

claimant requested a quote for a policy. Mr. R[Redacted] prepared a premium estimate for the employer of \$240.00.

4. The application for a workers' compensation policy for the employer listed the claimant as the Owner/CEO. In addition, the application was notated to indicate that the claimant was to be excluded from the policy. The application also noted a premium of \$240.00. The employer paid the insurer the premium of \$240.00.

5. The employer's workers' compensation policy became effective on August 8, 2019. The policy included an exclusions section that stated that the policy did not cover the claimant.

6. As indicated in the stipulated facts, on August 9, 2016, the claimant executed a document in which he refused coverage as an "owner" of the employer business. Language included in that form states, in part:

I hereby elect to reject workers' compensation coverage based on C.R.S. § 8-41-202 (Non-agricultural).

By signing this form, you are acknowledging your rejection of all benefits under the Workers' Compensation Act. You are further acknowledging that you are an owner of . . . at least 10% of the membership of the LLC at all times, and control, supervise or manage the business affairs of the . . . LLC. (*emphasis in the original*).

7. Despite signing the form identified above, the claimant testified that he believed that he was covered by the policy. The claimant also testified that he did not understand the document he signed.

8. The claimant also testified that in the days after he signed the rejection of coverage document he contacted Mr. R[Redacted] to tell him that he did not wish to proceed. The claimant further testified that he has not signed any document in which he rescinded his rejection of coverage.

9. On February 11, 2019, the claimant contacted Mr. R[Redacted] regarding filing a claim for an occupational injury. On the employer's behalf, Mr. R[Redacted] completed and filed an Employer's First Report of Injury. The body parts affected were listed as "multiple upper extremities". Thereafter, the claimant received some medical treatment.

10. On May 13, 2019, the claimant attended an independent medical examination (IME) with Dr. Jonathan Sollender.¹ At the time of the IME, the claimant reported symptoms in his bilateral hands and wrists. Those symptoms included numbness and tingling. In addition, the claimant report pain in his bilateral forearms.

¹ Although the issues of causation and compensability are not at issue at this time, the ALJ notes the report of Dr. Sollender to assist with an understanding of the overall timeline of events.

11. On May 28, 2019, the insurer denied the claimant's claim pending the completion of the IME process. Thereafter on June 13, 2019, the insurer denied the claimant's claim. The reason provided was that the injury was not work related.

12. Later the claimant learned from respondents' counsel² that the insurer would continue to deny the claim because the claimant had refused coverage, as evidenced by the document signed on August 9, 2016.

13. The claimant argues that he should have been covered by the employer's policy because he believed he was covered and he did not understand that he was excluded. The ALJ is not persuaded by the claimant's assertions. The claimant executed a document in which he rejected coverage. He has not rescinded that rejection.

14. At hearing, the claimant presented documents pertaining to an audit conducted by a third party on behalf of the insurer. In forms relating to that audit, the claimant included himself as an "employee". Similarly, the employer reported to the Colorado Department of Labor, Division of Unemployment Insurance that the claimant was an employee. As the ALJ understands the claimant's arguments, these documents demonstrate that the claimant believed he was an employee of the employer.

15. Mr. R[Redacted] testified by deposition. Mr. R[Redacted] testified that the claimant was not to be covered by the employer's workers' compensation policy. Mr. R[Redacted] also testified that, in his experience, owners of limited liability companies typically reject coverage for themselves because it results in monetary savings. Mr. R[Redacted] prepared a quote for the estimated premium, for the employer with the claimant excluded from coverage. The policy was issued excluding the claimant. Mr. R[Redacted] testified that the claimant has not expressed to him, verbally or in writing, that he intended to revoke his rejection of coverage.

16. Debra B[Redacted], Underwriting Team Manager with the insurer also testified by deposition. Ms. B[Redacted] testified that in the application for a workers' compensation policy the claimant was to be excluded from the policy. Ms. B[Redacted] also testified that the premium for the employer would have been approximately \$184.00 more if the claimant had been included in the coverage. Ms. B[Redacted] testified that the insurer has not received revocation of the claimant's rejection of coverage.

17. The ALJ does not find the claimant's testimony to be credible or persuasive. The claimant first asserts that he did not understand the impact of signing the revocation, but also asserts that he instructed his insurance agent to withhold the form.

18. The ALJ credits the documents entered into evidence and finds that the claimant has failed to demonstrate that it is more likely than not that he was covered by the employer's workers' compensation policy.

² The claimant was unrepresented at that time.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado (the Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2018).

4. Section 8-42-202, C.R.S., provides:

(1) Notwithstanding any provisions of articles 40 to 47 of this title to the contrary, a corporate officer of a corporation or a member of a limited liability company **may elect to reject the provisions of articles 40 to 47 of this title**. If so elected, said corporate officer or member shall provide written notice on a form approved by the division through a rule promulgated by the director of such election to the worker's compensation insurer of the employing corporation or company, if any, by certified mail. If there is no workers' compensation insurance company, the notice shall be provided to the division by certified mail. Such notice shall become effective the day following receipt of said notice by the insurer or the division.

(2) A corporate officer's or member's election to reject the provisions of articles 40 to 47 of this title **shall continue in effect** so long as the corporation's or company's insurance policy is in effect or until said officer or member, **by written notice to the insurer, revokes the election to reject said provisions**.

(3) Nothing in this section shall be construed to limit the responsibility of corporations or limited liability companies to provide coverage for their employees as required under articles 40 to 47 of this title. An election to reject coverage pursuant to this section may not be made a condition of employment.

(4) For the purposes of this section:

(a) "Corporate officer" means the chairperson of the board, president, vice-president, secretary, or treasurer who is an owner of at least ten percent of the stock of the corporation and who controls, supervises, or manages the business affairs of the corporation, as attested to by the secretary of the corporation at the time of the election.

(b) "Member" means an owner of at least ten percent of the membership interest of the limited liability company at all times and who controls, supervises, or manages the business affairs of the limited liability company. (*emphasis added*).

5. A business owner "who exercises his right to reject coverage under [Section] 8-41-202 is not considered an employee under the Act." *Boyle v. Red Mountain Builders, Inc.*, W.C. No. 4-778-626, (ICAO Feb. 18, 2010) *citing Kelly v. Mile Hi Single Ply, Inc.* 890 P.2d 1161 (Colo. 1995).

6. Section 8-41-202, C.R.S. was introduced in 1983 in response to business owners' complaints that the Act's self-coverage requirement "unduly burdened their operations." *Kelly* at 1163. This amendment "provided two primary benefits for small business owners: the right to reject compensation coverage and to avoid its premiums, and the corresponding right to choose their coverage without unnecessary duplication from the compensation scheme." *Kelly* at 1164.

7. The ALJ concludes that the claimant was not covered by the employer's workers' compensation policy as a result of the claimant's rejection of coverage. The statute is very clear that such a rejection continues until the individual revokes their refusal of coverage in writing. The ALJ further concludes that the claimant did not revoke his rejection in writing. Therefore, the claimant continued to be excluded from coverage.

8. As the ALJ understands the claimant's argument, he believed he was covered by the employer's policy, and therefore he should be covered. The ALJ finds nothing in Section 8-42-202, C.R.S that provides for consideration of a claimant's belief or understanding. On the contrary, the statute is quite clear that once the rejection of coverage is executed, it can only be undone by a written revocation. Therefore, regardless of what the claimant thought or believed, he was not covered by the employer's policy.

ORDER

It is therefore ordered that the claimant's claim for workers' compensation benefits is denied and dismissed.

Dated this 2nd day of January 2020.



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

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

**FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND ORDER**

In the Matter of the Workers' Compensation Claim of:

[Redacted],
Claimant,

vs.

[Redacted],
Employer,

and

[Redacted],
Insurer,
Respondents.

Hearing in this matter was held on October 30, 2019 before Administrative Law Judge Kimberly Turnbow at the Office of Administrative Courts in Denver, Colorado. Claimant was represented by [Redacted], Esq. Respondents, [Redacted], were represented by [Redacted], Esq. The proceedings were digitally recorded in courtroom 3 from 1:30 p.m. until 2:04 p.m. The Judge then held the record open until November 25, 2019 so that the parties could conduct the post-hearing deposition of Dr. Timothy O'Brien on November 11, 2019, and submit position statements.

In this order, the ALJ refers to [Redacted] as "Claimant," [Redacted], as "Employer," [Redacted], as "Insurer," and Employer and Insurer collectively as "Respondents."

The ALJ admitted Claimant's exhibits 1 through 13, and Respondents' exhibits A through J which into evidence without objection.

Also in this order, "Judge" refers to the Administrative Law Judge, "C.R.S." refers to Colorado Revised Statutes (2019); "OACRP" refers to the Office of Administrative Courts Rules of Procedure, 1 CCR 104-1, and "WCRP" refers to Workers' Compensation Rules of Procedure, 7 CCR 1101-3.

ISSUES

The issues to be determined by this decision are the following issues:

- Whether Claimant has proven by a preponderance of the evidence that she suffered a compensable injury on March 10, 2018?
- If Claimant suffered a compensable injury, has she proven that her ongoing medical conditions are causally related to the alleged work injury?
- If Claimant suffered a compensable injury, has she proven an entitlement to ongoing reasonable, necessary, and causally related medical benefits?

STIPULATION

The parties reached the following stipulations:

1. Claimant's average weekly wage is \$644.00.

PROPOSED FINDINGS OF FACT

Based upon the evidence presented at hearing, Respondents request the ALJ find as fact:

1. Claimant originally reported her injury to the employer as a non-work injury, and obtained wage benefits for five months under a Short Term Disability Policy.
2. Claimant testified that she received short term disability for her injury from March through July 2018.
3. Claimant's short term disability report does not mention any work injury. Rather, the Disability Report is blank where it asks about whether the injury was work related. Claimant testified that she told the short term disability adjuster that her injury was work-related, but this information does not appear in the call transcript information.
4. When Claimant's short term disability benefits ended, she returned to work full duty.
5. Claimant then filed her workers' claim for compensation on March 20, 2019.
6. Claimant filed her workers' claim for compensation over a year after the alleged injury of March 10, 2018, and just one week before she gave notice to quit her job with Employer.
7. Claimant's wage records show that Employer last paid Claimant March 24, 2019. Claimant began her employment with Cherry Creek Schools as a health tech on April 8, 2019.

8. Claimant testified that she injured her left shoulder on March 10, 2018 while lifting a trash can.

9. Claimant's initial medical reports do not mention a work-related injury. Rather, they repeatedly confirm ongoing neck complaints for approximately one year prior to the alleged injury.

10. Claimant's initial medical reports describe Claimant felt numbness in her left arm which began with no specific precipitating event or incident.

11. On March 11, 2018 Claimant reported to Dr. Elma Kreso that she felt something vibrating in her left shoulder while she was at work the day before. Claimant stated that she was drilling when the vibrating feeling occurred, and that she had experienced the same issues in the past. Claimant reported the same issue had happened two weeks earlier, and she used apap with icy hot. Claimant also reported she had this same issue four or five times in the past, and the first time was about one year prior to this visit.

12. On March 14, 2018 Claimant returned to Dr. Kreso and reported that she felt like an electric shock was heading down her arm when she turned her head to the left.

13. Dr. Kreso ordered cervical spine x-rays and opined that they did not show anything concerning, just some arthritis.

14. Claimant attended physical therapy with Jason Delavan on March 19, 2018. Mr. Delavan notes that Claimant reported she had sporadic left sided neck pain for about a year, but felt that the pain had gotten worse in the past one to two weeks. Claimant did not report any work-related mechanism of injury nor did she allege an incident involving lifting a trash can.

15. At hearing Claimant repeatedly testified that she disagreed with the medical records and that they were incorrect. The ALJ is not persuaded by Claimant's testimony that her medical records are in error.

16. The persuasive evidence supports a finding that Claimant had longstanding complaints to her left shoulder and neck that were not work related. Dr. Kreso and Therapist Delavan outline Claimant's reports of symptoms for about a year prior to her alleged work injury.

17. Claimant testified that she never had any left shoulder and neck complaints in the past. However, Claimant's complaints of back pain date back to 2009. In a pain questionnaire from 2009, Claimant reported that she had back pain. Claimant also had complaints of neck pain with left shoulder radiation at an appointment with Dr. Freeman on January 28, 2011. Claimant reported that she had been experiencing chest pain for four or five years, and that the pain usually started in the chest and traveled up to the neck with left shoulder radiation.

18. Dr. O'Brien testified that Claimant's medical records indicated that Claimant had prior complaints of shoulder pain, and that she might have received a prior injection.

19. When questioned about these prior complaints of pain, Claimant testified that she did not remember them. The ALJ finds these medical records more persuasive than Claimant's testimony.

20. During Claimant's testimony, she became confused as to which shoulder was injured. Claimant's medical history also mentions a right shoulder injury during her treatment with Dr. Jared White. Both Claimant's testimony and the medical report from Dr. White are inconsistent with an alleged left shoulder injury.

21. Dr. O'Brien opined that Claimant had revised her historical input regarding the mechanism of her injury as the March 11, 2018 reports do not mention dumping garbage into a dumpster, Claimant's revised mechanism of injury.

22. Dr. O'Brien remarked on inconsistencies in Claimant's reporting. For example, when Claimant saw Dr. White on May 14, 2018, she reported a six-month history of left shoulder pain that dated back to a lifting episode with a trash can. Dr. O'Brien explained that this would place the onset of Claimant's symptomatology in December 2017, not on March 10, 2018 as she alleges. Dr. O'Brien's testimony was consistent with his opinions expressed in his medical report.

23. Dr. O'Brien testified that Claimant's medical records were not consistent with the history she provided to him during his IME. Dr. O'Brien further testified that not only were there inconsistencies in the records themselves, but there were inconsistencies between the records and the reporting provided at the time of his examination.

24. Dr. O'Brien testified that on examination, Claimant's muscular development in both arms was the same, but that there was a dramatic difference in grip strength, which was only explained by nonorganic factors. Dr. O'Brien testified that the rest of the examination was essentially normal.

25. Dr. O'Brien testified that Claimant's examination demonstrated only nonorganic or magnified pain.

26. Dr. O'Brien testified that Claimant had a normal musculoskeletal exam to her neck and shoulder and that her subjective complaints of pain at the time of his examination were all non-organically based. Dr. O'Brien further testified that there was no work injury documented in the records, and that there was no isolated event that could explain the onset of Claimant's symptoms. Dr. O'Brien ultimately testified that he did not believe an occupational exposure caused her symptoms, and that she did not have any injury.

27. Claimant did not introduce opinions from any of her physicians that causally-related injuries to her alleged work injury.

28. Claimant's physicians found her condition to be degenerative. In an off-work note dated July 2018, Dr. Hancock wrote that Claimant "is being treated by Dr. Hancock for numbness and tingling in arms per *degenerative spinal condition*."

29. Dr. Jared White believed that the majority of Claimant's shoulder symptoms were actually stemming from her cervical spine. Dr. White opined that Claimant had mild symptoms on physical examination with mild complaints of actual shoulder pain. He

suspected “that the majority of the patient’s pain is secondary to her cervical spine with radiculopathy causing numbness in the first through third digits.” Dr. White did not even refer Claimant for a left shoulder MRI, but rather referred her for a cervical MRI. As evidenced above, the cervical MRI revealed degenerative changes.

30. The Cervical Spine MRI performed on June 7, 2018 revealed a disc protrusion at C4-C6 producing central stenosis, multilevel disc degeneration and facet arthropathy.

31. The Left Shoulder MRI performed on February 20, 2019 revealed no rotator cuff tear. Rather it showed mild ac joint osteoarthritis, minimal supraspinatus tendinosis, no muscle edema or atrophy, mild degeneration and fraying of the posterior labrum, and no bone contusion or fracture. There were no cartilage defects or reactive bone marrow edema. There was no joint effusion. These findings are not traumatic in nature, but rather show that Claimant had a degenerative condition. Dr. O’Brien concluded Claimant had profoundly positive nonorganic physical findings on his examination. Additionally, claimant had historical revisions of her mechanism of injury and absence of reporting of any type of work-related injury contemporaneous to the onset of her symptoms.

32. Dr. Shenoj reviewed the left shoulder MRI and opined that there was no rotator cuff tear, but rather mild inflammation of the bursa, which was not surgical or serious.

33. Dr. O’Brien opined that the imaging reports, including the MRI scan and the cervical spine CT, demonstrated chronic age-related degenerative changes and demonstrated no evidence of any type of acute injury. Dr. O’Brien testified that the diagnostic imaging reports showed arthritis of the neck with longstanding degenerative changes, and that there was no evidence of an acute injury such as a fracture or dislocation. During his examination, Dr. O’Brien found no redness, bruising, or swelling in the left shoulder area. Claimant’s range of motion was bilaterally symmetric and full.

34. Ultimately, Dr. O’Brien opined that Claimant’s onset of symptomatology on March 10, 2018 was a manifestation of her personal health and in no way causally related to any work activity or isolated injury event that occurred on that date.

35. The ALJ finds that Claimant has not proven by a preponderance of the evidence that she suffered a compensable injury on March 10, 2018.

CONCLUSIONS OF LAW

The purpose of the Workers’ Compensation Act of Colorado (Act), sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers’ compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of respondents and a workers’ compensation claim shall be decided on its merits. Section 8-43-201, C.R.S.

The claimant bears the burden of proving by a preponderance of the evidence that there is a direct causal relationship between the employment and the alleged injuries. Section 8-43-201, C.R.S.; *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

The determination of whether there is a sufficient nexus or causal relationship between the claimant's employment and the injury is generally one of fact. *Hembry v. Industrial Claim Appeals Office* 878 P.2d 114 (Colo. App. 1994). The mere temporal relationship between the claimant's movements and the onset of symptoms does not necessitate a causal connection between the symptoms and the industrial event. *Scully v. Hooters*, W.C. No. 4-745-712, 2008 WL 4790420, at *3 (Oct. 27, 2008). There is no presumption that an injury that occurs in the course of a workers' employment also arises out of the employment. *Finn v. Industrial Commission*, 165 Colo. 106 (1968).

Claimant has not persuaded the ALJ that her complaints of left arm tingling while at work are causally connected to her employment, and arise out of the employment. Claimant had complained of this condition multiple times throughout the prior decade, and the temporal relationship of numbness occurring at work does not necessitate a finding of a causal relationship to the employment.

A claimant's right to compensation initially hinges upon a determination that "at the time of the injury, the employee is performing service arising out of and in the course of the employee's employment." C.R.S. § 8-41-301(1)(b). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.*, 124 Colo. 210, 236 P.2d 2993.

The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the proximate causal relationship between an incident/injury and the need for medical treatment, plus entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. (2013). See *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985).

After reviewing all the evidence, the ALJ finds that claimant did not prove that she suffered a compensable injury. Specifically, the following evidence confirms that a work-injury did not occur:

- Claimant failed to report the alleged injury to her employer until her workers' claim for compensation was filed on March 20, 2019, over a year after the alleged injury;
- Despite alleging an incident where Claimant was lifting a trash can, Claimant's medical records do not support that a trash can lifting incident ever occurred on March 10, 2018;
- Claimant's own reports of injury throughout the initial medical records indicate that she had suffered from this condition for about a year prior to the alleged event on March 10, 2018, and that she had been treating it with icy hot and acetaminophen;
- Claimant's testimony lacked credibility throughout the hearing. She repeatedly denied the information contained in her medical and short term disability records;
- Claimant falsely testified that she had no prior neck or left shoulder problems;
- Claimant's medical records indicate a longstanding, chronic history of neck and left shoulder complaints;
- The medical records and diagnostic testing supports a finding that these symptoms are chronic and degenerative in nature;
- None of Claimant's medical providers opined regarding the causal relationship between Claimant's injuries and her employment; and
- Dr. O'Brien credibly testified that Claimant did not sustain a work-injury, that her reports of injury were inconsistent, that her examination was essentially normal, and that there were only findings of nonorganic pain.

The ALJ concludes that Claimant failed to prove that an accident occurred which caused the need for a medical treatment and produced a work injury. The ALJ finds it more likely Claimant suffered from a personal condition which was pre-existing and not exacerbated by any activity or incident at work. The ALJ further concludes that Claimant did not sustain a compensable injury arising out of and in the course of her employment on March 10, 2018.

ORDER

The ALJ orders the following:

1. Claimant failed to prove by a preponderance of the evidence that she suffered a compensable injury on March 10, 2018. As a result, this claim is denied and dismissed with prejudice.

ENTERED this 6th day of January 2020.

/s/ Kimberly Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, #400
Denver, CO 80203

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

ISSUES

- Whether claimant has proven by a preponderance of the evidence that she is entitled to an award of temporary total disability (“TTD”) benefits for the period of September 22, 2018 to January 4, 2019 and from March 30, 2019 until termination by law?
- Whether claimant has proven by a preponderance of the evidence that she is entitled to an award of temporary partial disability (“TPD”) benefits for the period of August 4, 2018 to September 21, 2018?
- Whether respondents have established that claimant committed a volitional act that resulted in her termination of employment pursuant to Sections 8-42-103(1)(g) and 8-42-105(4), C.R.S.
- The parties stipulated at hearing to an average weekly wage of \$520.00.
- The parties stipulated at hearing that if temporary disability benefits are awarded, the following amounts shall be paid by respondents:
 - TPD benefits in the amount of \$337.61 for August 4, 2018 to September 21, 2018.
 - TTD benefits in the amount of \$742.68 for September 22, 2018 to October 6, 2018.
 - TTD benefits in the amount of \$174.01 for October 7, 2018 to October 24, 2018 due to an employment offset allowed by respondents of \$717.00.
 - TTD benefits in the amount of \$3,565.75 for October 25, 2018 to January 4, 2019.
 - TPD benefits in the amount of \$1,323.57 for January 5, 2019 to March 29, 2019.
 - TTD benefits in the amount of \$11,291.54 for March 30, 2019 to November 12, 2019.

FINDINGS OF FACT

1. Claimant was employed by employer as a tire technician. Claimant began working for employer in September 2017. Claimant’s job duties included tire repair and tire replacement, stock tires, inventory count, cleaning the restrooms and showers, maintaining the grass area and maintenance of the shop.

2. Claimant sustained an admitted injury on August 4, 2018 when she smashed her hand in a tire jack. Claimant lacerated her left index finger and was treated at the emergency room. Claimant was discharged from the ER and instructed to follow up with an occupational medicine doctor within one week. Claimant was instructed by the ER physician to keep her wound covered until healed. Claimant was examined by Dr. Fitzgerald on August 6, 2018. Dr. Fitzgerald provided claimant with work restrictions that limited claimant to light duty work for one week on August 6, 2018.

3. At the time of claimant's injury, claimant was working the overnight shift for employer. Claimant had started working the overnight shift on July 23, 2018. Claimant's overnight shifts would last from 11:00 p.m. until 7:30 a.m. Following claimant's injury, claimant continued working the overnight shift initially, but due to the fact that claimant was on light duty, and no other technicians were scheduled to work the overnight shift, claimant was switched to a different shift. Claimant testified at hearing that when she was on light duty, she would have to apologize to customers and wait for the next technician to arrive if her work duties required her to perform work that was outside of her restrictions.

4. According to the wage records, claimant worked the night shift on August 6 through August 10, 2018. Claimant filed a complaint with her employer on August 13, 2018 against her manager, Mr. H[Redacted]. According to the complaint, Mr. H[Redacted] became argumentative with claimant because he wanted her to perform shop duties that she was unable to perform due to her light duty work status. Claimant requested to be anonymous in the complaint.

5. Claimant had been written up on two occasions prior to her work injury. Claimant was initially written up by Mr. H[Redacted] on April 9, 2018 when she called in sick. Mr. H[Redacted] noted in the write up that claimant had called in, been late or left early in her shifts 10 times since January 19, 2018. Claimant was written up again on July 6, 2018 for not emptying the trash barrels at the store prior to her shift or after her shift.

6. After claimant filed her complaint against her manager, claimant was written up by employer on August 24, 2018. In the August 24, 2018, claimant was written up for being late or leaving early four days since August 16, 2018 and having a no call/no show on August 22, 2018.

7. Notably, claimant's first day back with employer was August 15, 2018 at which time she was scheduled to work the overnight shift. Claimant testified at hearing that the shifts for employer were from 7:00 a.m. to 3:30 p.m. and from 3:00 p.m. to 11:30 p.m. with the overnight shift being from 11:00 p.m. until 7:30 a.m. with each shift including a ½ hour meal break. Respondents cross-examined claimant regarding the scheduled start and end times for the shifts for employer, but the ALJ finds claimant's testimony in this regard to be credible and persuasive as it would provide for three 8 hour shifts with some overlap between the shifts. Moreover, claimant's testimony is consistent with the time records entered into evidence that show shifts from 7:00 a.m. to 3:30 p.m., 3:00 p.m. to 11:30 p.m. and from 11:00 p.m. to 7:30 a.m.

8. Claimant testified at hearing that she was late for work on August 15, 2018 and had left work early on August 16, 2018 after her son began throwing up. Claimant testified she contacted the supervisor on duty in the store before leaving early on August 16, 2018 and was not spoken to about an issue with her leaving early until August 24, 2018.

9. Claimant's schedule changed from the overnight shift to the day shift on or about August 22, 2018. Claimant testified that when she had her shift change from the overnight shift to the day shift, she was not notified of it other than her scheduled start time was changed on the posted schedule. Claimant testified that when her schedule changed, she spoke to her supervisor and informed him that she would not be able to make be at her employer at the scheduled start time of 7:30 due to the fact that she had to get her kids to school.

10. With regard to the no call/no show incident on August 22, 2018 that claimant was written up for on August 24, 2018, claimant testified that she was scheduled to work the overnight shift on August 21, 2018 to 7:00 a.m. on August 22. Claimant testified that the schedule had her working the August 22, 2018 shift starting at 7:00 a.m., which would have kept her at the tire shop for a total of 17 hours from 11:00 p.m. the night before until 3:00 p.m. the next day. Claimant testified that she spoke to her supervisor about this scheduling mistake and she was told to go home after her shift and return the next day at 7:00 a.m.

11. According to the employment records entered by employer at hearing and the arguments made by claimant in the position statement, claimant was scheduled to work on August 22, 2018 at 10:00 a.m. for an 8 ½ hour shift after her overnight shift ended. This would have required claimant to work a full shift, drive home and be off for less than 3 hours before returning for another full shift. Insofar as employer scheduled claimant to work this shift in this manner, the ALJ finds the request unreasonable and finds no credible evidence of any extenuating circumstances that would explain a rational basis to request the claimant work such a schedule.

12. While there is some contradictions between claimant's testimony regarding her scheduled start time on August 22, 2018 and the employment records reported start time, The ALJ finds the neither schedule is a reasonable request of an employee who is changing from overnight shifts to day shifts.

13. The ALJ credits claimant's testimony with regard to the no call/no show incident on August 22, 2018 as it is corroborated by the time records that were entered into evidence at hearing. Moreover, no testimony was provided by respondents to explain the no call/no show incident beyond what was explained by claimant in her testimony at hearing. The ALJ further finds that the request by employer to have the claimant work two 8 hour shifts with less than a three hour break between the shifts, ostensibly due to a change in the schedule to be unreasonable, if that was the intent of the employer. Instead, claimant logged a total of 7.4 hours on the overnight shift stretching from the night of August 21, 2018 to the morning of August 22, 2018, followed

by 8.49 hours on August 23, 2018. Claimant was then written up for the no call/no show when she went to work on August 24, 2018.

14. According to the employment records, claimant had two more instances of being late after August 24, 2018. The first occurred on September 7, 2018 (which was documented by employer as occurring on September 8, 2018, but the time reports appear to have this incident occurring on September 7) and the second on September 17, 2018. According to the employer records, claimant last worked for employer on September 19, 2018 and was terminated on September 21, 2018.

15. According to the "Additional Comments" on claimant's termination paperwork filled out by Mr. H[Redacted], claimant had been "very problematic through the course of her employment since I have started here as the Tire Shop Manager ... Many times I have tried to do anything I can to help accommodate any troubling situation, much more than any other Employee. There are other occasions I should have documented attendance or behavioral issue (the main issues) but chose not to hoping that she would improve her career. This is also why I have been more attentive in making sure I am properly noting any issues I have to help give the broader scope of what I have had to deal with." At the end of the additional comments, the author noted that claimant "is currently on light duty due to an incident in which the adjustable portion of a jack stand, when released, pinched and damaged her index finger while she was doing some work in the shop roughly 4-5 weeks ago.... We are also waiting on the claims adjuster so she can go through therapy to be able to get back to full work responsibility."

16. After being terminated from her employment by Employer, claimant began working for Planet Fitness for a period of time. Claimant was subsequently terminated from her position with Planet Fitness on March 29, 2019. Claimant testified she was terminated from Planet Fitness due to missing work.

17. Claimant was referred for therapy of her hand on March 12, 2019 by Dr. Czpala. Claimant reported to Dr. Czpala on March 27, 2019 that she thought the therapy was helpful initially, but the pain had not really improved. Claimant was provided with work restrictions by Dr. Czpala on June 12, 2019 of no lifting more than 20 pounds. Claimant was also referred to Dr. Lewis and Dr. Rooks for evaluation and treatment. Claimant continues to be under active care for the injury.

18. The ALJ credits claimant's testimony at hearing that she received permission on August 16, 2019 to leave early when her son was throwing up. The ALJ further credits claimant's testimony that she was advised to not work the 10:00 a.m. shift on August 22, 2019. The ALJ further finds claimant's testimony credible that she spoke to Mr. H[Redacted] about issues involving her ability to appear at work for the 7:00 a.m. shifts due to the school schedule for her children. The ALJ finds this testimony corroborated by the employee comments on the August 24, 2018 write up where claimant notes that she had spoken to Mr. H[Redacted] on three occasions about her schedule and he had originally allowed her permission to show up at a set time after her scheduled start time.

19. Under the circumstances of this case, the ALJ finds that respondents have failed to establish that claimant was responsible for her termination of employment. The ALJ credits claimant's testimony that she had permission to leave early on August 16, 2018 and was not required to show up for her shift on August 22, 2018 after just finishing her overnight shift. The ALJ further finds claimant's testimony credible that she had originally be provided with permission to work a schedule that allowed her to take care of her child care responsibilities when her shift changed as this is reflected in her comments after being written up. While claimant was terminated for other issues as reflected in Mr. H[Redacted]' notes in the termination paperwork, including "behavioral issues (the main issues)", no credible evidence was presented at hearing to establish what the behavioral issues were and to what extent they played a part in claimant's termination and whether those behavioral issues constituted a volitional act on the part of claimant.

20. With regard to the issue of temporary disability benefits, the ALJ notes that claimant's lost time from work for the period of August 4, 2018 through September 21, 2018 was according to claimant, related to issues other than her injury, including her having to leave work early for a sick child. Additionally, according to the time reports entered into evidence at hearing, on August 13 and August 14, 2018, claimant was not at work due to "vac". The ALJ interprets these records to mean claimant had taken vacation during these two days and the missed time from work was not due to her work injury. The ALJ therefore determines that claimant has failed to establish that it is more likely than not that the wage loss prior to September 21, 2018 was related to claimant's work injury.

21. The ALJ finds that claimant had not been released to return to work regular duty as of the time of her termination of employment and was still under work restrictions as established by Dr. Fitzgerald at the time she was terminated from her work with employer. Due to the fact that claimant was under work restrictions at the time of her termination, and those work restrictions resulted in a loss of wages for employer, claimant is entitled to an award of temporary total disability benefits beginning September 22, 2018.

22. Once the temporary disability benefits have been established by claimant effective September 22, 2018, those benefits continue until there is a basis for termination of the benefits pursuant to the Colorado Workers' Compensation Act. The ALJ finds that there is no credible evidence of a basis for terminating the temporary disability benefits established by the record, and therefore orders that temporary disability benefits in the amounts established by the stipulation of the parties be paid beginning September 22, 2018.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving

entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2017).

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

4. As found, claimant has failed to establish by a preponderance of the evidence that her wage loss for the period of August 4, 2018 through September 21, 2018 was related to her work injury. As found, claimant's testimony during that she was required to leave work early on August 16, 2018 for a sick child and for vacation time. Due to the fact that claimant has failed to establish that her loss of earnings was related to the work injury, claimant's request for TPD benefits during this period of time is denied.

5. Claimant was terminated from work by employer on September 21, 2018. Claimant was under work restrictions as established by Dr. Fitzgerald that limited

claimant to light duty work as of the time of her termination. As found, claimant has established by a preponderance of the evidence that she is entitled to an award of TTD benefits commencing September 22, 2018 and continuing until terminated by law or statute.

6. Sections 8-42-105(4) and 8-42-103(1)(g), C.R.S., contain identical language stating that in cases “where it is determined that a temporarily disabled employee is responsible for termination of employment the resulting wage loss shall not be attributable to the on-the-job injury.” In *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P3d 1061 (Colo. App. 2002), the court held that the term “responsible” reintroduced into the Workers’ Compensation Act the concept of “fault” applicable prior to the decision in *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Hence, the concept of “fault” as it is used in the unemployment insurance context is instructive for purposes of the termination statutes. *Kaufman v. Noffsinger Manufacturing*, W.C. No. 4-608-836 (Industrial Claim Appeals Office, April 18, 2005). In that context, “fault” requires that the claimant must have performed some volitional act or exercised a degree of control over the circumstances resulting in the termination. See *Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1995) *opinion after remand* 908 P.2d 1185 (Colo. App. 1995).

7. As found, respondents have failed to establish that claimant committed a volitional act that resulted in her termination of employment. As found, claimant’s testimony that she had permission to leave work early on August 16, 2018 is found to be credible under the circumstances. As found, claimant’s testimony that she did not violate the no call/no show policy by failing to show up for work at 10:00 a.m. on August 22, 2018 after finishing her overnight shift a few hours earlier is found to be credible. As found, claimant’s testimony that she had spoken to her supervisor and been given initial permission to work a schedule that allowed for her early morning child care is found to be credible.

8. Therefore, the ALJ orders respondents to provide claimant with temporary disability benefits pursuant to the stipulated amounts set forth beginning September 22, 2018 and continuing until terminated by law or statute.

ORDER

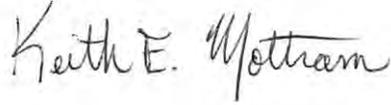
It is therefore ordered:

1. Respondents shall pay claimant temporary disability benefits pursuant to the stipulated amounts as reflected in this Order for the periods of September 22, 2018 and continuing until terminated by law or statute.

2. Claimant’s request for TPD benefits for the period of August 4, 2018 through September 21, 2018 in the amount of \$337.61 is denied and dismissed.

3. All issues not herein decided are reserved for future determination.

Dated: January 6, 2020



Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

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

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-110-490-001**

ISSUES

Whether the claimant has demonstrated, by a preponderance of the evidence, that the knee surgery recommended by Dr. William Sterett is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted April 4, 2019 work injury.

STIPULATIONS

At hearing, the parties stipulated that if the left knee surgery is found reasonable, necessary, and related to the work injury, the claimant is entitled to temporary total disability (TTD) benefits beginning June 15, 2019 and ongoing.

In addition, the parties agreed to hold in abeyance the following issues: 1) whether the claimant was responsible for termination of his employment; and 2) whether the claimant is entitled to TTD benefits from April 4, 2019 through June 14, 2019.

FINDINGS OF FACT

1. The claimant worked at the employer's restaurant in Vail, Colorado. The claimant began his employment in June 2018 as a sous chef. However, the claimant was later promoted to the position of Executive Chef.

2. On April 4, 2019, the claimant was at work performing his normal job duties and assisted one of his coworkers with dumping a large pot of boiled potatoes. During this process, the claimant was standing on a drain cover, and the drain cover moved. This resulted in the claimant's left foot slipping into the drain, causing his left knee to twist. The claimant testified that his left foot slipped four to six inches into the drain. The claimant reported the incident to the employer. The claimant testified that prior to the April 4, 2019 incident he had not experienced left knee pain or other symptoms.

3. At the direction of the employer, the claimant sought medical treatment in the emergency department (ED) with Vail Health on April 8, 2019. At that time, the claimant was seen by Dr. Mark Brownson and reported aching pain and swelling in his left knee. An x-ray of the claimant's left knee was taken. Based upon the x-ray, Dr. Brownson diagnosed a sprain of the claimant's left medial cruciate ligament (MCL). The claimant was provided crutches and a knee brace.

4. The claimant testified that his employment with the employer ended on April 9, 2019.

5. Subsequently, the claimant began treatment with Lucia London, CNP with Vail Health/Occupational Health. This provider is the claimant's authorized treating provider (ATP) for this claim. The claimant was first seen by Ms. London on April 17, 2019. At that time, Ms. London diagnosed "possible knee meniscus pain". Ms. London recommended ice, a hinged knee brace, crutches, and over the counter medications. In addition, Ms. London ordered a magnetic resonance image (MRI) of the claimant's left knee.

6. On May 2, 2019, an MRI of the claimant's left knee showed mild insertional quadriceps tendinosis without tear. The radiologist, Dr. Trystain Johnson, noted that it was an "unremarkable exam" and there was no meniscal tear.

7. On May 3, 2019, the claimant returned to Ms. London. On that date, Ms. London noted that the MRI was normal. However, the claimant was reporting continued left knee pain and a "clunking" sensation. Ms. London recommended physical therapy and referred the claimant to Vail Summit Orthopaedics for consultation.

8. On May 8, 2019, the claimant was seen at Vail Summit Orthopaedics by Jonathan Walker, PA-C. At that time, the claimant reported ongoing left knee pain. Mr. Walker recommended conservative treatment including physical therapy and a steroid injection. On that same date, Dr. William Sterett administered an intra-articular injection.

9. On May 24, 2019, the claimant returned to Ms. London and reported that since the injection administered by Dr. Sterett "[t]here has been absolutely no improvement in pain". Ms. London continued to recommend physical therapy, ice, and pain medications.

10. On May 31, 2019, the claimant returned to Dr. Sterett and reported that he had relief from the injection that lasted one to two days. In addition, the claimant was experiencing "locking and catching like symptoms". Dr. Sterett recommended that the claimant undergo a left knee diagnostic arthroscopy, lysis of adhesion, with synovectomy. On June 3, 2019, a request for authorization of the recommended surgery was submitted to the insurer.

11. The respondents filed a General Admission of Liability (GAL) on June 27, 2019. However, as reported in the other medical records, it appears that the recommended left knee surgery was denied by the respondents.

12. The claimant was again seen by Dr. Sterett on August 21, 2019. At that time, Dr. Sterett noted that the claimant had significant pain relief from the prior steroid injection. He opined that the claimant's left knee symptoms were possibly caused by a hypertrophic fat pad; or a cartilage contusion; or a meniscus tear. Dr. Sterett again recommended that the claimant undergo surgical intervention involving a left diagnostic arthroscopy and synovectomy. On August 22, 2019, a request for authorization of the recommended surgery was submitted to the insurer.

13. On September 16, 2019, the claimant attended an independent medical examination (IME) with Dr. Lawrence Lesnak. In connection with the IME, Dr. Lesnak reviewed the claimant's medical records, obtained a history from the claimant, and completed a physical examination. In his IME report, Dr. Lesnak opined that the claimant suffered a possible acute left knee sprain, but that sprain had been resolved. Dr. Lesnak did not believe that the claimant was in need of any additional medical treatment, including further injections or surgery. Dr. Lesnak also opined that the claimant had reached maximum medical improvement (MMI). Dr. Lesnak's testimony by deposition was consistent with his written report.

14. Dr. Lesnak testified that the claimant suffered a left knee sprain. Dr. Lesnak also testified that the recommended surgery is not reasonable, necessary, or related to the admitted work injury. In support of this opinion, Dr. Lesnak noted that the claimant had a normal MRI of his left knee that showed no evidence of any trauma or injury. In addition, Dr. Lesnak relied upon the May 24, 2018 medial report in which Ms. London recorded that the injection provided "absolutely no improvement in pain". Therefore, it is the opinion of Dr. Lesnak that the injection was not diagnostic. Dr. Lesnak also noted that the claimant presented with a normal exam at the IME, and demonstrated normal function.

15. The ALJ credits the medical records and the opinion of Dr. Lesnak over the contrary opinion of Dr. Sterett and finds that the claimant has failed to demonstrate that it is more likely than not that the recommended left knee surgery is reasonable, necessary, and related to the admitted work injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2018).

4. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; see *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

5. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that the left knee arthroscopic surgery recommended by Dr. Sterett is reasonable, necessary, and related to the admitted work injury. As found, the opinion of Dr. Lesnak and the medical records are credible and persuasive.

ORDER

It is therefore ordered that the claimant's request for a left knee arthroscopic surgery, as recommended by Dr. Sterett, is denied and dismissed.

Dated this 7th day of January 2020.



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

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

ISSUES

- Whether claimant has proven by a preponderance of the evidence that she sustained a compensable injury arising out of and in the course and scope of her employment with employer?
- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that the medical treatment she received from Dr. Stagg was reasonable and necessary to cure and relieve the claimant from the effects of the industrial injury?

FINDINGS OF FACT

1. Claimant is employed by employer as a stocker. Claimant testified she reported to work on May 28, 2019 to work the 2:00 a.m. to 10:30 a.m. shift. Claimant testified she clocked in and walked to the bathroom. Claimant testified she went blank and when she came to, she was struggling to get up. Claimant testified she looked around for a cone that would indicate the floor was wet, but did not see a cone. Claimant reported the incident to "Ryan", the night lead.

2. Store video of the incident was entered into evidence in the case. The video shows the floor being mopped by an employee. Claimant later walks into the area and slips and falls into the wall, landing on her left knee and then stands up.

3. Claimant reported the incident to Melissa J[Redacted], an assistant manager, and was referred for a urinalysis test. Claimant testified that Ryan began to explain what had happened and Ms. J[Redacted] said, "don't worry, there is a camera there." In the incident report, it is noted claimant complains of upper back pain.

4. Claimant was evaluated by Dr. Stagg on June 4, 2019. Dr. Stagg noted claimant reported she was at work when she slipped on a wet floor, landing on her right hip. Claimant reported she was not sure if she hit her head or not, and denied losing consciousness. Claimant complained of some occipital pain along with aches in her shoulders, arms and right hip that had gotten worse in the ensuing several days. Dr. Stagg recommended a computed tomography ("CT") scan of the head and neck and provided claimant with modified duty work restrictions.

5. The CT scans were performed on June 7, 2019. The CT scan of the head showed no intracranial abnormalities and no trauma. The CT scan of the neck showed no traumatic fractures or acute alignment abnormalities. Severe degenerative disc disease and facet degenerative joint diseases was noted at the C5-C6 level.

6. Claimant returned to Dr. Stagg on June 10, 2019. Claimant reported upper back pain with intermittent numbness into both hands and both legs. Claimant

reported an episode lasting about 20 minutes where she had some contracture of both hands three to four days prior. Claimant reported that since the injury, she had tingling sensations in both feet, but denied any back pain. Claimant was instructed to decrease her dosage of ibuprofen and provided with Lidoderm patches. Claimant was referred for an x-ray of the right hip and a magnetic resonance image (“MRI”) of the cervical spine. Claimant was also referred to Dr. Price for follow up and referred for physical therapy.

7. Claimant underwent the x-ray of the right hip on June 10, 2019. The x-ray was normal.

8. Claimant’s claim for benefits was subsequently denied by respondent.

9. Respondent referred claimant for an independent medical evaluation (“IME”) with Dr. Bernton on September 3, 2019. Dr. Bernton reviewed claimant’s medical records, obtained a medical history and performed a physical examination in connection with his IME. Dr. Bernton also reviewed the surveillance of claimant’s fall in performing the IME. Dr. Bernton noted claimant had received a release to return to work from her primary care physician.

10. Dr. Bernton noted that claimant complained of pain in her right leg along with tingling in both legs and both arms. Claimant also complained of bad headaches and dizziness as well as numbness in her bilateral hands. Claimant noted she had pain in her right groin and when she walks, her pain increased and claimant complained of shooting pains.

11. Dr. Bernton opined in his report that claimant did not sustain a work injury when she fell on May 28, 2019. Dr. Bernton opined in his report that while there were potential physical systemic problems which could result in some of claimant’s multiple symptoms, there was no medical basis on which claimant’s symptoms could be related to the slip and fall incident. Dr. Bernton noted that the surveillance video did not show a mechanism of injury for claimant’s right hip or an injury to the cervical spine. Dr. Bernton opined in his report that claimant has not had an occupational injury requiring medical care or resulting in impairment or disability.

12. Dr. Bernton testified consistent with his IME report at hearing. Dr. Bernton testified that in order to determine if it is possible for an accident to cause an injury, you have to go further and determine that they type and magnitude of the force did cause the particular problem. Dr. Bernton opined that there was no reasonable connection between claimant’s subjective reports of pain in her right leg and right groin and the fall that showed claimant going down on her left knee in the surveillance video.

13. Dr. Stagg testified as well in this case. Dr. Stagg testified consistent with his medical records. Dr. Stagg testified that when claimant came under his care, she reported having a fall at work, landing on her right hip and maybe hit her upper shoulder and was not sure if she hit her head or not. Dr. Stagg noted claimant complained of various subjective complaints including tingling sensations in both feet, intermittent numbness in her hands and legs with continued right hip pain and cervical pain, along

with an incident where she had contractures of both her hands. Dr. Stagg testified he recommended an MRI of claimant's cervical spine and referred claimant to a neurologist for electrodiagnostic studies, along with a physical medicine and rehabilitation specialist and to begin physical therapy. Dr. Stagg noted that he had not seen claimant since June 10, 2019 and was forwarded the surveillance video along with the report from Dr. Bernton.

14. Dr. Stagg testified regarding the foundation of his September 27, 2019 report in which he notes his conclusions on reviewing the video and the report from Dr. Bernton. Dr. Stagg noted in that report that the video shows the claimant slipping with her left knee hitting the ground and does not depict claimant losing consciousness. Dr. Stagg testified that what he observed on the video was claimant sipped with her right foot, went down and directly hit her left knee, with her elbow and maybe her shoulder hitting the wall. Dr. Stagg testified that the fall did not show much trauma or a large hit at the left elbow. Dr. Stagg also testified that there was no head injury in the video.

15. Dr. Stagg testified that when claimant's right foot slipped out, she could have strained a muscle, but she did not fall onto her right side. Dr. Stagg testified that claimant's fall could have caused a sort of whiplash injury, but he did not see her head move a lot during the fall.

16. In this case, claimant had an incident occur at work when she slipped on March 28, 2019. This incident is depicted in the video surveillance that was entered into evidence at hearing.

17. Claimant's testimony at hearing is inconsistent with the fall depicting on the surveillance video in that claimant testified she went blank after the fall and was on the floor when she woke up. The ALJ credits the surveillance video over the claimant's testimony at hearing regarding the nature of the fall.

18. The ALJ noted that accident history provided by claimant to her physicians is inconsistent with the accident depicted in the video. Claimant reported to Dr. Stagg that she fell, landing on her right hip. The surveillance in this case does not depict claimant landing on her right hip. Moreover, the video does not depict claimant striking her head in the fall.

19. The ALJ credits the video surveillance entered into evidence along with the opinions expressed by Dr. Bernton in his IME report and finds that claimant has failed to establish that it is more probable than not that she sustained a work related injury arising out of and in the course of her employment with employer. The ALJ further notes that the medical records in this case do not demonstrate evidence of an acute injury being caused by the May 28, 2019 incident, as the x-rays and MRI scans were interpreted as being normal.

20. The ALJ finds that claimant has failed to establish that it is more probable than not that the medical treatment she received falling the slip and fall incident on May

28, 2019 was reasonable medical treatment necessary to cure and relieve claimant from the effects of her work injury.

CONCLUSIONS OF LAW

1. The purpose of the “Workers’ Compensation Act of Colorado” is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers’ Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers’ Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers’ Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ’s factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness’s testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2017).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it “aggravates accelerates or combines with “a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra*.

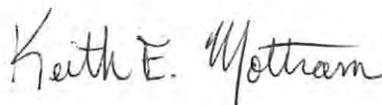
4. As found, claimant has failed to establish by a preponderance of the evidence that she sustained a compensable injury arising out of and in the course of her employment with employer. As found, claimant’s report of the slip and fall incident to her treating physicians was not supported by the surveillance video of the incident entered into evidence in this case. As found, the ALJ credits the surveillance video along with the opinions expressed by Dr. Bernton over claimant’s testimony presented at hearing and finds that claimant has failed to meet her burden of proof in this case.

ORDER

It is therefore ordered:

1. Claimant's claim for benefits is denied and dismissed.

Dated: January 7, 2020



Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

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

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-088-776-002**

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she sustained a compensable work related injury to her low back.
2. Whether Claimant has established by a preponderance of the evidence that she sustained a compensable work related injury to her bilateral upper extremities.
3. Whether Claimant has established by a preponderance of the evidence an entitlement to reasonable, necessary, and causally related medical benefits to treat her low back and her bilateral upper extremities.

FINDINGS OF FACT

1. Claimant is a 48-year-old female employed by Employer as a baker. Claimant has been employed by Employer as a baker for approximately 20 years. Claimant worked for approximately 17 years at store No. 30 before transferring to store No. 124 on July 29, 2018.

2. On July 2, 2018, Claimant reported to her manager that her wrists hurt after repetitive motion molding dough. A statement made by assistant manager John H[Redacted] indicated that Claimant reported to manager Liz R[Redacted] on July 2, 2018 that she hurt her wrist while rolling out bread. Mr. H[Redacted] indicated that he contacted Claimant on July 5, 2018 and that Claimant stated that she was fine and nothing was wrong. On July 8, 2018, Claimant stated that she had a sore wrist again and requested medical treatment. Mr. H[Redacted] noted that Claimant worked July 2, 3, 4, and 5 and had off July 6, and 7. Employer filled out a report of injury form. See Exhibits 2, 3, 4, A.

3. On July 9, 2018, Claimant was evaluated by Matthew Lugliani, M.D. Claimant reported that she had been a bread maker for 18 years at King Soopers and reported progressively worsening bilateral wrist pain and mid and low back pain after kneading a new type of dough and after lifting racks. Claimant denied any acute incident. Claimant reported pain at a 7-8/10. Claimant was given a wrist support with thumb. Occupational therapy and chiropractic therapy was requested. Dr. Lugliani opined that the objective findings were consistent with a work related mechanism of injury noting that Claimant constantly used her wrist and hands. Dr. Lugliani noted objective findings present with swelling and weakness. Dr. Lugliani noted work restrictions of maximum lifting of 5 pounds and no pinching. See Exhibits 5, C.

4. On July 16, 2018, Dr. Lugliani evaluated Claimant. Claimant reported that she had made gains and requested work restrictions be advanced. Dr. Lugliani changed the work restrictions to include using wrist splints only. Dr. Lugliani recommended

Claimant continue with therapy and chiropractic care. He recommended Claimant follow up with her primary care provider regarding her high blood pressure. See Exhibits 5, C.

5. On July 30, 2018, Dr. Lugliani evaluated Claimant. Dr. Lugliani recommended an EMG/nerve conduction study and also recommended a job duties analysis specialist. Dr. Lugliani noted the referral reason was for the bilateral wrist pain and to rule out overuse injury. Dr. Lugliani advanced Claimant to full duty work without restrictions. See Exhibits 5, C.

6. On August 13, 2018, Dr. Lugliani evaluated Claimant. Claimant reported that she was working full duty and felt better. Claimant also reported that she changed grocery stores to see if she could get more help. Dr. Lugliani noted concern for carpal tunnel syndrome but that both the EMG and the job duties analysis had been denied. Dr. Lugliani also noted that occupational therapy and chiropractic care had been denied. Dr. Lugliani noted that Claimant would continue with medications. See Exhibits 5, C.

7. On August 15, 2018, a Job Demand Analysis and Risk Factor Analysis report was completed by Jill Adams. Ms. Adams noted that Claimant had transferred to another store and was not interviewed but that other bakery associates/bakers were observed. Ms. Adams noted that 85-90% of Claimant's job duties involved baking tasks. Specifically, removing frozen doughs from freezer area putting them on carts and rolling carts to the baking area. Placing pan liners on baking sheets and opening plastic bags to remove dough and place dough on baking sheet that either needs to be placed on baking racks or is already on baking racks. Rolling racks into the rising oven, then rolling the rack into the baking oven. Once baked, rolling the rack to another location. Ms. Adams noted that if the dough was inadvertently left out to thaw, then kneading the dough by hand before putting into the rising oven. Ms. Adams noted that a baker employee would be responsible for loading, rising, and baking approximately 10-15 racks of dough per work shift. Ms. Adams also noted 10-15% of job desks involved stocking, 1-5% involved cleaning, and 1-2% involved customer service. Ms. Adams opined that there were no primary risk factors or secondary risk factors for force, repetition, awkward posture, computer work, or cold working environment. Ms. Adams found 2 pounds of pinch force or 10 pounds of hand force 3 times or more per minute for approximately 2 hours and 33 minutes over an 8-hour work shift. Ms. Adams found bilateral lifting 10 pounds or more approximately 104 times in an 8-hour work shift. See Exhibits 6, D.

8. On September 11, 2018, Claimant underwent an independent medical evaluation performed by John Burris, M.D. Claimant reported the insidious onset of bilateral hand pain and low back pain several months ago with no specific inciting workplace event. Claimant reported a recent change in her work activities over the last 3-4 months with a new process of making bread. Claimant reported the bread dough arrives in a large bulk/brick and that she has to cut and mold into individual loafs by hand. Claimant also reported having to repetitively move/rotate trays of bread weighing between 5-10 pounds on a rack or proofer. Claimant reported her pain seemed to be improving since moving to a different store and being provided a helper. Claimant reported she is not doing the same activities. Claimant reported pain at an 8/10. Dr. Burris reviewed

medical records and the job demands analysis. Dr. Burris also performed a physical examination. Dr. Burris found extreme pain behaviors and somatic focus through the physical examination. On lumbar spine examination, he found diffuse superficial tenderness without localization, full range of motion, and no muscle spasm or trigger points. Dr. Burris found that Claimant could walk heel to toe without difficulty and had a negative seated straight leg raise. In the bilateral upper extremities, Dr. Burris found no hypersensitivity, full range of motion in all joints, diffuse tenderness without localization throughout the distal forearms extending into the hands, and diffuse pain complaints with finkelstein's maneuver. See Exhibits 7, I.

9. Dr. Burris assessed diffuse myofascial complaints. Dr. Burris noted Claimant's report of the pains being associated with workplace activities in the bakery but he opined that after careful review of the jobsite evaluation, there were no potential physical risk factors for the development of an upper extremity disorder related to the workplace. Dr. Burris opined that the nature of the forces involved with repetitively moving racks of 5-10 pounds of bread trays was not sufficient to cause an injury. Dr. Burris also opined that on examination, Claimant had diffuse non-dermatomal subjective complaints out of proportion to her examination, which revealed no objective findings. Dr. Burris could not find a specific diagnosis given the diffuse complaints. Dr. Burris also opined that the diffuse complaints were suggestive of a non-work related possible systemic/rheumatologic disorder. See Exhibits 7, I.

10. On October 19, 2018, Claimant was evaluated by LPN Tresha Boone at Kaiser. Claimant reported hand pain and low back pain, both at an 8/10 on the pain scale. Claimant reported that she developed mid and low back pain and bilateral wrist pain over the summer after a work process changed and required new repetitive motions and lifting. Claimant reported that her pains had been found not work related by an occupational medicine specialist and she wanted a letter stating that she had never previously had problems with mid, low back, or wrist pain. On October 19, 2018, Craig Robbins, M.D., Claimant's primary care provider, issued a report. Dr. Robbins indicated that Claimant was a patient at Kaiser and had no history of being treated for wrist pain or back pain. See Exhibits 1, F.

11. On November 9, 2018, Claimant was evaluated at Kaiser. Claimant reported that she was appealing a determination that she did not have a work related injury and wanted to continue treatment. Claimant was referred to physical therapy. Claimant was assessed with tendinitis of the bilateral wrists and with low back pain. See Exhibits 1, F.

12. On November 28, 2018, Claimant was evaluated at Kaiser. Claimant reported bilateral wrist pain, left greater than right, since July of 2018 from repetitive motion with her hands after kneading bread dough daily. Claimant reported that after kneading dough, her bilateral wrists began to swell and had pain. Claimant reported that her low back pain started with aching and more recently got worse with spasms. Claimant reported that she had been bending down and lifting trays into racks at work when the problem began and that it was worse with bending, lifting, and sit-to-stand. Claimant also

underwent physical therapy on November 28, 2018. At therapy, she reported her low back pain started in August with aching type pain after bending down and lifting trays in racks at work but more recently had gotten worse with spasms. See Exhibits 1, F.

13. On December 21, 2018, Claimant was evaluated at Kaiser and reported bilateral wrist pain. Claimant reported that it had been going on since July of 2018 after kneading bread dough. Claimant reported the pain was better in both hands as she was now doing lighter work. Claimant was diagnosed with bilateral tendinitis of the wrists. Claimant also underwent therapy on December 21, 2018 for her bilateral wrists and low back. Claimant reported she had been doing her home exercise program and that her low back pain was decreased. Claimant also reported that she was having less pain in both her hands and was doing lighter work. See Exhibits 1, F.

14. On January 17, 2019, Claimant was evaluated at Kaiser by Julia Pierce, M.D. Claimant reported low back pain that started in May of 2018. Claimant reported precipitating factors were recent heavy lifting and the change in the weather. Dr. Pierce noted that Claimant had a prior history of back problems and had recurrent self-limited episodes of low back pain in the past. Claimant underwent x-rays of her lumbar spine. The results showed small anterior marginal osteophytes at L2-3 and L3-4. Dr. Pierce opined that the x-rays showed arthritis at two levels, which was likely the source of Claimant's pain. Dr. Pierce recommended conservative treatment with back stretches and medication. See Exhibits 1, F.

15. On February 3, 2019, Claimant underwent an MRI of her lumbar spine. The results showed mild levoscoliosis with exaggerated lumbar lordosis, and mild disc degeneration at L4-5. AT L2-3 Claimant had mild broad based disc protrusion and mild bilateral facet arthropathy with mild fluid signal in the facet joints bilaterally. At L3-4 there was a mild broad based disc protrusion with bilateral facet arthropathy contributing to mild bilateral foraminal narrowing. There was mild fluid signal in the facet joints bilaterally with no significant canal stenosis. At L4-5 there was mild circumferential disc bulge with bilateral facet and ligamentous hypertrophy and resultant mild canal narrowing with moderate bilateral foraminal stenosis. At L5-S1 there was a broad based disc protrusion with bilateral facet and ligamentous hypertrophy as well as moderate to severe bilateral foraminal narrowing without canal stenosis. Dr. Pierce provided the impression of L5-S1 moderate to severe bilateral foraminal narrowing with compression of the L5 nerve roots and L4-5 moderate bilateral foraminal narrowing. She recommended a referral to neurosurgery. See Exhibits 1, 8, H, F.

16. On February 20, 2019, Claimant underwent nerve conduction studies and a needle electromyography. The results showed relative slowing of the median nerve in the right wrist (carpal tunnel) segment. Claimant had poor tolerance to the nerve conduction and needle portions of testing. Peter Bergmann, M.D. noted that it was a very limited study due to Claimant's poor tolerance but that she had moderate right median neuropathy at the right wrist and presumably at the wrist on the left as well given her symptoms. Dr. Bergmann opined that Claimant's lower extremities showed normal nerve conduction with needle EMG of L5 and S1 normal. See Exhibits 1, 8, F, G.

17. On March 11, 2019, Ranee Shenoi, M.D. evaluated Claimant. Claimant reported lower and middle back pain that began in June of 2018 with no trauma. Dr. Shenoi noted limited lumbar range of motion on flexion and extension. Mild lumbar scoliosis and pain with facet loading of the right and left. Dr. Shenoi noted that Claimant had diffuse tenderness to palpation in the lumbar spine and had an abnormal gait pattern. Dr. Shenoi noted straight leg testing negative in seated, but very painful in supine bilaterally. Dr. Shenoi recommended bilateral L4-5 transforaminal epidural steroid injections but Claimant vehemently refused injections. Dr. Shenoi opined that surgical consultation was not indicated at the time. See Exhibits 1, F.

18. Claimant continued to treat at Kaiser with continued reports of bilateral wrist and low back pain. She also continued to undergo therapy. See Exhibit 1.

19. On April 24, 2019, at a therapy visit, Claimant reported that she had been on vacation and doing more walking and playing with grandkids than working on her home exercise program. Claimant reported that her back was doing all right, but then her pain came back. Lumbar traction was done and Claimant was encouraged to continue working on her home exercise program and following her pain rules. See Exhibit F.

20. On June 7, 2019, Claimant underwent an independent medical evaluation performed by Douglas Scott, M.D. Claimant reported pain and swelling in both forearms, wrists, and hands left worse than right. Claimant also reported low back pain with pain and numbness over the outside and inside of her legs and the bottoms of both feet. Claimant reported that she worked as a baker, which required her to constantly flex up and down at the waist to adjust product. Claimant also reported swelling and pain in both hands from handling and cutting blocks of frozen bread dough. Dr. Scott reviewed medical records and the job demands analysis. Dr. Scott also performed a physical examination. On exam, Dr. Scott found positive swelling in the left more than the right forearm, tenderness over both the medial and lateral epicondyles at the elbows, positive finkelsteins at both wrists, sensitivity to tapping over the carpal tunnels, and decreased grip strength. Dr. Scott found increased lumbar lordosis, stiff walking bent forward in forward flexion, negative straight leg raising signs, and decreased sensation to light touch over both legs and feet in L4, L5, and S1 dermatomes. See Exhibits 9, J.

21. Dr. Scott assessed: probable pre-existing bouts of low back pain due to underlying and pre-existing lumbar spine degenerative disc and joint disease; radiographic evidence of degenerative disc and facet disease at two levels with bilateral foraminal stenosis at L4, L5, and S1 nerve roots; possible work related aggravation of an asymptomatic low back condition from bending and lifting product in the bakery in July of 2018; history of hypertension; history of pre-diabetes; electrodiagnostic evidence of moderate median nerve conduction slowing at the right carpal tunnel and presumption of the same in the left carpal tunnel, possibly related to history of pre-diabetes versus flexor tenosynovitis or both; clinical diagnosis of tendonitis causing pain and swelling in the arms, wrists, and hands; possible work related aggravation of asymptomatic tendonitis of the hands and wrists from molding and cutting dough at work; possible development of

mild medial and lateral epicondylitis from molding and cutting dough at work; and rule out rheumatologic disorder with blood testing. See Exhibits 9, J.

22. Dr. Scott noted reports of specific onset for bilateral upper extremity problems with improvement when in modified duty and at a different store. Dr. Scott noted that Claimant had repetitive awkward wrist and hand postures with force as a required part of the job and that he observed signs of swelling on exam. Dr. Burris noted only pre-diabetes as a possible condition that could contribute to carpal tunnel and tendinopathy but noted no prior signs or other contributing employment, sports, recreational, or avocational activities. Dr. Burris opined that Claimant's hand work with frozen dough either activated a previously asymptomatic tendonitis/epicondylitis in both arms or caused a new condition of tendonitis/epicondylitis in both arms due to tasks that required forceful grip, extreme wrist radial/ulnar positions with elbows in awkward postures. Dr. Scott also opined that Claimant probably activated her asymptomatic low back degenerative disc and joint disease by forward bending and lifting at work in July of 2018. Dr. Scott recommended Claimant continue with treatment including blood testing for diabetes and inflammation including sed rate and CRP, continue physical therapy, continue home exercise program, and avoiding certain actions. See Exhibits 9, J.

23. On August 7, 2019, Dr. Scott issued an updated addendum. Dr. Scott reviewed additional medical records. Dr. Scott opined that Claimant's hand work with the frozen dough either activated a previously asymptomatic tendonitis/epicondylitis in both arms or caused that as a new condition. See Exhibits 9, J.

24. Rule 17, Exhibit 5 of the Medical Treatment Guidelines concerning Cumulative Trauma Conditions was entered into evidence. The guidelines indicate that mechanisms of injury for the development of cumulative trauma related conditions have been controversial. However, repetitive awkward posture, force, vibration, cold exposure, and combinations thereof are generally accepted as occupational risk factors for the development of cumulative trauma related conditions. The guidelines indicate that evaluation of cumulative trauma related conditions require an integrated approach that may include ergonomics assessment, clinical assessment, past medical history, and psychosocial evaluation on a case-by-case basis. The guidelines include a chart indicating that after diagnosis and job duties are considered, but if neither primary nor secondary risk factors are present, then the case is probably not job related. Under general principles of medical causation, the guidelines indicate that treatment for a work related condition is covered when: 1) the work exposure causes a new condition; or 2) the work exposure activates or exacerbates a previously asymptomatic latent medical condition; or 3) the work exposure combines with, accelerates, or aggravates a pre-existing symptomatic condition; or 4) the work exposure combines with a pre-existing comorbid condition, such as diabetes, to render the occurrence of a cumulative trauma condition more probable in combination with the work related exposure. It goes on to state that the provider should consider: "is it medically probable that the patient would need the recommended treatment if the work exposure had not taken place?" See Exhibit K.

25. Prior to July of 2018, Claimant underwent regular medical care and treatment. At her annual examinations with her primary care provider, Claimant was assessed with being in the pre-diabetic range with an increased risk for diabetes and Claimant had high value blood sugar results in November of 2014, November of 2015, November of 2016, and November of 2017. At her annual examination in November of 2018, Claimant's HGBA1C level was down to 5.5, and considered normal as it was below 5.7. However, for the four years prior, her level was elevated and she was in the pre-diabetic range. See Exhibit 1.

26. On February 27, 2012, Claimant was evaluated for a lump at her left wrist and was found to have a left wrist cyst below the thumb on the palmar side that was approximately 1 cm. The provider assured Claimant that the cyst was benign and diagnosed ganglion cyst. See Exhibit 1.

27. Other than the left wrist ganglion cyst in 2012, Claimant had no other no other problems with her bilateral wrists documented in her medical records. Claimant had no prior problems with her low or mid back documented in the medical records. See Exhibit 1.

28. Prior to July of 2018, Claimant received a behavior notice from Employer. The notice indicated that Claimant had produced product for sale from the bakery that was not up to standards and that Claimant had been coached on product quality before. The notice also indicated that future problems could result in actions up to and including terminations. See Exhibit M.

29. Claimant testified at hearing. Claimant reported that she has worked for Employer for 19 years with no other jobs or volunteer work. Claimant testified that she works the night shift from midnight until 8:30 a.m. Claimant testified that she had no other hobbies involving her hands like knitting, gardening, etc. Claimant testified that she is not diabetic or pre-diabetic but that she takes high blood pressure medicine. Claimant testified that as a baker, she has to proof the product, and then bake it. Claimant testified that proofer was broken and that when she put product on racks in the proofer, only the top racks would proof and the bottom racks would not. Claimant testified that she had to move the racks more frequently because of this problem and that her back started hurting. Claimant testified that after the proofer broke, she used it for four months. Claimant testified that when the proofer was working, she just had to put the shelves in and push the cart into the proofer but because it was broken, she had to bend more. Claimant testified that she had to move the shelves all night long, and every 30 minutes. Claimant testified that each tray that went onto a shelf on the proofer was approximately 5 pounds and that there were 10 trays/racks.

30. Claimant also testified that in the summer of 2018 the product for different bread was bad and that after thawing it overnight to get it soft, she had to mold it with her hand. Claimant testified that after a few months of molding the bad product her hands hurt. Claimant testified that she had to roll her hand to mold the product and that it made her hands swell. Claimant testified that she rolled dough all night long and lifted the

shelves all night long. Claimant testified that she did a lot of lifting and that a lot of it was light stuff but that a 20-35 pound box of product would be the heaviest. Claimant testified that in August of 2018 she transferred to a different store where she had more help and where the proofer worked. Claimant testified that since she has been at the new store, her hands were getting better and her back was also getting better. Claimant also testified that she often worked overtime because there were not enough bakers.

31. Trish C[Redacted] testified at hearing. Ms. C[Redacted] is a bakery manager for Employer and was Claimant's supervisor during the summer of 2018. Ms. C[Redacted] also has performed the job of baker previously and was the person observed during the job demands analysis as Claimant had moved stores. Ms. C[Redacted] testified that the trays that go onto the proofer weigh approximately 5 pounds. Ms. C[Redacted] testified that there is a bakery plant that makes all of the product and ships it frozen to the store. Ms. C[Redacted] testified that the bread is thawed overnight and is then placed on the baking sheets before going into the proofer. Ms. C[Redacted] testified that typically 70 loaves of French bread are baked and needed every day, but that Claimant was making only 45-50. Ms. C[Redacted] testified that normally the product would not need any kneading and would just be placed on baking sheets after it thaws, but she testified that Claimant kept claiming that the dough was stuck together and needed to be kneaded back together. Ms. C[Redacted] testified that even if Claimant was kneading, it would have only been approximately 15 minutes per day and that Claimant would not have had time to do all her other job duties if she was consistently kneading product or kneading dough for 4 hours per day. Ms. C[Redacted] also testified that although Claimant started her shifts at midnight, the dough would not thaw until 6 a.m. and that Claimant wouldn't be able to work on the loaves of bread until that time. Ms. C[Redacted] testified that she did not observe Claimant kneading the dough but that Claimant would place two half-loaves close together and that it would form itself together while proofing. Ms. C[Redacted] also testified that Claimant was swapping out or rotating the proofer trays because Claimant believed only the top racks were proofing, but that maintenance found nothing wrong with the proofer. Ms. C[Redacted] testified that Claimant spent approximately 5 hours per day on other items like cookies, donuts, etc and not on the bread racks. Ms. C[Redacted] testified that Claimant worked overtime when their part time baker would be on vacation. She testified that Claimant is in and out of a freezer during her shifts, but estimated Claimant would be in for 5 minutes at a time and in-out for approximately 1.5-2 hours total in 5 minute increments during her shift. Ms. C[Redacted] testified that the job demands analysis did not show kneading bread or cycling trays.

32. Elizabeth R[Redacted] testified by deposition. Ms. R[Redacted] was the store manager for Employer and managed the store where Claimant was working during the summer of 2018. Ms. R[Redacted] was Claimant's store manager for approximately 6 years. Ms. R[Redacted] testified that Claimant reported to her that Claimant's wrist hurt. Ms. R[Redacted] testified that Claimant's last day at her store was July 28, 2018 and that Claimant went to a different store on July 29, 2018. Ms. R[Redacted] testified that claimant changed stores because of discipline and conversations about Claimant's performance and testified that Claimant did not like her. Ms. R[Redacted] testified that

Claimant would not speak to her without a union representative and that after written write-ups, there would be a grievance filed, and the write-ups would be thrown out. Ms. R[Redacted] testified that Claimant called corporate and made false claims in the months before Claimant left her store. Ms. R[Redacted] testified that she called maintenance several times after Claimant said the proofer was broken and that they came several times but found nothing wrong. Ms. R[Redacted] testified that no other stores were having trouble with the bread loaves and rolls sticking together and that she made calls to check. Ms. R[Redacted] testified that she found out that after taking the product out of the freezer, Claimant was letting it sit and thaw on the floor for over four hours, and then was putting it back into the freezer, which was causing the problem of the product sticking together. Ms. R[Redacted] testified that the product is supposed to come off the truck into the large freezer at the back of the store, and that Claimant is supposed to take it from the freezer to the baker freezer and put it into the freezer without leaving it out on the floor to thaw. Ms. R[Redacted] told Claimant to stop letting the product thaw on the floor to stop the problem. Ms. R[Redacted] testified that since Claimant left her store, there had been no problems with the proofer and no complaints about it not working. Ms. R[Redacted] also testified that while Claimant was at her store, the other baker there did not have problems with product consistency like Claimant did. Ms. R[Redacted] testified that Claimant reported to her that she had to pull the bottom two pans up on the proofer and switch them out because the proofer was not working.

33. Ms. R[Redacted] testified that even after Claimant left the dough out and caused it to stick together, Claimant would not have to knead it back into a product. Ms. R[Redacted] testified that Claimant would maybe have to tuck the ends or put pieces together. Ms. R[Redacted] testified that Claimant only had to roll/form on the shepherders loaves and that Claimant would have to make four loaves of that type per day. Ms. R[Redacted] estimated the shepherders loaves would take 10, 15 minutes.

34. The dough for Employer's baker products is made by Employer's central bakery plant. The plant freezes individual loaves of bread and places the frozen loaves into a box. The boxes are then shipped to Employer's grocery stores where the boxes are put in the main freezer. The baker employee then has to transfer the frozen bakery dough boxes to the bakery freezer. The dough has to be thawed before it can go into the proofer and then the oven. To thaw the dough, the baker has to place the loaves in the bakery refrigerator overnight. Then, once thawed, the loaves are placed on the baking trays that are slid onto baking racks and pushed into the proofer. The baker's job duties to not normally require any kneading or rolling of dough and the thawed dough is placed directly onto the bakery trays already formed and ready to bake.

35. Dr. Scott testified at hearing. Dr. Scott indicated that Claimant had no chronic health problems and no outside activity that could cause her problems. Dr. Scott noted a concern that Claimant was pre-diabetic, but noted a normal result in November of 2018. Dr. Scott testified that there was no evidence that the wrist problems and the median nerve slowing were a result of diabetes. Dr. Scott testified that Claimant had a body mass index of 33, which was not high enough to cause compression in the wrist and was on the low end of obesity. Dr. Scott testified that the grip, grasp, force, and

awkwardness at the baker caused the flexor/extensor tenosynovitis and that with the change in the product and Claimant's increased hand work to cut, mold, and stretch it, cause problems. Dr. Scott testified that it was logical that Claimant was getting better now that she was at a new store and removed from the kneading type activity. Dr. Scott opined that it was medically probable that the new force required to knead the product caused Claimant's bilateral upper extremity symptoms.

36. Dr. Scott opined that Claimant had pre-existing degenerative conditions in her lower back. However, he opined that Claimant's work activity aggravated these underlying pre-existing conditions and caused them to be symptomatic. Dr. Scott noted that Claimant had no prior back pain in her medical records. Dr. Scott opined that the MRI showed a broad based disc protrusion at L5/S1 but that the bulge got bigger or protruded more because of work activity. Dr. Scott opined that a person can have a normal EMG but still have symptoms of nerve root pathology and he believed that Claimant had some compression where the nerve root comes out in her lumbar spine. Dr. Scott opined that foraminal narrowing was not caused by lifting but happens over time where the hole the nerve root comes out of narrows. Dr. Scott testified that given Claimant's age and body habitus, he would not be surprised if she had back pain in July of 2018.

37. Dr. Burris also testified at hearing. Dr. Burris testified that at his independent medical evaluation, Claimant did not tell him about the proofer or moving the baking sheets. Dr. Burris testified that the baking sheets were 5 pounds which is not very much weight and would place no stress on structural elements of the spine. Dr. Burris testified that moving 5-pound trays was not sufficient enough of force to cause an injury or to injure the human spine. Dr. Burris also pointed out that Claimant had no radiation of her low back complaints until more than five months out from the reported injury so there was no nerve being pinched. Dr. Burris testified that the tunnels nerves exit out of in the spinal canal can tighten over time, develop bony growths, and degenerate. Dr. Burris testified that it was not unusual and that 80% of the population over the age of 50 has abnormalities in the lumbar spine. Dr. Burris testified that Claimant still has back pain now and at similar levels despite having left the store. Dr. Burris opined that Claimant's work activities did not aggravate, accelerate, or cause her low back problems.

38. Dr. Burris also testified that Claimant had many very strong non-work related risk factors for carpal tunnel. He testified her age, gender, body mass index, genetics, and the psychosocial issues including her relationship with her supervisor were strong risk factors. Dr. Burris testified that Claimant had no primary or secondary risk factors identified by the job demands analysis. Dr. Burris testified that if Claimant made kneading motions not captured by the job demand analysis, then the motions could cause the problems in the bilateral wrists but that here there was no measure of force, duration, or information helpful to determine if they did. Dr. Burris opined that the bilateral upper extremity problems were idiopathic and due to Claimant's non-occupational risk factors.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. See § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. See § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Compensability

To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S. (2006); *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlanda*, 811 P.2d 379, 383 (Colo.

1991). The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.*, 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *Enriquez v. Americold D/B/A Atlas Logistics*, W.C. No. 4-960-513-01, (ICAO, Oct. 2, 2015)

However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. See *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1995); *Atsepoyi v. Kohl's Department Stores*, W.C. No. 5-020-962-01, (ICAO, Oct. 30, 2017). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000). *Fuller v. Marilyn Hickey Ministries, Inc.*, W.C. No. 4-588-675, (ICAO, Sept. 1, 2006).

Bilateral upper extremities

Claimant has established by a preponderance of the evidence that her bilateral upper extremity conditions are work related. It is more likely than not that Claimant's work activities caused her conditions or aggravated an underlying asymptomatic condition in her bilateral upper extremities. The testimony provided shows that, although due to her own fault of letting bread thaw and re-freeze, Claimant began kneading dough during the time frame at issue. Claimant had a new onset of symptoms and swelling due to her work activities. Claimant has no outside activities likely to cause her condition. It is true that Claimant has several risk factors for developing bilateral wrist or upper extremity conditions including her age, gender, her obesity, and her pre-diabetic status. Claimant was pre-diabetic with high levels for the four years prior to the alleged injury. However, the ALJ finds it more likely than not that these co-morbidities combined with Claimant's work exposure to render the occurrence of a cumulative trauma condition probable. It is true, as pointed out by Dr. Burris and the job demands analysis, that Claimant does not meet the primary or secondary risk factors for the development of the conditions per the medical treatment guidelines. However, the guidelines are merely guidelines. Given Claimant's other risk factors that likely combined with her work exposure to cause this condition, the fact that primary or secondary risk factors were not met is not ultimately conclusive. Because she let the dough sit out, thaw, and re-freeze, the dough could not just simply be placed on the baking sheets like normal. The dough had to be remolded to some degree. Claimant not only performed her regular duties that required significant upper extremity use but also began to remold the dough that she had caused to stick together. Although the force, repetition, and other factors do not meet primary or secondary risks under the guidelines, the ALJ finds that Claimant has established, more

likely than not, that her bilateral upper extremity conditions are work related. Claimant is thus entitled to reasonable, necessary, and causally related medical benefits to treat her bilateral upper extremities.

Low back/lumbar spine

Claimant has failed to meet her burden to show, more likely than not, that her low back condition was caused by or aggravated/accelerated by her employment with Employer. Dr. Burris testified persuasively that bending and lifting five-pound trays was not sufficient to cause an alteration to the anatomy of the low back or cause an injury. Dr. Burris further testified that if Claimant's back pain had been caused by or aggravated by increased bending to lift the five-pound trays if the proofer was broken, Claimant's back pain would have improved shortly after transferring to the "significantly easier" Baker position at Store No. 124. However, Claimant's back condition actually continued to get worse after switching to Store No. 124, despite not having to bend down to lift the bakery trays. Radiation of the back pain did not begin until several months following the alleged date of injury. The imaging notes pre-existing non-work related degenerative conditions in Claimant's low back. The narrowing of Claimant's foramen is a degenerative issue that takes time to develop. Although Claimant may have had symptoms of her pre-existing non-work related degenerative back condition while at work, she has failed to establish that her duties at work caused the symptoms or that her duties at work aggravated or accelerated her condition. Rather, the persuasive evidence establishes it to be more likely that Claimant had the continued progression of a non-work related degenerative condition and disease in her low back.

There was significant testimony regarding the proofer and whether or not it was working in the summer of 2018. It appears that the proofer was working as no other employees besides Claimant found a problem with it. However, even assuming Claimant rotated baking sheets due to her belief the proofer was not working correctly, there still would not be sufficient activity to cause or aggravate/accelerate an underlying degenerative condition of the low back. Claimant has failed to meet her burden. Claimant's request for reasonable and necessary medical treatment for her low back is denied, as the condition is not work related.

ORDER

It is therefore ordered that:

1. Claimant has established by a preponderance of the evidence that her bilateral upper extremity conditions are work related.
2. Claimant has failed to establish by a preponderance of the evidence that her low back condition is work related. Claimant's request for reasonable and necessary treatment to treat her low back is denied, as the condition is not work related.

3. Claimant has established by a preponderance of the evidence an entitlement to medical treatment that is reasonable, necessary, and causally related to treat her bilateral upper extremity conditions.

4. Any issues not determined herein are reserved for future determination.

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

DATED: January 8, 2020

/s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

[REDACTED],
Claimant,

v.

[REDACTED],
Employer,

and

[REDACTED],
3805225
Insurer,
Respondents.

A hearing in this matter was held on hearing that took place on July 28, 2019, before Administrative Law Judge Kimberly Turnbow at the Office of Administrative Courts in Denver, Colorado. The proceeding was digitally recorded in Courtroom 4 beginning at approximately 8:30 a.m.

[Redacted], Esq. represented Claimant who appeared in person. [Redacted], Esq. represented Respondents.

Hereinafter the ALJ refers to [Redacted] as "Claimant," [Redacted] as "Employer," [Redacted] as "Insurer," and Insurer and Employer collectively as "Respondents." Also in this Order, "ALJ" or "Judge" refers to the Administrative Law Judge, "C.R.S." refers to Colorado Revised Statutes (2019), and "OACRP" refers to the Office of Administrative Courts Rules of Procedure, 1 CCR 104-1.

At hearing, the ALJ admitted Claimant's Exhibits 1-17 and Respondents' Exhibits A-Y and AA-CC without objection. Interpretation services were provided at hearing by Maria Bravo of Foreign Locals, LLC.

ISSUES

- Whether Claimant met his burden to overcome the DIME by clear and convincing evidence regarding causation and relatedness of his cervical spine.
- Whether Claimant met his burden to prove by a preponderance of the evidence that his right carpal tunnel syndrome and subsequent surgery was related to his work-injury on June 24, 2015.
- Whether Claimant met his burden to prove by a preponderance of the evidence that he is entitled to higher right upper extremity impairment rating.
- Whether Claimant met his burden to prove he has a permanent functional impairment to a body part not listed on the list of scheduled disabilities.

STIPULATIONS

- The issue of overpayment was continued until a hearing on the issue of permanent total disability takes place.
- The right carpal tunnel surgery was denied by Respondents.
- Claimant received right carpal tunnel surgery on October 25, 2016 despite the denial.

FINDINGS OF FACT

1. On June 24, 2015 Claimant injured his right shoulder while working for Employer as a plumbing apprentice. Claimant reported the injury to Employer who gave him a designated provider list.

2. On June 26, 2015, Claimant attended an initial examination with his designated provider at Cherry Creek Family Practice. Claimant complained of feeling a locking sensation in his right shoulder while pulling a bucket of concrete with soreness in his shoulder and mid-back which started several hours later. Claimant initially did not report neck or cervical spine pain. Claimant denied having injured himself previously. X-rays of his t-spine and right shoulder were negative for acute injuries. Claimant's provider took him off work until his follow-up visit on July 6, 2015, and referred him to physical therapy.

3. On July 6, 2015 Claimant continued to report right shoulder and t-spine pain of 6/10, with intermittent numbness into his right hand. His provider diagnosed a thoracic strain and probable right rotator cuff injury. Physical examination revealed a normal spine aside for t-spine pain. Claimant was to continue physical therapy and follow up in one month.

4. On July 27, 2015, due to continued complaints of shoulder pain, Claimant's provider referred him for an orthopedic shoulder evaluation with Dr. John Reister. Claimant there complained of "global pain from his neck" through his medial parascapular region. Dr. Reister hypothesized that often times persistent bursitis tended to "tighten up all the muscles in the posterior triangle of the neck and aggravate degenerative disk disease."

5. On August 4, 2015, Claimant underwent an MRI which revealed a near complete undersurface supraspinatus tendon tear with possible posterior superior labral tear. Dr. Reister recommended Claimant undergo right shoulder arthroscopy with extensive labral debridement, bicipital tendon resection, followed by open rotator cuff repair with acromioplasty and bicipital tendon tenodesis. Insurer approved the surgery which Dr. Reister performed on September 21, 2015.

6. On August 18, 2015, Respondents filed a general admission of liability admitting to medical benefits and lost wages.

7. On November 19, 2015, Claimant returned to Dr. Kreutter reporting 5/10 shoulder pain with movement and ongoing neck pain which radiated into his right trapezius. Claimant requested a referral to continue therapy on his neck. He denied any numbness or tingling. Dr. Kreutter referred Claimant for additional physical therapy and kept him off from work.

8. On December 21, 2015, Claimant reported to Dr. Kreutter that he was having right hand/forearm jerks every now and then and that he never had this before. Claimant complained of right dorsal forearm pain with radiating pain into his shoulder and hand. He was not working and denied sustaining any new injury. Dr. Kreutter referred Claimant for evaluation of his forearm pain.

9. On February 18, 2016, Claimant returned to Dr. Kreutter reporting slow progress with his range of motion and strength. He now complained of *left* shoulder pain. Claimant thought he may now have a left shoulder RTC injury and asked Dr. Kreutter if he would authorize left shoulder surgery. Dr. Kreutter told Claimant his left shoulder pain was not related to his work injury. Dr. Kreutter recommended Claimant undergo aggressive physical therapy to avoid possible frozen shoulder.

10. On March 28, 2016, Dr. Levi Miller performed a neurological evaluation on Claimant. Claimant underwent an assessment which indicated psychosocial limitations could be delaying his recovery and that further evaluation might be necessary. Dr. Miller opined that Claimant's right upper extremity tremor/myoclonic jerk was of unknown etiology. He thought it unlikely that Claimant's tremor was from a right shoulder injury or cervical radiculopathy, but rather suspected a psychogenic component.

11. On March 29, 2016 Claimant underwent a c-spine MRI which showed evidence of degenerative change at C5-6 and C6-7 with disk osteophyte complexes

narrowing both central canal and neural foramen. At his C6-7 level he had moderate bilateral foraminal encroachment which “likely accounts for [Claimant’s] symptoms in his right hand, as well as the lancinating pain down his right arm.” Dr. Miller believed Claimant’s degenerative conditions could have been aggravated by the industrial injury and recommended Claimant undergo C5-6, C6-7 transforaminal ESIs for cervical radiculopathy.

12. On September 14, 2016, Dr. Reister reevaluated Claimant for his continued complaints of biceps tic, noting that during his twenty years of performing shoulder surgeries, he had not seen anything like it. He recommended Claimant undergo an MRI neurogram to further elucidate the issue. Results of the MRI neurogram were normal. Despite the results, Dr. Reister still recommended Claimant undergo a second surgery due to his continued complaints. Right shoulder tenodesis takedown surgery was requested on October 24, 2016, and performed on October 25, 2016. Surgical notes suggested that Claimant’s musculotaneous nerve was not in fact compressed.

13. However, along with the right shoulder tenodesis takedown surgery performed by Dr. Reister, Claimant also underwent right carpal tunnel release surgery by Dr. Tanya Oswald on the same date. This surgery was not requested for pre-authorization, nor was it authorized.

- On October 31, 2016, Dr. Peter Weingarten completed a physician advisor review for the shoulder surgery requested by Dr. Reister and opined that he had never encountered a situation in which a patient’s bicep tendon was too tight after rotator cuff repair and biceps tenodesis. However, he felt the only option was to proceed as Dr. Reister suggested and opined that the surgery should be approved.
- On November 23, 2016, Dr. Jonathan Sollender conducted a physician advisor’s review regarding the recently performed carpal tunnel release surgery and right shoulder musculocutaneous nerve release procedure. *Respondents’ Exhibit Q*, at 465. While he did believe that the right shoulder tenodesis “takedown” was reasonable and related, he did not believe the right carpal tunnel surgery was related to claimant’s work injury. He recommended approving the shoulder surgery, but denying the right CTS surgery.

14. On January 19, 2017 Claimant returned to Dr. Reister for further examination of his right shoulder and with complaints of left shoulder pain. Dr. Reister believed Claimant’s jerking issue was as yet impossible to diagnose. He noted Claimant’s complaints of left shoulder pain and wrote that he was “very, very uninterested in reoperating on [Claimant] for any particular reason at this timeframe, as the results we have had so far are not good. He did heal his rotator cuff, MRI proven.”

15. On January 24, 2017, Claimant returned to Dr. Miller for C7-T1 interlaminar

ESI injections. Claimant reported no improvement from the injections during his follow up-examination with Dr. Kreutter on February 20, 2017. Due to a lack of improvement in his neck pain, Claimant requested he be evaluated by a spine surgeon. He continued to complain of pain in his T12-L1 area on the left.

16. On April 24, 2017, Claimant reported for neurological consultation with Dr. Maxwell Matson for his complaints of involuntary right arm movement. Claimant alleged onset of involuntary movement post rotator cuff repair on September 21, 2015 with progressive symptomology. Dr. Maxwell believed Claimant's etiology likely originated in dysfunction in the lateral cord of his brachial plexus, however, further work-up was needed. He prescribed Klonopin and referred Claimant for an EMG with Dr. Pitzer.

17. On June 21, 2017, Dr. Miller performed C2-3 and C3-4 ESI injections for Claimant's continued complaints of neck pain. During follow up examination on July 7, 2017, Claimant noted only 10% improvement during the anesthetic phase with no lasting relief. Dr. Miller recommended against any further c-spine injections as cervical transforaminal, interlaminar, and facet injections had not provided benefit.

18. A July 13, 2017 EMG showed no active denervation. Dr. Pitzer noted that Claimant's twitching suppressed with distraction and he thought that there might have been a voluntary or subconscious component to Claimant's movements. However, Claimant's right brachialis muscle showed moderately increased polyphasic potentials and a moderately decreased interference pattern, so Dr. Pitzer recommend possible Botox injections into claimant's brachialis.

19. On October 5, 2017, Dr. Allison Fall conducted a Respondents' sponsored IME of Claimant. She opined that Claimant likely had a significant somatic component to his work-injury and that his subjective complaints were not consistent with objective findings. Dr. Fall opined Claimant was at MMI as of April 4, 2017, with impairment only to Claimant's right shoulder. She also believed Claimant's October 25, 2016 right carpal tunnel release and right musculocutaneous nerve release were not medically reasonable, necessary, or related to the original work-injury. Dr. Fall opined that Claimant did not have a work-related injury to his cervical spine as it had been ruled out as the cause of his ongoing symptomology due to numerous failed treatment modalities.

20. On October 17, 2017, Claimant returned for examination with Dr. Kreutter. After reviewing Dr. Fall's IME report, he opined that Claimant had reached MMI for his right shoulder injury as of April 4, 2017. However, Dr. Kreutter believed Claimant also injured his c-spine during the incident and required an impairment rating for such. He did not provide an opinion on how the described mechanism of injury could have caused an injury or what specific diagnosis Claimant had as a result. Dr. Kreutter noted Claimant's range of motion was distinctly less that it was at his last visit. "In fact [Claimant] barely moved the neck." Dr. Kreutter assigned Claimant a 6% whole person impairment for his c-spine based on a table 53 rating without range of motion. He agreed that Claimant's right bicep jerk movements were of unknown etiology and did not believe it required an

impairment rating.

21. On April 17, 2018, Dr. Caroline Gellrick completed a DIME of Claimant.

- She agreed with Dr. Fall's assessment that Claimant's c-spine was not related to his work-injury as complaints of neck pain did not start until well after his inciting injury.
- Likewise, Claimant demonstrated the mechanism of injury to Dr. Gellrick for approximately 20 minutes and at no time did she observe a mechanism of injury that would have caused an injury to Claimant's c-spine.
- Dr. Gellrick believed Claimant should have his left shoulder symptoms, left hand paresthesias, neck pain, and hypertension treated by his PCP.
- She assigned an impairment for his thoracic spine and right shoulder as those complaints were present since day one of his injury.
- She gave Claimant a 13% right upper extremity rating and a 5% whole person impairment rating for Claimant's t-spine.
- She believed Claimant should abstain from lifting over 20 pounds past chest height and that he should stay off ladders and mechanized equipment.
- Dr. Gellrick opined that an FCE may be warranted in order to obtain more formal restrictions and that she believed Claimant had attained MMI as of April 14, 2017.

22. On October 10, 2018, Dr. John Hughes performed a Claimant sponsored IME. Claimant reported pain in his right posterior neck, right scapula, right shoulder, right biceps, right hip, low back, and right leg with occasional numbness into his right foot. Dr. Hughes noted Claimant's cervical spine ranges of motion appeared "quite guarded and are inconsistent with informal observation of head and neck movement with maximum flexion and extension." Dr. Hughes was unable to use any range of motion measurements as they were too "extreme." He agreed with Dr. Gellrick that Claimant initially complained of a t-spine injury, however, he disagreed with her as to the site of residual impairment. He believed it was in Claimant's c-spine versus his t-spine and assigned a 6% impairment rating based on Dr. Kreutter's assignment of a table 53 rating.

23. Claimant testified at hearing that he immediately felt a pulling sensation in his right shoulder and, despite medical records to the contrary, immediate pain in his neck. Claimant complained of initial onset of right finger numbness and a "jerk" in his right bicep after his first shoulder surgery. Despite four years of not working, two surgeries, extensive physical therapy, massage therapy, chiropractic care, facet injections, interlaminar injections, epidural steroid injections, and numerous diagnostic

tests, Claimant noted continued and similar pain in his shoulder, neck, and scapular unchanged since the original date of injury. Despite video evidence to the contrary, Claimant testified to significant limitation looking up and to the sides due to his neck pain.

24. Dr. Allison Fall testified as an expert in physical medicine and rehabilitation during hearing. Dr. Fall is Level II accredited with emphasized training on causation. She opined Claimant was experiencing delayed recovery from his work injury. Dr. Fall did not believe Claimant's cervical spine or right CTS were related to his work-injury. She did not believe there was a mechanism of injury sufficient to have caused Claimant's cervical spine complaints or right CTS complaints. She disagreed with Dr. Reister's theory that Claimant aggravated the "posterior triangle" of his neck as there was no objective evidence substantiating such hypothesis. Had this theory been correct, Claimant would have improved from conservative treatment, but he did not. Dr. Fall noted Claimant's inconsistent range of motion measurements, delayed recovery, severe subjective complaints, and a complete lack of correlating objective findings lead her to believe Claimant suffered from psychogenic overlay in the presentation of his symptoms. However, objective findings and Claimant's description of a corresponding mechanism of injury led her to believe that he did have a work-related rotator cuff tear of his right shoulder. She opined Claimant was adequately compensated with an extremity rating for his right shoulder impairment.

25. Dr. Fall disagreed with Dr. Hughes' assessment that Claimant's c-spine and right CTS were related to the work-injury. Dr. Hughes failed to adequately address causation in regards to those body parts, in contradiction to the requirements of Level II providers. Dr. Fall believed that Dr. Hughes gave an impairment rating for any body part Claimant complained of, regardless of whether there was a sufficient mechanism of injury to have caused such injury. She disagreed with Dr. Millers' hypothesis of C7 compression as diagnostics were negative, injections directed at Claimant's C7 failed to produce improvement, and there were no findings during physical examination supporting this theory. She also disagreed with Dr. Miller's opinions that Claimant's stenosis and/or nerve root irritation explained his symptoms as diagnostic tests proved otherwise.

26. Dr. Fall did not believe Claimant's right CTS was affected by the work-injury or subsequent treatment/surgery. She concluded there was no mechanism of injury described by Claimant or documented in medical records sufficient to establish relatedness of his right CTS, and that Dr. Hughes failed to address the mechanism of injury and/or causation in his assessment of relatedness. She did not believe the right CTS surgery was an emergency operation and saw no evidence in the medical records indicating such.

27. Dr. Fall did not believe there was any evidence to indicate Claimant should have a higher impairment rating for his right upper extremity. In fact, she believed video surveillance showed Claimant to be moving without functional limitation and consistent with a person who has an improving right shoulder rotator cuff repair. She believed Claimant's functional impairments were adequately reflected in the impairment ratings

assigned by Dr. Gellrick, and found no basis to include additional body parts, increase Claimant's impairment ratings, or convert his scheduled impairment to a whole person rating.

28. Dr. John Raschbacher completed an IME of Claimant on October 2, 2018 to address his work-related conditions, MMI, and impairment. Claimant complained of entire back pain, right hip, neck, and right shoulder pain. Dr. Raschbacher believed Claimant sustained an injury to his right shoulder and that his thoracic pain would certainly be explained by the rotator cuff tear alone and not actually present in the form of a strain. He believed Claimant's described mechanism of injury was consistent with a right shoulder injury, but that Claimant likely had secondary gain issues regarding claims for other body parts. After physical examination, he assigned claimant a 10% impairment rating for his right upper extremity.

29. Dr. Raschbacher testified as an expert in occupational medicine at hearing. Dr. Raschbacher did not believe Claimant's cervical spine was a work related condition nor did he believe it required an impairment rating. He testified that Claimant's cervical spine condition was not caused, aggravated, or accelerated by any work-related injury and that Claimant's cervical spine had been diagnostically ruled out as the cause of claimant's ongoing complaints. He did not believe Dr. Hughes appropriately applied the AMA Guides to permanent impairment with regard to Claimant's C-spine and CTS as no causation evaluation was ever completed. Dr. Raschbacher did not believe Dr. Gellrick erred in her assessment of Claimant nor did he think Claimant's right CTS or subsequent surgery should be included. He credibly testified that Claimant properly received a right upper extremity rating for the injury he received and that video surveillance contradicted Claimant's presentation in court.

STATEMENT OF LAW

The purpose of the Workers' Compensation Act of Colorado is to assure quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1) C.R.S.* Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. *Section 8-43-201, C.R.S.* A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The ALJ, as the fact-finder, is charged with

resolving conflicts in expert testimony. *Rockwell Int'l v. Turnbull*, 802 P.2d 1182, 1183 (Colo. App. 1990). Moreover, the ALJ may accept all, part, or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968); see also *Dow Chemical Co. v. Industrial Claim Appeals Office*, 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary medical opinion).

Where a party presents expert opinions, the weight, and credibility, of the opinions are matters exclusively within the discretion of the ALJ as the fact-finder. *Cordova v. Industrial Claim Appeals Office*, P.3d (Colo. App. No. 01CA0852, February 28, 2002). The ALJ, as the fact-finder, is charged with resolving conflicts in expert testimony. *Rockwell Int'l v. Turnbull*, 802 P.2d 1182, 1183 (Colo. App. 1990). Moreover, the ALJ may accept all, part, or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968); see also *Dow Chemical Co. v. Industrial Claim Appeals Office*, 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary medical opinion).

A DIME physician's findings of causation, MMI, and impairment are binding on the parties unless overcome by "clear and convincing evidence." Section 8-42-107(8)(b)(III), C.R.S.; *Qual-Med v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). In other words, to overcome a DIME physician's opinion regarding MMI, permanency or the cause of a particular component of a Claimant's medical condition, the party challenging the DIME must demonstrate that the physician's determinations in these regards are highly probably incorrect and this evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015, 1019 (Colo. App. 2002). A mere difference of opinion between physicians fails to constitute error. See *Gonzales v. Browning Farris Indust. Colorado*, W.C. No. 4-350-356 (ICAO March 22, 2000). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appeals Office*, *supra*.

Claimant failed to meet his burden to overcome the DIME by clear and convincing evidence as he failed to provide evidence that was "unmistakable and free from serious doubt" that the DIME physicians determinations in regards to causation and relatedness of his cervical spine were "highly probably incorrect."

Dr. Gellrick found that the work incident on June 24, 2015 did not cause an injury to Claimant's c-spine. True to the requirements in any casual analysis, Dr. Gellrick had Claimant demonstrate the mechanism of injury to her for over 20 minutes and no mechanism of injury sufficient to have caused an injury to Claimant's cervical spine was observed. Claimant did not sustain an injury to his neck as all diagnostic tests were negative and none of his degenerative conditions were shown to have been exacerbated

by the incident. Likewise, Dr.'s Fall and Raschbacher agreed with Dr. Gellrick and disputed Dr. Hughes' opinions on causation of Claimant's alleged c-spine symptoms.

The Division IME's opinion regarding causation is entitled to no special weight where the industrial injury does not result in an injury outside the schedule of disabilities. In *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998) the court, citing *Askew v. Industrial Claim Appeals Office*, 927 P.2d 1333 (Colo. 1996), noted that whether a particular component of the Claimant's overall medical impairment was caused by the industrial injury is an inherent part of the rating process under the AMA Guides. Therefore, the *Egan* court determined that in order to challenge and overcome the causation conclusion by the DIME physician, a party must present clear and convincing evidence. However, the *Egan* court further explained that the statutory scheme, requiring causation questions to be challenged through a DIME, applies only to injuries resulting in whole person impairment. When there is a dispute concerning causation or relatedness in a case involving only a scheduled impairment, the ALJ will continue to have jurisdiction to resolve that dispute. The Division IME physician's causation determination is not afforded any special weight in a scheduled disability.

In resolving the question of whether the DIME physician's opinions have been overcome, the ALJ may consider a variety of factors including whether the DIME physician properly applied the AMA Guides and other rating protocols. See *Metro Moving and Storage Co. v Gussert*, 914 P.2d 411 (Colo. App. 1995); *Wackenhut Corp. v. Indus. Claim Appeals Office*, 17 P.3d 2002 (Colo. App. 2000). The ALJ should also consider all of the DIME physician's written and oral testimony. *Lambert and Sons, Inc. v. Industrial Claim Appeals Office*, 984 P.2d 656, 659 (Colo. App. 1998).

The DIME is required to rate a Claimant's impairment in accordance with the AMA Guides. § 8-42-107 (8) (c), C.R.S.; *Wilson v. Industrial Claim Appeals Office*, 81 P.3d 1117, 1118 (Colo. App. 2003). Section 8-42-101(3.5) (a) (II), C.R.S. states, "The director shall promulgate rules establishing a system for the determination of medical treatment guidelines and utilization standards and medical impairment rating guidelines for impairment ratings as a percent of the whole person or affected body part based on the revised third edition of the 'American Medical Association Guides to the Evaluation of Permanent Impairment,' in effect as of July 1, 1991." The Impairment Rating Tips, produced as required by that section of the Act, are readily available to the parties and to an ALJ, and are proper subjects for judicial notice. See *Miller v. Century Link*, W.C. No. 4-843-356 (January 11, 2013); *Kurtz v. JBS Carriers*, W.C. No. 4-797-234 (December 7, 2011); *Davis v. Mohawk Industries*, W.C. No. 4-674-003 (July 21, 2011); *Ortiz v. Service Experts, Inc.*, 4-657-974 (January 22, 2009). "The Impairment Rating tips, and other rating protocols, have been rendered by the General Assembly as part of a judge's inherent duty and power to find and apply the law." *Serna v. SSC Pueblo Belmont Op Co., LLC*, W.C. No. 4-922-344-01 (December 1, 2015). "We extend deference to the Workers' Compensation Division's interpretation of the AMA Guides as set forth in the Impairment Rating Tips. These Tips were written at the direction of the statute, section

8-42-101(3.5) (a) (II). The questions of whether the DIME physician has correctly applied the rating protocols, and ultimately whether the rating itself has been overcome by clear and convincing evidence, are questions of fact for the ALJ. *McLane Western Inc. v. Industrial Claim Appeals Office*, 996 P.2d 263 (Colo. App. 1999); *Wackenhut Corp. v. Industrial Claim Appeals Office*, 17 P.3d 2002 (Colo. App. 2000).

For purposes of determining levels of medical impairment pursuant to articles 40 to 47 of this title a physician shall not render a medical impairment rating based on chronic pain without anatomic or physiologic correlation. Anatomic correlation must be based on objective findings. Section 8-42-101(3.7) C.R.S.

Principles of Causation of Occupational Neck Pain provide that causation is a medical/legal analysis in the workers compensation system. The information in the Medical Treatment Guidelines pertaining to causation addresses only the evidence related to the medical analysis of causation. Actual cases may vary from the evidence presented based on specific circumstances of the claim. Work-related conditions may occur from the following: • a specific incident or injury, • aggravation of a previous symptomatic condition, or • a work-related exposure that renders a previously asymptomatic condition symptomatic and subsequently requires treatment. All of these conditions must be determined based on the specifics of the work related injury or exposure. The complaint of pain alone is generally not compensable in this system. To apply these standards, the clinician must first make a specific cervical diagnosis that is substantiated by reproducible physical exam findings. *AMA Treatment Guides, Rule 17, Exhibit 8(f), at 14.*

Under Table 53(II)(B), the examiner may assign an impairment value for impairment or a specific disorder of the lumbar or cervical regions of the spine, so long as the medical evidence establishes the presence of a specific diagnosis, objective pathology, and 6 months of medically documented pain and rigidity. *Bryant v. Transit Mix Concrete and Travelers Indemnity Co.*, W.C. No. 5-058-044-001, June 5, 2019.

Section 8-42-107(1), C.R.S., provides that a claimant is limited to a scheduled disability award if the Claimant suffers an “injury or injuries” described in § 8-42-107(2). *Strauch v. PSL Swedish Healthcare System, supra*. 917 P2d 366. Where a claimant suffers an injury or injuries not enumerated in § 8-42-107(2), the claimant is entitled to whole person impairment benefits under § 8-42-107(8), *Mountain City Meat Co. v. Oqueda*, 919 P.2d 246 (Colo. 1996).

The term “injury” as used in the statute refers to the manifestation in a part or parts of the body which have been impaired or disabled as a result of the industrial accident. *Mountain City Meat Co. v. Industrial Claim Appeals Office*, 904 P.2d 1333 (Colo.App.1995) (*cert. granted* October 30, 1995). The statute then refers to an injury resulting in a “loss” set forth in the schedule. The statute does not refer to the particular site of the injury or the medical reason for the loss; rather, it refers to the portion of the body that sustains the ultimate loss. See *e.g. McKinley v. Bronco Billy's*, 903 P.2d 1239

(Colo.App.1995).

The determination whether a claimant has suffered a functional impairment that is listed on the schedule of disabilities is a factual question to be resolved by the ALJ. See *Jones v. Adolph Coors Co.*, 689 P.2d 681 (Colo.App.1984). This determination is distinct from, and should not be confused with, the treating physician's rating of physical impairment under the *AMA Guides*. Nevertheless, that rating may be considered by the ALJ in determining whether the claimant's functional impairment is fully described on the schedule of disabilities. *Id.*

Dr. Hughes and Dr. Kreutter believed Claimant's functional impairment from the shoulder injury resided in his c-spine, while Drs. Gellrick, Ogsbury, Fall, and Raschbcher believed it was in Claimant's t-spine. Clearly these physicians disagree on the residual site of Claimant's functional impairment. However, mere disagreement alone is insufficient to establish that the DIME physicians determinations in these regards were highly probably incorrect nor is there evidence in the record "unmistakable and free from serious or substantial doubt" showing Dr. Gellrick made a mistake in her causation assessment for Claimant's c-spine. Dr. Gellrick specifically excluded Claimant's c-spine from the claim after observing the mechanism of injury and completing a thorough causation evaluation. She believed Claimant's residual functional impairment from his shoulder injury was in his t-spine and assigned a 5% whole person impairment rating for his thoracic spine.

Even if this ALJ were to find Claimant's c-spine related, he is not entitled to a permanent impairment rating. In order to assign a table 53 impairment rating for a c-spine injury, the guidelines require a specific diagnosis substantiated by reproducible physical examination while the Act proscribes that an individual shall not receive an impairment rating for pain without anatomical or physiological correlation. Numerous providers hypothesized, but were unable to ultimately render a specific diagnosis for Claimant's c-spine which were either reproducible during physical examination or corroborated by objective testing. Claimant failed to gain any substantial improvement despite exhaustive attempts to treat with conservative treatments and no diagnosis was ever made as all diagnostic tests were negative. The only benefit received was elimination of the c-spine as the cause of his subjective pain complaints. Without a specific diagnosis, even if related, Claimant has failed to establish he is entitled to a permanent impairment rating for his c-spine.

An employer or insurer shall not be liable for treatment provided pursuant to article 41 of title 12, C.R.S., unless such treatment has been prescribed by an authorized treating physician. Section 8-43-404(7), C.R.S.

Under § 8-43- 404(5)(a), C.R.S., the employer has the right in the first instance to designate the authorized provider to treat a claimant's compensable condition. If the claimant obtains unauthorized medical treatment, the respondents are not required to pay for it. Section 8-43-404(7), C.R.S.; *Yeck v. Industrial Claim Appeals Office*, 996 P.2d 228

(Colo. App. 1999).

In *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990), a division of the court of appeals held that medical treatment provided in emergency situations constitutes an exception to the statutory rule that the employer has a right of first selection of the treating physician. Generally speaking, the “emergency doctrine” requires that a claimant establish the existence of a bona fide emergency requiring treatment. 2 Larson, *Workmen's Compensation Law*, § 61.12(f) (1997); *Lucero v. Jackson Ice Cream*, W.C. No. 4-170-105, January 6, 1995.

Claimant failed to meet his burden to prove by preponderance of the evidence that his right CTS and subsequent surgery was related to the June 24, 2015 work-incident. The record contains no persuasive evidence supporting a conclusion of relatedness as out of the more than ten physicians who saw Claimant, only Dr. Hughes, an expert retained and paid for by Claimant, opined that his right CTS and surgery was work-related. Even then, Dr. Hughes failed to describe how it could be related to the work-injury other than opining that Claimant complained of difficulty opening his right third digit upon initial examination.

To the contrary, Drs. Gellrick, Kreutter, Fall, and Raschbacher all concluded that Claimant’s right CTS and subsequent surgery was unrelated to the June 24, 2015 bucket lifting incident. They found no corresponding and appropriate mechanism of injury to have caused, aggravated, or accelerated this condition. Likewise, the record contains no persuasive evidence that Claimant’s right CTS was caused, aggravated, or accelerated by the treatment Claimant received for his shoulder. Both Drs. Fall and Raschbacher credibly testified that this did not happen and no expert made persuasive contradictory assertions.

Even if the ALJ were to find Claimant’s right CTS and subsequent surgery related, Respondents are not liable for the costs associated with the right CTS surgery. Respondents are only liable for authorized treatment. The parties stipulated and the evidence shows that the right CTS surgery was not, and is still not authorized. Additionally, the emergency doctrine is not applicable in the current matter as both Drs. Fall and Raschbacher credibly testified that the right CTS surgery was non-emergent and the ALJ finds no persuasive evidence to the contrary.

Claimant failed to prove by a preponderance of the evidence that he is entitled to a higher right upper extremity impairment rating. Claimant would have the court believe he can only move his head by moving his entire body and that he is unable to lift his arm to shoulder height without grimacing in pain. The ALJ finds this not credible. The only physician to give Claimant an impairment rating higher than a 13% was Claimant’s retained expert, Dr. Hughes. However, Dr. Hughes inappropriately applied the guides to permanent impairment when assigning an impairment for Claimant’s right CTS (in addition to not providing a causation analysis) and was the clear outlier when he assigned a 23% right upper extremity impairment rating. Contrary to Dr. Hughes and Claimant’s

assertion, Claimant's right rotator cuff tear was appropriately treated and adequately healed. Claimant underwent an extensive amount of conservative treatment and invasive procedures with little to no benefit noted subjectively, now over four years post injury. Claimant exhibited unrestricted range of motion in his shoulder and neck when observed on video surveillance and lost or lessened his myoclonic jerk when he was distracted. Nonetheless, at his impairment rating appointments he presented with significantly limited range of motion and voluntary jerking movements. Unfortunately, Claimant's likely voluntary movements caused him to undergo a second surgery which showed his musculotaneous nerve was not compressed and failed to provide him appreciable relief. Claimant properly received a 13% right upper extremity impairment rating for his shoulder injury and failed to prove it more likely than not that his right upper extremity rating should be increased.

The ALJ finds and concludes Claimant's right shoulder injury resulted in functional impairment contained on the list of scheduled disabilities. Claimant sustained a disability to his right arm at the shoulder. Claimant has been compensated for any other functional impairment as a result of the shoulder injury by Respondent's admission to the 5% whole person impairment rating he was given by Dr. Gellrick. Claimant continued to complain of pain and functional limitation which extended into his back, Dr. Gellrick thoroughly examined Claimant and believed the functional impairment was to his t-spine and assigned the appropriate rating. Any other subjective complaint by Claimant of functional limitation to different body parts are unsubstantiated by persuasive evidence.

Claimant did not present persuasive evidence that more likely than not he sustained an injury to a body part not on the list of scheduled disabilities for which he has not already been compensated. It is not the situs of the injury, rather, the situs of functional impairment which is essential in determining the body part permanently impaired. The portion of Claimant's body which sustained the ultimate loss was Claimant's right shoulder. No objective evidence of acute pathology was found within Claimant's neck or mid-back despite numerous diagnostic and treatment modalities. Likewise, Claimant's subjective complaints of functionally limiting pain is uncorroborated by objective testing or physical examination, and is contradicted by his behavior on video surveillance. Throughout the duration of his claim, Claimant's pain complaints continued to expand to other body parts without medical explanation. Claimant's c-spine/neck pain complaints are not corroborated by any persuasive evidence.

ORDER

The ALJ orders the following:

1. Claimant's claim to include his cervical spine as part of the work-injury is denied and dismissed.
2. Claimant's claim for inclusion of his right CTS and subsequent surgery is denied and dismissed.
3. Claimant's claim to increase his right upper extremity impairment rating is denied and dismissed.
4. Claimant's claim to convert his right upper extremity rating to a whole person impairment rating is denied and dismissed.

Dated January 9, 2020

/s/ Kimberly Turnbow
Administrative Law Judge
Office of Administrative Courts
1525 Sherman, #400
Denver, CO 80203

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

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that his admitted scheduled permanent impairment rating should be converted to a whole person impairment rating.

FINDINGS OF FACT

1. Claimant is a 41-year-old male who works for Employer as welder. Claimant's job requires going up and down trailers, lifting, and carrying heavy parts.

2. On September 10, 2018, Claimant sustained an admitted industrial injury when an 800-pound piece of equipment dropped on his left foot. Claimant immediately sought emergent care and was diagnosed with a crush injury to his left foot with 2-5th proximal phalanx fractures and a displaced distal 1st toe fracture. No other trauma or injury was noted. That same day Claimant underwent a closed reduction and percutaneous pinning of Claimant's left foot toes 2 through 5 proximal phalanx fractures and great toe distal phalanx fracture.

3. Claimant subsequently attended follow-up appointments with the surgeon, Dr. Taylor, and began treatment with podiatrist James Yakel, D.P.M. and Ryan Reiss, N.P. Claimant complained of left foot pain and anxiety. Dr. Yakel ultimately determined Claimant's toes had become gangrenous and amputated all five of Claimant's toes on his left foot on December 14, 2018.

4. Claimant continued to treat with Dr. Yakel and NP Reiss for his left foot. The medical records document reports of left foot symptoms including nerve pain, shaking, sensitivity, numbness and temperature changes. Claimant was referred to Greg Reichhardt, M.D. to help manage Claimant's ongoing pain issue.

5. Claimant first presented to Dr. Reichhardt on March 27, 2019. Dr. Reichhardt noted Claimant had significant pain at the distal residual limb and significant phantom limb sensation in all of the digits and, at times, an aching feeling throughout his left leg. Dr. Reichhardt noted Claimant's gait, balance, and coordination were normal.

6. Dr. Reichhardt reexamined Claimant on April 23, 2019. Claimant complained of continued pain in left leg mostly over the left distal foot. Claimant reported to Dr. Reichhardt that, on a good day, he would walk all day without pain but on a bad day he could only walk approximately two hours without pain. He further reported that he had been running and playing soccer. Claimant informed Dr. Reichhardt of a new complaint of right knee pain that began three days prior without specific injury. Dr. Reichhardt opined Claimant's right knee issues were not related to the work injury.

7. On May 21, 2019, NP Reiss noted Claimant had insisted on returning to work last week due to financial reasons and did so, but now was experiencing increased foot pain. He noted Claimant had some developed some right knee pain unrelated to the work injury and had not been playing soccer or increasing his activity since.

8. On May 22, 2019, Claimant reported 4/10 left foot pain, tingling and tenderness to Dr. Reichhardt. Dr. Reichhardt noted Claimant had undergone some testing for complex regional pain syndrome (CRPS), the results of which were negative.

9. On June 17, 2019, NP Reiss noted that Claimant informed him he needed to go back to work for financial reasons, and that Claimant wished to proceed with closing out his workers compensation claim and receiving an impairment rating.

10. Dr. Reichhardt reevaluated Claimant on July 2, 2019. Claimant continued to report some pain over the left forefoot. Claimant also completed a pain diagram for this visit which noted only left foot pain. There is no reference in this medical report to any issues or complaints of pain or dysfunction beyond Claimant's left foot. Dr. Reichhardt's impression was, in relevant part, left foot pain due to a crush injury, anxiety secondary to the injury, and opioid use with tapering advised. Dr. Reichhardt noted Claimant had returned to work essentially full-time and was tolerating the work and felt safe climbing ladders. Dr. Reichhardt opined Claimant reached maximum medical improvement (MMI). He recommended work restrictions of sitting for 15 minutes every two hours of standing and walking, and maintenance care in the form of tapering opioid medications and 12 follow-up visits over the next three years. Dr. Reichhardt assigned 30% left foot impairment rating (8% whole person) for the toe amputations.

11. Respondents filed a Final Admission of Liability (FAL) on July 10, 2019 admitting to a 30% scheduled impairment rating and reasonable, necessary and related maintenance care per Dr. Reichhardt's July 2, 2019 report.

12. Claimant continued to see NP Reiss and Dr. Reichhardt as maintenance care and began tapering of his opioid medications. Claimant continued to report left foot pain and restlessness. The medical records do not document reports of other symptoms or complaints regarding any other areas. On October 8, 2019, NP Reiss noted Claimant had no difficulty with his gait. Dr. Reichhardt noted normal gait on October 14, 2019 and October 31, 2019.

13. On November 13, 2019, Albert Hattem, M.D. performed an independent medical record review at the request of Respondents. Dr. Hattem opined that Claimant sustained a left foot injury only and did not qualify for a whole person impairment as Claimant did not suffer from any functional loss, sufficiently altered gait, pain or any other conditions. In support of this opinion, Dr. Hattem noted Claimant's trauma was only to his left foot and, with the exception of right knee pain which he agreed was unrelated to the work injury, there was no record of pain complaints to areas other than the left foot. Dr. Reichhardt further noted CRPS had been ruled out and Dr. Reichhardt had observed Claimant's gait to be normal on multiple occasions.

14. At hearing, Claimant testified he still experiences left foot pain and his injury has limited his ability to do the things he used to do, such as jumping on trailers, moving and working quickly, going to the gym and playing soccer, and balancing on uneven ground. He also testified that his injury has affected his "relations" with his wife. Claimant testified that he is afraid his foot might "go out" when lifting items and that he can no longer go out and have fun with his wife and walk around stores without taking a break. Claimant testified these issues are the result of his left foot pain.

15. Other than the aforementioned right knee complaints which Dr. Reichhardt determined were unrelated to Claimant's work injury, the medical records are devoid of complaints of symptoms affecting areas other than Claimant's left foot and lower extremity.

16. The ALJ credits the opinions of Drs. Reichhardt and Hattem, as supported by the medical records, and finds Claimant failed to prove by a preponderance of the evidence his work injury resulted in functional impairment to an area of the body the scheduled list of injuries.

17. Claimant failed to meet his burden of proof to establish his scheduled impairment rating should be converted to a whole person impairment rating.

18. Evidence and inferences contrary to these findings were not credible and persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact

finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Whole Person Conversion

Section 8-42-107(1)(a), C.R.S. limits medical impairment benefits to those provided in §8-42-107(2), C.R.S. when a claimant's injury is one enumerated in the schedule of impairments. When an injury results in a permanent medical impairment not set forth on a schedule of impairments, an employee is entitled to medical impairment benefits paid as a whole person. See §8-42-107(8)(c), C.R.S.

The Judge must thus determine the situs of a claimant's "functional impairment." *Velasquez v. UPS*, W.C. No. 4-573-459 (ICAO Apr. 13, 2006). The situs of the functional impairment is not necessarily the site of the injury. See *In re Hamrick*, W.C. No. 4-868-996-01 (ICAO, Feb. 1, 2016); *In re Zimdars*, W.C. No. 4-922-066-04 (ICAO, Feb. 4, 2015). Pain and discomfort that limit a claimant's ability to use a portion of the body may be considered functional impairment for purposes of determining whether an injury is off the schedule of impairments. *In re Johnson –Wood*, W.C. No. 4-536-198 (ICAO, June 20, 2005); *Vargas v. Excel Corp.*, W.C. 4-551-161 (ICAO, Apr. 21, 2005). However, the mere presence of pain in a portion of the body beyond the schedule does not require a finding that the pain represents a functional impairment. *Lovett v. Big Lots*, WC 4-657-285 (ICAO, Nov. 16, 2007); *O'Connell v. Don's Masonry*, W.C. 4-609-719 (ICAO, Dec. 28, 2006).

As found, Claimant failed to prove it is more probable than not he suffered functional impairment beyond the list of scheduled injuries. Claimant's injury, while severe, was limited to his left foot. With the exception of right knee pain, which Dr. Reichhardt and Dr. Hattem credibly opined was unrelated to the work injury, the medical records do not document complaints or findings in areas other than the left foot and leg. Dr. Reichhardt consistently noted normal gait and balance at his examinations subsequent to Claimant's placement at MMI. Claimant has returned to work performing his normal duties with minimal restrictions. To the extent Claimant continues to

experience pain and suffers from functional limitations, there is insufficient credible and persuasive evidence the situs of fictional impairment extends to an area beyond the list of scheduled injuries. Accordingly, based on the totality of evidence, Claimant is not entitled to conversion of his scheduled impairment rating to whole person rating.

ORDER

1. Claimant's request for conversion of his 30% scheduled left foot impairment to 8% whole person impairment is denied and dismissed.
2. All matters not determined herein are reserved for future determination.

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

DATED: January 9, 2020



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-109-584-001 & 5-078-213**

ISSUES

- Did Claimant prove by a preponderance of the evidence a left shoulder injury she suffered on May 17, 2019 is a separate injury rather than a compensable consequence of her original May 20, 2018 injury?

FINDINGS OF FACT

1. Claimant works for Employer as an Emergency Medical Officer and firefighter. She suffered an admitted injury to her right shoulder on May 20, 2018 (W.C. No. 5-078-213).

2. Dr. Terrance Lakin is Claimant's primary ATP. Claimant received extensive treatment for the right shoulder, including surgeries on July 25, 2018 and February 6, 2019, both performed by Dr. Kobayashi.

3. Claimant had restrictions because of the work injury that prevented her from performing her regular job. Employer accommodated Claimant's restrictions with "light duty."

4. Claimant attended multiple sessions of physical therapy at Synergy Physical Therapy & Wellness. By May 2019, she was nearing the end of her rehabilitation and appeared to be approaching MMI.

5. On May 13, 2019, Claimant saw PA-C Terry Schwartz in Dr. Lakin's office. She had finished the approved therapy sessions and "isn't sure it's helping anymore." She recently started massage therapy was wanted to see a chiropractor. Claimant reported pain in the right scapular area, upper back, and neck when using her right shoulder. Despite her ongoing symptoms, Claimant wanted her work restrictions liberalized because she was "running out of light-duty time." PA-C Schwartz noted neither he nor Claimant knew the exact requirements of her job, which "creates a dilemma to determine when she has reached full duty status. I explained that we would have to use standard lifting guidelines for the general public . . . adjusted for what [Dr. Lakin] perceives as firefighter requirements." PA-C Schwartz planned to have his office staff contact Dr. Kobayashi about Claimant's restrictions.

6. The next day, Dr. Lakin referred Claimant for functional capacity testing at Synergy to evaluate her work capacity and readiness to return to regular duty. Dr. Lakin spoke by phone with the physical therapist at Synergy regarding functional testing. He noted Claimant was still on restrictions because using the right shoulder "has seemed to aggravate myofascial pain up to now," but Dr. Kobayashi had cleared Claimant to "advance" her lifting limitations.

7. Claimant went to Synergy for testing on May 17, 2019. She reported the shoulder was 80% functional and wanted to get back to work full duty without restrictions. The therapist evaluated Claimant's work capacity by "trial[ing] higher level activities for duties related to being a firefighter." The testing was relatively vigorous, including activities such as swinging a 25-pound sledgehammer, lifting 75 pounds to shoulder height, and pulling a heavy sled. The therapist noted Claimant's strength "quickly fatigues," and she would benefit from work hardening.

8. Claimant returned to Dr. Lakin on May 28, 2019 and reported she had injured her left shoulder during the functional capacity assessment at Synergy. Dr. Lakin opined,

Injury to left shoulder 5/17/2019 . . . is a separate injury. MOI was out of the ordinary for assessment/care of her right shoulder injury. Right shoulder will be closed out, MMI, and rating will be completed. Left shoulder should be a new injury claim.

9. Claimant filed a new workers' compensation claim for the left shoulder with a May 17, 2019 date of injury (W.C. No. 5-109-584).

10. Respondent denied the 2019 claim and accepted liability for the left shoulder injury under the original 2018 claim (W.C. No. 5-078-213). Respondent has covered all requested benefits relating to the left shoulder under the original claim, including left shoulder surgery on July 3, 2019 and TTD benefits.

11. Claimant's motivation for pursuing the left shoulder injury as a separate claim is to "reset the clock" regarding her eligibility for light duty work under Employer's policies.

12. Claimant failed to prove she suffered a separate compensable injury on May 17, 2019. The functional capacity testing was ancillary to authorized medical treatment and directly related to Claimant's admitted right shoulder injury. The left shoulder injury is a compensable consequence of the May 2018 admitted injury under the quasi-course of employment doctrine.

CONCLUSIONS OF LAW

To prove a compensable injury, a claimant must prove the injury occurred while performing service arising out of and in the course of his employment. Section 8-41-301(1)(b). Injuries sustained while pursuing authorized treatment for a compensable work-related injury are compensable under the "quasi-course of employment" doctrine. *Travelers Insurance Company v. Savio*, 706 P.2d 1258 (Colo. 1985); *Excel Corp. v. Industrial Claim Appeals Office*, 860 P.2d 1393 (Colo. App. 1993). Although these injuries occur outside the time and space limits of normal employment, they are nevertheless related to the employment in the sense that they are necessary or reasonable activities that would not have been undertaken but for the compensable injury. *Turner v. Industrial Claim Appeals Office*, 111 P.3d 534 (Colo. App. 2004). Because the employer must provide medical treatment for a compensable injury and an injured employee must submit

to it, the treatment becomes an implied part of the employment contract, and injuries sustained while attending authorized treatment are considered compensable consequences of the original injury and not a separate injury claim. *Price Mine Service, Inc. v. Industrial Claim Appeals Office*, 64 P.3d 936 (Colo. App. 2003).

As found, Claimant failed to prove she suffered a separate compensable injury on May 17, 2019. The ALJ agrees with Respondent that the left shoulder injury suffered during the functional capacity testing is a compensable consequence of the May 2018 injury, and should be covered under the claim denominated W.C. No. 5-078-213. Even though the FCE was not medical “treatment” *per se*, it was certainly ancillary to treatment. One of an ATP’s primary responsibilities is to determine an injured worker’s limitations and restrictions during recovery from an injury. See *e.g.*, §§ 8-42-105; 8-42-106; WCRP 18-6(G)(2)(a), (b); DOWC Form WC164 – Physician’s Report of Workers’ Compensation Injury. Treating providers frequently send injured workers for functional capacity evaluations (FCEs) or similar testing to help establish their work capacity, and carriers routinely cover FCEs without question. According to the WC Fee Schedule, an FCE is a medical benefit payable under HPCPS 97750.¹

The ALJ has no question the May 17, 2019 functional testing was a compensable medical benefit obtained in the natural progression of authorized treatment for Claimant’s 2018 injury. The testing was undertaken on direct referral from the ATP, and its sole purpose was to assess Claimant’s safe work capacity and residual restrictions *resulting from the work injury*. As such, it was a direct and natural consequence of the original injury.² The fact that the physical therapist was more aggressive than necessary or expected does not change the analysis or the outcome. Injuries sustained because of medical negligence are covered under the quasi-course doctrine just like any other injury resulting from authorized treatment. *Hennig v. Crested Butte Anthracite Mining Co.*, 21 P.2d 1115 (Colo. 1933); *Hascek v. CPI Corp.*, W.C. No. 3-699-359 (November 17, 2005). Dr. Lakin’s legal opinion that the therapy injury represents a “new injury” is not persuasive as it is outside his area of expertise and reflects a misunderstanding of the law.

ORDER

It is therefore ordered that:

1. Claimant’s claim for workers’ compensation benefits in W.C. No. 5-109-584 is denied and dismissed.

¹https://www.colorado.gov/pacific/sites/default/files/2020_CO_WC_Medical_Fee_Schedule_version_0107_2020.xlsx

² The functional assessment was neither required nor requested by Employer, and the injury might not be compensable at all absent the quasi-course doctrine. Typically, a determination that an injury was not a “direct and natural” consequence of the original injury results in a finding of non-compensability. See, *e.g.*, *Travelers’ Insurance Company v. Savio*, 706 P.2d 1258 (Colo. 1985) (bad faith by insurance carrier); *Schreiber v. Brown & Root, Inc.*, 888 P.2d 274 (Colo. App. 1993) (unauthorized medical treatment); *Jarosinski v. Industrial Claim Appeals Office*, 62 P.3d 1052 (Colo. App. 2002) (“litigation stress”); *Lang v. Southern Ute Tribe*, W.C. 4-450-747 (May 16, 2005) (injuries during FCE arranged by claimant’s attorney).

2. Respondent shall continue covering the May 17, 2019 left shoulder injury under W.C. No. 5-078-213.

3. All issues **relating to W.C. No. 5-078-213** not decided herein are reserved for future determination.

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

DATED: January 9, 2020

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-104-509-001**

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that he suffered a compensable lower back injury during the course and scope of his employment with Employer on February 13, 2019.
2. Whether Claimant has established by a preponderance of the evidence that he is entitled to receive authorized, reasonable and necessary medical treatment for his industrial injury.
3. A determination of Claimant's Average Weekly Wage (AWW).
4. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period March 25, 2019 until terminated by statute.

FINDINGS OF FACT

1. Claimant worked for Employer as an Insulation Installer. He explained that he injured his lower back while riding in a company box truck during a snowstorm from a job site in Castle Rock to Employer's headquarters in Denver. During the trip, the truck pulled over several times due to snow and ice build-up on the windshield wipers. Claimant's co-worker Pascacio T[Redacted], the driver of the truck, instructed him to get out of the truck and clear snow and ice from the windshield. Claimant noted that he was required to jump down about 4-5 feet off the truck to the ground. He jumped down about 4-5 times to clean the ice and snow from the windshield during the trip to Denver.
2. On March 20, 2019 Claimant visited the UC Health Emergency Room for an evaluation. In an "after visit summary" Jessica Paisley, M.D. diagnosed Claimant with acute bilateral low back pain with left-sided sciatica.
3. On March 25, 2019 Claimant visited the Mile High Primary Care Clinic for an evaluation. He reported lower back pain that began approximately one week earlier. Claimant could not recall a specific event that caused his lower back pain. Kevin Scott, M.D. diagnosed Claimant with lower back pain, prescribed medications and recommended a lumbar spine MRI.
4. On April 6, 2019 Claimant underwent a lumbar spine MRI. The MRI revealed a L3-L4 disc protrusion, an L4-L5 left asymmetric disc bulge, mild left neural foraminal narrowing and mild facet arthropathy of the lower spine.
5. Claimant again visited Dr. Scott on April 10, 2019 and received a work excuse. Dr. Scott wrote that Claimant was under his care for a back injury and issued restrictions of no lifting, bending or twisting until evaluated by a spine surgeon. On April

11, 2019 Dr. Scott's office issued a health summary that noted lower back pain and listed Claimant's medications. None of Dr. Scott's records contained any reference to a work-related injury.

6. On April 22, 2019 Claimant visited Authorized Treating Physician (ATP) Brenden Matus, M.D. at Workwell Occupational Medicine for an initial evaluation. Claimant reported lower back pain that began on March 13, 2019. He specifically explained that he had been climbing up and down from his work truck in blizzard conditions to clean the windshield wipers. Claimant noted that "when he would jump down from the truck he would slide a bit." Several days later on March 19, 2019 Claimant lifted a two-part 16-foot ladder and felt a pulling sensation in his back. After performing a physical examination, Dr. Matus determined that Claimant may have suffered a lower back strain. However, he also remarked that Claimant did not have a "significant mechanism of injury, but he certainly does have a mechanism that was in the workplace and no other competing mechanism that was outside of work." Dr. Matus recommended physical therapy and prescribed medications. He also suggested an orthopedic surgery evaluation.

7. On April 26, 2019 Claimant presented to Stephen Pehler, M.D. for an orthopedic evaluation. Claimant reported lower back pain with left leg radiculopathy and left-sided groin pain. Despite severe pain complaints, Claimant performed well on his lower extremity motor testing. Dr. Pehler reviewed Claimant's MRI and recommended a transforaminal lumbar epidural steroid injection.

8. At Claimant's May 7, 2019 evaluation with Dr. Matus, he reported an inability to maintain a position for more than 10 – 20 minutes. He also stated his pain was so severe that it caused nausea and vomiting. Claimant reported loose stools and diarrhea that he believed were connected to his pain. Dr. Matus remarked that Claimant required a mental health evaluation and referred him for a psychiatry evaluation.

9. At a June 19, 2019 evaluation with Dr. Matus Claimant reported he fell out of a chair at home two nights prior while holding his child on his lap. Claimant noted a sharp pain with the inability to stand. On July 3, 2019 Claimant again visited Dr. Matus and reported worsening symptoms including numbness and sharp pain in the center of his back. Dr. Matus again recommended a depression-screening tool and referred Claimant for a psychiatric evaluation. He continued work restrictions because Claimant had not demonstrated any functional progress.

10. Claimant has a prior work injury from November 5, 2015 in which he fell off the back of a garbage truck and hit his head. He treated extensively for the injury over approximately two years. Medical records document that he was frequently non-compliant with medical treatment recommendations and eventually discharged by his neurologist and physical medicine specialist Kristin Mason, M.D. for non-compliance.

11. On August 11, 2019 Lawrence A. Lesnak, D.O. performed a records review of Claimant's claim. Dr. Lesnak concluded that there was no medical evidence that Claimant suffered a compensable injury at work on March 13, 2019. He reasoned that

Claimant had a long history of “psychologic” symptom diagnoses that would suggest his subjective complaints tend to be unreliable. Dr. Lesnak explained that “in cases such as this, the initial medical history obtained by any healthcare provider frequently is the most accurate.” Claimant did not report a specific inciting event that was responsible for his back and leg symptoms to Dr. Scott on March 25, 2019. Furthermore, the April 6, 2019 lumbar MRI did not reflect any recent or traumatic injury to Claimant’s lumbar spine. The MRI merely revealed typical age-related degenerative changes. Dr. Lesnak thus summarized that Claimant’s medical treatment and diagnostic testing for his lower back and leg symptoms were unrelated to any March 13, 2019 work incident.

12. Claimant testified at the hearing in this matter. He remarked that suffered a lower back injury on March 13, 2019 when he was returning from a job site. He was jumping in and out of the truck to clean off the windshield because the wipers were freezing up. Claimant noted his back was then aggravated on March 19, 2019 when he lifted a heavy ladder. Claimant commented he initially reported his injury to Employer’s Production Manager Edgar V[Redacted] on Friday, March 15, 2019 via telephone and/or text message. He subsequently reported his injury to supervisor Mike B[Redacted] on Wednesday March 20, 2019 in person after he had reported to the emergency room at UC Health. Claimant explained that neither Mr. V[Redacted] nor Mr. B[Redacted] took any action in response to his report of an injury. Specifically, Claimant testified that he told Mr. V[Redacted] that he was “feeling under the weather on March 15, 2019” and subsequently sent both Mr. V[Redacted] and Mr. B[Redacted] multiple text messages to which neither responded.

13. Mr. V[Redacted] testified at the hearing in this matter. He explained that Claimant called him on March 15, 2019 but only told him that he was “under the weather” and did not report any specific incident or injury that occurred on March 13, 2019. In fact, Claimant never reported any work injury. Mr. V[Redacted] also confirmed that he exchanged several text messages with Claimant and the two men had played phone tag for the next several days until Claimant presented to the office on March 20, 2019 after his emergency room visit. It was Mr. V[Redacted]’ understanding that the emergency room visit was not the result of any work-related incident. Although Claimant had sent Mr. V[Redacted] several text messages and called him numerous times, he never sent either a text or voice message stating that he had injured his back at work on March 13, 2019 or March 19, 2019. Notably, when Mr. V[Redacted] asked Claimant verbally if his injury was work-related, Claimant responded in the negative.

14. Mr. V[Redacted] first learned that Claimant was alleging a work-related injury on or about March 25, 2019. He investigated the claim by obtaining witness statements from the crewmembers who had worked with Claimant on March 13, 2019. None of the crewmembers confirmed an incident or injury in writing with Mr. V[Redacted]. Claimant also sent a text message on March 20, 2019 to Employer’s General Manager, Eric, confirming that he had also told Mr. B[Redacted] that his injury was not work related.

15. On October 1, 2019 Dr. Lesnak testified through a post-hearing evidentiary deposition in this matter. He maintained that there was no medical evidence to suggest Claimant suffered a compensable lower back injury while working for Employer on March

13, 2019. Dr. Lesnak specified that many of Claimant's subjective complaints were not supported by objective examination findings in either the 2015 claim or the current 2019 claim. He also stated that the medical records contained an absence of objective and reproducible findings on physical examination. Despite therapy and treatment, Claimant's symptoms progressed over time, which was inconsistent with the expected course after an injury. Notably, he explained that Claimant exhibited many expanding complaints that "really didn't make sense and fit the injury." Dr. Lesnak also testified that, although he had reviewed written witness statements from co-workers who denied seeing Claimant sustain any injury on March 13, 2019, the statements were not crucial to his opinion on causation. Instead, the statements simply provided additional information to the overall analysis regarding the reliability of Claimant's presentation and history. Moreover, the April 6, 2019 MRI did not reflect any recent or traumatic injury to Claimant's lumbar spine. The MRI merely revealed typical age-related degenerative changes. Finally, Claimant's reported symptoms after cleaning the truck's windshield and lifting the ladder involved tiredness and no specific pain. Dr. Lesnak commented that the reports of symptoms following the preceding activities did not "really seem to correlate." Therefore, Dr. Lesnak summarized that Claimant did not suffer a compensable lower back injury on March 13, 2019.

16. Claimant has failed to demonstrate that it is more probably true than not that he suffered a compensable lower back injury during the course and scope of his employment with Employer on February 13, 2019. Initially, Claimant asserts that he injured his lower back on March 13, 2019 when he repeatedly climbed up and down from his work truck in blizzard conditions to clean the windshield. ATP Dr. Matus determined that Claimant may have suffered a lower back strain but remarked that Claimant did not have a "significant mechanism of injury" Nevertheless, Dr. Matus reasoned that Claimant "certainly does have a mechanism that was in the workplace and no other competing mechanism that was outside of work." Despite Claimant's testimony and Dr. Matus' opinion, the medical records, in conjunction with the persuasive opinion of Dr. Lesnak, reflect that Claimant likely did not suffer a lower back injury during the course and scope of his employment with Employer on March 13, 2019.

17. The medical records reveal that Claimant did not report a work-related injury to medical providers until he visited Dr. Matus for an examination on April 22, 2019. On March 25, 2019 Claimant visited Dr. Scott and reported lower back pain that began approximately one week earlier. Claimant could not recall a specific event that caused his lower back pain. Furthermore, although Claimant testified that he reported his lower back injury to Employer shortly after the incident, the credible testimony of Mr. V[Redacted] demonstrates that Claimant did not report his injury and there were no witnesses to a March 13, 2019 event. Notably, Claimant called Mr. V[Redacted] on March 15, 2019 but only told him that he was "under the weather" and did not report any specific incident that occurred on March 13, 2019. Although Claimant had sent Mr. V[Redacted] several text messages and called him numerous times, he never stated that he had injured his back at work on March 13, 2019 or March 19, 2019. Furthermore, when Mr. V[Redacted] asked Claimant verbally if his injury was work-related, Claimant responded in the negative. Mr. V[Redacted] also investigated the claim and none of Claimant's crewmembers from March 13, 2019 confirmed an incident or injury in writing. Finally,

Claimant sent a text message on March 20, 2019 to Employer's General Manager, Eric, confirming that he had also told Mr. B[Redacted] that his injury was not work related.

18. The persuasive medical opinion of Dr. Lesnak also reflects that it is unlikely Claimant suffered a lower back injury while working for Employer. Dr. Lesnak specified that the medical records contain an absence of objective and reproducible findings on physical examination. Claimant also did not report a specific inciting event that was responsible for his back and leg symptoms to Dr. Scott on March 25, 2019. Furthermore, the April 6, 2019 lumbar MRI did not reflect any recent or traumatic injury to Claimant's lumbar spine. The MRI merely revealed typical age-related degenerative changes. Finally, despite therapy and treatment, Claimant's symptoms progressed over time, which was inconsistent with the expected course after an injury. Notably, Dr. Lesnak explained that Claimant exhibited many expanding complaints that "really didn't make sense and fit the injury." He thus summarized that Claimant's medical treatment and diagnostic testing for his lower back and leg symptoms were unrelated to any March 13, 2019 work incident. Based on the medical records and persuasive opinion of Dr. Lesnak, Claimant likely did not suffer a lower back injury while working for Employer on March 13, 2019. Accordingly, Claimant's claim is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. See *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Compensability

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson*, W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.*, 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner*, 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts*, W.C. No. 4-606-563 (ICAP, Aug. 18, 2005).

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. See *Cotts v. Exempla, Inc.*, W.C. No. 4-606-563 (ICAO, Aug. 18, 2005). Rather, the symptoms could represent the “logical and recurrent consequence” of the pre-existing condition. See *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAO, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs*, W.C. No. 4-745-712 (ICAO, Oct. 27, 2008), simply because a claimant’s symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that “correlation is not causation,” and merely because a coincidental correlation exists between the claimant’s work and his symptoms does not mean there is a causal connection between the claimant’s injury and work activities.

7. As found, Claimant has failed to demonstrate by a preponderance of the evidence that he suffered a compensable lower back injury during the course and scope of his employment with Employer on February 13, 2019. Initially, Claimant asserts that he injured his lower back on March 13, 2019 when he repeatedly climbed up and down from his work truck in blizzard conditions to clean the windshield. ATP Dr. Matus determined that Claimant may have suffered a lower back strain but remarked that Claimant did not have a “significant mechanism of injury” Nevertheless, Dr. Matus reasoned that Claimant “certainly does have a mechanism that was in the workplace and no other competing mechanism that was outside of work.” Despite Claimant’s testimony and Dr. Matus’ opinion, the medical records, in conjunction with the persuasive opinion of Dr. Lesnak, reflect that Claimant likely did not suffer a lower back injury during the course and scope of his employment with Employer on March 13, 2019.

8. As found, the medical records reveal that Claimant did not report a work-related injury to medical providers until he visited Dr. Matus for an examination on April

22, 2019. On March 25, 2019 Claimant visited Dr. Scott and reported lower back pain that began approximately one week earlier. Claimant could not recall a specific event that caused his lower back pain. Furthermore, although Claimant testified that he reported his lower back injury to Employer shortly after the incident, the credible testimony of Mr. V[Redacted] demonstrates that Claimant did not report his injury and there were no witnesses to a March 13, 2019 event. Notably, Claimant called Mr. V[Redacted] on March 15, 2019 but only told him that he was “under the weather” and did not report any specific incident that occurred on March 13, 2019. Although Claimant had sent Mr. V[Redacted] several text messages and called him numerous times, he never stated that he had injured his back at work on March 13, 2019 or March 19, 2019. Furthermore, when Mr. V[Redacted] asked Claimant verbally if his injury was work-related, Claimant responded in the negative. Mr. V[Redacted] also investigated the claim and none of Claimant’s crewmembers from March 13, 2019 confirmed an incident or injury in writing. Finally, Claimant sent a text message on March 20, 2019 to Employer’s General Manager, Eric, confirming that he had also told Mr. B[Redacted] that his injury was not work related.

9. As found, the persuasive medical opinion of Dr. Lesnak also reflects that it is unlikely Claimant suffered a lower back injury while working for Employer. Dr. Lesnak specified that the medical records contain an absence of objective and reproducible findings on physical examination. Claimant also did not report a specific inciting event that was responsible for his back and leg symptoms to Dr. Scott on March 25, 2019. Furthermore, the April 6, 2019 lumbar MRI did not reflect any recent or traumatic injury to Claimant’s lumbar spine. The MRI merely revealed typical age-related degenerative changes. Finally, despite therapy and treatment, Claimant’s symptoms progressed over time, which was inconsistent with the expected course after an injury. Notably, Dr. Lesnak explained that Claimant exhibited many expanding complaints that “really didn’t make sense and fit the injury.” He thus summarized that Claimant’s medical treatment and diagnostic testing for his lower back and leg symptoms were unrelated to any March 13, 2019 work incident. Based on the medical records and persuasive opinion of Dr. Lesnak, Claimant likely did not suffer a lower back injury while working for Employer on March 13, 2019. Accordingly, Claimant’s claim is denied and dismissed.

ORDER

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

Claimant’s claim for Workers’ Compensation benefits is denied and dismissed.

If you are a party dissatisfied with the Judge’s order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge’s order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you

mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at <http://www.colorado.gov/dpa/oac/forms-WC.htm>.*

DATED: January 9, 2020.

DIGITAL SIGNATURE:


Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Whether claimant has proven by a preponderance of the evidence that her average weekly wage (“AWW”) should be increased based on concurrent employment?
- Whether claimant has proven by a preponderance of the evidence that she is entitled to an award for disfigurement?
- Whether claimant has proven by a preponderance of the evidence that respondents claim of an overpayment of temporary disability benefits (and subsequent offset of permanent partial disability benefits) was improper based on claimant having failed to receive the temporary disability checks issued by respondents?
- Whether respondents have proven by a preponderance of the evidence that the interest should be waved pursuant to Section 8-43-410(2), C.R.S.?

FINDINGS OF FACT

1. Claimant sustained a compensable injury arising out of and in the course of her employment with employer on October 22, 2015.
2. Respondents filed a final admission of liability (“FAL”) on March 1, 2019 admitting to an impairment rating of 18% whole person. The FAL admitted to an average weekly of \$593.18. This AWW was based on claimant’s earnings with employer and did not take into consideration any concurrent employment. Claimant testified she did not discuss her concurrent employment with the insurance adjuster. Claimant testified that her manager for employer was aware of her concurrent employment. This testimony was contradicted by Ms. Robinson, the General Manager and Human Resources (“HR”) manager for employer. Ms. Robinson testified she was unaware of claimant having a second job.
3. Claimant testified that at the time she was injured, she was also working for a concurrent employer, Retredia A&M Services performing housekeeping services. Claimant testified this was the same type of work she performed for employer. Claimant testified she earned approximately \$300 per week working for her concurrent employer. According to the W2 forms entered into evidence at hearing, claimant earned \$3,617.75 working for her concurrent employer in 2015.
4. The wage records entered into evidence from the concurrent employment document claimant’s earnings in 2015. Claimant testified that the nature of her employment was seasonal and she would work more hours during the busy season than the low season. Claimant testified that the low season was generally the months of April, May, August, September and October.

5. Claimant testified she would have returned to work for her concurrent employer in November if she had not been injured. The wage records show claimant worked for her concurrent employer in September 2015 and then again in January 2016. Claimant testified she was unable to continue to work for her concurrent employer due to her injury involved in this claim.

6. Claimant testified at hearing that she did not receive many of her temporary total disability (“TTD”) checks including her checks between December 28, 2015 and June 23, 2016. Claimant testified that she did not keep a record of the checks that she deposited. Claimant testified that she mostly used Wells Fargo, but deposited a few checks at Yampa Valley Bank.

7. Respondents presented the testimony of Ms. M[Redacted], the adjuster for insurer. Ms. M[Redacted] testified insurer admitted to an AWW of \$593.18 on December 28, 2015 based on claimant’s earnings on the 12 weeks prior to the work injury. Ms. M[Redacted] testified she only recently learned of claimant’s concurrent employment. Ms. M[Redacted] testified she did not ask claimant about concurrent employment when speaking with claimant. Ms. M[Redacted] testified as to her conversations with claimant and discussions regarding her change of address during the claim.

8. Ms. M[Redacted] testified as to checks that were issued to claimant that did not clear, and the measures insurer took to issue stop payments on those checks and reissue checks to claimant. Ms. M[Redacted] testified she did not recall if those checks were returned through the mail or not. Ms. M[Redacted] testified five checks did not clear, and she reissued a check for \$113.66 (four checks for \$20 and one for \$33.66) to cover those checks. Ms. M[Redacted] testified there were two other checks issued on October 6, 2017 and October 19, 2017 that were not cashed. Ms. M[Redacted] testified that when she was advised in 2017 that claimant had not received the checks, she reissued the checks and sent the checks via overnight mail. According to the payment logs, these checks were issued on November 6, 2017 and cashed on November 8, 2017.

9. Copies of two checks, one dated December 28, 2015 for \$3,331.44 and a second dated May 13, 2016 in the amount of \$1,393.45 were entered into evidence at hearing. This first check was negotiated at Wells Fargo, the second check was negotiated at Yampa Valley Bank. Both checks contain a signature endorsement that is similar to claimant’s signature as reflected in her authorization for release of employment information entered into evidence by respondents. The ALJ does not credit claimant’s testimony at hearing that she did not receive or negotiate the temporary disability benefits reflected in these payments.

10. The ALJ credits the testimony of Ms. M[Redacted] and the payment logs entered into evidence and finds that insurer has issued temporary disability benefits to claimant amounting to \$54,240.83 as reflected in the March 1, 2019 final admission of liability (“FAL”). The respondents are therefore entitled to credit for the temporary

disability benefits paid as reflected in the indemnity logs and the FAL filed by respondents.

11. The ALJ credits the testimony of Ms. M[Redacted] and the indemnity logs entered into evidence over the testimony of claimant that she did not receive the checks. The ALJ notes that the checks were cashed and when checks were reported as missing to the insurer, new checks were issued in a timely manner and sent to claimant. Those checks were almost immediately cashed. The evidence presented at hearing does not establish that claimant failed to receive any of the benefits listed on the indemnity log as claimed by respondents in the FAL filed on March 1, 2019. Claimant's testimony in this case that

12. Following claimant's injury, claimant underwent surgery on her low back. As a result of the surgery, claimant has a surgical scar on her back measuring three and one-half (3 ½) inches in length and one-quarter (¼) inch in width. Claimant also demonstrated that she now walks with a limp. Respondents presented surveillance of claimant that they contend demonstrates claimant walking without a limp. Additionally, Ms. Robinson testified at hearing that she has not noticed claimant walking with a limp when she sees claimant at work.

13. Based on the evidence presented at hearing, the ALJ finds that claimant has proven that it is more likely than not that her AWW should be increased based on the concurrent employment. Respondents argue that the AWW should be increased by \$100.51 based on claimant's earnings between June 12, 2015 and September 17,,2015. This does not take into consideration the nature of claimant's employment with her concurrent employer, however.

14. Based on the evidence presented at hearing, it is apparent that claimant was earning more from her concurrent employment during the busy times with her concurrent employment. For instance, during the six weeks between June 11 and July 22, 2015, claimant earned a total of \$1,296 for an average of \$216.00 per week. However, if you include the 10 weeks prior to claimant's injury, claimant earned \$156.10 per week.

15. Based on the evidence presented at hearing, and using the discretion allowed to the ALJ for calculating a fair AWW by the Colorado Workers' Compensation Act, the ALJ determines that claimant's AWW should be increased by the \$156.10 claimant was earning per week in the 10 weeks prior to her work injury. The ALJ notes that Ms. M[Redacted] testified that she calculated claimant's AWW by using the wages for the 12 weeks prior to her work injury. The ALJ notes that 10 weeks is more appropriate for the concurrent employment based on the wage records from her concurrent employer that shows consistent work for the concurrent employer in the 10 weeks prior to her injury.

16. The ALJ finds claimant has proven by a preponderance of the evidence that the industrial injury resulted in a disfigurement that is normally exposed to public view based on the surgical scar and the altered gait. The ALJ credits claimant's

presentation at hearing over the testimony of Ms. Robinson and the surveillance video and finds that claimant has proven it is more probable than not that her gait was altered as a result of the injury and subsequent surgery.

17. Respondents argue that they should be relieved of paying interest pursuant to Section 8-43-410(2), C.R.S. for the increased AWW due to the fact that they were unaware of claimant's concurrent employment. The ALJ is not persuaded.

18. Section 8-43-410(2), C.R.S. provides that interest shall be paid on all awards under the Workers' Compensation Act. This provision allows for the ALJ to relieve the insurance company of paying the interest upon application and satisfactory showing to the ALJ of terms under which the ALJ may relieve the employer or insurance carrier from having to pay the interest of an award.

19. Despite the fact that the claimant did not inform the insurance carrier of the concurrent employment in this case, the ALJ finds that the claimant does not need to volunteer this information, especially in cases where the claimant is initially not represented by counsel, or risk being denied interest on payments that should have been issued.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2017).

3. "Overpayment" means money received by a claimant that exceeds the amount that should have been paid. Section 8-40-201(15.5), C.R.S. Claimant alleges

in this case that certain temporary disability checks were never received by claimant, and therefore, respondents should not be entitled to claim an overpayment of benefits for these checks.

4. As found, the testimony of Ms. M[Redacted] and the indemnity logs entered into evidence are determined to be more credible and persuasive than the testimony of claimant at hearing that she did not receive certain checks from respondents in this case. As found, the testimony of Ms. M[Redacted] that certain issues regarding checks was brought to her attention by claimant and she reissued checks to claimant in these instances is determined to be credible and persuasive. As found, the indemnity logs establish that \$54,280.83 in temporary disability was paid to claimant and those checks were cashed. As found, insufficient evidence was presented to establish by a preponderance of the evidence that claimant did not receive the benefits listed in the indemnity log.

5. As found, claimant's testimony that she did not receive temporary disability benefits for a period of time is found to be not persuasive. The evidence presented at hearing demonstrates that checks issued on December 28, 2015 and January 3, 2016, for \$3,331.44 and \$1,393.45 respectively, were negotiated by claimant based on the signature on the back of the checks is found to be more credible and persuasive than claimant's contrary testimony at hearing.

6. The ALJ must determine an employee's AWW by calculating the money rate at which services are paid the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995).

7. As found, the ALJ determines that the best method for determining claimant's AWW is to use the claimant's wages from claimant's concurrent employment for the 10 weeks prior to the injury and combine that amount to the AWW for claimant's work with employer as reflected in the FAL.

8. As found, claimant's AWW should be increased by \$156.10 based on claimant's concurrent employment for an AWW of \$749.28.

9. As found, claimant has proven by a preponderance of the evidence that she sustained a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles claimant to additional compensation. Section 8-42-108 (1), C.R.S.

10. Pursuant to Section 8-42-108(1), the ALJ awards claimant disfigurement benefits in the amount of \$1,210.04 for claimant's surgical scar and altered gait.

11. Section 8-43-410(2), C.R.S. provides in pertinent part:

Every employer or insurance carrier shall pay interest at the rate of eight percent per annum upon all sums not paid upon ... the date the employer

or insurance carrier became aware of an injury.... Upon application and satisfactory showing to the director or an administrative law judge of the valid reasons therefor, said director or administrative law judge, upon such terms or conditions as the director or administrative law judge may determine, may relieve such employer or insurer from the payment of interest after the date of the order therefor....

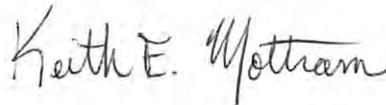
12. As found, respondents have failed to establish by a preponderance of the evidence a satisfactory showing of circumstances that the relieve respondents of the obligation to pay claimant interest on benefits not paid in this case. Despite the fact that claimant did not volunteer information to respondents about her concurrent employment, these facts alone do not establish, in this case, a satisfactory basis for relieving respondent of the obligation to pay interest to claimant in this case.

ORDER

It is therefore ordered:

1. Respondents shall pay claimant temporary disability benefits based on an AWW of \$749.28. Respondents are entitled to a credit for temporary benefits already paid.
2. Respondents shall pay claimant disfigurement benefits in the amount of \$1,210.04.
3. Respondents request for a waiver of interest due to claimant pursuant to Section 8-43-410(2) is denied.
4. All issues not herein decided are reserved for future determination.

Dated: January 10, 2020



Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that a right shoulder reverse total arthroplasty recommended by Dr. Provencher is reasonable, necessary, and causally related to Claimant's May 22, 2017 work injury.

FINDINGS OF FACT

1. Claimant is a 71-year-old male employed by Employer as a tunnel maintenance employee. Prior to his May 22, 2017 work injury, Claimant had been employed as a tunnel maintenance employee for approximately 4 years.

2. As a tunnel maintenance employee, Claimant's job duties involved the operation and maintenance of the Eisenhower Johnson Memorial Tunnel. Claimant's crew was responsible for operating and maintaining the outsides of the tunnel during both winter and summer conditions. Claimant was required to operate heavy equipment including snowplows. Claimant was also regularly required to shovel snow. The position also required Claimant to assist containing fire activity and to assist with accidents in the tunnel.

3. Claimant's job description as a tunnel worker is classified as heavy, with exertion of up to 100 pounds of force occasionally and/or up to 50 pounds of force frequently and/or up to 20 pounds of force constantly to move objects. See Exhibit 3.

4. On May 22, 2017, Claimant sustained an admittedly compensable work related injury.

5. The diagnoses ultimately involve the right biceps and the right shoulder. Respondents dispute that a right shoulder replacement is causally related to the work injury on May 22, 2017. Respondents do not dispute that a right biceps injury occurred.

6. On May 22, 2017, Claimant signed and completed an Employee Incident Statement on May 22, 2017. Claimant's description on the form indicated that he was loading an old advance warning sign on 1-ton truck to be recycled and that he lost his grip on the sign straining his right arm (arm bicep). See Exhibit 1.

7. On May 22, 2017, Michael Ruygrok, M.D. evaluated Claimant at St. Anthony Summit Medical Center emergency department. Claimant reported right arm pain and stated, "I think I tore a bicep." Claimant reported that he was lifting a heavy road sign into his truck when the sign fell out of the truck and struck his right hand. Claimant reported

feeling an immediate pop in his right proximal biceps. Claimant reported discomfort and swelling over his proximal biceps. Claimant denied pain in his right hand and denied any other trauma or complaints. Dr. Ruygrok assessed rupture of the right proximal biceps with a history and exam consistent with a rupture of the proximal biceps muscle. Dr. Ruygrok opined that the flexor function of Claimant's elbow was intact, but that there was deformity and pain over the biceps muscle. On examination, Claimant had swelling and tenderness over the proximal bicep. Claimant's right shoulder and right elbow were examined and had no tenderness to palpation. Dr. Ruygrok found no other signs of trauma. Dr. Ruygrok recommended Claimant follow up with occupational health for management. See Exhibit 5.

8. On May 23, 2017, Employer filled out a first report of injury form. The statement indicates that Claimant was loading a 4x4, 24-pound icy road sign over the rear tailgate into the bed of a 1-ton truck when he lost his grip, the sign slipped, and he caught it straining his right bicep. See Exhibit 2.

9. On May 23, 2017, PA Lindsey Larson evaluated Claimant. Claimant reported a right arm injury and right arm pain and weakness. Claimant reported difficulty using his right extremity and difficulty with lifting. Claimant reported that he was lifting up a sign at work when he felt and heard a pop in his right shoulder in his biceps tendon area. Claimant reported that this felt the same as a prior torn left biceps tendon that he had. Claimant reported that he had pain right away and that he had limited use and strength of his shoulder afterwards. On examination of the right shoulder, PA Larson found a visible shorted bicep muscle on the right side and tenderness to palpation over the tendon insertion site. PA Larson also found limited active range of motion in flexion, internal rotation, and abduction. Claimant had an increase in pain with resisted range of motion and had no active range of motion in any place above the shoulder level. PA Larson discussed that Claimant seemed clinically to have a complete proximal biceps tendon rupture. She also was worried about possible rotator cuff dysfunction given Claimant's limited range of motion in the glenohumeral joint. PA Larson referred Claimant to orthopedics for further imaging, evaluation, and treatment. See Exhibit 7.

10. On May 23, 2017, Claimant underwent x-rays of his right shoulder with the indication being acute pain of the right shoulder and trauma. No evidence of fracture or dislocation was found. Degenerative narrowing of the glenohumeral joint was found, as was early osteophyte formation in the inferior aspect of the humeral head. No unusual soft tissue calcifications or swelling was found. See Exhibit 6.

11. On June 7, 2017, Thomas Hackett, M.D. evaluated Claimant. Claimant reported that he was discharging a 4x4 metal road sign into the back of a work truck, when he was throwing it over the lift gate, but the sign didn't make it, and slid back down. Claimant reported that he held out his right hand and that the corner of the sign went into his right palm and jerked his right shoulder downward with his elbow locked and his arm in extension. Claimant reported that he felt and heard a pop in his right shoulder and had pain and weakness ever since that injury. Claimant denied any pain or difficulty with the right shoulder prior to his injury and stated that he had no problems with his right arm in

the past. Claimant reported his biggest complaints as pain and weakness as well as loss of range of motion. Dr. Hackett performed a physical examination and reviewed x-rays. Dr. Hackett found decreased active and passive range of motion of the shoulder and positive impingement signs. Dr. Hackett also found a Popeye deformity and prominence of the biceps. Dr. Hackett recommended an MRI. See Exhibit 8.

12. On June 13, 2017, Steve Yarberry, M.D. evaluated Claimant. Claimant reported that on May 21, 2017 he was throwing a sign into the back of a truck and did not throw it high enough. Claimant reported that the sign slid back and that he caught it with his right hand and felt a pop. Claimant reported that since then he had pain in his right shoulder. Claimant reported difficulty turning doorknobs, difficulty using the extremity, difficulty with fine motor skills, and difficulty with grasping. Dr. Yarberry noted the problem story as a CDOT worker who injured his right shoulder throwing a sign into the back of a tall truck. Dr. Yarberry provided the impression of clinical right biceps tendon injury and probable rotator cuff injury as well. Dr. Yarberry agreed that an MRI should be performed and opined that Claimant would probably need surgery to have a satisfactory result. See Exhibit 7.

13. On June 14, 2017, Claimant underwent an MRI of his right shoulder. The impression provided was full thickness tearing of the distal supraspinatus and subscapularis tendons from greater and lesser tuberosities with medial retraction with tear defect over about 4x5 cm wide area, long biceps tendon tear and retraction, and degenerative fraying tearing of margins of labrum near circumferentially. See Exhibit 9.

14. On June 28, 2017, Dr. Hackett evaluated Claimant. Dr. Hackett reviewed the recent MRI and noted that it showed a tear of the long head of the biceps tendon, a chronic appearing rotator cuff tear of the supraspinatus with a full thickness tear retracted at the level of the glenoid with significant fatty atrophy and infiltration of the supraspinatus muscle belly, and a full thickness tear of the subscapularis with retraction and some mild fatty atrophy infiltrative changes as well. Dr. Hackett opined that based on the MRI it appeared that Claimant's rotator cuff tear had been there for a long time and would not be amenable to rotator cuff repair. Dr. Hackett noted that Claimant's shoulder was symptomatic now although the tears had likely been there chronically. Dr. Hackett opined that the long head of the biceps tendon rupture was likely new and that inflammation within the shoulder was new. Dr. Hackett recommended treating non-operatively with injection and physical therapy focused on scapular stabilization. Dr. Hackett discussed that if injection and therapy did not improve symptoms, the surgical option available to Claimant would likely be a reverse total shoulder arthroplasty given the significant atrophy in the rotator cuff. Dr. Hackett assessed rotator cuff arthropathy, long head of biceps tendon rupture, and likely acute on chronic exacerbation of shoulder pain. See Exhibit 8.

15. On September 19, 2017, Dr. Yarberry evaluated Claimant. Claimant reported decreased activity levels, decreased range of motion, and difficulty using his right extremity. Claimant reported that he had been going to physical therapy and felt that he had improvement. Dr. Yarberry opined that Claimant had good range of motion but still had chronic 4/10 level pain in the right shoulder. Claimant reported he could not

sleep on the shoulder and that certain arm positions were painful. On right shoulder examination, Claimant had good range of motion and normal strength and tone. Claimant was tender in the right suprascapular area, at the top of the humeral head, and was tender midway down the right arm over the biceps tendon. Dr. Yarberry opined that Claimant did not appear to have much discomfort from the rupture of the biceps tendon. See Exhibit 7.

16. On October 17, 2017, Dr. Yarberry evaluated Claimant. Claimant reported that he felt they were making some progress with his pain in the right shoulder and that his shoulder was getting stronger. Claimant reported decreased range of motion and difficulty using his right extremity and pushing. On examination, Dr. Yarberry found some tenderness in the scapular area and the in the biceps tendon anteriorly. Dr. Yarberry found a lack of full forward flexion and abduction, but symmetrical with the left shoulder. See Exhibit 7.

17. On October 23, 2017, orthopedic consultant William Ciccone, M.D. performed an independent medical evaluation. Claimant reported injuring his right shoulder when working and trying to throw a sign up into a truck. Claimant reported that the sign did not quite make it, the corner of the sign fell back and hit his hand, and the sign pulled on his shoulder making a pop in the shoulder. Claimant reported increased pain at that time to the anterior aspect of his shoulder and that he reported the injury and went to the Emergency department. Claimant reported no prior history of shoulder problems. Claimant reported the pain was worse with overhead reaching, sleep, work, lifting, pushing, and pulling. Claimant reported that he had trouble dressing, vacuuming, driving, and cooking. Dr. Ciccone reviewed medical records and performed a physical examination. Dr. Ciccone provided the impression of right shoulder long head biceps tear and right shoulder chronic rotator cuff tear. Dr. Ciccone noted that Claimant had a previous history of right shoulder pain and reported on December 22, 2016 that he had on and off shoulder pain in the past. Dr. Ciccone noted that Claimant underwent physical therapy and felt improved with restored normal range of motion by January 3, 2017. See Exhibit 12.

18. Dr. Ciccone opined that Claimant did not aggravate or accelerate any of Claimant's chronic rotator cuff pathology and that Claimant suffered tearing of the long head of the biceps as a result of the May 22, 2017 injury. Dr. Ciccone noted that the MRI scan did not reveal any acute rotator cuff pathology, only chronic tearing associated with muscle atrophy and that it was clear from the records that Claimant had a previous history of intermittent shoulder pain associated with restrictions. Dr. Ciccone opined that given the severity of the chronic pathology noted in the right shoulder, intermittent shoulder pain and restrictions with activities would be expected. Dr. Ciccone pointed out that prior to May 22, 2017, Claimant already had right shoulder pain intermittently severe enough to require narcotic medications and time off work. Dr. Ciccone opined that the need for a possible right shoulder replacement was not created by the work injury. See Exhibit 12.

19. On November 21, 2017, Dr. Yarberry evaluated Claimant. Claimant reported he had a shoulder injection on October 27 and was doing great with almost no

pain, good range of motion, and improved strength. Dr. Yarberry noted that Claimant was upbeat and doing very well after a second steroid injection. See Exhibit 7.

20. On February 20, 2018, Dr. Yarberry evaluated Claimant. Claimant reported that he continued to improve, but was still weak. Claimant reported that he could not get his Jeep into reverse unless he used his left arm to help. Claimant reported that he could not lift a bag filled with groceries. Claimant also reported that he fell down cross-country skiing and couldn't get up with his poles/arms until he took his skis off. See Exhibit 7.

21. On February 23, 2018, Dr. Hackett evaluated Claimant. Claimant reported that a steroid injection helped with the pain and that physical therapy was helping him to make gradual progress. Claimant reported having minimal pain in his shoulder. Claimant had pretty good active range of motion and no significant weakness on examination. Dr. Hackett recommended continuing with conservative management and physical therapy. See Exhibit 8.

22. On March 21, 2018, Dr. Yarberry evaluated Claimant. Claimant had stopped taking meloxicam due to a bleeding ulcer. Claimant reported his shoulder pain was a 4/5 on the pain scale. Claimant reported that since stopping meloxicam he had bad pain in his shoulder, as well as pain in the back and the knee. Dr. Yarberry noted that surgery had not been recommended yet. Dr. Yarberry provided an impression indicating Claimant's pain had definitely returned, not taking a long acting NSAID and he planned voltaren cream as well as restarting oxycodone. See Exhibit 7.

23. In response to a March 21, 2018 letter from Insurer, Dr. Yarberry opined that Claimant did not injure his shoulder while cross-country skiing, but that he did have trouble getting back up due to shoulder weakness. Dr. Yarberry noted that Claimant had injured his right shoulder about one year ago and had a slow recovery with pain and weakness being the main problems. Dr. Yarberry noted that Claimant had the symptoms especially when reaching overhead with the right arm. Dr. Yarberry opined that Claimant was not able to do full duty work or perform his preinjury lifting duties and questioned whether Claimant would ever return to his pre-injury capacity. Dr. Yarberry opined that Claimant was slowly improving with physical therapy. See Exhibit 7.

24. On May 31, 2018, Matthew Provencher, M.D. evaluated Claimant. Claimant reported feeling an acute pain and pop in his right shoulder after a heavy piece of material slipped while loading it into the back of a truck and catching it on his outstretched arm. Claimant reported no prior problems with his lifting activities before and that he was able to do full activities. Dr. Provencher noted that the right shoulder pain had been present for one year and was described as acute on chronic. Dr. Provencher had x-rays performed and found them to demonstrate rotator cuff arthropathy including a high riding humeral head, decreased joint space, and osteophyte formation. Dr. Provencher reviewed an outside MRI provided by Claimant that demonstrated a high riding humeral head in the setting of chronic appearing massive cuff tear with retraction almost to the level of the glenoid with evidence of inferior osteophytes on both the glenoid and humeral head as well as evidence of AC joint arthrosis. Dr. Provencher noted that Claimant's

presentation was consistent with a massive rotator cuff tear of the right shoulder with the development of rotator cuff arthropathy type changes. Dr. Provencher planned to obtain a new MRI and opined that the most likely surgical option was a reverse total shoulder replacement. Dr. Provencher noted findings of a more chronic appearing rotator cuff but insufficiency now after an acute type of event. Dr. Provencher noted that it was felt this was related to Claimant's initial injuries as he was working full time without restrictions and lifting heavy signs without any restrictions before and that this was more probably than not related to the injury in question. Dr. Provencher opined that the reverse total shoulder arthroplasty was medically necessary and justified as related to the injury on a more probable than not basis and to a high degree of medical certainty. See Exhibit 8.

25. Dr. Yarberr evaluated Claimant between May of 2018 and September of 2018. During this time, he noted that Claimant's pain continued to exist and that Claimant was using narcotics to help control the pain. On September 21, 2018, Dr. Yarberr noted that not much had changed, that orthopedics had recommended a shoulder replacement, and that an IME felt Claimant had degenerative changes already. Dr. Yarberr found that Claimant had decreased range of motion on physical examination. Dr. Yarberr noted that the main issue was pain control and that Claimant had better pain relief when he was doing physical therapy, so Dr. Yarberr again recommended physical therapy. See Exhibit 7.

26. On August 3, 2018, Dr. Ciccone performed another independent medical evaluation. Claimant reported that since his prior evaluation with Dr. Ciccone, he had injections that previously worked but were no longer working. Claimant reported continued pain involving the whole shoulder that hurt with reaching and lifting. Dr. Ciccone reviewed his previous independent medical evaluation, medical records, and performed a physical examination. Dr. Ciccone again opined that the work injury did not cause the need for shoulder replacement. Dr. Ciccone again pointed out to a history of shoulder pain in the past with minor activities that had previously required medications and therapy to resolve. Dr. Ciccone noted that the long standing pre-existing rotator cuff pathology was the reason for the need for shoulder replacement. Dr. Ciccone opined that the shoulder problems Claimant was having were a result of the natural history of the rotator cuff degeneration occurring in his right shoulder. Dr. Ciccone opined that Claimant seemed to have reached his baseline with no pain and improvement in range of motion and strength and that it would be expected that Claimant would have intermittent and increasing bouts of shoulder pain and restrictions as is the natural history of rotator cuff pathology. Dr. Ciccone opined that the course was consistent in this case with a minor injury to the shoulder that resolved, just as Claimant's prior non-work related injury did with physical therapy and injections. Dr. Ciccone opined that the shoulder replacement would have been necessary regardless of the work event. See Exhibit 12.

27. On October 8, 2018, Dr. Provencher's PA, Samantha DelNegro, evaluated Claimant. PA DelNegro opined that Claimant had unfortunately suffered permanent aggravation of an injury to the right shoulder that was asymptomatic before his work related incident. PA DelNegro noted that because surgical intervention had been denied,

the best and likely only option would be to consider repeat steroid injections, although she opined that surgical intervention was the best option going forward. See Exhibit 8.

28. On November 21, 2018, Dr. Yarberry evaluated Claimant. Claimant reported that he received another steroid injection in the right shoulder that really helped his pain. Claimant also reported that he had been attending physical therapy and was working on strengthening. See Exhibit 7.

29. On January 23, 2019 and March 5, 2019, Dr. Yarberry evaluated Claimant. Dr. Yarberry found Claimant's range of motion of the right shoulder to be fair and the same as the left at the January visit and found the range of motion to be good at the March visit, again symmetrical with the left side. See Exhibit 7.

30. On March 25, 2019, Dr. Provencher evaluated Claimant. Dr. Provencher provided the impression of rotator cuff arthropathy and opined that a massive rotator cuff tear in combination with shoulder arthritis is known as rotator cuff arthropathy, more common with advanced age. He noted stages of the condition included mild without shoulder instability whereas more advanced disease was associated with shoulder instability and migration of the head of the shoulder upwards and that atrophy of the shoulder muscles was a common finding. Dr. Provencher opined that Claimant had traumatic right rotator cuff arthropathy felt to be related to the industrial injury on a more probable than not basis. See Exhibit 8.

31. On April 16, 2018, Dr. Yarberry evaluated Claimant. Claimant noted that Claimant had a long-standing right shoulder injury that was work related and that Claimant was waiting for a hearing to see if the recommended total shoulder replacement would be approved. Dr. Yarberry agreed with Dr. Provencher that Claimant would probably benefit from a steroid injection while waiting for a hearing that had been postponed several times. See Exhibit 7.

32. On May 16, 2019, Dr. Yarberry evaluated Claimant. Dr. Yarberry noted that Claimant needed a shoulder replacement but there was a question of who would pay for it. Dr. Yarberry noted that a recent shoulder injection helped with pain relief. See Exhibit 7.

33. Prior to the May 22, 2017 admitted work injury, Claimant was diagnosed with right shoulder joint pain and with impingement syndrome of the right shoulder.

34. On December 22, 2016, Claimant was evaluated at Kaiser. Claimant reported right shoulder pain, worsening for two days, since shoveling very heavy snow. Claimant reported a history of off and on again right shoulder pain and reported that in the past he was told he may have rotator cuff issues and had responded well to physical therapy. Claimant reported that he almost dropped an iron skillet and felt his right arm was a little weaker. Claimant reported his pain was worse when lifting arm side to side, that it was waking him at night, and that he was taking Mobic for arthritis. Claimant was diagnosed with right shoulder joint pain with a recommendation for oxycodone at night

and physical therapy. He was also diagnosed with right rotator cuff syndrome and it was recommended that if he did not improve in 4-6 weeks an orthopedic evaluation should be considered. See Exhibit 11.

35. On December 27, 2016, Claimant was evaluated at Kaiser. Claimant reported numbness in his right fingers and a history of right shoulder pain since a few days before December 22 when shoveling snow. It was noted that Claimant started a Medrol dose pack and took oxycodone, which had not been as helpful as it was in the past. Claimant wanted to try to get right shoulder injections. Patricia Dietzgen, D.O. noted that recent x-rays showed AC and shoulder arthritis. Dr. Dietzgen diagnosed right shoulder joint pain, osteoarthritis of the right shoulder, and impingement syndrome of the right shoulder. She noted that Claimant may need shoulder AC joint injections and that they made phone calls to try to get Claimant into orthopedics for possible injections, but that all clinics were booked for the next 10 days or more. See Exhibit 11.

36. On December 29, 2016, Claimant called Kaiser. Claimant reported severe pain in his right shoulder that had been going on for one week and that oxycodone and gabapentin had not helped. Claimant reported pain at a 6/10 and that he had to sleep on the floor and couldn't work due to the pain. Claimant wanted to know if he could schedule an injection for that day. See Exhibit 11.

37. On January 3, 2017, Claimant reported that he was much better after physical therapy for his right shoulder pain. Claimant reported that physical therapy was helping and his pain and range of motion were improved. Claimant asked to return to work without restrictions. Claimant was diagnosed with right shoulder joint pain and right shoulder impingement syndrome. Paperwork was completed allowing Claimant to return to work and Claimant was prescribed medication. Claimant was given information on shoulder exercises and stretches. See Exhibit 11.

38. On February 23, 2017, Claimant reported that his right shoulder was improving slowly with no weakness and that he was continuing therapy on his right shoulder. Claimant asked for a refill of his oxycodone for pain. Claimant's exam was found positive for joint pain. See Exhibit 11.

39. Claimant testified at hearing in this matter. Claimant reported that on the date of injury he went to throw a sign up into the back of a truck, which was over his head, and that the sign didn't make it and came back down hitting his palm which was extended and locked. Claimant testified that he immediately felt really bad pain and heard a pop. Claimant testified that he tried to work through it, but couldn't, and immediately went into the bathroom area where he stripped off all of his winter clothes and shirt and looked at his shoulder. Claimant testified that he immediately knew there was damage and that he was still having significant pain so he went upstairs and reported it to a supervisor. Claimant reported that he then went to the emergency room where he was treated that day and released. Claimant testified that he has had continuous and debilitating pain in his right shoulder since May 22, 2017 and that with pain medication the pain is somewhat

tolerable. Claimant testified that he has a significant decrease in his abilities and range of motion.

40. Claimant testified that in the beginning of treatment for this work injury, physical therapy and medication mitigated the pain, but that he reached a point where it wouldn't get any better and it started hurting worse again. Claimant testified that he has not returned to work and absolutely could not perform the physical requirements of the job. Claimant testified that before May 22, 2017 he was in excellent physical condition and could do all the physical work at his job without any difficulty whatsoever. Claimant testified that about six months before his work injury, he had right shoulder pain. Claimant testified that he was skiing and developed numbness and pain in his right arm and hand and that he was given nerve pain medication that made the pain relent. Claimant testified that his pain lasted about ten days and that after the nerve medication and three to four days, his pain began to normalize and he went back to work and continued to perform his full duties. Claimant testified that he was never referred for injection of his right shoulder before May 22, 2017 and that right shoulder surgery was never recommended prior to May 22, 2017.

41. Dr. Ciccone testified by deposition as an expert in orthopedic surgery. Dr. Ciccone testified that if a rotator cuff tear is chronic, an MRI will show muscle atrophy and fatty replacement of the muscle and that in Claimant's case, the rotator cuff tear was chronic. Dr. Ciccone also testified that Claimant had a finding of a high riding humeral head, which meant that the bones did not align well anymore because the rotator cuff wasn't functional. Dr. Ciccone testified that there were no medical reports indicating the rotator cuff was acute. Dr. Ciccone testified that the biceps tendon has two heads, a long head that goes into the shoulder joint, and a short head that attaches to the scapula outside the shoulder joint. Dr. Ciccone testified that when someone had a long head biceps injury, it's usually due to chronic rotator cuff pathology because the biceps becomes uncovered when the rotator cuff retracts and tears. Dr. Ciccone noted that Claimant was referred to an orthopedic specialist in December of 2016 for chronic recurrent injury, degenerative joint disease and rotator cuff tear and opined it was likely that was the same rotator cuff tear seen on MRI in this case. Dr. Ciccone testified that a rotator cuff tear will not naturally heal on its own, but that they tend to get larger and become associated with fatty atrophy and loss of muscle. Dr. Ciccone also testified that it was common for pain to wax and wane over time with a rotator cuff tear. Dr. Ciccone agreed that a total shoulder replacement would be more appropriate as compared to a rotator cuff repair surgery since the rotator cuff was so chronic and retracted. Dr. Ciccone opined that the need for the total shoulder replacement was not related to the work injury.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. See

§ 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. See § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Medical Benefits

Respondents are liable for medical treatment that is reasonably necessary to cure or relieve an employee from the effects of a work injury. §8-42-101, C.R.S. However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of his employment. §8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000). Treatment for a condition not caused by employment is not compensable. *Owens v. Indus. Claim Appeals Office*, 49 P.3d 1187 (Colo. App. 2002). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *Enriquez v. Americold D/B/A Atlas Logistics*, W.C. No. 4-960-513-01, (ICAO, Oct. 2, 2015). However, where an industrial injury merely causes the discovery of the underlying disease to happen sooner, but does not accelerate the need

for the surgery for the underlying disease, treatment for the preexisting condition is not compensable. *Robinson v. Youth Track*, W.C. No. 4-649-298 (May 15, 2007).

The credible evidence establishes that Claimant's right shoulder rotator cuff pathology and symptoms were not caused, aggravated, or accelerated by the May 22, 2017 work injury where Claimant tore his biceps tendon. Claimant's is not found credible or persuasive. Claimant reported to several medical providers that he had no right shoulder problems prior to May 22, 2017. This is demonstrably false. Not only did he have prior right shoulder problems, medical records demonstrated significant diagnoses, treatment, medications, and exercise/stretching recommendations.

Dr. Provencher, Dr. Hackett, PA DelNegro, and Dr. Yarberry based their opinions on subjective information provided by Claimant that he had no prior right shoulder problems. Their opinions did not have the full benefits of prior medical records establishing prior diagnoses and history of right shoulder joint pain, osteoarthritis of the right shoulder, impingement syndrome of the right shoulder, and right shoulder rotator cuff syndrome. Just months before the May 22, 2017 incident, Claimant's doctor at Kaiser attempted to get Claimant an orthopedic evaluation to evaluate for possible right shoulder injections, but noted the clinics were all booked for the next 10 days or more. Claimant treated for his right shoulder for two months from December of 2016 to February of 2017. At his initial appointment on December 22, 2016, Claimant reported right shoulder pain worse since shoveling heavy snow and reported a history of on and off right shoulder pain. Claimant also reported that he had been told in the past that he may have rotator cuff issues and had responded well in the past to physical therapy. This is not, as argued by Claimant, a history of one bout of prior right shoulder pain. Rather, this is a report from Claimant himself that before December 2016 he had on and off right shoulder pain. Claimant also argues that this one "prior bout" of right shoulder pain was isolated and short-lived. However, as found above, by February 23, 2017 Claimant reported that his right shoulder was improving slowly with no weakness and that he was continuing therapy. His examination on February 23, 2017 was positive for joint pain and Claimant asked for a refill of oxycodone. Claimant was not doing fine on February 23, 2017 nor was his right shoulder pain short lived. Rather, the right shoulder pain was documented throughout two months and still existed on February 23, 2017 when Claimant asked for more pain medication. Claimant had not healed from a single short-lived bout of right shoulder pain. The testimony of Dr. Ciccone that rotator cuff pathology does not heal is persuasive.

Further, as found above, when Claimant was initially injured he reported on his Employee Incident Statement that he strained his right arm (arm bicep). At the emergency room that same day, Claimant reported that he thought he tore a bicep. Claimant denied any other trauma or pain at the emergency room and the examination found no tenderness to palpation in the right shoulder, although deformity and pain was found in the biceps. Not only do the medical records contradict Claimant's reports, but Claimant's testimony at hearing is also inconsistent with prior medical records. Claimant testified that he developed pain and numbness while skiing six months before his work injury and that he had pain for ten days but that nerve medication helped his pain

normalize. The medical records show two months of active treatment, physical therapy, recommendations for stretches/exercises, and show at his last appointment he requested oxycodone and had a positive examination. Claimant's subjective reports cannot be relied upon in this case to any degree of certainty. Thus, the opinions of medical providers who used Claimant's subjective reports, in part, also cannot be relied upon.

Dr. Ciccone is found credible and persuasive and his opinion is consistent with the overall weight of the medical evidence. Claimant has failed to establish that the right shoulder reverse total arthroplasty is causally related to the May 22, 2017 work injury. Rather, the need for shoulder replacement is related to his chronic and long-standing rotator cuff issues and degeneration in his right shoulder that pre-dated May 2017. The injury on May 22, 2017 did not accelerate or aggravate his need for right shoulder surgery. Rather, after the biceps injury, Claimant's right shoulder rotator cuff pain and restrictions continued to wax and wane like they did prior to the work injury. Claimant's right shoulder problems are the result of the natural progression of rotator cuff degeneration and Claimant would have needed a right shoulder reverse arthroplasty regardless of the work incident on May 22, 2017. Claimant has failed to meet his burden and his request for right shoulder reverse total arthroplasty is denied and dismissed.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish by a preponderance of the evidence that the right shoulder reverse total arthroplasty recommended by Dr. Provencher is causally related to Claimant's May 22, 2017 work injury. His request for surgery is denied and dismissed.

2. Any issues not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference,

see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: <http://www.colorado.gov/dpa/oac/forms-WC.htm>.

DATED: January 10, 2020

/s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

- Whether claimant has proven by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course and scope of his employment with employer?
- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that he is entitled to an award of temporary partial disability ("TPD") benefits?
- If claimant has proven a compensable injury, what is claimant's average weekly wage ("AWW")?

FINDINGS OF FACT

1. Claimant is employed by employer part time as a sales and service representative working 28-30 hours per week. Claimant testified he is paid \$14.49 per hour by employer. Claimant testified he will push a product cage out on to the stage floor to stock shelves with various products. Claimant will stock 2 stores per day normally.
2. Claimant testified at hearing that on September 30, 2018, he arrived at King Soopers to stock and stage shelves with product for employer. Claimant testified he arrived at approximately 4:30 a.m. and the store was not yet open, so the doors needed to be manually opened for claimant by an employee of King Soopers.
3. Claimant testified that an employee by the name of M[Redacted] unlocked the door and manually opened the sliding automatic doors for claimant to enter the building. Claimant testified the doors prematurely shut and the doors struck claimant on his right side. Claimant testified M[Redacted] apologized to him, but claimant was pretty much in shock as he never saw the door closing. Claimant testified he felt instant pain from the top of his neck, down to his biceps and into his fingers. Claimant testified he buckled down to the table in front when he was struck by the door. Claimant testified he proceeded to go about his work, but was having difficulty performing his job duties while at King Soopers, but his pain was too much. Claimant testified he reported his injury to "S[Redacted]", an employee at King Soopers. Claimant testified S[Redacted] apologized to him.
4. Claimant testified he completed his shift, but did not back stock his shelves due to the pain. Claimant testified his pain continued at the same level that day despite taking numerous aspirin. Claimant testified he did not seek medical treatment because he was hoping his pain would go away. Claimant testified he continued to self treat his injury with ice packs. Claimant did not report his injury to employer.

5. Claimant testified his pain in the back of his shoulder, neck, chest and bicep began getting worse after September 30, 2018 to the point that he could not raise his hand above his head and could not wash his hair. Claimant eventually reported his injury to his regional manager, Ms. A[Redacted], on November 1, 2018. Claimant was referred to Concentra Medical Center by Employer.

6. Claimant testified he told Dr. Villavicencio that he had been hit by a door and was having pain in his neck, shoulder, biceps and hand and could not feel his fingers. Claimant testified he had never injured his neck, left shoulder, left bicep or left hand prior to September 30, 2019. Claimant testified that he is currently on restrictions that limit him to 4 hours per day.

7. Claimant was examined by Physician's Assistant ("PA") Liedtke and Dr. Villavicencio on November 1, 2018. PA Liedtke recorded an accident history of having a coworker close a door on him 5 weeks ago, striking his right anterior shoulder. Claimant reported pain in the anterior/posterior shoulder and right side of his neck since then along with some intermittent numbness in the right third digit. Claimant reported a pain level of 5/10 that would go up with lifting. Claimant underwent an x-rays of the right shoulder and was diagnosed with a contusion of the right shoulder, strain of the trapezius muscle on the right and a cervical strain. Claimant was provided with work restrictions of no lifting over 15 pounds and no pushing or pulling over 20 pounds and was referred for physical therapy.

8. Claimant returned to Dr. Villavicencio on November 6, 2018. Dr. Villavicencio performed an examination and recommended a magnetic resonance image ("MRI") of the right shoulder. Examination of the shoulder revealed tenderness in the glenohumeral joint, in the trapezius muscle, in the anterior shoulder and in the superior shoulder. Dr. Villavicencio noted claimant had full range of motion of his right shoulder.

9. Claimant returned to Dr. Villavicencio on November 13, 2018. Claimant reported his pain was a 2/10. Dr. Villavicencio continued claimant's work restrictions. Claimant again returned to Dr. Villavicencio on December 4, 2018. Claimant reported he was having more pain in the scapular and thoracic muscle area and had a palpable knot. Dr. Villavicencio recommended trigger point injections. Dr. Villavicencio modified claimant's restrictions to allow for lifting up to 25 pounds and pushing/pulling up to 50 pounds.

10. Claimant continued to treat with Dr. Villavicencio and was eventually referred to Dr. Failing for surgical consultation. Dr. Failing evaluated claimant on April 11, 2019. Claimant reported to Dr. Failing that his shoulder was hit by an automatic door and he did not seek treatment for 30 days. Claimant reported he had neck and back pain and numbness ever since. Dr. Failing examined claimant and diagnosed him with right shoulder contusion, right shoulder myofascial pain, and a small chance of a rotator cuff tear. Dr. Failing noted that it would be most unusual to have any significant structural damage from the contusion from a door that closed on him. Dr. Failing recommended an MRI be performed.

11. Claimant underwent the MRI of the right shoulder on July 25, 2019. The MRI demonstrated moderate tendinosis with mild to moderate undersurface and interstitial tearing of the supraspinatus tendon. Mild tendinosis with mild undersurface and interstitial tearing of the infraspinatus tendon was also shown. No full-thickness rotator cuff tear was identified. Moderate tendinosis with moderate interstitial tearing of the intra-articular portion of the long head of the biceps tendon was also noted, along with mild biceps tenosynovitis.

12. Claimant returned to Dr. Failinger on August 8, 2019. Dr. Failinger noted that the MRI showed a severely macerated and torn biceps tendon with dislocation from the upper groove. Dr. Failinger also noted mild cuff tendinosis and some mild changes in the labrum. AC joint arthritis was noted as well. Dr. Failinger recommended that claimant obtain a nerve conduction study prior to any surgery. Claimant indicated he would like to avoid surgery and requested a cortisone injection as this was previously recommended by Dr. Villavicencio. Dr. Failinger noted he did not believe a cortisone injection would be helpful, but agreed to try it as a form of treatment in an effort to treat claimant's symptoms.

13. Claimant was evaluated by Dr. Chan on September 10, 2019. Dr. Chan noted claimant's accident history and the results of the MRI scan. Dr. Chan diagnosed claimant with a biceps tendon laceration and recommended a tomographic study to delineate what is a frank neuropathic lesion that might account for the patient's ongoing symptomology.

14. Respondents obtained an independent medical examination ("IME") with Dr. D'Angelo on September 23, 2019. Dr. D'Angelo reviewed claimant's medical records and obtained a history from claimant in connection with her IME. Dr. D'Angelo noted in her report that claimant's findings on MRI were consistent with a chronic shoulder impingement. Dr. D'Angelo opined in her report that claimant's findings were not causally related to his September 2018 mechanism of injury.

15. Claimant returned to Dr. Chan on September 26, 2019. Dr. Chan noted that claimant's MRI showed a rather significant amount of degenerative type changes over the right shoulder area. Dr. Chan recommended an electromyogram and nerve conduction velocity ("EMG/NCV") study. The EMG/NCV showed evidence of mild right carpal tunnel syndrome. The EMG/NCV showed no evidence of right cervical radiculopathy, brachial plexopathy or neurogenic thoracic outlet syndrome.

16. Claimant returned to Dr. Failinger on October 10, 2019. Dr. Failinger noted that claimant indicated he could no longer live with the pain and would like to push on with the surgery. Dr. Failinger noted that the cortisone injection was not helpful and agreed that claimant was a candidate for shoulder surgery as he had been cleared in terms of the cervical spine. Dr. Failinger noted that he would wait on the surgery until after claimant's upcoming court hearing.

17. Dr. D'Angelo testified at hearing in this case consistent with her IME report. Dr. D'Angelo testified that the interstitial tears that were noted on the MRI along

with macerations and tendinosis. Dr. D'Angelo testified that the impingement syndrome claimant was diagnosed with and the MRI findings were not related to an acute injury.

18. Claimant's claim for benefits in this case is complicated by the failure to report the injury or seek treatment for the injury for 32 days. While claimant testified that he was hoping his pain would improve during this time, claimant still waited over a month before informing his employer of the injury. The ALJ further notes that the physicians in this case, including Dr. D'Angelo and Dr. Chan, specifically note the degenerative nature of the findings on MRI, which Dr. D'Angelo testified is not consistent with an acute injury.

19. The ALJ credits the medical records in this case, along with the opinions expressed by Dr. D'Angelo in her IME report and testimony and finds that claimant has failed to establish that it is more probable than not that he sustained a compensable work injury to his shoulder on September 30, 2018 when the automatic doors closed on him as he was entering the store at 4:30 a.m. The ALJ credits the opinions of Dr. D'Angelo that the MRI reports and medical records fail to establish that claimant sustained an acute injury to his shoulder consistent with the mechanism of injury claimant described to Dr. Villavicencio and in his testimony at hearing.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2017).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical

condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. See *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); see also *Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it “aggravates accelerates or combines with “a preexisting disease or infirmity to produce disability or need for treatment. See *H & H Warehouse v. Vicory*, *supra*.

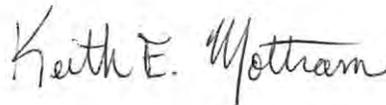
4. As found, claimant has failed to establish by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course of her employment with employer. As found, claimant failed to report his injury to his employer for 32 days after his alleged injury. As found, the testimony of Dr. D’Angelo that claimant’s findings of the MRI were not consistent with an acute injury. As found, claimant has failed to establish by a preponderance of the evidence that he sustained an injury arising out of his employment with employer on September 30, 2018 when the doors closed on him while he was entering the store.

ORDER

It is therefore ordered:

1. Claimant’s claim for benefits is denied and dismissed.

Dated: January 13, 2020



Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

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

ISSUES

Whether the claimant has demonstrated, by a preponderance of the evidence, that on July 26, 2018, she suffered an injury arising out of and in the course and scope of her employment with the employer.

FINDINGS OF FACT

1. The claimant has worked for the employer for approximately 12 years. At the time of the hearing, the claimant's job duties included hanging signage and oversight of the Bullseye Playground

2. On July 26, 2018, the claimant was working the night shift, completing inventory. The claimant testified that during that shift she and her coworkers were using rolling chairs. At one point, the claimant was standing and moved to sit in her chair. However, the chair rolled and the claimant fell onto the floor.

3. It is the claimant's testimony that she fell on her right hip and right elbow and then fell back "snapping" her neck and striking her head on the floor. The claimant also testified that because she struck her head with such force, her hair clip broke. The claimant further testified that she asked to go home, but Mr. G[Redacted] denied her the opportunity to do so.

4. Mr. G[Redacted] was present on July 26, 2018, when the claimant chair rolled. He testified that the claimant landed on her buttocks. When Mr. G[Redacted] asked how she was, the claimant responded that she was "fine". Mr. G[Redacted] also testified that the claimant indicated that she could continue working.

5. During her next scheduled shift, the claimant spoke to Ms. McCoy regarding the July 26, 2018 chair related incident. The claimant testified that she communicated with Ms. M[Redacted] so that her injury would be reported and she could obtain medical treatment. As of the date of the hearing, the claimant continued to work her regular job duties for the employer without work restrictions.

6. During her testimony, Ms. M[Redacted] agreed that the claimant did notify her of the July 26, 2018 chair incident. However, Ms. M[Redacted] testified that the claimant was reporting the incident because it was the claimant's belief that the use of wheeled chairs was "stupid". During their discussion, M[Redacted] began an injury report. However, the claimant indicated to Ms. M[Redacted] that she was not injured and she did not want Ms. M[Redacted] to file a report. Ms. M[Redacted] did not complete the report. Ms. M[Redacted] testified that at that time she was relatively new in her position and did not know that a report was to be filed regardless of the wishes of the employee. Subsequently, the claimant again approached Ms. M[Redacted] related

to the July 26, 2018 incident. Ms. M[Redacted] testified that the claimant approached her and complained that “someone” had filed a report. Ms. M[Redacted] further testified that the claimant was upset that a claim had been filed. Despite this, Ms. M[Redacted] provided the claimant with the claim number.

7. Ms. A[Redacted] was also approached by the claimant regarding the July 26, 2018 chair related incident. Ms. A[Redacted] testified that the claimant spoke with her on approximately July 28, 2018 because Ms. A[Redacted] was the manager on duty. Ms. A[Redacted] testified that the claimant voiced her opinion that inventory was not handled professionally and referenced the use of wheeled chairs. The claimant also relayed to Ms. A[Redacted] that she had fallen out of her chair. The claimant indicated that she was “fine” and her focus was on the use of the wheeled chairs. Ms. A[Redacted] notified the store manager, Mr. Moats. At that time, Mr. Moats instructed Ms. A[Redacted] to complete an incident report, and Ms. A[Redacted] did so. Sometime thereafter, Ms. A[Redacted] learned that the claimant was unhappy that a report was filed regarding the July 26, 2018 incident. The ALJ finds the version of events described by Mr. G[Redacted], Ms. M[Redacted], and Ms. A[Redacted] to be more persuasive than the claimant’s testimony.

8. The claimant testified that her current symptoms include pain and pinching in her right hip, pain in her back, elbow, and head. The claimant also testified that she continues to experience nine out of ten and ten out of ten pain. The claimant has not sought medical treatment related to the July 26, 2018 incident. When asked why she has not sought treatment of these symptoms, the claimant testified that she was waiting for a claim number. The claimant also testified that her prior workers’ compensation doctor (who had treated the claimant regarding prior claims) was no longer practicing. It is unclear to the ALJ why the claimant has not sought any medical treatment of her symptoms since the July 26, 2018 incident. No medical provider has made recommendations for medical treatment.

9. Prior to the incident at issue, the claimant sustained an admitted work injury on February 20, 2015. The claimant first received medical treatment for that injury on February 24, 2015. On January 7, 2016, the claimant suffered a second admitted work injury. The claimant first received medical treatment related to that injury on January 18, 2016.

10. While treating for the February 20, 2015 and January 7, 2016 work injuries, the claimant reported a variety of symptoms to her medical providers. Those symptoms included: right hip pain, gluteal region pain, pain on the right side of her face and jaw, neck pain, upper back pain, mid back pain, low back pain, buttock pain, left leg pain, right leg pain, right knee pain, right arm pain, left wrist pain, and right ankle pain.

11. The medical records entered into evidence indicate that the claimant reported nine out of ten and ten out of ten pain for many months prior to the July 26, 2018 incident.

12. On November 5, 2019, the claimant attended an independent medical examination (IME) with Dr. Lawrence Lesnak. In connection with the IME, Dr. Lesnak reviewed the claimant's medical records, obtained a history from the claimant, and completed a physical examination. In his IME report, Dr. Lesnak opined that the claimant did not suffer any injuries on July 26, 2018. In support of his opinion, Dr. Lesnak noted that the claimant's reported symptoms are the same as those she reported to medical providers prior to July 26, 2018.

13. The ALJ credits the medical records and the opinions of Dr. Lesnak. In addition, the ALJ credits the testimony of Mr. G[Redacted], Ms. M[Redacted], and Ms. A[Redacted]. The ALJ does not find the claimant's testimony to be credible or persuasive. The claimant has failed to demonstrate that it is more likely than not that on July 26, 2018 she suffered an injury arising out of her employment with employer. Although the claimant did fall when attempting to sit on the wheeled chair, she did not sustain an injury necessitating medical treatment. As of the date of the hearing, the claimant has had no treatment related to the July 26, 2018 incident. Additionally, her reported symptoms are identical to those she had prior to July 26, 2018.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2018).

4. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. See *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); see also *Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it “aggravates accelerates or combines with a preexisting disease or infirmity to produce disability or need for treatment.” See *H & H Warehouse v. Vicory, supra*.

5. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that on July 26, 2018, she suffered an injury arising out of and in the course and scope of her employment with the employer. While an incident did occur on that date, the claimant did not suffer an injury necessitating medical treatment. As found, the opinions of Dr. Lesnak and the testimony of Mr. G[Redacted], Ms. M[Redacted], and Ms. A[Redacted] are credible and persuasive.

ORDER

It is therefore ordered that the claimant’s claim for workers’ compensation benefits related to a July 26, 2018 incident is denied and dismissed.

Dated this 14th day of January 2020.



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

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

ISSUES

- Whether respondents have overcome the opinion of the Division-sponsored Independent Medical Examination (“DIME”) physician by clear and convincing evidence regarding whether claimant’s right shoulder was a compensable component of the April 16, 2015 work injury?

- Whether respondents have overcome the opinion of the DIME physician by clear and convincing evidence that claimant is not at maximum medical improvement (“MMI”)?

FINDINGS OF FACT

1. Claimant sustained an admitted injury on April 16, 2015 to his right hand and wrist while employed with employer. Claimant was injured while using a wire cutter to snip wires when he felt pain shoot up his arm. Claimant testified he did not report his injury right away, but after it happened again, he reported the injury to his boss.

2. Claimant had a prior injury to his lumbar spine involving the same employer with a date of injury of September 2014. Claimant received medical treatment for this prior injury and was eventually placed at maximum medical improvement (“MMI”) with no permanent impairment.

3. Claimant continued to treat with Dr. Gilman for periodic low back complaints on March 2, 2015, shortly before his work injury. Claimant’s symptoms included cervical spine pain, right upper extremity pain with numbness, weakness and atrophy. Dr. Gilman noted that the symptoms could be the result of nerve root irritation coming from claimant’s cervical spine. Claimant testified that after consultation, the doctor recommended against the nerve root blocks.

4. Following claimant’s work injury, claimant was referred for medical treatment to his right upper extremity by employer. Claimant was initially treated by Dr. Sofish. Dr. Sofish referred claimant to Dr. Burnbaum for electrodiagnostic testing. Dr. Burnbaum evaluated claimant on May 4, 2015 and reported complaints from claimant of bilateral wrist pain since the work injury. Dr. Burnbaum performed an EMG that was reported as normal.

5. Claimant was eventually referred to Dr. Viola for surgical consultation. Dr. Viola and Physicians’ Assistant (“PA”) Lueders evaluated claimant on March 1, 2016. Dr. Viola noted claimant continued to use a thumb spica splint at night, which he noted was the only thing that relieved the pain. Dr. Viola reviewed the diagnostic studies and diagnosed claimant with a torn ligament between the scaphoid and the lunate and a loss of cartilage throughout the wrist. Dr. Viola recommended surgery involving a four

corner fusion package. Claimant underwent surgery under the auspices of Dr. Viola on April 20, 2016. Claimant testified at hearing that he did not have shoulder pain following the surgery by Dr. Viola.

6. Claimant returned to Dr. Viola on May 2, 2016. Claimant reported he was having occasional sharp pain through his arm to his digits. Claimant eventually had the pins removed from his wrist on June 17, 2016, which involved a right capitate deep hardware removal and a right triquetrum deep hardware removal.

7. Claimant returned to Dr. Viola on June 17, 2016. Claimant reported still getting occasional zingers down the dorsal medial aspect of his right hand with digit motion. Dr. Viola recommended claimant undergo an MRI of his left thumb.

8. Claimant again returned to Dr. Viola on July 18, 2016. Dr. Viola noted claimant reported his pain was doing well and would come and go and get worse at night. Dr. Viola noted claimant continued to have a partial tear of the ligament in the left thumb and recommended a left trigger thumb surgery. The surgery was performed by Dr. Viola on August 10, 2016.

9. Following claimant's surgery, claimant reported to his physical therapist on August 15, 2016 that he was having numbness on his back, upper arm, anterior lateral forearm and right thumb. Claimant reported to his therapist that he would experience changes in sensation of the right thumb with different shoulder position. The therapist noted claimant had a sensory disturbance on the right in the C6 dermatome.

10. Claimant reported to Dr. Viola on August 29, 2016 that he had severe radicular pain down his right arm. Claimant reported pain at the base of his right neck which extended down into his arm and causing numbness into the dorsal aspect of the hand. Dr. Viola recommended an MRI of the cervical spine.

11. Claimant underwent the MRI on September 7, 2016. The MRI showed degenerative disc at the C3-C4, C4-C5, C5-C6 and C6.C7 levels.

12. Claimant was evaluated by Dr. Evans on September 9, 2016. Claimant reported to Dr. Evans that he had numbness and pain down his right arm and hand with a burning sensation into his right hand. Dr. Evans noted an injury of June 16, 2016 when his right shoulder popped and then flared afterward. Dr. Evans also noted claimant reported right shoulder blade pain after he visited a chiropractor in January 2016.

13. Claimant underwent a cervical intralaminar epidural steroid injection on September 21, 2016 under the auspices of Dr. Evans.

14. Claimant was examined by Dr. Sofish on October 5, 2016. Dr. Sofish noted claimant felt that the weakness to his right arm may have been from a chiropractic manipulation he experienced related to a work injury about two years ago.

15. Claimant returned to Dr. Evans on November 2, 2016 and reported he had some improvement after the injection, but continued to experience right arm pain and numbness. Dr. Evans recommended additional epidural steroid injections and diagnosed claimant with possible complex regional pain syndrome.

16. Claimant underwent additional injections to the C5-C7 levels on November 21, 2016. Claimant testified that following this injection, he went home and sat on his couch. Claimant testified as he got up from his couch, he was pushing himself up when he felt a pop in the front of his right shoulder.

17. Claimant returned to Dr. Sofish on November 29, 2016. Dr. Sofish made no mention of the shoulder pain or any incident in which claimant attempted to stand up from the couch causing his shoulder to pop.

18. Claimant was examined by Dr. Burnbaum on December 12, 2016. Dr. Burnbaum noted claimant was complaining of burning in his right hand up to his forearm with an area of numbness on the lateral aspect of his right shoulder. Dr. Burnbaum noted claimant reported worsening burning symptoms when abducting at the shoulder while supinating. Dr. Burnbaum diagnosed claimant with a right sided brachial plexus problem with involvement of the radial nerve, the axial nerve, and also the lateral antebrachial cutaneous sensory nerve. Dr. Burnbaum hypothesized that this could be a stretch injury from the chiropractic adjustment.

19. Claimant returned to Dr. Sofish on January 23, 2017. Dr. Sofish noted that they were waiting on an MRI of the right shoulder to see if they can explain what appears to be a brachial plexopathy to the right arm. Dr. Sofish noted that the operating surgeon for the wrist fusion felt claimant may have a brachial plexus injury with the arm extended during surgery.

20. Claimant underwent the MRI of the shoulder on February 13, 2017. Dr. Sofish noted on February 27, 2017 that the MRI showed inflammation to the brachial plexus which resulted in right forearm paresthesias, pain and decreased grip strength. Dr. Sofish recommended claimant be seen by a neurologist.

21. Claimant returned to Dr. Viola on April 2, 2017. Dr. Viola reviewed the MRI and opined that claimant had a partial thickness tear of the supraspinatus tendon along with abnormal hyperintensity at C5, C6 and C7 consistent with multi-focal neuritis and evidence of teres minor consistent with denervation.

22. Claimant was evaluated by Dr. Corenman on April 13, 2017. Dr. Corenman noted that claimant underwent the wrist surgery on April 20, 2016, and within two weeks of the procedure, claimant felt an electrical burning, severe discomfort in the right shoulder as well as a new onset of electrical burning and severe pain in the right radial wrist and dorsal hand. Claimant noted he had discomfort in his dorsal hand prior to the surgery, but his post-surgery discomfort was much different and more severe in nature. Claimant reported to Dr. Corenman that after his cervical epidural steroid injection on November 21, 2016, he was getting off the couch in late November and

recalls a pop sensation associated with increased right shoulder pain. Dr. Corenman performed a physical examination of claimant and noted claimant did have a Horner syndrome indicating some type of potential sympathetic involvement that could be a complex regional pain syndrome. Dr. Corenman recommended claimant undergo a block of the ganglion stellate. Dr. Corenman also recommended claimant be seen by Dr. Millett for his shoulder problem.

23. Claimant was examined by Dr. Millett and PA Davis on May 9, 2017. Dr. Millett noted claimant reported his shoulder felt fine until November 2016 when he was at home and got up from the couch, applied weight to his arm and experienced a popping sensation. Dr. Millett recommended an MRI of the right shoulder. The MRI was performed on June 5, 2017 and Dr. Frangiamore contacted claimant by telephone on behalf of Dr. Millett on June 16, 2017 and advised claimant that the MRI showed a moderate amount of rotator cuff tendinosis without any full thickness tearing. Dr. Frangiamore recommended physical therapy, anti-inflammatories or corticosteroid injections. Dr. Frangiamore contacted claimant again on June 19, 2017 and advised claimant that he could consider arthroscopic surgery to treat his shoulder condition.

24. Claimant underwent another epidural steroid injection with Dr. Evans on May 9, 2017. Claimant was then diagnosed with CRPS type I and underwent a right stellate ganglion block on May 16, 2017.

25. Respondents obtained a records review independent medical examination ("IME") with Dr. Failinger on June 26, 2017. Dr. Failinger issued an IME report that diagnosed claimant with chronic cervical spine degenerative disc disease, bilateral wrist pain, status post multiple surgeries; left trigger thumb release; and right shoulder AC joint degenerative joint disease with no apparent symptomatology, with rotator cuff tendinosis and apparent possible partial-thickness tear and possible biceps tendinitis. Dr. Failinger further opined that claimant's recommended right shoulder surgery was not, with a very high degree of medical probability, related to the April 16, 2015 industrial injury. Dr. Failinger opined that the rotator cuff and the AC joint were degenerative in nature and not related to the work injury of April 16, 2015.

26. Respondents obtained an IME with Dr. Lesnak on August 9, 2017. Dr. Lesnak reviewed claimant's medical records, obtained a medical history and performed a physical examination in connection with his IME. Dr. Lesnak diagnosed claimant with subjective complaints of constant burning sensation throughout his right shoulder girdle and proximal right upper arm diffusely with associated numbness and frequent locking of his right shoulder, worse with any right upper arm adduction or internal rotation activities. Dr. Lesnak specifically opined that there was no evidence that claimant sustained injuries to his right shoulder or cervical spine associated with his work injury. Dr. Lesnak opined that claimant might have sustained an aggravation of a pre-existing right wrist degenerative changes and may have aggravated his left trigger thumb as a result of the April 16, 2015 work injury.

27. Dr. Lesnak opined that claimant was at maximum medical improvement ("MMI") as it pertained to the April 16, 2015 work injury. Dr. Lesnak opined that

claimant did not need any post-MMI medical treatment. Dr. Lesnak opined that claimant was capable of returning to work without restrictions.

28. Claimant was examined by Dr. Sofish on August 10, 2017. Dr. Sofish noted that claimant was status post right wrist fusion with complex regional pain syndrome to the right upper lower forearm and wrist. Dr. Sofish also diagnosed hypoesthesias to the right radial forearm and internal derangement/brachial plexus injury to the right shoulder.

29. Dr. Sofish reviewed the report from Dr. Lesnak and placed claimant at MMI on September 26, 2017. Dr. Sofish provided claimant with a permanent impairment rating of 30% of the upper extremity. Dr. Sofish opined that claimant did not need any maintenance medical treatment or permanent restrictions.

30. Respondents filed a final admission of liability ("FAL") based on the report from Dr. Sofish on October 20, 2017. The FAL admitted for the 30% upper extremity impairment rating and denied post-MMI medical treatment. Claimant timely objected to the FAL and requested a Division-sponsored Independent Medical Evaluation ("DIME").

31. Dr. Stagg performed the DIME on February 28, 2018. Dr. Stagg reviewed claimant's medical records, obtained a medical history and performed a physical examination in connection with his DIME. Dr. Stagg noted that claimant reported an incident about 10 weeks prior to his work injury when he had an episode of increased pain in his right upper extremity and on the day of the injury, he had more increasing pain into his left ring finger and hand.

32. Dr. Stagg noted claimant's medical treatment with Dr. Sofish and his eventual surgery with Dr. Viola. Dr. Stagg further noted claimant's treatment with Dr. Corenman and his possible CRPS diagnosis. Dr. Stagg diagnosed claimant with an aggravation of underlying degenerative arthritis of the right wrist with subsequent surgical intervention and development of a neurologic injury with probable brachial plexus per Dr. Burnbaum, related to claimant's positioning during surgery. Dr. Stagg further noted that claimant had onset of shoulder pain after that same positioning. Dr. Stagg noted that claimant's symptoms from his left trigger thumb had resolved.

33. Dr. Stagg opined that claimant's left upper extremity had been adequately treated and needed no further treatment. Dr. Stagg opined, however, that claimant was not at MMI due to the fact that he needed further testing for CRPS and needed consideration of surgery for the left shoulder. Dr. Stagg opined that if, after testing, there was no evidence of CRPS, claimant should be evaluated by an orthopedic shoulder specialist to determine if the neurologic problems are related to the brachial plexus. Dr. Stagg opined that the shoulder problems were aggravated by positioning during claimant's surgery.

34. Dr. Stagg also provided a provisional impairment rating of 28% whole person.

35. Claimant was referred to Dr. Bernton for testing related to the potential CRPS diagnosis. Dr. Bernton evaluated claimant and performed the testing on June 19, 2018. Dr. Bernton noted that persistent asymmetry of 1 degree Centigrade was seen during the testing. Dr. Bernton noted that this was in the radial nerve distribution and not in a non-dermatomal distribution, and thus, it did not meet the criteria for complex regional pain syndrome. Dr. Bernton noted that possible brachial plexopathy or radial nerve pathology could account for the findings, but they were not consistent with CRPS.

36. Claimant returned to Dr. Lesnak on June 19, 2018. Dr. Lesnak again reiterated that there was no evidence of a right shoulder injury related to claimant's work injury. Dr. Lesnak noted that there was no current clinical evidence of sympathetic dysautonomia, including CRPS type 1 or type 2. Dr. Lesnak disagreed with Dr. Stagg's assertion that claimant may have CRPS as claimant had no specific subjective complaints or documented exam findings to meet the criteria for a diagnosis of CRPS. Dr. Lesnak further noted that claimant had complaints of shoulder issues several months prior to his work injury and did not report specific shoulder problems until 2 years after his shoulder injury.

37. Dr. Lesnak noted that while Dr. Stagg opined that claimant's shoulder symptoms could be caused by the positioning of the shoulder during surgery based on his review of the orthopedic surgery note, claimant had reported to Dr. Lesnak that the symptoms began when claimant attempted to rise from the couch later that day. Dr. Lesnak again opined that claimant had reached MMI as of September 26, 2017 and did not require any further medical treatment.

38. Respondents sent a letter to Dr. Sofish on July 18, 2018 attaching the June 19, 2018 IME report from Dr. Lesnak and Dr. Bernton's June 19, 2018 report. Dr. Sofish indicated in the report that he agreed with Dr. Lesnak and Dr. Failing that claimant's right shoulder complaints were unrelated to the April 16, 2015 work injury. Dr. Sofish further opined that he agreed with Dr. Bernton's opinion that the test results did not meet the diagnostic criteria for CRPS. Dr. Sofish indicated that it was his opinion that claimant had reached MMI as of September 26, 2017.

39. The ALJ credits the opinions expressed by Dr. Stagg in his DIME report that claimant is not at MMI and finds that respondents have failed to overcome that opinion by clear and convincing evidence. The ALJ notes that Dr. Stagg recommended additional testing including testing for CRPS, but also recommended that if the CRPS testing did not show evidence of CRPS, claimant should undergo additional testing to determine if the neurologic problems are related to the brachial plexus. This has not yet been accomplished.

40. The ALJ further notes that Dr. Stagg opined that claimant's shoulder issues were related to the position claimant's arm was in during surgery performed after his work injury. The ALJ notes that Dr. Stagg reviewed and considered all of the medical evidence provided to him during his DIME examination. Dr. Stagg reviewed the records from Dr. Millett relating to the treatment of claimant's shoulder and the onset of

shoulder symptoms. Dr. Stagg also noted the records from Dr. Viola discussing claimant's treatment and surgeries and based his opinion on his review of the medical records.

41. Dr. Lesnak notes in his reports that there were no documentation of any right shoulder complaints involving claimant's right shoulder until March, 2017, nearly two years after the injury. However, Dr. Evans noted on September 9, 2016 that claimant had an incident in June, 2016, around the same time as the surgery to remove the pins from claimant's wrist occurred, when claimant had symptoms involving his right shoulder popping and then flared up afterward. The ALJ notes that the report from Dr. Evans notes this took place on June 16, while the surgery to remove the pins took place June 17, but finds that there is documentation that this shoulder popping incident is what Dr. Stagg is referencing in his report to indicate that the shoulder condition was related to the position of claimant's shoulder during the surgery.

42. Following this incident in June 2016, claimant began seeking treatment for ongoing problems in his upper extremity that the physicians explored as either stemming from his cervical spine or his shoulder. Claimant began complaining of symptoms radiating down his right upper extremity that resulted in the treatment claimant then received. The ALJ finds that the opinion of Dr. Stagg that claimant's shoulder issues developed due to the position of claimant's right upper extremity during the surgery are consistent with claimant's report to Dr. Evans of developing symptoms in his shoulder in June 2016 associated with a popping. While there was also testimony that claimant had another popping incident when standing up from the couch, this was after claimant was getting treatment for his right upper extremity symptoms and the ALJ does not find that this incident represents an intervening event that severs respondents liability for ongoing medical treatment, especially in light of the opinions expressed by Dr. Stagg in his DIME report.

43. In this case, based on the review of the DIME report from Dr. Stagg and the corresponding medical records, the ALJ finds and concludes that respondents have failed to establish that it is most likely true and free from substantial doubt that Dr. Stagg erred in finding claimant not at MMI for the effects of the April 16, 2015 work injury.

CONCLUSIONS OF LAW

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

2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2008).

3. Section 8-42-107(8)(b)(III) and (c), C.R.S. provides that the DIME physician's finding of MMI and permanent medical impairment is binding unless overcome by clear and convincing evidence. Clear and convincing evidence is highly probable and free from substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it is highly probably the DIME physician is incorrect. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). A fact or proposition has been proved by clear and convincing evidence if, considering all of the evidence, the trier-of-fact finds it to be highly probable and free from substantial doubt. *Metro Moving & Storage, supra*. A mere difference of opinion between physicians fails to constitute error. See *Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-356 (March 22, 2000).

4. The ALJ may consider a variety of factors in determining whether a DIME physician erred in his opinions including whether the DIME appropriately utilized the Medical Treatment Guidelines and the AMA Guides in his opinions.

5. As found, based on the review of the DIME report issued by Dr. Stagg and the medical records entered into evidence, the ALJ finds that respondents have failed to overcome the opinion of Dr. Stagg that claimant was not at MMI by clear and convincing evidence. As found, the medical records that document claimant experiencing a pop and symptoms in his shoulder around the same time as the June 17, 2016 pin removal surgery is consistent with the opinion expressed by Dr. Stagg in his report that the shoulder issues began based on the position of claimant's shoulder during the surgery.

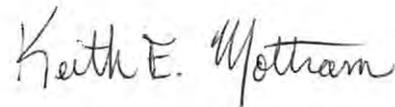
ORDER

It is therefore ordered that:

1. Respondents are liable for the reasonable medical treatment necessary to cure and relieve the claimant from the effects of the industrial injury, including the treatment recommended by Dr. Stagg in his DIME report. Respondents request for a finding that the opinion from Dr. Stagg that the claimant is not at MMI be overcome by clear and convincing evidence is denied and dismissed.

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

DATED: January 14, 2020



Keith E. Mottram
Office of Administrative Courts
Administrative Law Judge
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

- Whether claimant has proven by a preponderance of the evidence that the sustained a compensable injury arising out of and in the course of his employment with employer?
- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that the medical treatment he received was reasonable and necessary to cure and relieve the claimant from the effects of the industrial injury?
- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that he is entitled to an award of temporary total disability ("TTD") or temporary partial disability ("TPD") benefits?
- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that he is entitled to an award of penalties for failure to file notice of the injury with the Division of Workers' Compensation?
- If claimant has proven a compensable injury, what is claimant's average weekly wage ("AWW")?
- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that he suffered a disfigurement in an area normally exposed to public view?
- If claimant has proven that respondents failed to file proper notice with the Division of Workers' Compensation, whether respondents have proven by a preponderance of the evidence that the penalty was cured pursuant to Section 8-43-304(4), C.R.S.?

FINDINGS OF FACT

1. Claimant is employed by employer as a home health physical therapist. Claimant testified his job duties included driving a company vehicle from Steamboat Springs to various clients in the area. Claimant testified he was paid by employer \$42 per hour. Claimant testified he would normally drive approximately 120 miles per day. Claimant testified that on April 10, 2018 he drove from Steamboat Springs to Grandby, a distance of 75 miles, and pulled up to a patient's home. Claimant testified he reached into the passenger seat to grab his work bag and lifted the bag over the console in the car to carry the bag out of the car and into the patient's home. Claimant testified that as he was walking around his car to the trunk of his car and into the patient's house, he felt pain in his low back. On cross examination, claimant testified he felt pain in his buttock between picking up his bag and getting to the back of his car. Claimant testified on

cross-examination that the movement of getting the bag settled was when he felt the pain.

2. Claimant testified that when he got into his patient's home, he stretched his back on the patient's floor, then worked with the patient. Claimant testified he then drove to his next patient who was approximately one mile away. Claimant testified by the time he got to the second patient's house, he had to lay down on the patient's couch. Claimant testified he then went to take the blood pressure of the patient, and as he knelt down, he felt excruciating pain and had to lie down again. Claimant testified he needed help getting back into his car, and at that point contacted his supervisor and drove back to Steamboat Springs.

3. Claimant testified that while driving back to Steamboat Springs, his pain became very severe and when he got back to the employer, he could not stand without support. Claimant testified that he tried to get a walker out of the back of his car, but needed help from a co-worker, Mr. S[Redacted].

4. Mr. S[Redacted] testified consistent with claimant's testimony. Mr. S[Redacted] testified that on April 10, 2018, he came out of the building and noticed claimant at his car trying to get something out of the back of her car. Mr. S[Redacted] testified he walked over and helped claimant get the walker out of his car and helped claimant into the building. Mr. S[Redacted] testified that claimant was in severe pain, and was crying and yelling. Mr. S[Redacted] testified claimant's daughter eventually picked claimant up and he helped claimant into the back of her sports utility vehicle.

5. Claimant testified at hearing that he had pre-existing issues with his low back, including problems with the L5 area for which he received 3 epidural injections in the late 1990's. Claimant denied that he had any back problems that kept him from working prior to April 10, 2018. Claimant testified that his pre-existing pain in his back was a nagging pain that could be managed.

6. Claimant testified he was referred by employer to Dr. Harrington for medical treatment. Claimant was initially evaluated by Dr. Harrington on April 10, 2018. Claimant reported an injury occurring at approximately 9:00 a.m. when he was driving to a therapy appointment. According to Dr. Harrington's notes, claimant was able to walk up and check on a couple of patients, but his pain progressed and then seemed to spread down his leg to his right leg and right groin. Claimant reported pain over his sacroiliac ("SI") joint which seemed to involve more his piriformis area. Dr. Harrington provided claimant with a valium and tramadol, and referred claimant for physical therapy.

7. Claimant testified that he had severe pain over the next two days and Dr. Harrington instructed claimant to go to the emergency room ("ER") on April 12, 2018. Claimant was examined by Dr. Powers at the Yampa Valley Medical Center on April 12, 2108. Dr. Powers noted that claimant had a history of L5 disc problem in 1998 resulting in multiple injections but now surgery. Claimant reported a several day history of right buttock pain radiating to the right lower leg. Claimant denied low back pain or any

history of trauma. Dr. Powers noted claimant worked as a physical therapist but did not think he injured himself on the job. Dr. Powers obtained an x-ray of the lumbar spine and recommended a magnetic resonance image ("MRI") be performed. However, claimant was too claustrophobic to complete the MRI. The x-ray revealed suspected mild right hip arthropathy and L5-S1 degenerative disc disease and lower lumbar facet osteoarthritis. Claimant was subsequently sedated and the MRI was able to be completed. The MRI demonstrated moderate to severe right foraminal stenosis with right L4 nerve root compression. This was noted to be secondary to a right far lateral disc-osteophyte complex and hypertrophic arthrosis of the facet joints. Mild bilateral foraminal stenosis L3-4, mild left foraminal stenosis L4-5 and L5-S1, and mild to moderate right foraminal stenosis at the L5-S1 level was also noted.

8. Claimant was examined by Dr. Devin and physicians assistant ("PA") Nyquist while at the hospital. Claimant reported to Dr. Devin that he had an acute onset of right sided sciatica beginning approximately one week ago while at work. Claimant reported a history of right sided "SI joint" pain for many years with a previous L5 injection around 1998. Claimant reported his current episode began after driving an hour in his car on Monday, April 9 to see PT patients in Grand Lake. Claimant reported his pain worsened when he saw patients throughout the day, and quickly progressed to the point he was barely able to walk. Claimant reported pain starting in the right thigh, radiating to the groin/scrotum, down the thigh and most significant in the anterior lower leg. Claimant reported he saw Dr. Harrington the next day, Tuesday, April 10. Dr. Devin noted that claimant's MRI showed severe right L4-L5 foraminal stenosis with compression of the exiting L4 nerve root. Dr. Devin diagnosed claimant with a lumbar disc herniation with lumbar spondylosis with myelopathy. Dr. Devin recommended a transforaminal epidural steroid injection ("ESI") to the right L4 nerve root and recommended gabapentin.

9. Claimant was seen by Dr. Siegel on April 13, 2018. Dr. Siegel noted claimant had been recently admitted to the hospital with intractable leg pain. Dr. Siegel noted that claimant's pain began April 9, and stated that it was likely from the work he does which requires quite a bit of travelling in a car. Dr. Siegel noted significant degenerative changes at the L5-S1 level with bilateral foraminal stenosis. Dr. Siegel diagnosed claimant with a herniated nucleus pulposus lumbar spine; degenerative disc disease of the lumbar spine with lumbar stenosis; and right lower extremity radiculitis. Dr. Siegel likewise recommended a transforaminal ESI. Claimant underwent the transforaminal ESI under the auspices of Dr. Siegel on April 13, 2018.

10. Dr. Harrington noted that following the ESI, claimant's pain was well controlled and claimant was discharged from the hospital.

11. Claimant testified that when he did not recall giving intake information to the ER.

12. Claimant developed a spinal headache related to a spinal fluid leak after the ESI and returned to Dr. Siegel on April 20, 2018. Claimant had a lumbar epidural

blood patch at L4-5 and reported to Dr. Siegel on May 1, 2018 that his headache was 100% relieved.

13. Claimant returned to Dr. Devin on April 27, 2018 and reported that the blood patch had resolved his headache. Claimant continued to report discomfort down his right leg, but noted it was markedly improved from where it was before. Dr. Devin noted claimant was progressing nicely and recommended starting physical therapy. Dr. Devin noted claimant's further treatment could include another injection or surgery. Dr. Devin reported that if surgical intervention was performed, the surgery would consist of a right L4 hemilaminotomy.

14. Dr. Devin subsequently requested authorization for the surgery on May 8, 2018. The surgery was denied by respondents. Claimant made arrangements for his personal insurance to cover the cost of the surgery and on May 29, 2018 Dr. Devin performed a right L4 hemilaminectomy and right L4 foraminotomy with a right L4-5 discectomy. As a result of the surgery, claimant has a surgical scar on his back measuring 1 ½ inches in length and ½ inch in width.

15. Claimant returned to Dr. Devin on July 9, 2018 for evaluation. PA Nyquist noted that claimant reported doing well overall since his initial post-operative period. Claimant reported immediate significant relief of his right lower extremity symptoms, but felt he had plateaued in his progress. Claimant was released to return to work full duty.

16. Claimant returned to Dr. Devin on December 13, 2018.

17. Claimant testified that he was off of work for employer between April 10, 2018 through June 6, 2018 when he returned to work performing office work. Claimant testified he worked 40 hours per week when he returned. Claimant testified he began seeing patients again on July 16, 2018.

18. Claimant testified that he received medical and employment releases from employer on April 16, 2018.

19. Ms. L[Redacted], a claims representative for employer testified at hearing in this case. Ms. L[Redacted] testified she was the representative for claimant's workers' compensation case in this matter. Ms. L[Redacted] testified that she did not recall speaking to the employer prior to May 9, 2018. Ms. L[Redacted] testified she did not see a workers' claim for compensation form involving this claim between April 10, 2018 and May 15, 2018.

20. A Workers Compensation First Report of Injury was filed by employer on April 12, 2018. The First Report of Injury does not indicate the last day the claimant worked. A notice of contest was filed by employer on May 16, 2018. Claimant did not request a hearing on penalties until May 15, 2019.

21. The ALJ credits the medical records and reports regarding the onset of claimant's symptoms over claimant's testimony at hearing and finds that claimant's discomfort began while driving to see patients on the morning of April 10, 2018. The

ALJ notes that there is some discrepancies in the ER records about whether the pain started a week prior, or on April 9 as opposed to April 10, but finds that the accident history establishes that the original onset of symptoms began while driving on April 10, 2018 and then increased as claimant got out of the car to meet with his patients. This pain progressed between claimant's first and second appointment and then continued to progress as claimant drove back to Steamboat Springs according to claimant's testimony.

22. The ALJ credits the accident history of the pain developing while driving over claimant's testimony at hearing that the pain developed after he got out of the car and was putting on his bag. The ALJ notes that the accident history of pain developing while claimant is driving to the patients as opposed to after he gets out of the car is consistent between claimant's reported history to Dr. Harrison on the date of the injury, the report to the ER which denied any history of trauma, and to Dr. Devin on April 12 where he reported an onset of pain after driving an hour in his car which worsened as he saw his patients. Likewise, Dr. Siegel reported an accident history of intractable right leg pain related to the work he does which requires quite a bit of traveling in a car.

23. The issue in this case is whether the development of pain that occurs when claimant is traveling in a car for work is a compensable work injury where the claimant has a history of low back complaints and degenerative findings on radiographic studies.

24. In this case, claimant has established the onset of symptoms occurring while claimant is at work. Claimant has failed to establish, however, how the condition arose out of his employment with employer. There is insufficient evidence presented at hearing that claimant's symptoms were related to any job duty that claimant performed. The mere fact that the symptoms presented themselves during a time in which claimant is at work is insufficient to establish a compensable work injury under the Colorado Workers' Compensation Act. The claimant must also establish that the injury arose out of his employment with employer. In this case, claimant has failed to establish how riding in the car contributed to his development of symptoms in a way that would constitute a compensable injury.

25. Notably, none of the physicians in this case have related claimant's symptoms to the lifting of the bag that claimant testified to at hearing. Likewise, while claimant mentioned in his history to some of the physicians that he related the onset of pain as being the result of his driving, none of the physicians have indicated how the driving resulted in the diagnosis of a herniated disk in his back and the resultant treatment for the herniated disk, including the surgery.

26. In this case, based on the evidence presented at hearing, the ALJ determines that claimant's symptoms developed while he was driving on April 10, 2018. What claimant has failed to establish is that the development of those symptoms related to his work with employer. None of the physicians have established that the driving, even if the driving was prolonged, aggravated or accelerated claimant's underlying

condition causing the need for treatment. Because claimant has failed to establish this element of his case, claimant's claim for benefits must be denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2017).

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. See *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); see also *Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with "a preexisting disease or infirmity to produce disability or need for treatment. See *H & H Warehouse v. Vicory, supra*.

4. A compensable injury is one which arises out of and in the course of employment. Section 8-41-301(1)(b), C.R.S. (2017). The "arising out of" test is one of causation. It requires that the injury have its origin in an employee's work-related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. In this regard, there is no presumption that injuries which occur in the course of a worker's employment arise out of the employment. *Finn v. Industrial Commission*, 165 Colo. 106, 437 P.2d 542 (1968); Rather, it is the claimant's burden to prove by a preponderance of the evidence that there is a direct

causal relationship between the employment and the injuries. Section 8-43-201, C.R.S. 2002; *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989).

5. In this case, the ALJ finds that claimant's pain developed while driving on April 10, 2018. As found, the ALJ credits the medical records over claimant's testimony to establish this factual finding. However, there is no credible evidence that the pain in this case was related to the driving or to any other action claimant was performing on behalf of employer on April 10, 2018. As found, claimant had a pre-existing condition involving his low back and there is a lack of evidence to establish that the manifestation of symptoms related to claimant's low back condition was related to his employment with employer.

6. The ALJ would further note that this does not involve a case where some unexplained event occurred causing an injury, such as an unexplained fall. The ALJ recognizes that unexplained falls are compensable under the Colorado Workers' Compensation Act pursuant to *City of Brighton v. Rodriguez*, 318 P.3d 496 (Colo. 2014). Under the unexplained falls line of cases, the unexplained fall is a "neutral risk" that results in a compensable injury.

7. In this case, there is no "neutral risk" that resulted in claimant's onset of symptoms related to claimant's employment with employer. Claimant's symptoms were related to the underlying condition of his lumbar spine and simply became symptomatic on April 10, 2018. However, there is insufficient evidence to establish that any work duties claimant performed on April 10, 2018 led to the symptoms developing.

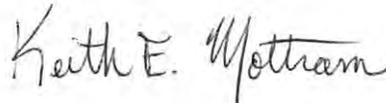
8. Based on the foregoing reasoning, claimant's claim for benefits must be denied.

ORDER

It is therefore ordered:

1. Claimant's claim for benefits is denied and dismissed.

Dated: January 15, 2020



Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that she suffered a compensable right upper extremity injury during the course and scope of her employment with Employer on July 4, 2019.
2. Whether Claimant has established by a preponderance of the evidence that she is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of her July 4, 2019 industrial injury.

FINDINGS OF FACT

1. Claimant is a New York-based actress and Employer is a theater located in Aspen, Colorado. Employer conducted auditions in the New York City area for a play commencing on July 1, 2019 and ending on August 3, 2019. Claimant auditioned and received a role in the play.

2. On May 29, 2019 Claimant executed an employment contract with Employer. In pertinent part, the contract provides that Claimant's employment would begin on July 1, 2019 at 10:00 a.m. Claimant was required to report to Employer's rehearsal studio located at 403 AABC, Aspen, CO 81611. Because Claimant was required to travel over 100 miles to effectuate her employment, Employer provided roundtrip airfare and housing accommodations. Notably, the employment contract did not provide for transportation after Claimant arrived in Aspen.

3. Claimant's employment duties required her to attend rehearsals and performances at Employer's studio and theater. Claimant remarked that the studio was approximately 4.7 miles from her housing. She was not required by her employment contract to work anywhere aside from the theater or rehearsal studio. In fact, Claimant was never required to travel as part of her employment with Employer. Finally, Employer did not dictate how employees should travel from their residences in Aspen to rehearsals or performances.

4. Claimant is a member of the Actors' Equity Association (AEA). The AEA is a union that provides rules governing employment contracts between actresses and theaters. AEA Rule 27 provides in pertinent part, "[i]n all cases where there is no available public transportation . . . within ¼ mile by normal transportation route to the theater, the Producer shall, at the Producer's own expense, furnish roundtrip transportation (including gas) to the Actor for all performances, rehearsals, and/or meals as the case may require in accordance with a pre-arranged schedule." Claimant's residence in Aspen and Employer's studio were located within ¼ mile of public transportation.

5. As an alternative to walking or taking public transportation Employer offered bicycles to employees. Employees were not required to use bicycles and usage was not encouraged by Employer. Claimant elected to check out a bicycle from Employer. She signed a waiver form acknowledging that she was borrowing the bicycle as a convenience and understood that Employer's insurance policies "do not include any coverage on this bicycle or me while this bicycle is in my possession."

6. On July 4, 2019 Claimant was riding her bicycle from her residence to rehearsal when the front wheel abruptly stopped. She fell and fractured a bone in her right wrist. The accident occurred prior to work hours and off Employer's premises.

7. Claimant testified at the hearing in this matter. She explained that, in addition to attending rehearsals at the studio, she prepared for her role by practicing in her lodging facilities. Claimant's co-actor and roommate in Aspen Alice Sherman confirmed that she worked with Claimant outside of rehearsals to practice their roles. Ms. Sherman also noted that the director of the show gave the actors homework in preparation for the next rehearsal.

8. Employer's General Manager Daniel B[Redacted]also testified at the hearing in this matter. He explained that employees were not required to work outside of rehearsals. Mr. B[Redacted]remarked that a free bus and bicycles were available to employees, and employees were only required to arrive at work. Stage Manager Warren W[Redacted] confirmed that Employer did not dictate a method of travel to and from show rehearsals. However, he commented that actors' typically prepare for their roles outside of rehearsals.

9. Claimant has failed to demonstrate that it is more probably true than not that she suffered a compensable right upper extremity injury during the course and scope of her employment with Employer on July 4, 2019. Initially, Claimant sustained a right upper extremity injury when she had a bicycle accident riding from her lodging to a rehearsal. The record reflects that Claimant was going to work and there were no special circumstances warranting recovery. Claimant conferred no benefit to Employer through travel and was not sent on business trips or required to travel off Employer's premises to effectuate her employment. Once Claimant arrived in Aspen, travel was in no way contemplated by her employment contract with Employer. In fact, Claimant's employment duties only required her to attend rehearsals and performances at Employer's rehearsal studio and theater.

10. Claimant's obligations under her contract and the conditions of her employment also did not create a "zone of danger." She was able to choose any number of way to get to her rehearsals and shows including riding free public transportation. Claimant elected to check out a bicycle from Employer. She signed a waiver form acknowledging that she was borrowing the bicycle as a convenience and understood Employer's insurance policies "do not include any coverage on this bicycle or me while this bicycle is in my possession." Finally, Claimant's fall occurred outside of working hours and off Employer's premises. Although Claimant and Ms. Sherman testified that they prepared for their roles outside of rehearsals in the lodging provided

by Employer, Claimant was not required by her employment contract to work anywhere aside from the theater or rehearsal studio. In sum, there was no causal connection between Claimant's employment and her injury. Claimant's travel on July 4, 2019 conferred no benefit to Employer outside of her mere arrival at work. Accordingly, Claimant's request for Workers' Compensation benefits is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. See *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S. (2006); see *City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "time" limits of employment include a reasonable interval before and after working hours while the employee is on the employer's property. *In Re Eslinger v. Kit Carson Hospital*, W.C. No. 4-638-306 (ICAP, Jan. 10, 2006). The "place" limits of employment include parking lots controlled or operated by the employer that are considered part of employer's premises. *Id.*

5. Generally, injuries sustained by employees while they are traveling to or from work are not compensable because such travel is not considered the performance of services arising out of and in the course of employment. *Madden v. Mountain West Fabricators*, 977 P.2d 861, 863 (Colo. 1999). However, injuries incurred while traveling are compensable if “special circumstances” exist that demonstrate a nexus between the injuries and the employment. *Id.* at 864. In ascertaining whether “special circumstances” exist the following factors should be considered:

- Whether travel occurred during working hours;
- Whether travel occurred on or off the employer's premises;
- Whether travel was contemplated by the employment contract; and
- Whether obligations or conditions of employment created a “zone of special danger” out of which the injury arose.

Id. In considering whether travel is contemplated by the employment contract the critical inquiry is whether travel is a substantial part of service to the employer. *See id.* at 865.

6. “Special circumstances” may be found where the employment contract contemplates the employee’s travel or the employer delineates the employee’s travel for special treatment as an inducement. *See Staff Administrators Inc. v. Reynolds*, 977 P.2d 866, 868 (Colo. 1999). “Special circumstances” may also exist when the employee engages in travel with the express or implied consent of the employer and the employer receives a special benefit from the travel in addition to the employee’s mere arrival at work. *See National Health Laboratories v. Industrial Claim Appeals Office*, 844 P.2d 1259, 1260 (Colo. App. 1992). The essence of the travel status exception is that when the employer requires the claimant to travel beyond a fixed location to perform his job duties the risks of the travel become the risks of the employment. *Breidenbach v. Black Diamond, Inc.*, W.C. No. 4-761-479 (ICAO, Dec. 30, 2009).

7. In considering whether travel was contemplated by the employment contract, case law reflects that the exception applies when a claimant is required by an employer to come to work in an automobile that is then used to perform job duties. The vehicle confers a benefit to the employer beyond the employee’s mere arrival at work. *See Whale Communications v. Osborn*, 759 P.2d 848 (Colo. App. 1988). As explained in 1 A. Larson, *Workmen’s Compensation Law*, §17.50 (1985), “[t]he rationale for this exception is that the travel becomes a part of the job since it is a service to the employer to convey to the premises a major piece of equipment devoted to the employer’s purposes. Such a requirement causes the job duties to extend beyond the workplace and makes the vehicle a mandatory part of the work environment.”

8. There is no requirement under the Act that a claimant must be on the clock or performing an act “preparatory to employment” in order to satisfy the “course of employment” requirement. *In re Broyles*, W.C. No. 4-510-146 (ICAP, July 16, 2002). As noted in *Ventura v. Albertson’s, Inc.*, 856 P.2d 35, 38 (Colo. App. 1992):

The employee, however, need not be engaged in the actual performance of work at the time of injury in order for the “course of employment” requirement to be satisfied. Injuries sustained by an employee while taking a break, or while leaving the premises, collecting pay, or in retrieving work clothes, tools, or other materials within a reasonable time after termination of a work shift are within the course of employment, since these are normal incidents of the employment relation.

9. The “arising out of” requirement is narrower and requires the claimant to demonstrate that the injury has its “origin in an employee’s work-related functions and is sufficiently related thereto to be considered part of the employee’s service to the employer.” *Popovich v. Irlanda*, 811 P.2d 379, 383 (Colo. 1991). Nevertheless, the employee’s activity need not constitute a strict duty of employment or confer a specific benefit on the employer if it is incidental to the conditions under which the employee typically performs the job. *In Re Swanson*, W.C. No. 4-589-645 (ICAO, Sept. 13, 2006). It is sufficient “if the injury arises out of a risk which is reasonably incidental to the conditions and circumstances of the particular employment.” *Phillips Contracting, Inc. v. Hirst*, 905 P.2d 9, 12 (Colo. App. 1995). Incidental activities include those that are “devoid of any duty component, and are unrelated to any specific benefit to the employer.” *In Re Rodriguez*, W.C. 4-705-673 (ICAO, Apr. 30, 2008). Whether a particular activity has some connection with the employee’s job-related functions as to be “incidental” to the employment is dependent on whether the activity is a common, customary and accepted part of the employment as opposed to an isolated incident. *See Lori’s Family Dining, Inc. v. Industrial Claim Appeals Office*, 907 P.2d 715 (Colo. App. 1995).

10. As found, Claimant has failed to demonstrate by a preponderance of the evidence that she suffered a compensable right upper extremity injury during the course and scope of her employment with Employer on July 4, 2019. Initially, Claimant sustained a right upper extremity injury when she had a bicycle accident riding from her lodging to a rehearsal. The record reflects that Claimant was going to work and there were no special circumstances warranting recovery. Claimant conferred no benefit to Employer through travel and was not sent on business trips or required to travel off Employer’s premises to effectuate her employment. Once Claimant arrived in Aspen, travel was in no way contemplated by her employment contract with Employer. In fact, Claimant’s employment duties only required her to attend rehearsals and performances at Employer’s rehearsal studio and theater.

11. As found, Claimant’s obligations under her contract and the conditions of her employment also did not create a “zone of danger.” She was able to choose any number of way to get to her rehearsals and shows including riding free public transportation. Claimant elected to check out a bicycle from Employer. She signed a waiver form acknowledging that she was borrowing the bicycle as a convenience and understood Employer’s insurance policies “do not include any coverage on this bicycle or me while this bicycle is in my possession.” Finally, Claimant’s fall occurred outside of working hours and off Employer’s premises. Although Claimant and Ms. Sherman

testified that they prepared for their roles outside of rehearsals in the lodging provided by Employer, Claimant was not required by her employment contract to work anywhere aside from the theater or rehearsal studio. In sum, there was no causal connection between Claimant's employment and her injury. Claimant's travel on July 4, 2019 conferred no benefit to Employer outside of her mere arrival at work. Accordingly, Claimant's request for Workers' Compensation benefits is denied and dismissed.

ORDER

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

Claimant's request for Workers' Compensation benefits is denied and dismissed.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at <http://www.colorado.gov/dpa/oac/forms-WC.htm>.*

DATED: January 15, 2020.

DIGITAL SIGNATURE:


Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- I. What is Claimant's Average Weekly Wage (for TTD purposes) at the time of his injury, based upon his hourly rate?
- II. What is Claimant's Average Weekly Wage (for TTD purposes) at the time his health care benefits were terminated by Employer?
- III. What is Claimant's Average Weekly Wage (for PPD purposes) based upon the replacement costs of his employer-supplied health and medical insurance?
- IV. Disfigurement

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

1. Claimant worked as a full time ramp agent for Employer. Claimant was a member of a union. Claimant's wages were determined as a result of a collectively bargained agreement. All full-time employees are scheduled to work 40 hours per week. (Ex. 8, p. 55). Claimant testified that he received scheduled raises twice per year. The first was in May and the second on the anniversary of his hire in November.
2. Claimant sustained an admitted industrial injury to his low back December 27, 2016 as a result of a fall on ice. At the time of his injury, Claimant was earning \$19.30 per hour, based on a recent raise in November, 2016. (Ex. 8, p. 50).
3. At hearing, Claimant testified that at the time of his injury, Claimant had group health insurance through Employer, including family coverage for health, dental and vision insurance.
4. Claimant was placed on leave of absence with Employer. As a result, his medical, dental and vision coverage ended on November 29, 2017. (Ex. 9, p. 59)
5. Claimant was offered COBRA continuation coverage for his family plan. Claimant's monthly cost of continued coverage for the family plan, which Claimant had on the date of injury, was \$1,657.58 for medical, \$143.17 for dental and \$17.18 for vision totaling \$1,817.93 per month.

6. This \$1817.93 monthly cost converts to \$419.52 on a weekly basis. [$\$1817.93 \times 12 = \$21,815.16 \div 52 = \$419.52$]. Claimant proposes this figure to be added to his hourly wages to compute his Average Weekly Wage.
7. Claimant testified that he did not elect COBRA continuation coverage. Claimant and his family ultimately obtained insurance coverage through his spouse's employer, Advance Circuits, effective February 2, 2019.
8. Two letters, each from the HR Department of Advanced Circuits, and each dated June 25, 2019, were admitted in the respective parties' exhibit packets. Claimant's Ex. 11 outlined the monthly insurance cost for \$1927.22 for medical, and \$87.46 for dental. Respondents' Ex. D outlines the monthly family medical cost to Claimant's wife at being \$590 monthly. Exhibit D is unclear whether or not dental insurance is included in the monthly premium; however, at hearing, Claimant testified to his belief that the \$590 figure (for which his wife paid monthly premiums through her employer) encompassed health only, and the additional monthly premium for dental insurance cost \$87.46.
9. Following Claimant's medical treatment, which included surgery for Claimant's lumbar spine, Claimant was placed at MMI on March 28, 2018. Claimant was later assigned a 26% whole person impairment rating from the Division Independent Medical Examiner.
10. Respondents filed their most recent Final Admission of Liability ("FAL") on March 8, 2019. Respondents admitted liability for an AWW of \$700.21, with a corresponding TTD rate of \$466.81. For purposes of the issues relevant to the present claim, Respondents admitted liability for temporary disability benefits from June 6, 2017 through March 27, 2018 at the admitted TTD rate of \$466.81. Respondents additionally admitted liability for PPD benefits at the admitted TTD rate of \$466.81.
11. At hearing, Claimant testified that he was released from care with permanent restrictions of no lifting greater than 20 pounds. Claimant's job duties with Employer require him to lift 70 pounds. As a result, Claimant has not been able to return to his regular job with Employer while still maintaining his employment status. Claimant testified that he has started performing some work as a driver, earning substantially less than his earnings with Employer. Claimant testified that his hourly employment with Employer *at the time of MMI* was \$21.29.

Disfigurement

12. By agreement of the parties, the presiding ALJ was shown the scar Claimant received as a result of his work injury. In summary, said scar is 'visible in a beach setting', one inch by $\frac{1}{4}$ ", very discolored, but smooth.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

1. The purpose of the “Workers’ Compensation Act of Colorado” (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge’s factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. See *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *CJI*, Civil 3:16 (2007). In this instance, the ALJ finds Claimant’s testimony to be credible, and consistent with the documents submitted by the parties.

Average Weekly Wage, Generally

4. Where the Claimant is earning an hourly wage at the time of the injury, the AWW is to be determined by multiplying the hourly rate by the number of hours in a day the claimant would have worked but for the injury, then multiplying that sum by the number of days in a week the Claimant would have worked. Colo. Rev. Stat. § 8-42-102(2)(d) (2003). However, 8-42-102(3) provides that an ALJ may diverge from the statutorily-prescribed methods of calculating the AWW if, for any reason, they will not fairly compute the AWW. The ALJ has wide discretion to decide whether the statutorily-prescribed methods will fairly calculate the AWW, and if not, to devise a method which will fairly determine the AWW. Because the ALJ’s authority is discretionary, appellate courts may not interfere with the AWW determination unless there is an abuse of discretion. An abuse occurs if the order is beyond the bounds of reason, as where it is contrary to the law or not supported by substantial evidence. *Pizza Hut v. Indus. Claim*

Appeals Office, 18 P.3d 867 (Colo. Ct. App. 2001). *Vance v. The Brown Schs/Cedar Springs Behavioral Health*, W.C. No. 4-558-130 (I.C.A.O. Aug. 17, 2004).

Average Weekly Wage, Hourly Rate, as Applied

5. At the time the *Pizza Hut* claimant was placed at MMI, he was earning considerably more as a result of taking a new job which reflected additional training. He had only been at this job a short while when placed at MMI. In upholding claimant's increased AWW to reflect the new position at MMI, the Court noted: "Moreover, a significant wage increase that occurs post-injury does not establish a lack of impairment, *nor does it mean that the claimant has not suffered a future wage loss related to the impairment.*" *Id.* at 869. It was further noted that claimant's future diminution in earning capacity was especially relevant due to that claimant's testimony "*as to the possible limitations he may face*" *Id.* (emphasis added). The ALJ finds that the reasoning in *Pizza Hut* should apply in this instance.

6. In this instance, Claimant's testimony, undisputed factually, is that his hourly wage *at the time of MMI* would have been \$21.29, had he continued working, uninjured. The ALJ finds this figure to be a reliable figure, based upon reasonable projections from the union contract. Additionally, the testimony is that Claimant has work restrictions which will likely prevent him from reassuming his position as a baggage handler; he might have to accept a lower-paying position within the company at future date. The objective herein is to most accurately project Claimant's diminution in potential earnings. Therefore, the ALJ finds the *wage component (at MMI)* of Claimant's AWW to be $\$21.29 \times 40 = \mathbf{\$851.60}$.

7. Further (for TTD purposes) *at the time Claimant was injured*, his AWW was **\$772.00**.

Average Weekly Wage, Health and Dental, as Applied

8. Respondents cite *Schelly v. ICAO*, 961 P.2d. 547 for the proposition that the additional [AWW] value of medical benefits should be based upon the additional *costs to Claimant*, and not to the *Employer*. The ALJ concurs with this reasoning. Advances Circuits' medical and dental coverage is a known, ascertainable, additional cost to Claimant, [more accurately, to Claimant's *household*, but for which Claimant derives a comparable benefit] based upon the documents in evidence. Based upon limited evidence available [and hearing nothing to the contrary], the ALJ assumes, and finds, that the quality and coverage of the health plans from Southwest and Advanced Circuits are similar. The weekly medical cost *to Claimant* is therefore $\$590 \times 12 = \$7080 \div 52 = 136.15$. The weekly dental cost to Claimant is therefore $\$87.46 \times 12 = \$1049.52 \div 52 = \$20.18$. The *AWW value* of medical and dental coverage combined is therefore combined to be **\$156.33**.

Average Weekly Wage, Summarized

9. The ALJ finds and concludes that Claimant's Average Weekly Wage (for PPD purposes) is **\$1,007.93** at the time of MMI. From November 29, 2017, until Claimant reached MMI, his Average Weekly Wage is $\$772 + 156.33 = \mathbf{\$928.33}$.

Disfigurement

9. The ALJ finds and concludes that as a result of this work injury, Claimant has a visible disfigurement to the body consisting of the scar as described in Finding of Fact #12. Claimant has suffered a serious permanent disfigurement to parts of the body normally exposed to public view, which entitled Claimant to additional compensation, pursuant to C.R.S. 8-42-108(1). The ALJ Orders that Insurer shall pay Claimant \$400.00 for that disfigurement. Insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

Offsets

10. The issue of offsets is not before this ALJ. While Respondent's Exhibit C is difficult to read and interpret, it suggests the *possibility* that Claimant was partially compensated by Southwest for much of 2018. The parties are encouraged to investigate further, and apply any offsets which might be applicable.

ORDER

It is therefore Ordered that:

1. Claimant's Average Weekly Wage is **\$1007.93** for purposes of all calculations of Workers Compensation benefits upon reaching MMI.
2. Claimant's Average Weekly Wage at the time of injury was **\$772.00**.
3. Claimant's Average Weekly Wage from November 29, 2017 until he reached MMI is **\$928.33**.
4. Respondents shall pay Claimant's Disfigurement benefits in the amount of **\$400.00**.
5. Respondents shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.
6. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the

Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: <http://www.colorado.gov/dpa/oac/forms-WC.htm>. In addition, it is *recommended* that you send a copy of your Petition to Review to the Colorado Springs OAC via email at oac-csp@state.co.us.

DATED: January 15, 2020

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he sustained a compensable work related injury on May 26, 2019.

2. Whether Claimant has established by a preponderance of the evidence an entitlement to reasonable, necessary, and causally related medical treatment for his May 26, 2019 injury including a right shoulder surgery recommended by Dr. Foulk.

FINDINGS OF FACT

1. Claimant is a 62-year-old male employed by Employer as a Ramp Lead. Claimant typically works Thursday through Monday and has Tuesdays and Wednesdays off. On Thursdays, he works as Relief Lead, on Fridays and Saturdays he works in Pet Safe, and on Sundays and Mondays he works as Lead Mail. Claimant typically works from 6:00 a.m. to 2:30 p.m.

2. As Lead Mail, Claimant is responsible for a crew that works in Employer's mail facility. The crew sorts, scans, and sets up carts of mail to be loaded onto airplanes. The work is fast paced and Claimant is responsible to get all the mail scanned and closed out 90 minutes before the flight is scheduled to depart so the weight of mail being added to the plane is known. After the cut off time, Claimant cannot add any items. If the crew misses the cutoff or the mail sits too long, the post office can repossess the items and then Employer will not be paid for the items.

3. Claimant testified that after carts full of mail are dropped outside the mail facility, his crew pulls the carts into the mail facility building, sorts it out and scans it, then puts it into carts to be sent to the airplanes. Claimant testified that a cart full of mail weigh approximately 1,000 to 1,200 pounds. Claimant testified that he pulls the carts one at a time to turn them around to be hooked to the tractor/mule, and that he has to push back and pull out on the cart handles to get them to hook onto the tractor/mule. Claimant testified that all day long he is moving carts, hooking them up, and sorting/scanning mail.

4. On May 26, 2019, Claimant was working as Lead Mail. Claimant testified that they were really busy that day and that he had 6-7 people working in the mail facility. Claimant testified that a good day would mean he had 9-12 people and that on a bad day he would have only 5-6 people.

5. Claimant testified that as he was pushing/pulling carts he felt pain in his shoulder and did not feel very good. Claimant testified that because they were so busy, the crew did not take a lunch that day and that instead of punching out at 2:30, they all punched out at 2:00 p.m. since no one received a lunch break. Claimant testified that he

could not find his supervisor to report his shoulder pain but that by the time he got home his pain was really bad so he called his supervisor's cell phone to report. Claimant testified that he did not feel a specific pop, click, lock or catch that day. Claimant testified that the back part of his right upper shoulder hurt and that it was a specific area of new pain that day.

6. Claimant testified that the supervisor indicated Claimant should do paperwork the next morning. Claimant testified that the next morning he was really sore and that he went in and filled out paperwork to report the injury.

7. Claimant testified that he requested to see Dr. Foulk at Panorama Orthopedic and Spine Center as he had treated with Panorama previously. Claimant testified that he had a prior left shoulder issue where Concentra had him do physical therapy but that physical therapy hurt and he found out later that he had a tear. Due to his past left shoulder issues, Claimant wanted to see Dr. Foulk at Panorama and he received approval.

8. It took one week for Claimant to get an appointment at Panorama and he went there for his first evaluation in this case.

9. Claimant testified that he had no right shoulder problems like this prior to May of 2019. Claimant testified as to his history of wrestling at the collegiate, high school, and Olympic trial levels and his work as a high school wrestling coach. He also testified that he played in a senior softball league as a pitcher and that his team won the state championship three years ago. Claimant testified that he lifts weights and does mostly cross fit type workouts with cardio, stair steps, and light weights on repetitions. Claimant testified that it helps him in his job to stay conditioned because his job is very physical. Claimant testified that he had never previously injured his right shoulder and that now, after May 26, 2019, he is unable to throw the ball or play softball. Claimant also testified that he is now unable to do push-ups because it is very painful.

10. Claimant testified that he returned to work May 27, 2019 but had restrictions and was mainly just scanning. He testified, however, that even when just scanning he often had to spin, lift, or push packages, which hurt his shoulder. Claimant testified that it hurt his shoulder but he did what he could. Claimant testified that after he received new restrictions he was off work and had not returned.

11. Claimant testified that he has a little bit of improvement in his shoulder and that he wants surgery to fix what is going on. Claimant has not yet undergone physical therapy or injections in his right shoulder.

12. On Employer's First Report of Injury, Employer noted that Claimant was assisting co-workers scanning and loading mail into and out of carts due to shortage of manpower and that when Claimant arrived home, he felt pain in the back of his right shoulder. On the Worker's Claim for Compensation form, Claimant indicated that the injury occurred working mail, pushing, pulling, and moving mail cart. See Exhibits 1, 3.

13. On June 3, 2019, Claimant was evaluated at Panorama Orthopedic and Spine Center by Hector Mejia, M.D. Claimant reported acute pain in his right shoulder that occurred on May 26, 2019. Claimant reported he was at work performing his normal duties when he felt a sharp pain in his shoulder and that the pain was increased with lifting, sports, pushing/pulling, twisting/turning, and lifting weights. Claimant reported no prior injury to the right shoulder. Dr. Mejia noted that x-rays showed no fractures, dislocations, or bony lesions and showed preserved glenohumeral joint space and AC joint space without any loose body or significant arthritic changes. Dr. Mejia diagnosed acute right shoulder pain. Dr. Mejia noted that the subjective and objective findings were consistent with a rotator cuff injury but that he was unsure of a strain versus a partial tearing. Dr. Mejia recommended an MRI of the right shoulder. See Exhibits 12, D, E.

14. On June 11, 2019, Claimant called Panorama indicating that a surgeon that did his cochlear implants advised him that he could not undergo MRIs. Claimant was scheduled to follow up with Dr. Foulk. See Exhibit 12.

15. On June 18, 2019, Douglas Foulk, M.D. evaluated Claimant. Claimant reported pain with movement of his arm including pulling, pushing, and lifting. Claimant also reported difficulty with sleep, and weakness in his right arm. Dr. Foulk had Claimant undergo right elbow x-rays which showed narrowing of the joint space and osteoarthritis of the elbow. Dr. Foulk diagnosed chronic right shoulder pain and right tennis elbow. Dr. Foulk noted a possible right rotator cuff tear based on Claimant's history and physical findings. Dr. Foulk recommended an arthrogram with x-rays since Claimant could not have an MRI. Dr. Foulk also recommended physical therapy and a strap for the right elbow. Dr. Foulk placed work restrictions of no bag scanning or lifting with the right arm. See Exhibits 12, D.

16. On June 24, 2019, Claimant underwent an arthrogram of his right shoulder. The findings showed contrast conforming to the glenohumeral joint, no contrast present within the subacromial subdeltoid bursa, and no obvious cartilage defect identified off the humeral head. Dedicated radiographs of the right shoulder were recommended. See Exhibits 14, E.

17. On June 24, 2019, Claimant underwent right shoulder radiographs following the arthrography injection to the right shoulder. The findings included chronic mild degenerative changes at the acromioclavicular joint. They also showed contrast residing with the glenohumeral joint capsule as expected, stenting to the subscapularis recess and into the biceps tendon sheath. No contrast was identified within the subacromial/subdeltoid bursa. There was no radiographic signs of a full thickness rotator cuff tear or a significant articular sided partial-thickness tear. The radiologist noted that a partial thickness bursal surface tear might not be visible. The findings also noted no loose bodies and no significant narrowing of the subacromial outlet. The final impression indicated no radiographic evidence for rotator cuff tear, no narrowing of the subacromial outlet, and contrast visualized within the subacromial-subdeltoid bursa. See Exhibit E.

18. On June 26, 2019, Claimant underwent physical therapy. Claimant reported that he was pushing/pulling carts all day on May 26 and had the onset of right shoulder and elbow problems. Claimant reported right shoulder pain, back of the upper arm pain, lateral elbow pain, and pain in the forearm. Claimant reported that prior to the onset, he was able to use his right arm for heavy level job with no problems. See Exhibits 12, F.

19. On July 1, 2019, Dr. Foulk evaluated Claimant. Dr. Foulk reviewed the arthrogram. Dr. Foulk diagnosed acute pain of right shoulder and incomplete rotator cuff tear or rupture of right shoulder not specified as traumatic. Dr. Foulk advised Claimant that he had a partial rotator cuff tear and that although he had a 10-pound restriction at work, due to repetitive overuse, work activities had aggravated Claimant's right shoulder and caused the rotator cuff tear. Dr. Foulk opined that rotator cuff tears could develop based on repetitive use of the arm even with lighter weight amounts in older patients and that Claimant had been performing these duties for over 30 years. Dr. Foulk recommended a right shoulder arthroscopy with debridement, decompression, evaluation, and possible rotator cuff repair. Dr. Foulk opined that although an arthrogram was a good test to rule out a full thickness tear, the arthrogram could not evaluate a deep bursal-sided thickness tear, which was his main concern. Dr. Foulk opined that for further evaluation, Claimant would require an arthroscopy. See Exhibits 12, D.

20. On July 9, 2019, Claimant underwent physical therapy on his right elbow. Claimant reported his arm had been less achy and that he had less tenderness on the lateral epicondyle. Claimant reported that he had not been doing any lifting with his arm. See Exhibits 12, F.

21. On September 18, 2019, Lawrence Lesnak, D.O. performed an independent medical evaluation. Dr. Lesnak found no significant psychosocial factors affecting Claimant's symptoms, recovery, and perceived function. Claimant reported that on May 26, 2019 he was shorthanded and was scanning mail and pushing and pulling many large wheeled freight carts loaded with mail. Claimant reported that after approximately six hours of work, he began to notice some pain in his right posterior shoulder/scapular region and that he completed his work shift two hours later and went home. Claimant reported he began to notice increased symptoms later that day and called his supervisor to report. Claimant reported that he was evaluated at Panorama one week later and underwent a right shoulder arthrogram and was told he had a possible rotator cuff tear and maybe some other abnormalities and that surgery had been recommended and denied. Claimant reported that he had intermittent/frequent right posterior shoulder/lateral scapula pain and soreness that seemed to be worse with any type of forward pushing activities away from his body such as when he does pushups. Claimant also reported increased pain with any throwing motions involving his right arm/shoulder. Claimant reported no prior right shoulder injuries or treatment. Claimant reported hobbies including playing organized softball and coaching high school wrestling. See Exhibit A.

22. Dr. Lesnak reviewed medical records and performed a physical examination. Dr. Lesnak found full active and passive range of motion of each shoulder

joint without evidence of scapular or pseudo scapular winging. Dr. Lesnak found rotator cuff impingement signs negative bilaterally including Hawkins' sign, Neer's sign, and crossed shoulder adduction maneuvers. Dr. Lesnak found increased right posterior shoulder/lateral superior scapular pains reproduced with right shoulder abduction activities and external rotation activities. Dr. Lesnak also found full active and passive range of motion of each elbow joint and no tenderness to palpation over either lateral or medial elbows. On muscle testing, Dr. Lesnak found 5/5 strength throughout the upper extremities bilaterally including the bilateral rotator cuff musculature. Dr. Lesnak found no pain behaviors or non-physiologic findings. Dr. Lesnak noted that Claimant had some tenderness to deep palpation in the area of his right posterior shoulder/right superolateral scapular region but no distinct trigger points or muscle spasms were identified. See Exhibit A.

23. Dr. Lesnak provided the impression of subjective complaints of intermittent/frequent right posterior shoulder/superolateral scapular pain and soreness and subjective complaints of occasional mild residual right lateral elbow soreness. Dr. Lesnak noted that Claimant's reports did not indicate any type of repetitive or frequent overhead activities on May 26, 2019. Dr. Lesnak also noted that the radiologist who reviewed the arthrogram of the right shoulder found no radiographic evidence for rotator cuff tear nor were any abnormalities found on the study. Dr. Lesnak noted, however, that Dr. Foulk nonetheless recommended a right shoulder diagnostic arthroscopy despite the fact that Claimant underwent absolutely no conservative treatment whatsoever directed at his right shoulder including physical therapy, injection trials, etc. Dr. Lesnak opined that Claimant did not have any current clinical evidence of rotator cuff impingement sings or of a full thickness right rotator cuff tear. Dr. Lesnak opined that Claimants' symptoms appeared to be primarily from an extra articular soft tissue etiology involving the right posterior shoulder girdle/scapular musculature. Dr. Lesnak opined that regardless of causality, Claimant was not currently a candidate for a diagnostic right shoulder arthroscopy but that an adequate trial of physical therapy directed at the right shoulder as well as possible diagnostic/therapeutic right shoulder corticosteroid injection trial should be considered prior to consideration of any type of surgical intervention directed at the right shoulder. See Exhibit A.

24. Dr. Lesnak also opined that Claimant did not sustain any intra-articular right shoulder injury as a result of any of his work activities that he may have been performing on May 26, 2019. Dr. Lesnak also opined that the description of the onset of symptoms as well as what was documented in the medical records was not consistent with any type of occupational disease or cumulative trauma disorder. Dr. Lesnak opined that Claimant's non occupational related activities were much more likely to cause or aggravate any type of symptomatic intra-articular shoulder joint pathology. Dr. Lesnak opined that it was possible that Claimant may have sustained an extra articular right posterior shoulder/scapular soft tissue strain injury that could possibly be related to some increased pushing/pulling activities at work on May 26, 2019. However, he opined that this type of extra articular soft tissue injury would have completely resolved by this time. See Exhibit A.

25. On October 18, 2019, Dr. Foulk evaluated Claimant. Claimant reported continued pain and weakness in his shoulder and that he was unable to throw a ball without pain and discomfort. Dr. Foulk noted that they were unable to obtain additional diagnostic imaging due to Claimant's medical history and that the only imaging they could do was an arthrogram. Dr. Foulk opined that based on the result of the arthrogram, the duration of symptoms following a work related injury, and the correlating physical exam indicating probable rotator cuff tear, proceeding with surgery was best for Claimant. Dr. Foulk noted that Claimant had been given a reasonable amount of time to heal, but continued to have shoulder pain and weakness. Dr. Foulk again recommended proceeding with an arthroscopy surgery. See Exhibit 12.

26. In 2003, Claimant was evaluated and underwent a physical examination. Claimant reported right lateral shoulder pain for the past week that developed after lifting a bag at work. Claimant was assessed with deltoid muscle strain. The examination noted mild tenderness in the right shoulder over the superior and lateral deltoid with negative impingement signs and normal range of motion. Claimant was advised that a deltoid strain should resolve in 1-2 weeks. No further treatment of the right shoulder is mentioned in any medical records submitted. See Exhibits 13, B.

27. On January 9, 2017, Claimant noticed left shoulder pain onset while pushing a load on a dolly. Claimant reported that he was performing a lot of lifting and carrying while at work when he began to experience pain in the shoulder. Claimant was assessed with incomplete tear of left rotator cuff and with pain in the left shoulder and he ultimately underwent a left shoulder surgery on March 22, 2017. Claimant was released at maximum medical improvement with no restrictions on December 26, 2017. See Exhibit C.

28. Dr. Foulk and Dr. Lesnak both testified by deposition in this case.

29. Dr. Lesnak testified as an expert in physical medicine and rehabilitation. Dr. Lesnak testified that Claimant reported having to push and pull some of the large wheeled freight carts and that after six hours of work noticed some pain in the back of his right shoulder blades, the posterior aspect of his right shoulder in the scapular area. Dr. Lesnak testified that typically scapular pains, posterior shoulder pains, were muscular myofascial in etiology. Dr. Lesnak testified that after removed from the environment purportedly causing symptoms, he would expect to see symptoms to improve and resolve but that Claimant's shoulder symptoms had not resolved. Dr. Lesnak testified that Claimant's pain with pushing activities and pushing away from his body would suggest more soft tissue muscle symptoms of the scapular region.

30. Dr. Lesnak testified that the arthrogram test was basically normal, showing no evidence of any rotator cuff tears, and no evidence of narrowing at the subacromial outlet. Dr. Lesnak also testified that on his examination of Claimant's shoulder he found negative impingement signs but had pain in the posterior and lateral scapular region, again suggesting that Claimant may have some soft tissues of the muscles that are irritated with activity. Dr. Lesnak also testified that he did not see any impingement documentation from Dr. Mejia or Dr. Foulk. Dr. Lesnak also testified that Claimant did not

have much, if any, treatment for his right shoulder. He testified that Claimant did not have right shoulder physical therapy and did not have any injections. Dr. Lesnak opined that the surgery was not appropriate because there was no evidence on diagnostic tests that there is a rotator cuff tear and that there was no evidence of positive impingement on examinations. Dr. Lesnak testified that without clinical findings or positive studies, there was no indication for surgery diagnostic or otherwise.

31. Dr. Lesnak testified that if Claimant had a deep-sided bursal tear, there would be objective findings on examination including positive impingement signs. He opined Claimant does not have those. Dr. Lesnak also testified that a deep-sided bursal partial thickness rotator cuff tear would not present as posterior lateral scapular symptoms. Dr. Lesnak testified that given Claimant's age and activity level his whole life the chances that Claimant had some type of partial little tear in his right shoulder were pretty high. Dr. Lesnak testified, however, that Claimant was asymptomatic and that even if there were a tear, it would be unrelated to work activities and surgery would absolutely not be appropriate. Dr. Lesnak testified that Claimant had subjective complaints with a normal examination other than tenderness and discomfort. Dr. Lesnak recommended independent exercise program focusing on strengthening the shoulder girdle musculature outside the shoulder joint itself. Dr. Lesnak testified that Claimant was pushing and pulling carts when developed symptoms and was not doing overhead activities or throwing things overhead so the mechanism as described does not put any increased stresses on the rotator cuff tendons. Dr. Lesnak testified that there is no way pushing or pulling carts, even if heavy, could cause a rotator cuff pathology or even aggravate pre-existing rotator cuff pathology. Dr. Lesnak testified that it could cause some inflammation of extra-articular muscles, soft tissues, scapular muscles, but not rotator cuff pathology. Dr. Lesnak also testified that regardless of causality there is no indication for surgery at this point.

32. Dr. Foulk testified as an expert in orthopedic surgery. Dr. Foulk testified that when he first examined Claimant on June 18, Claimant had some decrease in active range of motion measurements, some diminishment in the rotator cuff strength tests, and some generation of pain when Claimant performed resistive tests on the strength of the rotator cuff. Dr. Foulk noted that the arthrogram test performed was the only test they really could do because of Claimant's cochlear implants. Dr. Foulk testified that the arthrogram was an incomplete test and was the standard before MRI was given to providers technologically. Dr. Foulk opined that after contrast material is injected, x-rays are taken and if the contrast material leaks out of the shoulder, they assume the leak went through a hole or tear in the rotator cuff. Dr. Foulk testified that the arthrogram can demonstrate full tears but has difficulty demonstrating partial tears because it is only essentially imaging the rotator cuff on one surface, the deeper or articular surface and that the test does not give any imaging of the top surface of the rotator cuff. Dr. Foulk testified that the rotator cuff was a very thick tendon and that the arthrogram was a good test if there was a full thickness tear, but that the test did not eliminate the possibility of a significant partial grade tear occurring from the top surface. Dr. Foulk testified that Claimant's arthrogram showed that the contrast stayed in the shoulder joint, and thus

indicated there was no full thickness tear in the rotator cuff. Dr. Foulk testified that Claimant could still have a high-grade partial thickness rotator cuff tear.

33. Dr. Foulk testified that there was really only one other way to determine whether Claimant had a more significant partial thickness tear without doing surgery, by doing a diagnostic ultrasound of the shoulder. Dr. Foulk opined that a diagnostic ultrasound could be a good test if it were done in the correct way and interpreted by a highly skilled interpreter of musculoskeletal ultrasound, but opined there were not many people around that can do that test, therefore he does not order them for diagnostic purposes that often. Dr. Foulk testified that based on the symptoms, physical examination, and the fact that the symptoms had not gone away with time and modified activity/rest, it was likely there was damage to some degree within Claimant's rotator cuff. Dr. Foulk testified that usually an injury to the shoulder is treated conservatively with anti-inflammatories, modified activity, ice, heat, creams, and physical therapy. If the injury doesn't resolve, then they hope to do imaging to guide the providers. Here, however, Dr. Foulk testified that they were kind of stuck because they were lacking full detailed imaging. Dr. Foulk testified that an arthroscopy would let them physically go into and look at the structure and determine what needs to be done, which is what he recommended.

34. Dr. Foulk testified that you could put someone through three to four months of physical therapy twice a week at a cost of \$150, \$200 a physical therapy visit and run up an eight, nine, or ten thousand dollar physical therapy bill. He testified, however, that he did not feel like it was probably appropriate in this case and that he had a gut feeling in Claimant's case because Claimant had problems with the contralateral shoulder that they treated. Dr. Foulk testified that they often are forced to send patients to physical therapy a lot in this day and age and in the end, most of the time, they end up scoping the shoulder and repairing the rotator cuff. Dr. Foulk testified that this particular case involved a traumatic acute onset event. Dr. Foulk testified that this case was different from a patient who might present saying that they had pain in their shoulder for the last several months unrelated to anything they could think of. Dr. Foulk testified he would use physical therapy quite frequently in that type of situation, but that Claimant's situation was a traumatic acute onset event. Dr. Foulk testified that they treat acute injuries a little differently than they treat chronic pain and that they wanted rapid evaluation and treatment in this case to allow for a more rapid return to the work environment. Dr. Foulk testified that the working diagnosis was partial rotator cuff tear. He testified that patients can have near full thickness rotator cuff tears and still have normal arthrograms and that sometimes in arthroscopy they look at the rotator cuff on the deep surface and it looks normal, but then they look at the tendon from the top surface and it is almost completely eroded through. Dr. Foulk testified that Claimant's prior deltoid strain in 2004 was a different diagnosis than a rotator cuff tear.

35. Dr. Foulk testified that he disagreed that pushing and pulling large carts could not cause Claimant's symptoms. Dr. Foulk testified that considering the types of equipment used in an airline industry, the weights involved, and the repetition of which the carts were moved and mobilized and the awkwardness of the carts, sometimes due to weight sometimes because you're moving it by yourself, they were very much the kinds

of events that could strain and/or tear the rotator cuff. Dr. Foulk testified that he had taken care of a large number of Employer patients over the years who work in those jobs and opined that was exactly how rotator cuff injuries occur. Dr. Foulk also testified that Claimant's age played significantly into Claimant's presentation and that it was not very common to see rotator cuff tears in young patients, but significantly more common to see damage to the rotator cuff in the fourth, fifth, and sixth decade of life. Dr. Foulk testified that it was irrelevant that Claimant was a softball player, a wrestling coach, and a prior collegiate wrestler.

36. Dr. Foulk opined that if Claimant had just a strain, it would have resolved and that strains are typically six to ten weeks and typically resolve relatively quickly. Dr. Foulk testified that the longer the symptoms persist, it is more likely other conditions like a tear or partial tear. Dr. Foulk strongly disagreed that no rotator cuff impingement signs were shown on physical examination of Claimant. Dr. Foulk also testified that it was possible to have a partial thickness rotator cuff tear and not have positive impingement signs on examination. Dr. Foulk testified that there were certain corticosteroid injections that could be done for diagnostic and therapeutic purposes but not to determine that there was a rotator cuff tear, rather to rule out another explanation for the pain. Dr. Foulk testified that you could do a glenohumeral joint injection, an acromioclavicular joint injection and that you could go through that but it would not rule out or rule in a rotator cuff tear.

Compensability

To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S. (2006); see *City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991). The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.*, 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *Enriquez v. Americold D/B/A Atlas Logistics*, W.C. No. 4-960-513-01, (ICAO, Oct. 2, 2015)

However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing

condition that is unrelated to the employment. See *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1995); *Atsepoyi v. Kohl's Department Stores*, W.C. No. 5-020-962-01, (ICAO, Oct. 30, 2017). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000). *Fuller v. Marilyn Hickey Ministries, Inc.*, W.C. No. 4-588-675, (ICAO, Sept. 1, 2006).

Claimant has established, by a preponderance of the evidence, that he sustained a right shoulder injury on May 26, 2019 while in the course and scope of his employment with Employer. Prior to May 26, 2019, Claimant was working in a heavy job with no problems and he had no prior right shoulder issues other than a minor strain 16 years prior. Claimant had onset of pain on May 26, 2019 after a heavy work shift where he was required to sort, scan, lift, move, push, and pull heavy bags and carts of mail. Claimant is credible that prior to his work shift, he had no problems with his right shoulder and was very active and that his problems and symptoms developed acutely on a specific day, May 26, 2019, while at work and performing heavy work duties. Dr. Foulk is persuasive that the type of activity Claimant was performing could injure a shoulder and cause symptoms. Dr. Foulk and Dr. Mejia both documented similar findings consistent with an injury to the rotator cuff on their examinations following May 26, 2019. Although possible that Claimant could have injured his right shoulder in other activities, Claimant's testimony is credible that he developed acute and new pain in his shoulder on May 26, 2019 while at work. The new acute pain and symptoms that developed at work on May 26, 2019 are more likely due to the strenuous work activities than to the natural progression of some type of pre-existing condition. As testified by Dr. Foulk, the activities Claimant was performing on May 26, 2019 likely injured Claimant's right shoulder. Claimant has established, more likely than not, that he injured his right shoulder on May 26, 2019 and that his symptoms are not just progression of a pre-existing non-work related condition.

Claimant has failed to establish, by a preponderance of the evidence, that he sustained a right elbow injury on May 26, 2019. As found above, the initial reports included new right shoulder symptoms on May 26, 2019 and did not initially mention the right elbow. There is insufficient indication of acute right elbow pain on May 26, 2019 for the ALJ to conclude that an injury to the right elbow occurred. Further, diagnostic imaging of the right elbow showed osteoarthritis and narrowing of the joint space, more consistent with a degenerative non-work related condition.

Medical Benefits

Respondents are liable for medical treatment that is reasonably necessary to cure or relieve an employee from the effects of a work injury. §8-42-101, C.R.S. However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of his employment. §8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000).

Claimant has established that he sustained a work related right shoulder injury on May 26, 2019. Claimant is thus entitled to reasonable and necessary medical treatment for his right shoulder. Claimant is still symptomatic in his right shoulder and two orthopedic doctors have concluded that his symptoms are consistent with rotator cuff pathology. Claimant is entitled to additional treatment and diagnostics to treat his right shoulder. At this time, however, Claimant has failed to establish that the shoulder arthroscopy recommended by Dr. Foulk is reasonable and necessary, although a right shoulder arthroscopy might become reasonable and necessary in the future. Due to Claimant's cochlear implants, the imaging in this case is not ideal. However, Dr. Foulk and Dr. Lesnak both have opined that there are other conservative measures and/or diagnostic tests that can be performed prior to surgery. Although surgery could be diagnostic, the ALJ finds that other measures are more reasonable at this time. Dr. Foulk noted a diagnostic ultrasound could be performed. Although Dr. Foulk testified that there are very few qualified individuals that can adequately perform this type of diagnostic test, Dr. Foulk as an authorized provider can certainly refer Claimant to someone he believes is qualified to perform such a test. Further, although Dr. Foulk suspects that physical therapy and/or injections will probably not help and that Claimant will eventually need surgery anyways, there is the possibility that those more conservative treatment mechanisms will help therapeutically and/or diagnostically. The weight of the evidence establishes that there are multiple reasonable options prior to surgery that exist to help define and/or treat Claimant's right shoulder condition, Claimant has not yet shown that a diagnostic surgery is appropriate when more reasonable options exist. Therefore, his request for surgery is denied at this time.

ORDER

It is therefore ordered that:

1. Claimant has established by a preponderance of the evidence that he sustained a compensable right shoulder injury on May 26, 2019.
2. Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable right elbow injury on May 26, 2019.
3. Claimant has established, by a preponderance of the evidence, an entitlement to reasonable and necessary medical treatment for his right shoulder.
4. Claimant has failed to establish, by a preponderance of the evidence, that the right shoulder arthroscopy recommended by Dr. Foulk is reasonable and necessary at this time.
5. Any issues not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver,

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

DATED: January 16, 2020

/s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

1. Whether the claimant has demonstrated, by a preponderance of the evidence, that on May 13, 2019, he suffered injuries to his left wrist and low back that arose out of and in the course and scope of his employment with the employer.

2. If the claimant proves a compensable injury, whether the claimant has demonstrated, by a preponderance of the evidence, that medical treatment of his left wrist and low back, including treatment with Dr. Craig Stagg, is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury.

STIPULATION AND RESERVED ISSUES

1. The parties have reached a stipulation regarding the claimant's average weekly wage (AWW) as follows: prior to August 1, 2019, the claimant's AWW was \$813.30. Beginning August 1, 2019, the claimant's AWW is \$973.74.

2. The parties reserved the issue of whether a specific left wrist surgery recommended by Dr. James Rose is reasonable, necessary, and related.

3. The parties reserved the issue of whether the claimant is entitled to temporary total disability (TTD) benefits.

FINDINGS OF FACT

1. The employer manufactures batteries including car batteries and industrial batteries. The claimant began his employment with the employer in March 2013. During his employment, the claimant worked as a route driver. His job duties included loading and unloading batteries at customer locations. The claimant testified that the batteries varied in weight from 15 to 175 pounds. The claimant also testified that on a normal day he could lift between 30 and 100 batteries.

2. The claimant suffered an admitted injury to his right wrist in December 2018.

3. The claimant testified that on May 13, 2019, he began to experience pain in his left wrist and low back. The claimant believes that this occurred because he was overcompensating for his injured right wrist. The claimant also testified that he reported his left wrist and low back symptoms to David Garcia, Assistant Area Manager. Thereafter, the employer scheduled an appointment for the claimant at St. Mary's Occupational Health¹.

¹ The claimant has also been treating with St. Mary's Occupational Health for his right wrist.

4. On May 15, 2019, the claimant was seen at St. Mary's Occupational Health by Dr. Craig Stagg. At that time, the claimant reported that he had developed pain in his left wrist and low back earlier in the week. Dr. Stagg noted that the claimant believed that his symptoms were related to lifting. Dr. Stagg diagnosed a lumbar strain and a wrist strain. Dr. Stagg ordered an x-ray of the claimant's left wrist and referred him to physical therapy for his low back symptoms. In addition, Dr. Stagg placed the claimant on modified duty with no lifting, pushing, or pulling over 20 pounds.

5. On May 15, 2019, an x-ray of the claimant's left wrist was noted to be a normal study.

6. The claimant returned to Dr. Stagg on June 5, 2019, and reported that his left wrist and back symptoms were improving. At that time, Dr. Stagg recommended occupational therapy and continued physical therapy.

7. On July 3, 2019, the claimant was seen by Dr. Stagg. At that time, the claimant reported that his symptoms were improving, but he had some weakness in his left wrist. The claimant was concerned that he had injured his left wrist in the same manner he injured his right wrist. The claimant requested that Dr. Stagg refer him to Dr. James Rose for consultation regarding his left wrist, because the claimant had seen Dr. Rose regarding his right wrist. It is notable that on this same date, Dr. Staff returned the claimant to full duty with no restrictions.

8. The claimant was first seen by Dr. Rose regarding his left wrist on July 17, 2019. At that time, the claimant reported left wrist pain and popping. Dr. Rose observed that the claimant's physical exam was "relatively benign". However, given that the claimant was complaining of symptoms similar to those in his right wrist, Dr. Rose recommended a left wrist magnetic resonance image (MRI).

9. On July 18, 2019, Dr. Rose performed surgery on the claimant's **right** wrist. That surgery was a right wrist arthroscopy with triangular fibrocartilage complex (TFCC) debridement and scapholunate ligament debridement.

10. On July 30, 2019, an MRI of the claimant's left wrist showed "signal heterogeneity involving the membranous component of the scapholunate ligament, suspicious for central perforation/tear". The MRI also showed there was no discrete tear of the TFCC.

11. On July 30, 2019, Dr. Rose administered an intra-articular injection to the claimant's left wrist.

12. On August 1, 2019, the claimant sought treatment at the Veterans Affairs (VA) Western Colorado Health Care System. The claimant testified that he was establishing care following the closure of the employer's Grand Junction location. The claimant was seen by Dr. Jim Blankenship. The claimant reported his active medical problems as low back pain and right wrist pain. The claimant reported to Dr. Blankenship that he had experienced chronic low back pain for years and was requesting a referral to a chiropractor. The claimant also reported that his right wrist

was treated through a workers' compensation claim. At that time, the claimant did not report issues with his left wrist.

13. On August 16, 2019, the claimant returned to Dr. Rose and reported that his left wrist had not improved. Dr. Rose noted that the claimant's left wrist MRI was similar to the right. However, Dr. Rose also noted that there was no clinical or radiographic evidence of instability in the claimant's left wrist. Therefore, Dr. Rose did not recommend surgical intervention on the left. Dr. Rose referred the claimant to occupational therapy.

14. On September 27, 2019, the claimant returned to Dr. Rose. The claimant reported that he had not yet begun occupational therapy. The claimant also reported that his wrist symptoms had worsened because of vibrations caused by driving a side by side while hunting with his father. Dr. Rose continued to recommend occupational therapy.

15. On August 30, 2019, the claimant was seen by Dr. Stagg and reported that his low back pain was "on and off", but his left wrist continued to bother him. The claimant further reported that Dr. Rose had recommended conservative treatment of his left wrist.

16. On November 13, 2019, the claimant returned to Dr. Stagg and stated that he had increasing pain in his low back and left wrist. At that time, Dr. Stagg noted that "on the day of injury [the claimant] was doing repetitive lifting of heaving batteries".

17. On November 12, 2019, the claimant attended an independent medical examination (IME) with Dr. John Burriss. In connection with the IME, Dr. Burriss reviewed the claimant's medical records, obtained a history from the claimant, and completed a physical examination. In his IME report, Dr. Burriss noted that his exam of the claimant's left wrist and low back was normal for both body parts. Dr. Burriss assessed the claimant with left wrist pain and low back pain. Dr. Burriss noted that the claimant's subjective left wrist and low back complaints were out of proportion to the results of the physical exam. Dr. Burriss also opined that there was no mechanism of injury that occurred on May 13, 2019 to cause an injury to either the claimant's left wrist or his low back. In support of this opinion, Dr. Burriss noted that the claimant was under a five-pound lifting restriction on May 13, 2019.²

18. Dr. Burriss' testimony by deposition was consistent with his written report. Dr. Burriss testified that he would expect the claimant's pain complaints to lessen, as the claimant is not working. However, the claimant has reported increased pain. Dr. Burriss testified that if the presumption is that the claimant's symptoms are caused by his work duties, then it does not make sense for the claimant's symptoms to persist. Dr. Burriss

² On November 21, 2019, Dr. Burriss issued a supplemental report specifically addressing a left wrist surgery proposed by Dr. Rose. As that specific medical treatment is not currently before the ALJ, the content of that report is not addressed this time.

also testified that the claimant has a history of low back pain that dates back to high school. In addition, the claimant's complaints are of chronic and "nonspecific" low back pain. With regard to the claimant's left wrist, Dr. Burris noted that the claimant had full range of motion at the IME. In addition, Dr. Burris noted that the MRI of the claimant's left wrist did not show tears or perforations involving the TFCC. Dr. Burris opined that the claimant does not have a TFCC injury. Dr. Burris also noted in his testimony that as recently as November 6, 2019, Dr. Rose did not find instability in the claimant's left wrist. Finally, Dr. Burris testified that there is no scientific support of the theory that an injured upper limb will result in compensation and overuse of the contralateral limb.

19. The ALJ credits the medical records and the opinions of Dr. Burris and finds that the claimant has failed to demonstrate that it is more likely than not that he suffered injuries to his left wrist or his low back on May 13, 2019. The ALJ is unable to conclude that it is more likely than not that the claimant's work duties and his specific activities on May 13, 2019 are the proximate cause of any disability or need for medical treatment. Although it would appear that the claimant had some preexisting condition in his low back, the ALJ is not persuaded that the claimant's job duties aggravated, accelerated, or combined with that low back condition to necessitate treatment.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2018).

4. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. See *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); see also *Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it “aggravates accelerates or combines with a preexisting disease or infirmity to produce disability or need for treatment.” See *H & H Warehouse v. Vicory, supra*.

5. As found, the claimant has failed to demonstrate that it is more likely than not that he suffered injuries to his left wrist or low back on May 13, 2019. As found, the medical records and the opinions of Dr. Burris are credible and persuasive.

ORDER

It is therefore ordered that the claimant’s claim related to a date of injury of May 13, 2019, is denied and dismissed.

Dated this 17th day of January 2020.



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

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

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-095-749-002**

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he sustained a compensable work related injury on November 6, 2018.
2. Whether Claimant has established by a preponderance of the evidence an entitlement to reasonable, necessary, and causally related medical treatment for his November 6, 2018 injury.
3. Determination of Claimant's average weekly wage (AWW).
4. Whether Claimant has established, by a preponderance of the evidence, an entitlement to temporary total disability benefits (TTD) from November 6, 2018 through the date of hearing December 17, 2019 plus interest.
5. Whether Claimant has established an entitlement to penalties and/or additional payments under Sections 8-43-304(1) for failure to timely file an Employer's First Report of Injury as required by 8-43-101(1); under 8-43-408 for failure to provide workers' compensation insurance; under 8-43-304(1) for failure to timely pay temporary total disability (TTD) benefits as required by 8-42-105(2)(a); and under 8-43-203(2)(a) for failure to timely admit/deny liability.

FINDINGS OF FACT

1. Claimant is a 36-year-old male who was employed by Employer as a painter.
2. Claimant was hired on October 15, 2018 and his pay rate at the time of hire was \$16.00 per hour. Claimant testified that he expected to work full time hours and to work 40 hours per week. See Exhibit 2.
3. Employer paid Claimant weekly. On October 19, 2018, Employer paid Claimant for 16 hours of work. On October 26, 2018, Employer paid Claimant for 46 hours of work. On November 6, 2018, Employer paid Claimant for 26.5 hours of work. See Exhibit 6.
4. On November 6, 2018, Claimant was sent to a single family home to repaint the exterior of the home. Claimant was scheduled to begin at 8:00 a.m. Claimant has no memory of that day. At approximately 8:30 a.m., Employer's manager/owner Eric H[Redacted] arrived at the home and found Claimant on the ground and unresponsive next to a ladder. Mr. H[Redacted] called 911. It is unclear how Claimant fell from the ladder and it is unclear what time he fell or how long he was unconscious.

5. Records indicate that Longmont Fire Department EMTs were dispatched at 8:46 a.m. and arrived at 8:51 a.m. The records indicate that upon arrival Claimant was lying supine on a cement walkway with a frame ladder found flipped over 2 feet from Claimant. The records indicate Claimant was in severe distress with blunt trauma, head injury, and altered mental status and unconsciousness. Claimant had cheyne stokes breathing pattern and had an abrasion to the left occipital region of the head but with skull intact upon palpation. Claimant had several track marks to both forearms and possibly right inferior knee, suspected to be consistent with IV drug use. The records indicate the cause of injury was a fall 8 feet or less. The EMTs noted possible head injury with bleeding in the brain, possible polypharm overdose, seizures, stroke, and altered mental status of unknown etiology. Claimant was placed in a c-collar, put onto a stretcher, and transported to hospital. See Exhibit 9.

6. At the emergency room, an intraosseous line was placed as there was no vein access due to evidence of intravenous drug abuse. Claimant was also intubated and vomitus in the airway was suctioned out. Claimant underwent an emergent CT of the brain, cervical spine, abdomen, and pelvis. Claimant also was emergently evaluated by neurosurgery. The CT scan of his brain showed a right sided subdural hematoma with midline shift and evidence of herniation with a critical result of unknown or worsening intracranial hemorrhage. The CT of his cervical spine, abdomen, and pelvis showed no evidence of acute abnormality. A urine toxicology screen was performed and was positive for cannabis, cocaine, and opioids. A blood-testing screen also showed extremely high levels of glucose at 183 mg/dL, 166 mg/dL, and 199 mg/dL. The assessment was severe traumatic brain injury with intracranial bleed. See Exhibit 10.

7. Neurosurgeon Allen Nanney, M.D. performed urgent surgery after evaluating Claimant in the emergency room and recognizing a very poor neurologic exam. Dr. Nanney performed a right decompressive frontotemporoparietal hemicraniectomy with evacuation of subdural hematoma. Claimant's own bone was removed and placed in storage for hopeful future replacement. In surgery, Dr. Nanney noted the temporal lobe to be quite damaged and some of the inferior frontal lobe to be as well. A drainage tube was placed and secured as well. Claimant was then taken to the intensive care unit after surgery. See Exhibit 10.

8. Emergency room records indicate that Claimant's supervisor was interviewed at the emergency room and reported that he found Claimant unresponsive but breathing at 8:30 a.m. after starting the job around 8:00 a.m. He reported the fall was unwitnessed and that Claimant was found on concrete beneath an 8-foot ladder. The supervisor reported that Claimant appeared overmedicated at work. Medical records noted that Claimant had stigmata of intravenous drug abuse on his arms bilaterally. See Exhibit 10.

9. Following surgery, and that same day, it was noted that Claimant had drainage from his craniotomy that had filled 2 JP bulbs since returning from the operating room. See Exhibit 10.

10. On November 28, 2018, Dr. Nanney performed another surgery. This procedure was a cranioplasty replacement bone flap due to Claimant's right sided cranial defect after craniectomy for traumatic brain injury. See Exhibit 10.

11. On January 2, 2019, Claimant filed a Workers' Claim for Compensation. Employer filed an Employer's First Report of Injury on January 24, 2019. Employer also filed a Notice of Contest on January 24, 2019 indicating contested/denied for further investigation for causation, pre-existing medical conditions, and facts concerning the incident and noted no insurance coverage was known at that time. See Exhibit 3.

11. After discharge from Longmont United Hospital, Claimant underwent inpatient occupational therapy at Northern Colorado Rehabilitation Hospital for eleven days. See Exhibit 8.

12. On February 1, 2019, Claimant was evaluated at Aasha Brain Clinic. Claimant's aunt reported that Claimant was on a six-foot step ladder at work when the ladder brace broke 2-3 inches from the rivet and Claimant fell sustaining a severe traumatic brain injury. Claimant reported things looked blurry, he had headaches, light bothered his eyes, he had pressure in his brain, he had low energy and felt tired a lot, and that he had trouble remembering things. It was recommended that Claimant follow up with neuro-ophthalmology and avoid bright lights and loud environments. Vestibular therapy was also recommended. See Exhibit 8.

13. On May 14, 2019, Claimant was evaluated at Aasha Brain Clinic. He reported that he had undergone a successful eye surgery, vitrectomy, which had improved his vision significantly. Claimant reported feeling better and reported a desire to find a way to return to work on a full time basis. Claimant reported feeling 80 percent recovered. The assessment and plan noted that Claimant had improved symptom score and it was recommended that Claimant undergo functional neurocognitive testing. See Exhibit 8.

14. Claimant underwent neurocognitive testing on May 23, 2019. Claimant had scores below average on verbal memory, visual memory, and reaction time. His processing speed score was in the average range, and Claimant had promising signs on processing speed and reaction time that boded well for possible future cognitive recovery. The theme throughout testing was Claimant's desire to work. Claimant was noted to be a young man with very low symptom load and very high motivation to work and it was noted that his scores might improve with time and rehab. Claimant was found to be a good candidate for vocational rehabilitation to work on some realistic options for work and possible work training. A treatment plan developed focusing on vocational rehabilitation, cognitive rehabilitation, and any physical rehabilitation deemed necessary was recommended. See Exhibit 8.

15. On June 25, 2019, Claimant was evaluated at Aasha Brain Clinic. Claimant reported he opted against physical therapy based on good healing. He also reported that he had started applying for jobs and was ready to move forward with scheduling an

appointment with a job coach. Claimant reported feeling better overall with no new symptoms. Claimant continued to report that he had headaches and felt like he was moving at a slower speed, but reported very low levels of those problems. See Exhibit 8.

16. On July 22, 2019, Claimant was evaluated at Aasha Brain Clinic. Claimant reported that his neck pain was recurrent and that he had difficulty sleeping. Claimant reported that he had opted to file for disability. He reported headaches, neck pain, and trouble falling asleep. On examination, Claimant's attention was slow, yet improved as were his responses and language. Claimant's word finding was compromised, yet improved. See Exhibit 8.

17. On September 30, 2019, Claimant was evaluated at Aasha Brain Clinic. Claimant reported that his follow up visit with his eye surgeon was completed with no further surgery recommended, that he had no new symptoms, and that his disability application had been filed but that a decision was still pending. Claimant reported trouble balancing, headaches, trouble falling asleep, and feeling sad. His reports were all at low levels for each of the problems. See Exhibit 8.

18. Eric H[Redacted] appeared at hearing on behalf of Respondent, Sunrise Painting, Inc. Mr. Hoagland testified that he hired Claimant on approximately October 16, 2018 as a journeyman level painter. Mr. Hoagland testified that on the day of injury he sent Claimant to a one level exterior re-paint job. Mr. Hoagland testified that Claimant was supposed to be at the job at 8:00 a.m. and that he arrived at approximately 8:30 a.m. after running errands and found Claimant unconscious on the ground next to the ladder. He testified that he called 911. Mr. Hoagland testified that he did not have workers' compensation on the date of the injury. Mr. Hoagland testified that he took the net pay from Claimant's three paychecks and divided it by 3 to get an average weekly wage of \$415.17

19. Claimant also testified at hearing. Claimant testified that he started working for Respondent as a painter with duties including painting, masking, taping, caulking, etc. Claimant testified that he does not remember much about November 6, 2018 and that he woke up in the hospital sometime in December. Claimant testified that he was paid \$16 per hour and that he expected to work full time hours of 40 hours per week. Claimant testified that he was not yet back to work for medical reasons. He testified that initially, he could not see and that he now had vision impairment. He also testifies that he has headaches several times per day where he lays in bed and has pain and disorientation. He also testified that he gets tired and has balance issues. Claimant testified that he could not paint at all now and wouldn't climb a ladder now because of his balance issues.

20. At hearing, Mr. Hoagland presented an October 21, 2019 Order of Discharge signed by United States Bankruptcy Judge Joseph Rosania Jr. The Order indicates that a discharge under 11 U.S.C. 727 was granted to: Eric William H[Redacted] dba World Minerals, fods Sunrise Painting Inc., ods Zen Painters Inc., ods Erik H[Redacted] Painting Inc. It is unclear from the Order what debts were discharged or

listed in the bankruptcy proceeding. It is also unclear how much, if any, money the trustee will pay creditors. See Exhibit A.

Compensability

To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S. (2006); see *City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991). The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.*, 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *Enriquez v. Americold D/B/A Atlas Logistics*, W.C. No. 4-960-513-01, (ICAO, Oct. 2, 2015)

Claimant has established, by a preponderance of the evidence, that he sustained a compensable injury on November 6, 2018. On November 6, 2018, Claimant was at a residential home at the direction of Respondent Employer to perform a painting job. Claimant sustained a traumatic fall from a ladder while performing work duties. The injury that occurred was within the time and place limits of employment and during a painting activity connected to Claimant's work duties. The fall caused disability requiring medical treatment. Claimant has established he sustained a compensable injury.

Medical Benefits

Respondents are liable for medical treatment that is reasonably necessary to cure or relieve an employee from the effects of a work injury. §8-42-101, C.R.S. However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of his employment. §8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000).

Claimant has established that he sustained a work related injury on November 6, 2018 after falling from a ladder while painting. The extensive and extreme medical treatment that Claimant has undergone has been reasonably necessary to help cure and relieve Claimant from the effects of his work injury. Respondent shall be liable for all reasonable and necessary medical treatment in this case. Claimant did not include in

evidence any medical bills or receipts. Although it is clear Claimant has undergone extensive medical treatment in relation to this injury, the monetary amount of medical benefits cannot be determined from the evidence.

Average Weekly Wage

Section 8-42-102(2) requires the ALJ to base the claimant's Average Weekly Wage (AWW) on his or her earnings at the time of injury. However, under certain circumstances the ALJ may determine the claimant's AWW from earnings received on a date other than the date of injury. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Specifically, §8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp.*, *supra*.

In the present case, Claimant had a very short period of employment prior to his injury. Records and testimony indicate that Claimant was hired on either October 15, 2018 or October 16, 2018. Later that week, on October 19, 2018, Employer paid Claimant for 16 hours of work. This partial week likely does not reflect any agreement or average weekly wage of Claimant and is not considered. The first full week of employment, from October 20, 2018 through October 26, 2018, Employer paid Claimant for 46 hours of work. The next week of employment would have been from October 27, 2018 through November 2, 2018. However, there is no paycheck dated November 2. The only additional paycheck is dated November 6, 2018, the date of Claimant's injury. This final paycheck paid Claimant for 26.5 hours of work. The ALJ finds that the two paychecks in consideration, October 26, 2018 and November 6, 2018 paid Claimant for 72.5 hours of work over a two week time period and find the November 6, 2018 paycheck was for the week prior to injury, ending November 2, 2018. This averages to 36.25 hours per week at an agreed wage of \$16 per hour and amounts to an average weekly wage of \$580. Although Claimant testified that he expected to work full time, and 40 hours per week, the records do not reflect any such agreement. In the week prior to being injured Claimant worked only 26.5 hours. The ALJ finds that a fair approximation of Claimant's wage loss and diminished earning capacity is based on the average hours Claimant worked prior to his injury, excluding the initial shortened week in which he was hired. Claimant's average weekly wage is \$580.00.

Temporary Total Disability (TTD)

To prove entitlement to Temporary Total Disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. See Sections 8-42-(1)(g), 8-42-105(4); *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office*, 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity

evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (citing *Ricks v. Industrial Claim Appeals Office*, P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic*, 952 P.2d 831, 833 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

Claimant has established by a preponderance of the evidence an entitlement to TTD benefits from the date of his injury and through the December 17, 2019 hearing. Claimant sustained an industrial injury that caused a disability lasting more than three work shifts and caused him to leave work and lose wages. Claimant initially had severe medical incapacity and continued to the date of hearing to have medical incapacity and the inability to resume his prior work, causing continued wage loss. Claimant has not been placed at maximum medical improvement by a provider nor has he returned to modified or regular employment. Claimant has not been released to return to regular employment nor has he been released to modified employment and been offered such and failed to begin. Although vocational rehabilitation has been suggested and noted in the records, Claimant has not returned to work and has shown an entitlement to TTD benefits. With an AWW of \$580, as found above, Claimant's TTD rate is \$386.67 per week. From the date of injury through the date of hearing, and from November 6, 2018 through December 17, 2019, there were 58 weeks and 1 day. Claimant's entitlement to TTD for this period of time is \$22,482.10. As Claimant is successful on the merits of the claim, the ALJ also awards amount of 8% interest for these TTD benefits as they were not paid during this time period. The interest amounts to \$1,316.35. Employer thus is ordered to pay TTD benefits in the amount of \$23,798.45

Penalties

Claimant has endorsed various penalties that are addressed below:

8-43-304(1) for failure to timely file Employer First Report as required by 8-43-101(1)

Section 8-43-101(1), C.R.S. requires Employer to report a lost time injury within ten days after notice or knowledge that an employee has a lost time injury. Employer is required to report the injury on forms prescribed by the division.

As found above, Claimant was injured on November 16, 2018. Employer filed a First Report of Injury on January 24, 2019. Employer was aware of Claimant's injury on

the date the injury occurred. Employer's manager/member found Claimant unresponsive, called 911, and later provided a statement at the hospital. Employer knew immediately that Claimant had sustained a lost time injury that would last more than three work shifts. Employer thus had the duty to file a First Report of Injury within ten days and by November 26, 2018. Employer did not file a report until January 24, 2019. The report was 59 days late.

Section 8-43-304(1), C.R.S. provides that any Employer who violates articles 40 to 47 of the WC Act for which no penalty has been specifically provided shall be punished by a fine of not more than one thousand dollars per day for each offense to be apportioned at the discretion of the administrative law judge between the aggrieved party and the Colorado uninsured employer fund with the amount apportioned to the aggrieved party being a minimum of twenty five percent of any penalty assessed.

There is no specific penalty amount provided for an Employer's failure to timely file a first report of injury. Although late, Employer did eventually file a first report of injury as required by statute. The ALJ finds that a penalty amount of \$100 per day is appropriate, for a penalty of \$5,900 due to late filing. Of that penalty amount, Employer shall pay \$1,475 to Claimant and \$4,425 to the Colorado Uninsured Employer Fund.

8-43-408 failure to provide WC insurance

Section 8-43-408, C.R.S. provides that if an employer is subject to the WC Act and at the time of injury has not complied with the insurance provisions of the WC Act, shall in addition to any compensation paid or ordered, shall pay an amount equal to twenty five percent of the compensation or benefits to which the employee is entitled to the Colorado Uninsured Employer Fund.

Respondent Employer does not dispute that it was uninsured on November 6, 2018 when Claimant was injured. Employer was subject to the WC Act on that date and had an employee that sustained an injury. Thus, Employer is required to pay twenty five percent of the compensation or benefits to which Claimant is entitled to the Colorado Uninsured Employer Fund. Claimant has established an entitlement to \$23,798.45 in TTD benefits as well as \$2,450 in penalties. The total amount of compensation/benefits to which Claimant is entitled has been established as \$ 26,248.45. Employer is required to pay an amount equal to twenty five percent of the compensation or benefits to which Claimant is entitled to the Colorado Uninsured Employer Fund. Thus, the ALJ orders that Employer pay the Colorado Uninsured Employer Fund \$6,562.11 under this section.

8-43-304(1) failure to timely pay TTD benefits as required by 8-42-105(2)(a)

Section 8-42-105(2)(a), C.R.S. requires that the first installment of temporary total disability benefits payments shall be paid no later than the date that liability for the claim is admitted by Employer. However, it provides that if the Employer denies liability, the issue then goes to hearing.

The ALJ declines to award penalties under this section. Here, Employer denied liability so no temporary total disability payments were due or required to be paid. By filing a notice of contest, the matter proceeded to hearing and Claimant has been found successful and has established a compensable injury. However, benefits were not previously due as the matter was contested and Claimant has not established that Respondent failed to timely pay TTD benefits and interest has been awarded on the TTD benefits.

8-43-203(2)(a) Failure to timely admit/deny liability

Section 8-43-203(1)(a), C.R.S. provides: The employer or, if insured, the employer's insurance carrier shall notify in writing the division and the injured employee . . . within twenty days after a report is, or should have been filed with the division pursuant to section 8-43-101, whether liability is admitted or contested; except that, for purpose of this section, any knowledge on the part of the employer, if insured, is not knowledge on the part of the insurance carrier. Section 8-43-203(2)(a), C.R.S. provides that if such notice is not filed, "the employer, or if insured, the employer's insurance carrier, may become liable to the claimant, if successful on the claim for compensation, for up to one day's compensation for each failure to so notify." The claimant bears the burden of proof to establish the circumstances justifying the imposition of the penalty. See *Pioneer Hospital v. Industrial Claim Appeals Office*, 114 P.3d 97 (Colo. App. 2005)

Under § 8-43-203(1)(a), knowledge of an insured may not be imputed to the insurer. See *State Compensation Insurance Fund v. Wilson*, 736 P.2d 33 (Colo. 1987); *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Thus, an insurer is not responsible for admitting or denying liability until twenty days after it has knowledge of information that would require the employer to file a first report of injury with the DOWC under § 8-43-101, C.R.S. Those circumstances include injuries that result in "lost time from work for the injured employee in excess of three shifts or calendar days." The mere knowledge that the claimant sustained an injury, and that the injury resulted in restrictions and modified duty, does not establish that the claimant missed work as a result of the injury, or the number of days missed. See *Ralston Purina-Keystone v. Lowry*, 821 P.2d 910 (Colo. App. 1991); *Atencio v. Holiday Retirement Corp.*, W.C. No. 4-532-443 (ICAO, Nov. 15, 2002).

A First Report of Injury should have been filed by November 26, 2018. Thus, within twenty days after that report should have been filed with the Division, Employer also was required to notify the Division and the employee in writing whether liability was admitted or denied. Thus, by December 16, 2018 notice of whether Employer was admitting or denying liability was required. As found above, Employer did not file a denial of liability until January 24, 2019. Thus, the denial of liability was 39 days late. A specific penalty, if Claimant is successful on the claim for compensation of up to one day's compensation for each day's failure to so notify is provided by statute. Fifty percent of any penalty is required to be paid to the subsequent injury fund and fifty percent to the Claimant.

Here, the denial of liability was 39 days late. The ALJ finds it appropriate to order a penalty of \$50 per day, slightly less than one day's compensation, for each of the 39

days the admission/denial was late. This amounts to a penalty of \$1,950 of which Employer is ordered to pay \$975 (half) to Claimant and \$975 (half) to the subsequent injury fund.

ORDER

It is therefore ordered that:

1. Claimant has established by a preponderance of the evidence that he sustained a compensable injury on November 6, 2018.

2. Claimant has established by a preponderance of the evidence an entitlement to reasonable, necessary, and causally related medical benefits for his November 6, 2018 injury.

3. Claimant's average weekly wage is \$580.00.

4. Claimant has established by a preponderance of the evidence an entitlement to temporary total disability benefits from November 6, 2018 through December 17, 2019. Respondent-Employer shall pay Claimant temporary total disability benefits in the amount of \$22,482.10 plus \$1,316.35 in interest, for a total of \$23,798.45.

5. Claimant has established an entitlement to penalty payments in the amount of \$2,450.

6. Thus, it is ordered that Respondent-Employer shall pay the sum of \$26,248.45 in compensation and benefits to Claimant.

7. It is further ordered that Respondent-Employer shall pay the sum of \$10,987.11 to the Colorado Uninsured Employee Fund. The check shall be payable to the Division of Workers' Compensation, [633 17th Street, Suite 900, Denver, CO 80202](#), Attention Iliana Gallegos, Revenue Assessment Officer.

8. It is further ordered that Respondent shall pay the sum of \$975.00 to the Subsequent Injury Fund. The check shall be payable to the Division of Workers' Compensation, [633 17th Street, Suite 900, Denver, CO 80202](#), Attention Gina Johannesman, Trustee Special Funds Unit.

9. All issues not determined herein are reserved for future determination.

In lieu of payment of the above compensation and benefits to the Claimant, the Respondent-Employer shall:

a. Deposit the sum of **\$38,210.56** with the Division of Workers' Compensation, as trustee, to secure the payment of all unpaid compensation and benefits awarded. The check shall be payable to and sent to the Division of Workers' Compensation, 633

17th Street, 9th Floor, Denver, Colorado 80202, Attention: Gina Johannesman / Trustee Special Funds Unit; **or**

b. File a surety bond in the sum of **\$38,210.56** with the Division of Workers' Compensation within ten (10) days of the date of this order:

(1) Signed by two or more responsible sureties who have received

prior approval of the Division of Workers' Compensation; or

(2) Issued by a surety company authorized to do business in Colorado.

The bond shall guarantee payment of the compensation, penalties and benefits awarded.

IT IS FURTHER ORDERED: That the Respondent-Employer shall notify the Division of Workers' Compensation, and counsel for the Claimant, of payments made pursuant to this order.

IT IS FURTHER ORDERED: That the filing of any appeal, including a petition to review, shall not relieve the Respondent-Employer of the obligation to pay the designated sum to the Claimant, to the trustee or to file the bond as required by paragraph (b) above. §8-43-408(2), C.R.S.

IT IS FURTHER ORDERED: That any interest that may accrue on a cash deposit shall be paid to the parties receiving distribution of the principal of the deposit in the same proportion as the principal, unless an agreement or Order authorizing distribution provides otherwise.

IT IS FURTHER ORDERED: That pursuant to § 8-42-101(4), C.R.S., any medical provider or collection agency shall immediately and forthwith cease and desist from any further collection efforts from the Claimant because the Respondent-Employer is solely liable and responsible for the payment of all medical costs related to the Claimant's work injury.

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

when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: <http://www.colorado.gov/dpa/oac/forms-WC.htm>.

DATED: January 21, 2020

/s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUE

- I. Whether Claimant established by a preponderance of the evidence that the arthroscopic surgery recommended by Dr. Stull, an authorized treating physician, is reasonable, necessary, and related to Claimant's industrial injury.

STIPULATIONS

- At the commencement of the hearing, the parties stipulated that Claimant's AWW would be increased to \$1,400.00 per week effective January 21, 2019.

FINDINGS OF FACT

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

1. Claimant is a credible witness and his testimony is both persuasive and consistent with the medical records in the case.
2. The Claimant has been a thirteen-year delivery driver for Respondent Bimbo Bakeries.
3. This is an admitted injury arising as a result of a slip and fall occurring on January 21, 2019, while Claimant was in the course and scope of employment. While working, Claimant injured his right knee when he slipped on ice and twisted and/or hyperextended his knee.
4. Claimant was sent for medical treatment to CareNow and underwent conservative care with Dr. Bianca Bryant-Greenwood. *Exhibit 5*.
5. On February 27, 2019, Claimant underwent an MRI, which established the presence of degenerative problems in his right knee. The MRI also found the presence of an irregular degenerative tear of the medial meniscus, a non-displaced horizontal tear of the anterior horn of the lateral meniscus, and a mild MCL strain accompanied by degenerative edema, along with severe degenerative changes in the medial and patellofemoral to compartments. *Exhibit 9, BS 91*.
6. On March 1, 2019, pursuant to a referral from Dr. Bryan-Greenwood, Claimant was evaluated by Dr. Phillip Stull, an orthopedic surgeon. Dr. Stull noted that Claimant had no significant knee symptoms prior to his injury of January 21, 2019. But, after his work injury, Dr. Stull noted Claimant complained of pain as well as mechanical symptoms which included grinding, popping, and locking

(emphasis added). Dr. Stull also performed a physical examination and reviewed Claimant's MRI. His impression/diagnosis was that Claimant's work injury resulted primarily in a medial meniscus tear, which was causing most of his symptoms, even though he also had underlying arthritis. After his assessment, he discussed treatment options with Claimant and concluded that arthroscopic surgery was warranted and had the best chance of getting him back to his preinjury status. After thoughtful consideration, Claimant chose to undergo arthroscopy of his right knee, which Dr. Stull also thought was reasonable and advised Claimant of such. *Exhibit 6, BS 71 – 72.*

7. Dr. Stull requested authorization for the arthroscopic surgery, however, his request for authorization was declined by the carrier based on the subsequent IME performed by Dr. Failinger, as set forth below.
8. On April 11, 2019, Dr. Mark Failinger performed an Independent Medical Examination (IME) on behalf of Respondents. Dr. Failinger opined that Dr. Stull's operative treatment of the meniscus was inappropriate due to the nature of Claimant's physical problems, which Dr. Failinger stated did not include mechanical symptoms, such as locking. In so opining, he stated in his report that he was relying on the Medical Treatment Guidelines ("*Guidelines*"), Rule 17, Exhibit 6. *Exhibit H.*
9. Dr. Failinger stated in his report that when there is an aggravation of osteoarthritis, which he concluded occurred in this case, arthroscopic surgery is only appropriate if there is a "loose body causing locking." In his report, he gives the impression that he is quoting the complete section of the *Guidelines*, which supports his opinion. He provides the following in his report:

[A]rthroscopic debridement and lavage are not recommended unless there is a loose body causing locking, according to the Guidelines. There are situations where an arthroscopy may be appropriate, as mentioned above, where the arthritis is not nearly as advanced and there may be an extension of meniscus tear, but that does not appear to be medically probable given the severely advanced stage of arthritis.

Exhibit F, BS 14-15.

10. However, Dr. Failinger did not quote the entire section of the *Guidelines* upon which he used to support his opinion that the surgery was not appropriate. The full quote from the *Guidelines* provides:

[A]rthroscopic debridement is not recommended "unless there is meniscal or cruciate pathology or a large loose body causing locking" (emphasis added). *RHE H, p. 27; Guidelines, (2)(a)(viii)(A).*

11. Moreover, Claimant reported to Dr. Stull during his March 1, 2019, evaluation that he had locking in his knee and Dr. Stull noted the locking in his report. Therefore, Claimant's symptoms are consistent with a meniscal or cruciate

pathology causing locking. Moreover, Dr. Bryant-Greenwood stated in her July 29, 2019, report that Claimant “continues to report mechanical issues with his knee joint that includes a sensation of catching with knee extension.” Therefore, based purely on the above section of the *Guidelines*, the surgery recommended by Dr. Stull is supported by the *Guidelines*.

12. On May 14, 2019, Dr. Stull appealed the denial, which was based on Dr. Failinger’s initial IME report. Dr. Stull stated in his appeal that it was his opinion that the need to perform the arthroscopy is related to Claimant’s work injury. He further concluded that although Claimant has underlying degenerative changes in his knee, Claimant likely tore his meniscus due to the work accident, and it is the tear that necessitated the need for surgery. However, since the surgery had been denied, and Claimant still had ongoing symptoms, Dr. Stull provided Claimant a cortisone injection in order to see if that would provide some relief while the appeal was pending. *Exhibit 6, BS 67-68*.
13. Despite Dr. Stull’s appeal, and the failure of the cortisone injection to relieve Claimant’s symptoms, Dr. Stull’s request for authorization continued to be denied.
14. On June 12, 2019, Claimant returned to Dr. Bryant-Greenwood. She reported that Claimant had undergone conservative care, which included intra articular joint injections, and long-term management, including physical therapy. However, despite the conservative care, Claimant continued to have ongoing symptoms. Dr. Bryant-Greenwood again concluded Claimant had clinical findings and imaging results of meniscal pathology, which warranted surgical intervention. *Exhibit 8, BS 87*.
15. In her June 12, 2019, report, Dr. Bryant-Greenwood also commented on Dr. Failinger’s April 11, 2019, IME. Dr. Brant-Greenwood noted that she also reviewed the *Guidelines*. She also concluded that while she agreed Claimant has an underlying arthritic condition, the work accident caused an acute injury, which is causing Claimant’s current symptoms and for which he needs the surgery recommended by Dr. Stull. She also noted that based on page 74 of the *Guidelines* regarding “Aggravated Osteoarthritis, [Claimant] does have by clinical findings and imaging results, meniscal pathology that would warrant and likely benefit from surgical intervention. She also astutely noted that the language providing for surgery when “there is meniscal or cruciate pathology or a large loose body causing locking” was missing from Dr. Failinger’s initial IME report. Therefore, she referred Claimant back to orthopedist Dr. Stull to address the meniscal pathology. See *Claimant’s Exhibit 8, BS 87; the Guidelines, page 74; Respondents’ Exhibit H, BS 27*.
16. Claimant credibly testified to ongoing symptomatology, which impacts both his activities of daily living and his ability to function in the work place. This includes problems descending stairs or walking on a flat surface with a 10-degree incline. He also indicated that any bending from the floor is affected and that he would have problems getting into his delivery truck. He also testified that he is unable to kneel.

17. Claimant contends in his proposed order that the *Guidelines* also support the surgical recommendation based on the following provision which provides:

In summary, there is strong evidence that partial meniscectomy provides no clear benefit over initial exercise therapy for patients with an isolated degenerative meniscal tear. Therefore, it is **not recommended**. (Emphasis in original.) *It may be appropriate for the patients who continue to have significant functional deficits of activities of daily living or work duties after 6 weeks of therapy.* (Emphasis added by Claimant in his Proposed Order.)

Medical Treatment Guidelines Rule 17, Exhibit 6, p. 92 – 93; See also Respondents' Exhibit H, pages 31-32.

18. Therefore, Claimant contends that because he continues to have significant functional deficits of activities of daily living or work duties after 6 weeks of therapy, the *Guidelines* support the surgery recommended by Dr. Stull.
19. However, Claimant's position merely isolates a section of *Guidelines* that supports his position if there is "an isolated degenerative meniscal tear." Moreover, what the *Guidelines* give in one situation or section, they can take away in another. For example, after indicating surgery may be appropriate for patients that continue to have significant functional deficits, Section 2(f)(vi) of the *Guidelines* provide that surgery is not recommended if Claimant also suffers from severe arthritis in the knee. The section specifically provides:

Operative Treatment: Repair of meniscus, partial or complete excision of meniscus, or meniscus allograft. Debridement of the meniscus is **not recommended** in patients with severe arthritis, as it is unlikely to alleviate symptoms (emphasis in original).

See Guidelines, Section 2(f)(vi), page 93; See also Respondents' Exhibit, H, page 32.

20. Therefore, although the initial section cited by Claimant indicates arthroscopic surgery may be reasonable and necessary under the *Guidelines* for an isolated degenerative meniscal tear when conservative treatment fails, the subsequent section indicates arthroscopic surgery is not recommended if Claimant also has severe arthritis. And, in this case, Claimant has severe arthritis.
21. As demonstrated by the various sections of the *Guidelines*, the words, phrases, and sections of the *Guidelines* cannot be read in isolation. The analysis and treatment protocols are dependent upon the diagnosis and/or pathology. Therefore, if the diagnosis or pathology is aggravated osteoarthritis, and there are degenerative tears to the meniscus, arthroscopic meniscus surgery is only recommended if there is "meniscal or cruciate pathology or a large loose body causing locking." On the other hand, if the diagnosis or pathology is an acute meniscal tear, caused by a traumatic incident, then arthroscopic meniscus surgery can be appropriate, unless there is also "severe arthritis." The

distinction in treatment recommendations under the *Guidelines* based on the primary cause of the symptoms was discussed by Dr. Failinger in his Addendum, dated July 23, 2019, as well as his deposition.

22. Dr. Failinger also noted that a more detailed review of the right knee MRI scan report documented “extensive subchondral marrow edema and mild sclerosis of the medial femoral condyle and to a lesser extent (sic?) in the medial tibial rim. It stated ‘both areas with associated chronic-appearing Grade IV cartilage loss’ and diffuse osteophytosis Grade IV chondromalacia of the patellofemoral joint with lateral compartment cartilage.” *RHE F*, p. 13. (Emphasis in original IME report.)
23. Dr. Failinger diagnosed Claimant with severe degenerative joint disease of the right knee including patellofemoral joint and medial compartment. Dr. Failinger noted that Claimant had “longstanding and essentially end-stage arthritis.” *RHE F*, p. 14.
24. Dr. Failinger, a Board Certified Orthopedic surgeon, also provided evidentiary deposition testimony in this matter. Dr. Failinger was accepted as an expert in orthopedic surgery, and as to his specialized knowledge and training as a Level 2 accredited physician. Dr. Failinger testified that degenerative joint disease is the loss of articular cartilage in the knee. He stated that once the layer of cartilage is lost, the knee is essentially down to the bone. *Depo. Tr. pp. 7-8*.
25. Dr. Failinger also indicated Claimant had significant and advanced arthritis that was medically unlikely to have been caused by the January 21, 2019 industrial injury. Dr. Failinger further noted that it was his opinion that there was no evidence Claimant incurred acute or new pathology in his right knee on January 21, 2019. *RHE F*, p. 14; *Depo Tr.*, pp. 9-10.
26. However, Dr. Failinger concluded in his deposition that the work accident did cause some of Claimant’s symptoms and that he should be entitled to some additional medical treatment under this claim to help reduce his symptoms and increase his function. *Depo Tr.*, p. 15. Dr. Failinger also recommended that Claimant consider a cortisone injection or possibly viscosupplementation. Nevertheless, Dr. Failinger expressly opined that the arthroscopic surgery proposed by Dr. Stull was not medically appropriate. *RHE F*, pp. 14-15.
27. Dr. Failinger testified that that Claimant’s severe degenerative and chronic arthritis was the probable cause of Claimant’s symptoms, and was so advanced that the arthroscopic procedure could not be anticipated to improve Claimant’s condition to within a reasonable degree of medical probability. *RHE F*, p. 14.
28. However, during cross-examination, Dr. Failinger also testified that he did not doubt that Claimant’s work accident caused the degenerative changes in his knee to become symptomatic. *Depo. Tr. p. 28-29*.
29. Dr. Failinger further opined that the only medically appropriate surgical procedure that should be considered to treat Claimant’s symptoms is a total knee replacement, after conservative measures had been exhausted. However, Dr. Failinger concluded that a total knee replacement procedure would be done to

address the preexisting pathology and would not be related to the January 21, 2019 industrial injury. *RHE F*, p. 15.

30. In support of his opinions, Dr. Failinger identified isolated sections of the *Guidelines*. Dr. Failinger explained in his testimony, “The *Guidelines* were built, my understanding is, so that this constant volume of trying to things over and over that don’t have a reasonable chance of helping a patient, to try to curb that in somewhat.” *Depo. Tr.* p. 17.
31. However, Dr. Failinger agreed that Dr. Stull was not violating the orthopedic standard of care by recommending the arthroscopic meniscus surgery. He also testified that this merely constituted a difference of medical opinion between competent medical professionals. Furthermore, he does not dispute that competent medical professionals can disagree about treatment based on their clinical judgement. *Exhibit 10, BS 117, lines 10 – 18*. This is the case here. *Id.*, *BS 125*.
32. Dr. Failinger agreed that despite the presence of degenerative problems which probably pre-existed the happening of the injury, there is no way to establish that the Claimant would have symptoms but for the slip and fall which occurred on January 21, 2019. Thus, he did not know whether the knee would have ever gone out, despite the presence of degenerative conditions. *Id.*, *BS 126, lines 19 – 23*.
33. Moreover, during his deposition, Dr. Failinger testified that Claimant’s locking or catching symptoms were not raised until after he performed his IME on April 11, 2019. *Depo. Tr. pg. 31*. However, this contention is not accurate. As found, the March 1, 2019, report from Dr. Stull indicates Claimant was complaining of “locking” in his right knee. Furthermore, in his report, Dr. Failinger indicates he reviewed the March 1, 2019, report from Dr. Stull. He also quotes a portion of Dr. Stull’s report, but does not quote the portion that specifically documents Claimant’s mechanical knee symptoms, which included locking. In addition, in his initial report, Dr. Failinger failed to quote the entire portion of the *Guidelines*, which indicates surgery may be appropriate when there is “meniscal or cruciate pathology” that is causing locking. See *Ex. F, and Ex. H, the Guidelines, Section (2)(a)(viii)(A)*, *BS 27*. Consequently, the ALJ does not find Dr. Failinger’s ultimate opinion, as set forth in his reports and deposition, to be persuasive as to whether the surgery is reasonable, necessary, and related to the work accident based on the omissions in his initial report.
34. Moreover, the ALJ finds Dr. Failinger’s ultimate opinion and application of the *Guidelines* to be untenable when considering his ultimate conclusion. For example, Dr. Failinger agrees Claimant’s work accident resulted in an injury that necessitated the need for medical treatment. He then uses isolated portions of the *Guidelines* to conclude that the *Guidelines* do not support the surgery recommended by Dr. Stull because the chance of success is limited due to Claimant’s co-existing arthritis. He further concludes that the surgery recommended by Dr. Stull is not reasonable and necessary because the proper procedure based on Claimant’s pathology and symptoms is a knee replacement.

However, he goes on to conclude that the need for a knee replacement is not related to Claimant's industrial accident and resulting injury. In essence, Dr. Failing is attempting to apply the *Guidelines* in a manner that leaves Claimant without a medical remedy to treat the symptoms and functional impairment caused by the work accident.

35. The ALJ finds Claimant's right knee symptoms, for which Dr. Stull has recommended arthroscopic surgery, were caused by his work accident when he slipped, fell, and injured his knee.
36. Claimant's accident aggravated, accelerated, and combined with his preexisting asymptomatic arthritis in his right knee and caused it to become symptomatic. The accident also resulted in an acute injury to his meniscus, and possibly other cartilage and/or ligaments, in his right knee. Therefore, the accident caused Claimant's current symptoms of pain and locking, i.e., mechanical symptoms, in his knee. The surgery recommended by Dr. Stull is to reduce Claimant's pain and mechanical problems in his knee, which were caused by the work accident. Therefore, the surgery recommended by Dr. Stull is to cure Claimant from the effects of his work accident.
37. Although there is a difference of opinion as to whether the surgery is reasonable and necessary, the ALJ credits Dr. Stull's and Dr. Bryan-Greenwood's opinions, over Dr. Failing's, as to whether the surgery is reasonable, necessary, and related.
38. Claimant was present during the testimony of Dr. Failing. He is aware that Dr. Failing disputes the opinion of Dr. Stull, but he still wants to undergo the arthroscopic surgery recommended by Dr. Stull.
39. The surgery recommended by Dr. Stull is found to be reasonable, necessary, and related to Claimant's work accident.

CONCLUSIONS OF LAW

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

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. See *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385, 389 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The ALJ has considered, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Claimant established by a preponderance of the evidence that the arthroscopic surgery recommended by Dr. Stull, an authorized treating physician, is reasonable, necessary, and related to Claimant's industrial injury.

Claimant is required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. The Claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.*, 961 P.2d 571 (Colo. App. 1998).

A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990).

Moreover, the ICAO has noted that pain is "a typical symptom from the aggravation of a pre-existing condition" and Claimant is entitled to medical treatment for pain as long as the pain was proximately caused by the injury and is not attributable to an underlying preexisting condition. *Rodriguez v. Hertz Corp.*, WC 3-998-279 (ICAO February 16, 2001).

Claimant must prove causation to a reasonable probability. Lay testimony alone may be sufficient to prove causation. However, where expert testimony is presented on

the issue of causation it is for the ALJ to determine the weight and credibility to be assigned such evidence. *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990).

In this case, Claimant and Respondents rely on different sections of the *Guidelines* to support their respective positions. When determining the issue of whether proposed medical treatment is reasonable and necessary the ALJ may consider the provisions and treatment protocols of the *Medical Treatment Guidelines* because they represent the accepted standards of practice in workers' compensation cases and were adopted pursuant to an express grant of statutory authority. However, evidence of compliance or non-compliance with the treatment criteria of the *Guidelines* is not dispositive of the question of whether medical treatment is reasonable and necessary. Rather the ALJ may give evidence regarding compliance with the *Guidelines*, and treatment recommendations contained in the *Guidelines*, such weight as he determines it is entitled to considering the totality of the evidence. See *Adame v. SSC Berthoud Operating Co., LLC.*, WC 4-784-709 (ICAO January 25, 2012); *Thomas v. Four Corners Health Care*, WC 4-484-220 (ICAO April 27, 2009); *Stamey v. C2 Utility Contractors, Inc.*, WC 4-503-974 (ICAO August 21, 2008).

The ALJ finds and concludes that the *Guidelines* do not provide a concise and persuasive treatment recommendation based on the facts of this case and the entire record. However, to the extent the *Guidelines* support the surgery recommended by Dr. Stull because Claimant's symptoms include locking in his knee, they are accepted as persuasive. To the extent the *Guidelines* do not support the surgery because Claimant has co-existing arthritis, they are not found to be persuasive.

The ALJ finds and concludes Claimant established by a preponderance of the evidence that:

- Claimant's right knee symptoms, for which Dr. Stull has recommended arthroscopic surgery, were caused by his work accident when he slipped, fell, and injured his knee.
- Claimant's accident aggravated, accelerated, and combined with his preexisting asymptomatic arthritis and caused it to become symptomatic. The accident also resulted in an acute injury to his meniscus. Therefore, the accident caused Claimant's current symptoms of pain and locking, i.e., mechanical symptoms, in his knee.
- The surgery recommended by Dr. Stull is reasonably expected to reduce Claimant's pain and mechanical problems in his knee, which were caused by the work accident. Therefore, the surgery recommended by Dr. Stull is to cure Claimant from the effects of his work accident.
- Although there is a difference of opinion as to whether the surgery is reasonable and necessary, the ALJ credits the opinions of Drs. Stull and Bryan-Greenwood, over Dr. Failing's, as to whether the surgery is reasonable, necessary, and related.
- The surgery recommended by Dr. Stull is reasonable, necessary, and related to Claimant's work accident.

ORDER

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

1. The surgery recommended by Dr. Stull is reasonable, necessary, and related. The surgery shall be paid for by Respondents, subject to the Colorado Medical Fee Schedule.
2. The stipulation of the parties increasing the Claimant's AWW to \$1,400.00 is approved and is effective from the date of injury.
3. Respondent shall pay to Claimant interest at the rate of 8% per annum on all amounts of compensation not paid when due.
4. Issues not expressly decided herein are reserved to the parties for future determination.

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

DATED: January 22, 2020.

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- I. Has Claimant shown, by a preponderance of the evidence, that she suffered a compensable work injury to her left knee on June 5, 2019?
- II. If said injury is compensable, is Claimant entitled to a general award of medical benefits incurred for this injury, including Penrose Hospital Emergency Room, CCOM, Colorado Springs Imaging, Colorado Sport and Spine, and Dr. Michael Simpson, MD?

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

The Work Incident

1. Claimant works for the [Redacted] ("DOC") as a trainer for parole officers. She has had that title for the past five years. Claimant works at the building located at 888 Garden of the Gods in Colorado Springs, CO. Her entire tenure with DOC is 18 years.
2. At hearing, Claimant testified she was walking from the employee parking lot into the office building on June 5, 2019 at about 7:30 a.m. She testified she was walking down the handicap ramp when she stumbled on "something", but was unable to identify what it was. She had a bag in her left hand.
3. She said she grabbed the railing with her right hand, and her "left leg felt funny, so I took a few more steps." She testified that all of a sudden she heard a loud pop and felt intense pain in her knee and could not go any further. At no point did she fall to the ground.
4. Claimant testified she was at the far [upper] end of the ramp at the time her knee popped. Claimant testified that after the incident, she retrieved her cell phone out of her bag and called for help from her office. When no one answered, she called her friend, Theresa F[Redacted], who also had not yet arrived at work.
5. While waiting for Ms. F[Redacted] to arrive, Donald C[Redacted], another co-employee asked her if she needed any assistance. She told him that she could not put weight on her leg so he went to get a wheelchair for her. The Claimant testified that she was very upset while standing on the ramp and, in fact, was crying.
6. Claimant testified at hearing that prior to coming into view of the security camera she had an "earlier stumble". She testified she did not feel any pain in the left knee with

the stumble, but her leg “felt funny. It felt weird and somewhat funny.” Claimant did not recall twisting her left knee during this stumble.

7. Claimant did not specifically testify to twisting or torqueing her left knee at any time either during the reported ‘stumble’ or while walking down the ramp.

Surveillance Video partially depicts this Incident

8. Color Video of the reported incident was recorded by the building’s security camera. The camera appears to be mounted near the building entrance where Claimant works, and partially captures persons walking down the ramp from the front, and towards the left side of the walker. Claimant testified she observed the video for the first time on or after June 24, 2019. (Ex. 1). The ALJ has viewed this video [which has no sound component], but which is of comparatively high quality. The time capture on the video shows it to begin at 7:45:38 a.m.
9. The security video shows Claimant [lower body only] first walk into the frame from street level and place her right hand on the handrail going down the concrete ramp. Claimant is then obstructed for several seconds by tree branches and bushes. Up until that point in the video, it is not possible to see if Claimant is limping, but her right hand appears at all times to be using the railing to her right for some level of support or balance. While she is still obscured, it is not possible to see what occurred, although her walking cadence is not seriously disrupted before she comes back into view, and continuing down the ramp. Once she comes back into view – for the first time, mostly a full body view – Claimant has a slight limp, favoring her left leg. Then Claimant is seen dropping her right hand from the railing and taking two steps.
10. Claimant then appears to take one additional step and immediately and suddenly lift her left leg. Her entire body jolts in response. At that same time, she grabs the concrete retaining wall with her right hand, and the guardrail to her left with her left hand. She does not walk any further. From when the video starts until she stops walking takes about 11 seconds. She then stands at the rail until a co-worker arrives.
11. While Claimant was standing at the handrail and calling Ms. F[Redacted] for assistance, several other persons are seen in the video walking close by Claimant as they walked into the building. Claimant does not appear to try to contact any of those people for help.

Initial Medical Treatment / Referral to Dr. Simpson

12. Ms. F[Redacted] took Claimant to the emergency room at Penrose St. Francis. Upon her release, she then to CCOM for treatment that same day, and saw NP Joyce. (Ex. 13).

13. In the First Report of Injury dated June 5, 2019 Claimant was asked to describe in her own handwriting exactly what happened to cause the accident. She reported "I was walking down ramp tripped. When landing on left leg a loud pop happened on my left knee. I caught myself with my left arm on the hand railing. At that point I was unable to bear weight on my left knee stood at the railing until CPO C[Redacted] got me." (Ex. J, p. 135).
14. On 6/5/19, NP Joyce placed work restrictions on the Claimant to include sitting 95% of the time; use of crutches for all ambulation; no pushing, pulling, lifting, carrying, kneeling, squatting, stairs or ladders. NP Joyce also referred the Claimant for an MRI.
15. MRI of the Claimant's left knee revealed a full thickness radial tear of the posterior horn/root of the medial meniscus, grade 2 medial compartment chondromalacia and a small joint effusion with a moderate-sized leaking Baker's cyst. The MRI did not estimate the age of the meniscus tear. (Ex. 14). Upon receipt of the MRI results, N.P. Joyce referred the Claimant to Dr. Michael Simpson, an orthopedic surgeon. Dr. Simpson specializes in the diagnosis and treatment of knee injuries. He has treated thousands of patients with meniscus conditions.
16. Dr. Simpson's initial medical record (Ex.15) reflects "patient states she was at work and she tripped and caught herself on the left leg. She did hear and feel a pop and caught herself on a railing".

Dr. Simpson's Deposition Testimony

17. At his deposition, Dr. Simpson testified that he did not personally take the history of the injury from the Claimant. His normal practice is to review the computer notes before seeing the patient. (Depo. Dr. Simpson pp. 35-36).
18. Dr. Simpson recommended surgery to repair the meniscal root tear. He testified that if, during surgery, he determined that the root could not be repaired he would then remove the torn portion of the meniscus in an attempt to relieve the Claimant's pain. Dr. Simpson disagreed with Dr. Failing regarding the amount of arthritis in the Claimant's left knee. Dr. Simpson testified that he would not characterize the Claimant's preexisting (but theretofore asymptomatic) arthritis as 'significant', 'severe' or 'excessive'. (Depo. Dr. Simpson p. 17).
19. Dr. Simpson explained that there is a significant difference in a general meniscal tear and a root tear of the posterior horn of the meniscus. He explained that, in his experience, root tears do not typically have a dramatic trauma at the onset of symptoms. Most have a trivial or minor incidence of trauma wherein the individual then begins having pain. It is not until the tear becomes a full thickness tear which "gets all the way to the edge" of the meniscus that there is a significant onset of pain, since only this portion of the meniscus is vascularized.

20. Dr. Simpson testified that some root tears are painful even if they are not displaced in the knee joint. He opined that the Claimant likely had some degeneration, and the start of a meniscal tear, prior to the event on 5/6/19. The stumble/trip on the handicap ramp resulted in additional tearing of the meniscal root after the Claimant had taken a few steps.
21. When asked whether the Claimant's root tear preexisted this incident, Dr. Simpson opined that since the Claimant had no symptoms in her left knee prior to this incident and there was no evidence to suggest a root tear prior to this incident. (Depo. Dr. Simpson p. 20).
22. Dr. Simpson also opined that there is really no way to know whether not the small joint effusion and leaking Baker's cyst seen on the 6/11/19 MRI were acute or chronic without an imaging study showing they existed prior to the incident of 6/5/19.
23. Dr. Simpson disagreed with Dr. Failinger (Respondent's IME physician) that the pain generator in this case is likely the Claimant's preexisting arthritis. Dr. Simpson opined that based on the Claimant's history and exam and her lack of prior complaints, symptoms or treatment to the left knee, the Claimant's left knee pain is more likely a result of the meniscal root tear rather than the preexisting arthritis.
24. Dr. Simpson based this opinion on the sudden onset of pain on 6/5/19, the fact that the pain was sharper and worsened with flexion of the knee and the fact that the pain was more localized in the joint line and was worse with weightbearing. Additionally, the MRI scan did not show evidence of any bone marrow edema, a large effusion, synovitis or inflammation of the joint lining in the knee, all of which might otherwise suggest the Claimant suffered from osteoarthritis. He opined that if an individual had more severe degeneration/arthritis, one would generally see overload or change to the bone as well as inflammation in the joint. (Depo. Dr. Simpson p. 23-24).

25. Dr. Simpson reviewed the security video multiple times at his deposition. Dr. Simpson testified Claimant did not tear her meniscus in the incident on the video. (Depo Dr. Simpson, pp. 42-43). Dr. Simpson testified that in order to suffer a meniscal tear one ordinarily needs to twist the knee while it is bearing weight. Dr. Simpson testified that the visible portion of the video of Claimant walking down the ramp does not show any mechanism of injury to the knee. The video does not show the requisite twisting while bearing weight. (Depo. Dr. Simpson. pp. 41-42).

Claimant's Previous Descriptions of the Work Incident

26. Claimant gave a recorded statement to the claim adjuster, Lisa Biggs, on June 10, 2019. (Ex. L). At hearing, Claimant testified it was a "lengthy conversation." Claimant testified she was being as detailed as she could be about the incident. In the audio recording, Claimant, again, reported the injury causing incident to Ms. Biggs as one

single motion where she grabbed the railing, heard a pop and couldn't bear weight (Ex. L).

27. Claimant was asked in an interrogatory to explain how she claims she was injured. Under oath Claimant stated, "I was walking down the sloped ramp outside of the building and tripped (and caught myself on the railing). I felt immediate pain and heard and felt a loud pop in my left knee". (Ex. M, p. 2). Claimant did not report an earlier "trip and stumble".

Claimant's IME, Dr. Hall

28. On September 12, 2019, Claimant underwent an Independent Medical Examination (IME) by Dr. Timothy Hall at her request. He was provided with a copy of the security video.
29. Dr. Hall's history of the incident reflects "she reports that prior to what was seen on the video, she had tripped and stumbled on 'something' although is not sure what. She as a consequence of that grabbed the rail with her left hand and then took a couple of 'normal steps' and then as she put her foot down left side, she felt and heard a pop in the left knee and simply could no longer weight bear/walk".
30. Dr. Hall opined the Claimant's meniscal root tear is a result of her stumble on the handicap ramp. He disagrees with Dr. Failing's opinion that the Claimant's current left knee pain is due to the preexisting degeneration in her knee, rather than her torn meniscal root.

Number one is, she doesn't have that much degenerative change. I think that's the main one.

The other one is, these - - usually when degenerative problems become symptomatic, they become symptomatic more insidiously, meaning they slowly ramp up over time. *It's unusual for, all of a sudden, these relatively asymptomatic degenerative changes to become so – so symptomatic that someone can barely walk* (Depo. Dr. Hall p. 11) (emphasis added).

31. Dr. Hall continued:

And...if there was no more acute pathology, you would think, if this just was an exacerbation of underlying arthritis, that that would clear relatively quickly with time, because *if there really is no dramatic or significant pathology, just a circumstance where a pre-existing problem got aggravated, you wouldn't expect it to last this long*, especially with this rather minimal level of arthritic disease (Dep. Dr. Hall, p. 12) (emphasis added).

32. Dr. Hall testified that the fact that the Claimant's knee has continued to swell since the injury is more consistent with an injury to the root of her meniscus than degeneration. He testified that one would need torque on a loaded knee to tear the radial horn of the meniscal root. He explained that the Claimant's left knee would have been loaded when she stumbled and placed her left knee in front of her to stop herself from falling.
33. Dr. Hall further testified that it is unlikely that walking alone would cause a tear in the knee.
34. Dr. Hall testified he could not tell whether Claimant had a pre-existing tear in the root of her meniscus prior to the event, but he opined that most people who have a radial tear would have symptoms.

Respondent's IME, Dr. Failinger

35. Claimant was also examined by Dr. Mark Failinger. Dr. Failinger is board certified in orthopedic surgery and sports medicine. Sixty percent (60%) of Dr. Failinger's practice is devoted to the treatment of knee conditions. Three quarters of his practice is workers' compensation patients.
36. Dr. Failinger reviewed Claimant's medical records and the security video. He opined the video does not show a mechanism of injury. (Ex. A, pp. 11-12; Depo Dr. Failinger, p. 13).
37. Dr. Failinger testified Claimant did not trip over an object and she did not twist her knee. He testified that when one looks at the video to explain the root tear, this also does not seem to have occurred on the video. He explained there is not a twisting of a fully weighted knee, which is needed to result in the injury.
38. Instead what is seen is a sudden unweighting of Claimant's knee. Dr. Failinger explained that one cannot tear a meniscus with an unweighted knee. In the video, he opines that Claimant is walking down the ramp with an antalgic gait which means she already has a limp when she is first seen entering the picture. Then the limp appears a little more pronounced, and suddenly, she takes the weight off her knee as if there is pain. (Depo Dr. Failinger, p. 13). Dr. Failinger explained that is not a plausible mechanism in any way for tearing a meniscus.
39. According to Dr. Failinger, Claimant comes into view at the point of 7:45:44 on the video. At that point she already has a mild limp. At 7:45:48 Claimant suddenly goes down and takes the weight off her left knee. She does not go into a fall with all her weight, most of her weight, or even half her weight on the left knee. There is no tripping over her own feet, there is no catching her foot. It hits suddenly and then she unweights the knee before anything else happens that could have caused a meniscus tear. (Depo Dr. Failinger, p. 17).

40. Dr. Failinger opined that the root tear probably pre-existed the described event. He explained the mechanism that could cause a tear in a meniscus is a weighted knee where the two bones have trapped the meniscus and a twist occurs causing a tear.
41. Dr. Failinger testified the video does not show any sort of twist on a weighted knee. There is no mechanism of injury. There is no probability or possibility that Claimant suffered a work injury walking on the minimally inclined ramp. (Ex. A, p. 11).
42. Dr. Failinger testified that Claimant did not give him the same history she gave to Dr. Hall. Claimant did not report to Dr. Failinger a history involving an earlier tripping event that occurred higher up the ramp. Dr. Failinger does not interpret Claimant's report to either the emergency room provider or to N.P. Valerie Joyce on the June 5, 2019 date of injury as describing two events on the ramp. (Failinger Depo. p. 29). He later admitted that since one cannot see what occurred on the video while Claimant was concealed by the tree branches, that Claimant could have experienced two events [in rapid succession].
43. In his report, Dr. Failinger opined that the MRI does not show significant effusion, which would be consistent with an acute tear. (Ex A, p.11). Dr. Failinger had not reviewed the actual MRI scans as of the date of his report or the date of his deposition. (Dr. Failinger Depo. p. 10). Although during his deposition, Dr. Failinger offered to review the actual scan, there is no evidence of record that he actually did so during his deposition. At no time during his deposition were the parties off the record [for him to review the scan]. In fact, in later questioning by Claimant's counsel, he references seeing only the MRI report. (Depo Dr. Failinger, p. 45).

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. §8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. §8-43-201, C.R.S.

B. In accordance with §8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and

resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

C. Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

D. In this instance, the ALJ finds Claimant to have testified sincerely, and to the best of her abilities. Respondents infer that Claimant has now embellished her version of events to maintain consistency with the video evidence and expert testimony. The ALJ does not draw such an inference. Claimant supplied sufficiently consistent versions of the mechanism of injury, and of the symptoms she experienced, to match her objective findings by imaging and physical examinations. The details supplied will vary somewhat with the context of the questions by providers, experts, or attorneys. This is especially so when a person is still under the exciting influence and pain of a recent injury. Only experts and attorneys are concerned with causation, and after the fact. In this instance, Claimant is a long-term employee in law enforcement, with existing medical benefits, and the ALJ finds insufficient motivation for her to supply unwarranted embellishment.

E. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55, P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968). As will be addressed forthwith, the ALJ finds that the medical experts involved have each provided medical opinions to the best of their abilities; thus their opinions will be evaluated in terms of persuasiveness, as opposed to credibility per se.

F. Further, courts are to be "mindful that the Workmen's Compensation Act is to be liberally construed to effectuate its humanitarian purpose of assisting injured workers." *James v. Irrigation Motor and Pump Co.*, 503 P.2d 1025 (Colo. 1972).

Compensability

G. It is the Claimant's burden to prove a causal relationship between the industrial injury and the medical condition for which she seeks benefits. Section 8-43-301, C.R.S. 2001; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). However, the claimant is not required to prove causation by medical certainty. Rather it is sufficient if the Claimant presents evidence of circumstances indicating with reasonable probability that the condition for which she seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and need for treatment. See *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

H. To sustain her burden of proof concerning compensability, Claimant must establish that the condition for which she seeks benefits was proximately caused by an injury arising out of and in the course of employment. *Loofbourrow v. Industrial Claim Appeals Office*, 321 P.3d 548 (Colo. App. 2011), *aff'd Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014); *Section 8-41-301(l)(b)*, C.R.S.

I. The phrases "arising out of" and "in the course of" are not synonymous and a Claimant must meet both requirements for the injury to be compensable. *Younger v. City and County of Denver*, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals*, 759 P.2d 17, 20 (Colo. 1988).

J. The "arising out of" test is one of causation. It requires that the injury have its origins in an employee's work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. *Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001).

K. The "in the course of" requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando*, 811 P.2d 379, 381 (Colo. 1991). An injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.*, 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976).

L. This injury occurred within the time and place limits of Claimant's employment relationship with Employer and during an activity, specifically going from her parked car on Employer's premises and entering her work building. She had a choice to use the stairs or the ramp, and chose the latter. However, the question remains whether Claimant's condition and need for surgery resulted from her work-related activities on June 5, 2019, or rather was the result of his pre-existing left knee condition.

M. A pre-existing condition "does not disqualify a claimant from receiving workers' compensation benefits." *Duncan v. Indus. Claim Appeals Office*, 107 P.3d 999

(Colo. App. 2004). A claimant may be compensated if a work-related injury “aggravates, accelerates, or combines with” a worker’s pre-existing infirmity or disease to “produce the disability for which workers’ compensation is sought.” *H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). Moreover, an otherwise compensable injury does not cease to arise out of a worker’s employment simply because it is partially attributable to the worker’s pre-existing condition. *Subsequent Injury Fund v. Thompson*, 793 P.2d 576, 579 (Colo. 1990); *Seifried v. Indus. Commission*, 736 P.2d 1262, 1263 (Colo. App. 1986)(“[I]f a disability were [ninety-five percent] attributable to a pre-existing, but stable, condition and [five percent] attributable to an occupational injury, the resulting disability is still compensable if the injury has caused the dormant condition to become disabling.”)

Compensability, as Applied

N. In this instance, Dr. Failinger has opined that Claimant’s complaints likely stem from rather severe degenerative arthritis. Dr. Hall, and Dr. Simpson think her pain complaints are more consistent with the torn medical meniscus near the posterior horn. The ALJ finds Drs. Hall and Simpson to be more persuasive. While Claimant had some degree (as is common) of degenerative arthritis, there is no evidence that her knee was symptomatic until June 5, 2019 – at which time it became very symptomatic, and has remained that way ever since.

O. There is no way of knowing to what degree her meniscus might have been damaged prior to that date, but June 5 is the date it became symptomatic. In fact, due to her meniscus’ possibly fragile state, it would require far less of a twisting, torquing motion to damage it further [over the edge], possibly loosening it from its mooring. No dramatic stumble or fall was observed, but nor would one be needed to trigger her symptoms. A minor stumble or miss-step behind the bushes would be sufficient, and the ALJ finds that this is what occurred. This is especially likely, since *Claimant already had a mildly antalgic gait when she came back into view from behind the bushes*. She was fine driving into work and getting out of her car. After stumbling, she was protecting her knee for a couple steps before things really started hurting. *Claimant’s medial meniscus became permanently aggravated while Claimant was walking down the ramp*. Her obvious, instant distress can be seen on the video. The ALJ finds that it now requires medical treatment as a direct result.

P. Respondents argue that because Claimant had pre-existing damage to her knee (which is certainly possible, but not firmly established either way) that she must show that a “special hazard” of employment existed that precipitated this injury. The ALJ will not apply the “special hazard” analysis here, since the evidence already shows that Claimant either stumbled, or miss-stepped, on the ramp sufficient to cause this injury.

Medical Benefits

Q. Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). Claimant must prove entitlement to benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

R. Claimant went to the emergency room at Penrose on an emergent basis. She then was sent by her employer to CCOM who then referred her for an MRI, physical therapy and to an orthopedic surgeon, Dr. Simpson (all within the chain of referral). The ALJ finds that all such treatment was reasonable, necessary, and related to Claimant's compensable work injury. Therefore, all bills from Penrose Hospital, CCOM, CCOM Physical Therapy, Colorado Springs Imaging and Dr. Simpson are to be paid by the Respondents. The ALJ further finds that the surgery proposed by Dr. Simpson is reasonable, necessary, and related to her work injury. As such, Respondents are to pay for said surgery, and all prescribed aftercare.

ORDER

It is therefore Ordered that:

1. Claimant suffered a compensable work injury to her left knee on June 5, 2019.
2. Respondents shall pay for all reasonable, necessary, and related medical expenses incurred in connection with her work injury.
3. Respondents shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.
4. All matters not determined herein are reserved for future determination.

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

petition to review form at: <http://www.colorado.gov/dpa/oac/forms-WC.htm>. In addition, it is recommended that you send a copy of your Petition to Review to the Colorado Springs OAC via email at oac-csp@state.co.us.

DATED: January 22, 2020

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

- Did Claimant overcome the DIME's MMI determination by clear and convincing evidence?
- Did Claimant overcome the DIME's whole person impairment rating by clear and convincing evidence?
- If Claimant overcame the DIME, what is the correct rating?

FINDINGS OF FACT

1. Claimant worked for Employer performing janitorial services. She injured her low back on February 9, 2017 while throwing a bag of garbage over a wall into a dumpster.

2. Employer referred Claimant to CCOM for authorized treatment. She was diagnosed with a lumbar strain and referred to physical therapy. An MRI on March 16, 2017 showed degenerative disc disease, but nothing acute and no indication for surgery. Claimant received conservative care, including chiropractic, acupuncture, medications, and injections. She underwent a functional capacity evaluation (FCE) on February 28, 2018 that demonstrated the ability to work at the light physical demand level.

3. Dr. Jay Neubauer at CCOM put Claimant at MMI on March 29, 2018, with an 11% whole person rating. The rating was a combination of a 5% Specific Disorder impairment under Table 53(II)(B) and 6% for range of motion deficits.

4. Respondents requested a DIME to challenge Dr. Neubauer's rating. Dr. Michael Janssen was selected as the DIME physician.

5. Dr. Janssen evaluated Claimant on June 26, 2018. He agreed with Dr. Neubauer that Claimant reached MMI on March 29, 2018. He also agreed Claimant has 5% whole person impairment under Table 53 (II)(B). He took range of motion measurements and concluded they showed 0% impairment. Accordingly, Dr. Janssen's final rating was 5% whole person.

6. Dr. Robert Messenbaugh, an orthopedic surgeon, has performed multiple IMEs for Respondents regarding this claim. In his first IME report dated October 11, 2017, Dr. Messenbaugh supported the treating providers' determination Claimant suffered a compensable lumbar strain and was not at MMI.

7. Dr. Messenbaugh saw Claimant again on January 7, 2019. He agreed she reached MMI on March 29, 2018, and assigned a 10% whole person impairment. The rating was composed of 5% under Table 53(II)(B) and 5% for range of motion deficits.

8. Dr. Messenbaugh issued an addendum report on March 7, 2019. He opined Dr. Janssen's rating was incorrect because the measurements recorded on the DIME worksheet correspond to a 2% impairment. He opined the correct rating "should be somewhere between 7% and the 11% provided by Dr. Neubauer."

9. At hearing, Dr. Messenbaugh opined the variation in Claimant's range of motion measurements from different providers (*i.e.*, 6%, 5%, 2%) falls within the expected range of day-to-day variability. He confirmed the measurements from his IME were taken with a goniometer per *AMA Guides* criteria.

10. The ALJ agrees with Dr. Messenbaugh's analysis regarding Dr. Janssen's range of motion measurements.

11. Claimant presented no persuasive evidence she was not at MMI on March 29, 2018 as determined by Dr. Neubauer, Dr. Janssen, and Dr. Messenbaugh. Claimant failed to overcome the DIME's MMI determination by clear and convincing evidence.

12. Claimant proved Dr. Janssen's 5% rating is highly probably incorrect. Claimant overcame the DIME by clear and convincing evidence.

13. Claimant proved by a preponderance of the evidence she suffered 11% whole person impairment.

CONCLUSIONS OF LAW

A DIME's determination regarding MMI and whole person impairment are binding unless overcome by "clear and convincing evidence." Section 8-42-107(8)(C). This is a higher standard of proof than the typical "preponderance" standard. Clear and convincing evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App. 2002). The party challenging a DIME's conclusions must demonstrate it is "highly probable" that the impairment rating is incorrect. *Qual-Med v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998); *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Maximum medical improvement (MMI) is defined as the point when any medically determinable physical or mental impairment from the industrial injury has become stable and no further treatment is reasonably expected to improve the claimant's condition. Section 8-40-201(11.5). As found, Claimant failed to overcome the DIME's MMI determination by clear and convincing evidence. Three Level II physicians agree Claimant reached MMI on March 29, 2018 and no physician has opined to the contrary. Although a Claimant is not required to present expert opinion to prove her case, there must be some persuasive evidence that her condition has not plateaued and pointing to some additional treatment reasonably expected to improve her condition. *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983). The ALJ sees no such evidence on the present record.

A DIME physician must rate impairment consistent with the *AMA Guides*. Section 8-42-101(3.7); *Wilson v. Industrial Claim Appeals Office*, 81 P.3d 1117 (Colo. App. 2003).

The DIME's deviation from the rating protocols is evidence from which the ALJ can determine the DIME's rating was overcome. *Wilson v. Industrial Claim Appeals Office, supra; McCardie v. Transit Concrete Co.*, W.C. No. 4-964-260-01 (January 19, 2018).

As found, Claimant overcame Dr. Janssen's rating by clear and convincing evidence. Dr. Janssen clearly erred by assigning a 0% rating for lumbar range of motion. As Dr. Messenbaugh persuasively explained, the measurements Dr. Janssen documented at the DIME were valid and correspond to 2% rating. Dr. Janssen should have given a 7% rating based on the DIME evaluation. The 5% rating he assigned is highly probably incorrect.

When a DIME's impairment rating has been overcome "in any respect," the proper rating becomes a factual matter for the determination based on a preponderance of the evidence. *Newsome v. King Soopers*, W.C. No. 4-941-297-02 (October 14, 2016). The only limitation is that the ALJ's findings must be supported by the record and consistent with the *AMA Guides* and other rating protocols. *Serena v. SSC Pueblo Belmont Operating Company LLC*, W.C. 4-922-344-01 (December 1, 2015). In determining the rating, the ALJ can take judicial notice of the contents of the *AMA Guides*, Level II Curriculum, the Division's Impairment Rating Tips (Desk Aid #11), and other such documents promulgated by the Division of Workers' Compensation. *Id.*

All three Level II physicians who have reviewed Claimant's case applied the same rating methodology: 5% under Table 53(II)(B) combined with range of motion deficits.¹ Claimant's range of motion will likely fluctuate from day-to-day, as evidenced by the slightly different measurements obtained by Dr. Neubauer, Dr. Janssen, and Dr. Messenbaugh. The ALJ concludes Dr. Neubauer's measurements are the best representation of Claimant's permanent impairment because they were taken closest to MMI.

ORDER

It is therefore ordered that:

1. Claimant's request to overcome the DIME regarding MMI is denied and dismissed.
2. Claimant's request to set aside the DIME's impairment rating is granted.
3. Insurer shall pay Claimant PPD benefits based on Dr. Neubauer's 11% whole person rating.
4. Insurer shall pay Claimant statutory interest of 8% per annum on all benefits not paid when due.

¹ Although Dr. Janssen gave 0% for range of motion, the ALJ is confident he would have given an additional 2% had he properly analyzed the rating tables.

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

DATED: January 29, 2020

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that she suffered a compensable right knee injury during the course and scope of her employment with Employer on January 31, 2020.

2. Whether Claimant has established by a preponderance of the evidence that she is entitled to receive reasonable, necessary and causally related medical treatment for her January 31, 2020 industrial incident.

FINDINGS OF FACT

1. Claimant works for Employer as a Merchandizing Specialist. Her job duties involve organizing product orders and returns, performing cycle counts and preparing items for distribution.

2. On November 30, 2015 Claimant obtained treatment for chronic knee pain from Craig Anthony, M.D. at St. Anthony's Family Medicine Center North. Dr. Anthony reported that Claimant presented with chronic right knee pain that began after bending down to pick something off the floor. His physical examination revealed right knee swelling, tenderness to palpation over the proximal lateral patella and upward radiating pain. Dr. Anthony suspected an ACL injury but x-rays only revealed mild tricompartmental osteoarthritis. He provided Claimant with an excused absence note and stated Claimant could return to full duty work.

3. On December 28, 2015 Claimant returned to Dr. Anthony for an examination. Dr. Anthony recounted that Claimant was experiencing worsening right knee symptoms including instability, locking and popping. Claimant specifically reported her knee felt unstable, locks, pops and gives out. A physical examination revealed mild tri-compartmental osteoarthritis and tenderness with a McMurray test. Dr. Anthony discussed a possible arthroscopic debridement and referred Claimant for an orthopedic evaluation. However, Claimant did not follow-up with treatment.

4. Claimant testified that she received an injection into her right knee in late 2015 or early 2016. She did not receive any further right knee treatment until December 2019.

5. On December 9, 2019 Claimant obtained right knee treatment from Tam Minh This Nguyen, PA-C at St. Anthony's Family Medicine North. PA-C Nguyen reported that Claimant injured her right knee on November 21, 2019 when someone fell and struck the inside of her right knee with his or her shoulder. Claimant's knee condition was improving without treatment until she experienced a pop on Thanksgiving Day. Claimant subsequently felt a constant throb in her medial right knee. She disclosed

her chronic knee pain and noted she had undergone a cortisone injection in the past. A physical examination revealed right knee swelling and tenderness to palpation. PA-C Nguyen and her supervising doctor Bruce Williams, M.D., suspected patellar tendonitis. They instructed Claimant to wear a knee brace while at work, continue NSAIDs and undergo x-rays.

6. Claimant testified the November 21, 2019 incident occurred while in a mosh pit at a concert. She explained that her right knee condition improved and returned to baseline for pain and functionality without any further medical treatment. Claimant did not undergo the recommended x-rays but utilized a knee brace while at work and continued to take NSAIDs.

7. Claimant remarked that she stopped wearing a knee brace in early January 2020 but continued to wear a knee compression sleeve. She commented that she was able to walk without any assistive device, climb ladders, kneel down, squat, bend and lift in excess of 60 pounds. Nevertheless, Claimant worked her full duties before and after the mosh pit incident.

8. Claimant explained that on the morning of January 31, 2020 she was reading a cycle count sheet while hastily walking through Employer's facility. She struck her right foot against a roll of dense carpet-like material that was improperly positioned in the walkway. Claimant specified that she struck the inside of her right big toe. The force pushed her right foot outward and caused intense burning pain in the interior or medial side of her right knee. After a moment, she slowly lowered herself to the ground. Eventually a coworker arrived and helped Claimant into a chair. Claimant then called Employer's nurse line and was referred for treatment.

9. Later on January 31, 2020 Claimant visited Lisa Grimaldi, PA-C at Concentra Medical Centers. PA-C Grimaldi recorded that she had difficulty understanding the exact mechanism of Claimant's injury. She noted that Claimant developed right knee pain when she was walking and hit something hard with her right foot. Claimant then went forward and hit her right knee, but did not strike the ground. PA-C Grimaldi noted Claimant's pain at a level of 10/10. Claimant had difficulty walking, arrived in a wheelchair and was using a cane to ambulate. Claimant noted she had chronic knee pain for years and used a knee brace. Physical examination was difficult because Claimant experienced pain with all movements. Claimant underwent x-rays that were normal. PA-C Grimaldi administered a Toradol injection and prescribed medication, a "hinged" knee brace, pain gel and physical therapy. She also assigned work restrictions.

10. Claimant initially denied any prior right knee injuries during the evaluation with PA-C Grimaldi. However, while at the appointment, a medical assistant overheard Claimant discussing a right knee injury with her husband that occurred at a "mosh pit" in November 2019. Because the medical assistant relayed the information to PA-C Grimaldi, she asked Claimant again about prior injuries. Claimant acknowledged she had suffered a right knee injury a couple of months earlier when she was in a mosh pit.

At hearing, Claimant explained that her husband pressured her not to disclose her right knee problems to her medical providers.

11. On February 1, 2020 Claimant visited Marc Passo, M.D. at Arvada Emergency and Urgent Care. Dr. Passo reported that Claimant was experiencing right knee pain from a trip and fall at work one day earlier. Claimant disclosed she injured her right knee in November 2019, but her condition improved without any acute medical intervention. X-rays were again normal and a physical examination revealed right knee swelling.

12. On February 3, 2020 Misty Merritt filed Employer's First Report of Injury on behalf of Respondents. Ms. Merritt reported that Claimant injured her right knee on January 31, 2020. The document noted that at the time of injury Claimant was walking and looking at a piece of paper. She then tripped over a bag that was sitting on the floor.

13. On February 4, 2020 Claimant returned to Concentra and was evaluated by Janine Kennedy, PA-C under the supervision of Authorized Treating Physician (ATP) Amanda Cava, M.D. PA-C Kennedy reported that Claimant was utilizing crutches and needed adjusted restrictions to allow her to return to work. A physical examination revealed limited flexion and extension. PA-C Kennedy requested Claimant's medical records regarding her prior right knee treatment. She diagnosed Claimant with a sprain or strain of the right knee or lower extremity. PA-C Kennedy instructed Claimant to continue physical therapy and use the brace and crutches. She limited Claimant to sedentary work only,

14. On February 11, 2020 Claimant returned to PA-C Kennedy for an evaluation. During the physical examination Claimant demonstrated limited flexion and extension. PA-C Kennedy referred Claimant for an MRI and instructed her to continue physical therapy and medications.

15. On February 17, 2020 Claimant underwent a right knee MRI. The MRI revealed a large medial meniscus bucket-handle tear with moderately advanced patellofemoral chondromalacia and arthritis.

16. On February 27, 2020 Claimant was evaluated by John Papilion, M.D. Dr. Papilion reported that Claimant injured her right knee while walking in a warehouse at work when she caught her right foot, twisted her right knee and fell to the ground. Claimant developed significant swelling within 24 hours and has been unable to extend the knee since the incident. Although Claimant disclosed a right knee injection approximately five years earlier, she did not mention the November 2019 mosh pit incident. Dr. Papilion diagnosed an incarcerated bucket-handle tear of the right medial meniscus. He determined that Claimant required surgery to address her ongoing right knee issues and noted she could not extend her knee due to the locked meniscus. On February 28, 2020 Dr. Papilion requested authorization to perform surgery on Claimant's right knee.

17. On March 11, 2020 Respondents filed a Notice of Contest.

18. On March 12, 2020 Claimant provided a recorded statement to Sue Massey on behalf of Respondents. Claimant disclosed her chronic knee pain, stated that she had received a cortisone injection in the past and noted she injured her right knee in a mosh pit incident in November 2019. She relayed that on January 31, 2020 she was reading a cycle count sheet while walking through her store when she struck her right foot against a roll of floor dry material. Claimant specified that she did not trip or strike her knee, but instead slowly lowered herself to the ground.

19. On March 16, 2020 Claimant returned for an evaluation with PA-C Kennedy at Concentra. PA-C Kennedy noted that Claimant had suffered a knee sprain with a large bucket handle tear of the medial meniscus. She remarked that the requested medical records for prior right knee injuries “did not supply much information as there was a limited knee exam done at the time and no imaging and therefore do not support a significant prior knee injury.” PA-C Kennedy summarized that Claimant had not made any further progress in physical therapy and still could not fully flex or extend her right knee.

20. On March 19, 2020 Respondents sent a denial of the requested right knee surgery to Dr. Papilion.

21. On July 14, 2020 Claimant underwent an independent medical evaluation with Timothy O’Brien, M.D. Dr. O’Brien recorded that on January 31, 2020 she was pushing a cart, struck her right foot and jolted her right knee. She did not fall, but slowly lowered herself to the ground. Dr. O’Brien remarked that Claimant did not twist her knee or slip. Claimant did not describe hitting her knee but only her foot. He reviewed Claimant’s medical records and conducted a physical examination. Dr. O’Brien explained that Claimant was not a “credible, reliable, or trustworthy examinee and therefore her representation that she sustained a work injury on January 31, 2020 by hitting her foot against an object should not be supported.” He detailed that Claimant was not forthcoming with Dr. Papilion at her first evaluation, with PA-C Grimaldi on January 31, 2020 or with PA-C Kennedy on February 4, 2020. Dr. O’Brien commented that Claimant should have apprised the three examiners that she sustained an injury requiring treatment weeks earlier. Furthermore, Claimant made historical revisions and exhibited inconsistencies about the mechanism of her January 31, 2020 injury. Moreover, in 2015 Claimant “had significant symptomology following an innocuous daily activity such as leaning forward” that was consistent not only with osteoarthritis but also a meniscus tear. In fact, the examiner in 2015 suggested arthroscopic surgery might be indicated and initiated an orthopedic referral, but Claimant did not follow through. Dr. O’Brien determined that it was medically probable that Claimant had a meniscus tear in 2015.

22. Dr. O’Brien also explained that Claimant’s described mechanism of injury on January 31, 2020 would not have caused a meniscus tear. Specifically, kicking something with the foot or hitting the knee after kicking something with the foot is not an injury mechanism that produces a meniscus tear. Dr. O’Brien detailed that meniscus

tears occur when the foot remains planted and the body rotates through a knee that is either actively flexing or extending. He noted that many times meniscus tears occur on fields of play such as soccer and football. Dr. O'Brien summarized that the most contemporaneous historical input provided by PA-C Grimaldi on the date of the incident "was not consistent with that type of injury mechanism that would produce a meniscus tear." He determined that Claimant had a pre-existing bucket-handle meniscus tear. Accordingly, Claimant did not suffer a right knee meniscus tear while working for Employer on January 31, 2020.

23. On November 5, 2020 Respondents sent a letter to ATP Dr. Cava asking her to review Dr. O'Brien's independent medical examination and complete a questionnaire. On December 3, 2020 Dr. Cava submitted answers. The first question inquired whether Claimant suffered a work related injury on January 31, 2020. Dr. Cava stated that, after considering Claimant's pre-existing injuries and the "very mild mechanism" that occurred on January 31, 2020, her "meniscal tear was not work-related." Question number six asked about Claimant's permanent work restrictions. Dr. Cava responded "[a]s the meniscal injury is not work-related, any permanent work restrictions should come from personal physician," Finally, Dr. Cava agreed that Claimant's symptoms constituted a "personal health issue."

24. On December 7, 2020 the parties conducted the pre-hearing evidentiary deposition of Dr. O'Brien. He maintained that Claimant did not suffer an industrial injury to her right knee while working for Employer on January 31, 2020. He remarked that Dr. Papilion over-interpreted the MRI findings and they did not reflect surgical intervention by way of arthroscopy was emergent or necessary. Instead, the bucket handle meniscus tear shown on the MRI was not caused by the January 31, 2020 incident because there was no evidence of an acute injury. Instead, Dr. O'Brien reasoned that Claimant had some type of meniscus tear dating back to 2015 that was substantial enough to result in a wobbly and very unstable knee. He detailed that Claimant's symptoms included right knee locking, popping, instability and giving way. Dr. O'Brien noted that Claimant's complaints in 2015 constituted "classic symptoms" for a medial meniscus. In fact, the treatment provider at the time suggested an orthopedic referral and possible arthroscopic surgery. Moreover, Claimant suffered another substantial injury in a mosh pit in November 2019. Dr. O'Brien remarked that when Claimant visited PA-C Nguyen on December 9, 2019 at St. Anthony's Family Medicine North she stated that she was shouldered in the knee when another person was falling. The mechanism was also described as an aversion injury where the knee was flexed laterally. Dr. O'Brien explained that, although Claimant did not specifically mention the mosh pit, there was an event in which someone fell into Claimant's right knee and forced the knee outward. He characterized the accident as "a tackling type of injury" that would occur on a football or soccer field. He remarked that "this is a classic injury for something that would consistently produce a meniscus tear." Dr. O'Brien summarized that Claimant had a meniscal tear in 2015 and developed similar symptoms as a result of the November 2019 mosh pit incident.

25. Dr. O'Brien also explained that Claimant's January 31, 2020 mechanism of injury would not have caused a meniscus tear. He commented that, because

Claimant's foot was in motion, she was in a single-leg stance on the left moving her foot forward on the right at the time her foot impacted the object. Her right foot could not have been planted on the ground. The preceding action could not have produced a tear because the meniscus tears when the foot is planted and there is torsion and sometimes direct loading of the knee. Meniscus tears can only be produced in the lab when the foot is stationary. Dr. O'Brien detailed that the January 31, 2020 incident did not involve any torsion. He remarked that, when any individual kicks an object, there is a straightforward force that loads the patellofemoral joint. In contrast, the mosh pit incident created a load between the femorotibial part of the knee that compressed the meniscus. Dr. O'Brien further reasoned that the right knee MRI revealed arthritis at the patellofemoral joint. When she kicked an immovable object, she loaded the arthritic patellofemoral joint, not the femorotibial joint or meniscus. Claimant's right knee pain was thus consistent with her underlying arthritic condition at the patellofemoral joint that manifested itself when her foot struck an immovable object. Nevertheless, Claimant did not suffer an injury on January 31, 2020 because there was no bruising and the right knee appeared normal. Moreover, the MRI scan did not reflect any evidence of an acute injury. Although Claimant had pain in her arthritic joint, there was no new tissue breakage or yielding. Accordingly, Claimant did not suffer an injury to her right knee meniscus while working for Employer.

26. Dr. O'Brien concluded that, within a reasonable degree of medical probability, Claimant did not suffer an injury that required medical treatment as a result of the January 31, 2020 work incident. He summarized that Claimant had some type of meniscus tear dating back to 2015 that was substantial enough to result in a wobbly and very unstable knee. Moreover, Claimant suffered another substantial injury in a mosh pit in November 2019. Finally, Dr. O'Brien did not believe Dr. Papilion knew about Claimant's medical history and over-interpreted the MRI scan. Furthermore, the mechanism and forces created by kicking an object would not have caused a meniscus tear. Although Claimant may have been more susceptible to pain as a result of kicking an object due to significant right knee degeneration, she did not suffer a right knee injury. Accordingly, Claimant did not suffer an industrial injury to her right knee while working for Employer on January 31, 2020.

27. Claimant has failed to demonstrate that it is more probably true than not that she suffered a compensable right knee injury during the course and scope of her employment with Employer on January 31, 2020. Initially, Claimant explained that on the morning of January 31, 2020 she was reading a cycle count sheet while hastily walking through Employer's facility. She struck her right foot against a roll of dense carpet-like material and immediately experienced right knee pain. Employer referred Claimant to Concentra for medical treatment. Medical providers diagnosed Claimant with a sprain or strain of the right knee or lower extremity. Claimant subsequently received conservative treatment in the form of physical therapy and medications. A February 17, 2020 right knee MRI revealed a large medial meniscus bucket-handle tear with moderately advanced patellofemoral chondromalacia and arthritis. Dr. Papilion subsequently diagnosed an incarcerated bucket-handle tear of the right medial meniscus. On February 28, 2020 Dr. Papilion sought authorization to perform surgery on Claimant's right knee. Respondents denied the surgical request.

28. The record reveals that Claimant had the following significant pre-existing right knee problems prior to the January 31, 2020 incident:

- Claimant's previous right knee issues dated back to at least 2015 and included a positive McMurray's test with referral to an orthopedic specialist regarding possible surgical intervention;
- Claimant had ongoing popping in her knee where she would feel like she would need to fall down at times;
- Claimant had an injury to her right knee in November of 2019 when it was impacted by another person's shoulder in a mosh pit. Medical records reveal Claimant presented with bruising and swelling of her right knee after the incident;
- On Thanksgiving Day 2019 Claimant again sought treatment for pain in her right knee after it popped while simply walking and she had to sit down due to significant pain.
- Claimant was continuing to treat for pain associated with her right knee issues on January 31, 2020. She had been wearing a knee sleeve or brace and took Ibuprofen for pain shortly before the work incident.

29. In addition to Claimant's pre-existing right knee symptoms, the persuasive opinions of Drs. O'Brien and Cava also reflect that it is unlikely Claimant suffered a right knee injury during the course and scope of her employment with Employer on January 31, 2020. Dr. O'Brien maintained that the bucket handle meniscus tear shown on the MRI was not caused by the January 31, 2020 incident because there was no evidence of an acute injury. Instead, Dr. O'Brien specified that Claimant's significant right knee symptoms in 2015 were consistent with a meniscus tear. He detailed that Claimant's symptoms included right knee locking, popping, instability and giving way. Moreover, Claimant suffered another substantial injury in a mosh pit in November 2019. Dr. O'Brien explained that, although Claimant did not specifically mention the mosh pit, there was an event in which someone fell into her right knee and forced the knee outward. He remarked that "this is a classic injury for something that would consistently produce a meniscus tear." Dr. O'Brien summarized that Claimant had a meniscal tear in 2015 and developed similar symptoms as a result of the November 2019 mosh pit incident. The persuasive opinion of Dr. O'Brien thus reveals that Claimant's right knee meniscus tear likely preceded the January 31, 2020 work incident.

30. Claimant's January 31, 2020 mechanism of injury also likely would not have caused a meniscus tear. Dr. O'Brien commented that the January 31, 2020 event could not have produced a tear because the meniscus tears when the foot is planted and there is torsion and sometimes direct loading of the knee. He remarked that, when an individual kicks an object, there is a straightforward force that loads the

patellofemoral joint. In contrast, the mosh pit incident created a load between the femorotibial part of the knee that compressed the meniscus. Dr. O'Brien further reasoned that the right knee MRI revealed arthritis at the patellofemoral joint. Claimant's right knee pain was very consistent with her underlying arthritic condition at the patellofemoral joint that manifested itself when her foot struck an immovable object. Nevertheless, Claimant did not suffer an injury on January 31, 2020 because there was no bruising and the right knee appeared normal. Moreover, the MRI scan did not reflect any evidence of an acute injury. Although Claimant had pain in her arthritic joint, there was no new tissue breakage or yielding. Furthermore, ATP Dr. Cava persuasively agreed with Dr. O'Brien's assessment. On December 3, 2020 Dr. Cava submitted answers to Respondents' questionnaire. The first question inquired whether Claimant suffered a work related injury on January 31, 2020. Dr. Cava stated that, after considering Claimant's pre-existing injuries and the "very mild mechanism" that occurred on January 31, 2020, her "meniscal tear was not work-related." Based on Claimant's pre-existing right knee condition as well as the persuasive opinions of Drs. O'Brien and Cava, Claimant did not likely suffer an injury to her right knee meniscus while working for Employer. Accordingly, Claimant's request for Workers' Compensation benefits is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. See *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *CJI*, Civil 3:16 (2007).

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson*, W.C. No. 4-589-645 (ICAO, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.*, 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner*, 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). *Soto-Carrion v. C & T Plumbing, Inc.*, W.C. No. 4-650-711 (ICAO, Feb. 15, 2007); *David Mailand v. PSC Industrial Outsourcing LP*, W.C. No. 4-898-391-01, (ICAO, Aug. 25, 2014).

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. See *Cotts v. Exempla, Inc.*, W.C. No. 4-606-563 (ICAO, Aug. 18, 2005). Rather, the symptoms could represent the “logical and recurrent consequence” of the pre-existing condition. See *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAO, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs*, W.C. No. 4-745-712 (ICAO, Oct. 27, 2008), simply because a claimant’s symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that “correlation is not causation,” and merely because a coincidental correlation exists between the claimant’s work and his symptoms does not mean there is a causal connection between the claimant’s injury and work activities.

7. The provision of medical care based on a claimant’s report of symptoms does not establish an injury but only demonstrates that the claimant claimed an injury. *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020). Moreover, a referral for medical care may be made so that the respondent would not forfeit its right to select the medical providers if the claim is later deemed compensable. *Id.* Because a physician provides diagnostic testing, treatment, and work restrictions based on a claimant’s reported symptoms does not mandate that the claimant suffered a compensable injury. *Fay v. East Penn manufacturing Co., Inc.*, W.C. No. 5-108-430-001 (ICAO, Apr. 24, 2020); cf. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337, 1339 (Colo. App. 1997) (“right to Workers’ Compensation benefits, including medical payments, arises only when an injured employee initially establishes, by a preponderance of the evidence, that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment”). While scientific evidence is not dispositive of compensability, the ALJ may consider and rely on medical opinions regarding the lack of a scientific theory supporting compensability when

making a determination. *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983); *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020).

8. As found, Claimant has failed to demonstrate by a preponderance of the evidence that she suffered a compensable right knee injury during the course and scope of her employment with Employer on January 31, 2020. Initially, Claimant explained that on the morning of January 31, 2020 she was reading a cycle count sheet while hastily walking through Employer's facility. She struck her right foot against a roll of dense carpet-like material and immediately experienced right knee pain. Employer referred Claimant to Concentra for medical treatment. Medical providers diagnosed Claimant with a sprain or strain of the right knee or lower extremity. Claimant subsequently received conservative treatment in the form of physical therapy and medications. A February 17, 2020 right knee MRI revealed a large medial meniscus bucket-handle tear with moderately advanced patellofemoral chondromalacia and arthritis. Dr. Papilion subsequently diagnosed an incarcerated bucket-handle tear of the right medial meniscus. On February 28, 2020 Dr. Papilion sought authorization to perform surgery on Claimant's right knee. Respondents denied the surgical request.

9. As found, the record reveals that Claimant had the following significant pre-existing right knee problems prior to the January 31, 2020 incident:

- Claimant's previous right knee issues dated back to at least 2015 and included a positive McMurray's test with referral to an orthopedic specialist regarding possible surgical intervention;
- Claimant had ongoing popping in her knee where she would feel like she would need to fall down at times;
- Claimant had an injury to her right knee in November of 2019 when it was impacted by another person's shoulder in a mosh pit. Medical records reveal Claimant presented with bruising and swelling of her right knee after the incident;
- On Thanksgiving Day 2019 Claimant again sought treatment for pain in her right knee after it popped while simply walking and she had to sit down due to significant pain.
- Claimant was continuing to treat for pain associated with her right knee issues on January 31, 2020. She had been wearing a knee sleeve or brace and took Ibuprofen for pain shortly before the work incident.

10. As found, in addition to Claimant's pre-existing right knee symptoms, the persuasive opinions of Drs. O'Brien and Cava also reflect that it is unlikely Claimant suffered a right knee injury during the course and scope of her employment with Employer on January 31, 2020. Dr. O'Brien maintained that the bucket handle meniscus

tear shown on the MRI was not caused by the January 31, 2020 incident because there was no evidence of an acute injury. Instead, Dr. O'Brien specified that Claimant's significant right knee symptoms in 2015 were consistent with a meniscus tear. He detailed that Claimant's symptoms included right knee locking, popping, instability and giving way. Moreover, Claimant suffered another substantial injury in a mosh pit in November 2019. Dr. O'Brien explained that, although Claimant did not specifically mention the mosh pit, there was an event in which someone fell into her right knee and forced the knee outward. He remarked that "this is a classic injury for something that would consistently produce a meniscus tear." Dr. O'Brien summarized that Claimant had a meniscal tear in 2015 and developed similar symptoms as a result of the November 2019 mosh pit incident. The persuasive opinion of Dr. O'Brien thus reveals that Claimant's right knee meniscus tear likely preceded the January 31, 2020 work incident.

11. As found, Claimant's January 31, 2020 mechanism of injury also likely would not have caused a meniscus tear. Dr. O'Brien commented that the January 31, 2020 event could not have produced a tear because the meniscus tears when the foot is planted and there is torsion and sometimes direct loading of the knee. He remarked that, when an individual kicks an object, there is a straightforward force that loads the patellofemoral joint. In contrast, the mosh pit incident created a load between the femorotibial part of the knee that compressed the meniscus. Dr. O'Brien further reasoned that the right knee MRI revealed arthritis at the patellofemoral joint. Claimant's right knee pain was very consistent with her underlying arthritic condition at the patellofemoral joint that manifested itself when her foot struck an immovable object. Nevertheless, Claimant did not suffer an injury on January 31, 2020 because there was no bruising and the right knee appeared normal. Moreover, the MRI scan did not reflect any evidence of an acute injury. Although Claimant had pain in her arthritic joint, there was no new tissue breakage or yielding. Furthermore, ATP Dr. Cava persuasively agreed with Dr. O'Brien's assessment. On December 3, 2020 Dr. Cava submitted answers to Respondents' questionnaire. The first question inquired whether Claimant suffered a work related injury on January 31, 2020. Dr. Cava stated that, after considering Claimant's pre-existing injuries and the "very mild mechanism" that occurred on January 31, 2020, her "meniscal tear was not work-related." Based on Claimant's pre-existing right knee condition as well as the persuasive opinions of Drs. O'Brien and Cava, Claimant did not likely suffer an injury to her right knee meniscus while working for Employer. Accordingly, Claimant's request for Workers' Compensation benefits is denied and dismissed.

ORDER

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

Claimant's request for Workers' Compensation benefits is denied and dismissed.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street,

4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at <https://oac.colorado.gov/resources/oac-forms>.*

DATED: January 29, 2021.

DIGITAL SIGNATURE:


Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Did Claimant overcome the DIME's MMI determination by clear and convincing evidence?
- Did Claimant overcome the DIME's whole person impairment rating by clear and convincing evidence?
- If Claimant overcame the DIME, what is the correct rating?

FINDINGS OF FACT

1. Claimant worked for Employer performing janitorial services. She injured her low back on February 9, 2017 while throwing a bag of garbage over a wall into a dumpster.

2. Employer referred Claimant to CCOM for authorized treatment. She was diagnosed with a lumbar strain and referred to physical therapy. An MRI on March 16, 2017 showed degenerative disc disease, but nothing acute and no indication for surgery. Claimant received conservative care, including chiropractic, acupuncture, medications, and injections. She underwent a functional capacity evaluation (FCE) on February 28, 2018 that demonstrated the ability to work at the light physical demand level.

3. Dr. Jay Neubauer at CCOM put Claimant at MMI on March 29, 2018, with an 11% whole person rating. The rating was a combination of a 5% Specific Disorder impairment under Table 53(II)(B) and 6% for range of motion deficits.

4. Respondents requested a DIME to challenge Dr. Neubauer's rating. Dr. Michael Janssen was selected as the DIME physician.

5. Dr. Janssen evaluated Claimant on June 26, 2018. He agreed with Dr. Neubauer that Claimant reached MMI on March 29, 2018. He also agreed Claimant has 5% whole person impairment under Table 53 (II)(B). He took range of motion measurements and concluded they showed 0% impairment. Accordingly, Dr. Janssen's final rating was 5% whole person.

6. Dr. Robert Messenbaugh, an orthopedic surgeon, has performed multiple IMEs for Respondents regarding this claim. In his first IME report dated October 11, 2017, Dr. Messenbaugh supported the treating providers' determination Claimant suffered a compensable lumbar strain and was not at MMI.

7. Dr. Messenbaugh saw Claimant again on January 7, 2019. He agreed she reached MMI on March 29, 2018, and assigned a 10% whole person impairment. The rating was composed of 5% under Table 53(II)(B) and 5% for range of motion deficits.

8. Dr. Messenbaugh issued an addendum report on March 7, 2019. He opined Dr. Janssen's rating was incorrect because the measurements recorded on the DIME worksheet correspond to a 2% impairment. He opined the correct rating "should be somewhere between 7% and the 11% provided by Dr. Neubauer."

9. At hearing, Dr. Messenbaugh opined the variation in Claimant's range of motion measurements from different providers (*i.e.*, 6%, 5%, 2%) falls within the expected range of day-to-day variability. He confirmed the measurements from his IME were taken with a goniometer per *AMA Guides* criteria.

10. The ALJ agrees with Dr. Messenbaugh's analysis regarding Dr. Janssen's range of motion measurements.

11. Claimant presented no persuasive evidence she was not at MMI on March 29, 2018 as determined by Dr. Neubauer, Dr. Janssen, and Dr. Messenbaugh. Claimant failed to overcome the DIME's MMI determination by clear and convincing evidence.

12. Claimant proved Dr. Janssen's 5% rating is highly probably incorrect. Claimant overcame the DIME by clear and convincing evidence.

13. Claimant proved by a preponderance of the evidence she suffered 11% whole person impairment.

CONCLUSIONS OF LAW

A DIME's determination regarding MMI and whole person impairment are binding unless overcome by "clear and convincing evidence." Section 8-42-107(8)(C). This is a higher standard of proof than the typical "preponderance" standard. Clear and convincing evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App. 2002). The party challenging a DIME's conclusions must demonstrate it is "highly probable" that the impairment rating is incorrect. *Qual-Med v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998); *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Maximum medical improvement (MMI) is defined as the point when any medically determinable physical or mental impairment from the industrial injury has become stable and no further treatment is reasonably expected to improve the claimant's condition. Section 8-40-201(11.5). As found, Claimant failed to overcome the DIME's MMI determination by clear and convincing evidence. Three Level II physicians agree Claimant reached MMI on March 29, 2018 and no physician has opined to the contrary. Although a Claimant is not required to present expert opinion to prove her case, there must be some persuasive evidence that her condition has not plateaued and pointing to some additional treatment reasonably expected to improve her condition. *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983). The ALJ sees no such evidence on the present record.

A DIME physician must rate impairment consistent with the *AMA Guides*. Section 8-42-101(3.7); *Wilson v. Industrial Claim Appeals Office*, 81 P.3d 1117 (Colo. App. 2003).

The DIME's deviation from the rating protocols is evidence from which the ALJ can determine the DIME's rating was overcome. *Wilson v. Industrial Claim Appeals Office, supra; McCardie v. Transit Concrete Co.*, W.C. No. 4-964-260-01 (January 19, 2018).

As found, Claimant overcame Dr. Janssen's rating by clear and convincing evidence. Dr. Janssen clearly erred by assigning a 0% rating for lumbar range of motion. As Dr. Messenbaugh persuasively explained, the measurements Dr. Janssen documented at the DIME were valid and correspond to 2% rating. Dr. Janssen should have given a 7% rating based on the DIME evaluation. The 5% rating he assigned is highly probably incorrect.

When a DIME's impairment rating has been overcome "in any respect," the proper rating becomes a factual matter for the determination based on a preponderance of the evidence. *Newsome v. King Soopers*, W.C. No. 4-941-297-02 (October 14, 2016). The only limitation is that the ALJ's findings must be supported by the record and consistent with the *AMA Guides* and other rating protocols. *Serena v. SSC Pueblo Belmont Operating Company LLC*, W.C. 4-922-344-01 (December 1, 2015). In determining the rating, the ALJ can take judicial notice of the contents of the *AMA Guides*, Level II Curriculum, the Division's Impairment Rating Tips (Desk Aid #11), and other such documents promulgated by the Division of Workers' Compensation. *Id.*

All three Level II physicians who have reviewed Claimant's case applied the same rating methodology: 5% under Table 53(II)(B) combined with range of motion deficits.¹ Claimant's range of motion will likely fluctuate from day-to-day, as evidenced by the slightly different measurements obtained by Dr. Neubauer, Dr. Janssen, and Dr. Messenbaugh. The ALJ concludes Dr. Neubauer's measurements are the best representation of Claimant's permanent impairment because they were taken closest to MMI.

ORDER

It is therefore ordered that:

1. Claimant's request to overcome the DIME regarding MMI is denied and dismissed.
2. Claimant's request to set aside the DIME's impairment rating is granted.
3. Insurer shall pay Claimant PPD benefits based on Dr. Neubauer's 11% whole person rating.
4. Insurer shall pay Claimant statutory interest of 8% per annum on all benefits not paid when due.

¹ Although Dr. Janssen gave 0% for range of motion, the ALJ is confident he would have given an additional 2% had he properly analyzed the rating tables.

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

DATED: January 29, 2020

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

- I. Have Respondents, by clear and convincing evidence, overcome the DIME opinion of Dr. Zuehlsdorff for Claimant's Whole Person Impairment Rating?
- II. Has Claimant, by a preponderance of the evidence, shown that he is entitled to Medical Maintenance Benefits?

STIPULATIONS

Claimant's Average Weekly Wage is \$1,233.00. The ALJ accepted this stipulation.

EVIDENTIARY ISSUES ARISING DURING THE HEARING

Dr. Basse's IME Report

As already noted, Claimant's Exhibits 1 through 6, and Respondents' Exhibits A through M were admitted without objection. As such, they are rightly before the ALJ, and have all been reviewed to assist in rendering a decision for everything at issue in this case. The single, unamended, DIME report was issued 5/10/19.

However, during the examination of the DIME physician, Dr. Zuehlsdorff, it was revealed that Claimant's attorney, without leave of the Division or OAC, had, one day prior to the hearing, sent two items to the DIME physician for his review and possible impressions, to wit:

- 1) The IME report of Dr. Basse, dated 8/20/19 {Ex L}, and
- 2) Neuropsychological testing results from Lisa Townsend, Psy.D, dated 7/3/19 and 8/7/19 {Ex. K}.

The DIME physician himself had recommended the neuropsychological testing in his DIME report. There was also a brief telephonic conversation between the DIME physician and Claimant's attorney for the sole purpose of confirming receipt of these reports. When asked, both Claimant's attorney and the DIME physician freely confirmed this transaction, and opined that nothing inappropriate had occurred by transmitting and receiving these documents for review.

Respondents' attorney then asked that the DIME physician's entire testimony be stricken as a sanction for unauthorized communication with the DIME physician. At that time, this ALJ declined to do so, stating:

THE COURT:Well, I'm not prepared to strike his entire testimony. There is some concern that this was sent ultra vires, as it were, and without knowledge of the Court or Opposing Counsel. So it is a concern.

What I am prepared to do is simply redact or *disregard anything to do with this witness commenting on anything from Dr. Basse's report*. I'm prepared to do that.

.....What I will do, Ms. [Redacted], is allow you to brief the issue [of striking the entire testimony of the DIME physician]. And if you have case law that says that's an appropriate sanction, I'll reconsider my ruling. (Hearing transcript, pp. 140-141) (emphasis added).

Upon further research and review of the record, the ALJ is unaware of any case law mandating such a result. Had Claimant's attorney conveyed these reports through authorized channels, there is little doubt they could have been viewed and critiqued by the DIME physician anyway. Such comparison would likely have relevance to the central issue in this case. And, not without reason, and knowing the DIME physician would testify by phone, Claimant's attorney felt it to be far more efficient to send the reports up one day in advance, since there would be no meaningful way ask the DIME's impressions during the hearing. Nonetheless, the rules regarding contact with the DIME physician are there for a reason, and one should not 'profit' from a breach of those rules, even if such breach was done in good faith- as the ALJ concludes here. For that reason, the initial ruling, as announced above, will remain in effect, and the ALJ will admit the testimony of the DIME physician, but sans any comparison or critique of Dr. Basse's report.

Neuropsychological Reports

The analysis of what to do with the unauthorized transmission of the neuropsychological reports (Ex. K) is somewhat different. Once again, the ALJ concludes this occurred in good faith, but erroneously. However, in this case, Respondent's counsel chose to cross-examine the DIME physician in some detail over the contents of this report, and invited his opinion of the contents. The ALJ finds that this document was effectively litigated by consent of both parties. More to the point, however, is the conclusion of the DIME physician, as noted on Pages 173-174 of the hearing transcript.

THE WITNESS: My DIME opinion is still my DIME opinion at this point. This....neither one of these records which I have been given – it sounds like maybe shouldn't have or whatever, I don't quite understand the reasoning on that. But *neither one of thoseeither Dr. Basse's report or this neuropsych eval – changed my opinion as so stated in the DIME at this time*. (emphasis added).

THE COURT: Okay. *Nor anything else that you might have recommended?*

THE WITNESS: *No*.

The ALJ therefore will therefore admit the questioning of the DIME physician on the neuropsychological examination by both parties, and finds that the DIME physician was not unduly influenced by the transmission of these reports.

Medical Records of Claimant / Possible Preexisting Conditions

As cross-examination of the DIME physician progressed, it became increasingly clear during the hearing that certain medical records of Claimant had been admitted by the ALJ, but *had not been conveyed by Respondents to the DIME physician* during the DIME protocol. In summary, such records occasionally referenced headaches and other similar symptoms which were noted *prior to* Claimant's industrial injury. The ALJ notes that this was due to apparent *inadvertence* by Respondents (presumably support staff), since this time *Respondents'* attorney was caught by surprise - but also in good faith.

As a result, the DIME physician was cross-examined, by telephone, about reports which he had never seen, and which therefore could not form the basis of his written DIME report. In the final analysis, while this time-consuming process was allowed to proceed, the ALJ will not fault the DIME's failure to note such preexisting reports in his written report- since he was unaware of their existence, *and through no fault of his*. Far more importantly, as the hearing progressed, and such reports were discussed, *it became clear that such reports had no significant effect on his final opinion of his Impairment Rating*. So now, on with the show.

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

Claimant's Injury and related Testimony

1. Claimant is currently 60 years old. He supervises offenders in the laundry department at the Employer. He sustained an admitted work injury on October 26, 2017 while at work when a table fell on him hitting his head and upper back. (Ex. G, pp. 48, 111).

2. This injury occurred in an institutional laundry when a large heavy seven-foot folding table was leaning against the wall, and it was accidentally dislodged by one of the offenders. It then fell and struck Claimant while he was kneeling down, knocking him to the ground. Claimant indicated that he was dazed by the force of the blow, and was also propelled downward into the concrete floor striking his head. He immediately began experiencing symptoms of pain, disorientation, dizziness, buzzing in his ears, with concomitant headaches and memory loss. At hearing, Claimant estimated the table to weigh approximately 200 pounds.

3. Claimant testified that he did have a prior work related injury in 2011 that resulted in a left shoulder surgery; however, the headache and mental symptoms he

experienced after the injury of October 26, 2017, were completely different from any symptoms he suffered from previously. Claimant also testified that he continued to treat with Dr. Olson right up until the day before this hearing. He testified that his wife and children noticed that he continues to appear distracted and has momentary memory loss. He also testified that his ongoing symptoms of dizziness, headaches and buzzing in his ears continued up until the date of this hearing.

4. Claimant confirmed that he was released to return to his normal work duties following the October 26, 2017 incident, and he did so. In testifying about his symptoms, Claimant stated that they are “fluctuating,” that if he turns his head to the left he has “ringing” in his ear, he still has pain in his thoracic back and neck, and stated that when his neck hurts he gets a headache, and his memory issues have “just been here and there”. He described his headaches as being “periodic”.

Treatment with ATP Dr. Olson

5. Claimant treated for this work injury with Dr. Daniel Olson at CCOM. Claimant has also been seeing Dr. Olson for maintenance care for a prior 2011 work injury to his shoulder. During his initial evaluation on October 26, 2017, Claimant reported feeling dazed but did not lose consciousness. “He noticed a headache, as well as some unsteadiness with his gait. He still notices some nausea but has not thrown up. He also notices some discomfort in his upper back and neck area. His pain level is 5.” (Ex. G, p. 111).

6. Claimant was noted to be “alert and oriented...His mental status is sharp and he answers questions quickly and speech is coherent. Cerebellar testing was normal...He was able to perform a tandem gait without difficulty. He is able to balance on each foot separately...Palpation to the back of his head does not show any particular taken [sic] the scalp.” *Id.* Claimant was diagnosed with a concussion, which was anticipated to resolve. Due to his continued nausea and headache, Claimant was referred for a CT scan. *Id.* at 112.

7. The brain CT scan from October 26, 2017, showed “mild chronic small vessel ischemic change. No acute findings.” *Id.* at. 117.

Claimant Placed at MMI with Impairment Rating for Thoracic Spine Only

8. After receiving almost a year of conservative treatment, including physical therapy, massage therapy, and acupuncture, Claimant was placed at maximum medical improvement (MMI) by Dr. Olson on August 29, 2018. (Ex. G, pp. 55-56). In the August 29, 2018 MMI report, Dr. Olson noted, “He also brought up some headaches but he really has not been complaining of it. He states he has occasional memory lapses.” Despite these complaints as noted, Dr. Olson provided Claimant with a permanent rating of 10% whole person for his thoracic spine only. *Id.* at 49.

9. According to Dr. Olson's deposition testimony, Claimant's primary complaint during the course of his treatment was thoracic back pain.

10. Dr. Olson testified that post-concussive symptoms usually clear up in three months. He indicated it was not until Claimant's last visit, on August 29, 2018 that Claimant mentioned to him that he was having memory issues. He also stated that he did not recall Claimant "complaining as much about the neck pain. That's why – or the headaches. I guess that's why I did not rate them when I did my impairment rating." He did not diagnose Claimant with post-concussive syndrome, nor opine that Claimant's current cognitive or headache complaints were related to the October 26, 2017 work injury.

Respondents request a DIME to challenge the 10% Impairment Rating by Dr. Olsen for Thoracic Spine

11. Claimant subsequently attended a Division IME (DIME) with Dr. Gary Zuehlsdorff on May 10, 2019. Dr. Zuehlsdorff notes, under Current Subjective:

The patient notes primarily he has right mid thoracic pain and somewhat mid scapular in right paravertebral are that he would rate at 4-8/10 constant. Secondly, the right side of his neck and really points more to the suboccipital region and a little bit of the upper lateral aspect of his neck that he also would rate about a 4-8/10 and maybe a little bit less than the thoracic, but numerically he does not state that. Thirdly, he feels he has basically right and frontal headaches especially when his occipital neck area flares up, and these are intermittent. He claims they really come on when his occipital neck area kicks up. He will get some nausea with these but no real double or blurry vision or aura. No hemiplegic type symptoms or signs either, and he has not vomiting. He also denies lightheadedness, dizziness, vertigo, and balance issues. (Ex. J, p. 150).

12. Dr. Zuehlsdorff agreed Claimant had reached MMI as per Dr. Olson, however, instead of noting the MMI date as August 29, 2018 as provided by Dr. Olson, he instead lists it as September 4, 2018, which is the date of Dr. Olson's impairment rating report. Dr. Zuehlsdorff provided Claimant with a 6% whole person rating for his thoracic spine. *Id.* at 152. He also diagnosed Claimant with post-concussive syndrome and provided him with a 10% whole person rating for "Episodic Neurologic Disorders" primarily for his reports of headaches for "slight interference with daily living". *Id.* Those two ratings then combined for a 15% Whole Person Impairment Rating.

13. Dr. Zuehlsdorff recommended maintenance care only for Claimant's post-concussive syndrome, including a brain MRI, neuropsych evaluation, and soft treatment modalities to the right suboccipital region, including acupuncture, stim unit, injections, and medications such as Elavil which had been proven to be effective in post-concussive syndrome headaches. He also opined that after the workup and treatments

have been accomplished, a possibility for recalculating the impairment provided under Episodic Neurological Disorders could be a possibility. *Id.* at 153.

14. Dr. Zuehlsdorff felt Claimant had an episodic neurological disorder component of his occipital headaches, which also included some of his concussive symptoms. He also felt that Claimant might have had some sleep alteration from this injury. However, he saw only four dates in the record prior to the date of injury noting headaches, the most recent from April 12, 2014. He also opined that there was no cervical spine injury to warrant a spinal rating for impairment. He opined Claimant's headaches arose from cervical spine pathology, which he felt was the actual cause of Claimant's current symptoms.

15. When questioned specifically about records [some of which Dr. Zuehlsdorff had received, some of which he apparently did not] reflecting headache symptoms predating the work injury, Dr. Zuehlsdorff elaborated:

In review of the record, there are four dates in the record prior to the date of injury noting headaches, but there's very little in each of those records reflecting that. And the most recent notation of anything in a headache prior to this injury was 4/12/14, which was three-and-a-half years before this date of injury. And there's nothing in that time span.

And.....there's always a possibility we don't have all records, but, in the absence of that data to support that, if somebody is having an ongoing, chronic debilitating headache syndrome, I would think the records would be much more replete with evidence of that and not have a three-and-a-half-year gap before this injury before he starts having headaches again.

So, in my opinion, the pre-existing headache complex is not the current complex. It is not the cause of the current complex. (Hearing transcript, pp. 135-136) (emphasis added).

16. Dr. Zuehlsdorff also testified as to his normal procedure for preparing for a Division Independent Medical exam and the amount of time he spent with Claimant. He also testified that based upon the description of the industrial injury, he would say that he had at least a low moderate type of injury. 'If not a more middle moderate'. He also testified that it is not uncommon in the occupational medicine field to focus on the orthopedic injuries more intensely than the subtleties of a head injury. He went on to describe the symptoms one might experience with a mild head injury and they included visual difficulties, blurry vision, double vision, trouble focusing, memory loss and difficulty analyzing information and tinnitus. He used the example of the standard bell curve and explained that head injuries can often fall outside the outlier of the standard bell curve. He stated that it is unfair and unwise to always believe that mild head injury symptoms will resolve quickly. He testified that just because someone may have had head injury symptoms before such as headaches, that does not rule out a secondary and more serious injury. His diagnosis, reiterated at hearing, was: "number one, right sided headaches, occipital concussive injury secondary to contusive mechanism of table falling onto the right side of the head and right sided the thoracic area."

Prior Medical Records

17. Medical records show Claimant has a reported history of headache complaints and sleep issues prior to the date of injury:

- 5/1/04 – Claimant complained of restless sleep, loud snoring...a score of 17/24 indicating severe hypersomnolence per patient report,...and morning headaches. (Ex. D, p. 34). A sleep study showed a mild component of apnea. Recommendations for a sleep latency test to assess for narcolepsy and/or evaluation by a sleep medicine physician were made. *Id*
- 4/27/12 – Claimant reported “pain in neck and pain in headache. He gets headaches with it occasionally.” He was referred for a cervical spine MRI. (Ex. B, p. 12)
- 5/6/12 – Claimant reported waking up with “severe headache” and had limited balance, right after a fall which injured his shoulder. (Ex. A, p. 1) There is nothing indicating any follow-up treatment for these symptoms.
- 9/25/12 – Claimant continues treatment for his shoulder injury from the fall. Claimant reported frequent headaches. “[F]inds positioning his head and neck at night when he is sleeping clearly aggravates his neck and causes headaches.” It was noted the cervical MRI showed moderate stenosis at C4-5 and C5-6. (Ex. B, p. 11). No follow-up treatment was noted for his headaches.
- 10/18/12 – Claimant attended a DIME for a prior left shoulder injury from September 15, 2011. Claimant reported he wakes up with a headache when he lays on his back and has pressure on his neck. (Ex. C, p. 15). He reported the headaches are “very severe, has caused vomiting, and he cannot focus his eyes during the headache.” Headache episodes have lasted for a day and a half.” *Id*. The DIME’s diagnosis of Claimant included “chronic neck pain” and “recurrent severe headaches, migraine-like episodes”. *Id*. at 21. The DIME concluded, however, that any headaches were *not related* to the shoulder injury.
- 10/16/13 – Claimant noted a history of headaches on an intake form. (Ex. E, p. 37)
- 4/2/14 – Claimant noted symptoms including “headaches” and “loss of sleep”. (Ex. G, p. 114). No follow-up treatment for headaches was indicated.
- 7/11/14 – Claimant again notes a history of headaches on an intake form. (Ex. E, p. 36) No follow-up treatment for headaches was indicated.
- 1/8/15 – Claimant notes a history of headaches, anxiety and depression. (Ex. F, p. 39). No follow-up treatment was mentioned for headaches.
- 2/16/15 – Review of Claimant’s symptoms notes “headaches, sleep loss, anxiety, tinnitus”. (Ex. A, pp. 2, 4). No headache follow-up.

- 3/31/15 – Claimant notes headaches and neck pain symptoms. (Ex. D, p. 33). No headache follow-up treatment.
- 9/4/15 – Claimant notes a history of headaches, anxiety and depression. (Exhibit F, p. 38). No headache follow-up treatment noted.

Objective Testing

18. After the DIME, Dr. Olson referred Claimant for a brain MRI, neuropsychological evaluation and prescribed Elavil as recommended by the DIME. The brain MRI performed on June 27, 2019, showed only degenerative changes. Findings were “no evidence of acute intracranial hemorrhage mass effect or acute ischemia. Mild diffuse parenchymal atrophy of the cerebrum and cerebellum. Several focal areas of increased T2 signal in the periventricular and subcortical white matter both cerebral hemispheres likely chronic microvascular ischemia.” (Ex. G, p. 115).

19. The neuropsychological evaluation performed was performed by Dr. Lisa Townsend upon referral from Dr. Olson over dates from July 2019 and August 2019. Dr. Townsend notes that Claimant’s self-reported concussion symptoms are “elevated” and “cannot be explained.” (Ex. K, p. 162). She opined that one explanation could “be associated with early neurologic symptoms unassociated with concussion.” *Id.* She opined that Claimant’s pattern of test scores “most likely associated with non-concussion etiologies and mild anxiety/sleep.” *Id.*

Dr. Rachel Basse’s IME

20. At hearing, Dr. Rachel Basse, was accepted as an expert in physical medicine and rehabilitation and chronic pain medicine, Level II Accredited. She performed an Independent Medical Examination (IME) of Claimant in August 2019. As part of her IME, Dr. Basse took a history from Claimant, reviewed medical records, and performed a physical examination of Claimant.

21. Dr. Basse opined that Claimant does not have post-concussive syndrome related to the October 26, 2017 incident. She explained that while Claimant had some acute concussion symptoms immediately after the incident, like feeling dazed, had a headache, had some unsteadiness, he did not have any retrograde or anterograde amnesia, had no loss of consciousness, was able to give a clear and concise history on the date of injury, able to answer questions quickly and sharply, which indicates that any concussive event that occurred was mild.

22. She explained this is supported by the fact Claimant was able to continue his full-time, regular duty work without the need for brain rest or because his symptoms were precluding his ability to work. Dr. Basse explained that the natural course of a mild concussive event is complete recovery over a course of days to months. She explained that even a moderate concussion usually only took three to four months to recover.

23. Dr. Basse testified that there are other potential causes explaining his current symptoms. She explained that the CT scan from October 26, 2017 noted small ischemic changes, which she explained were changes in the brain due to less blood flow. Also, Claimant's sleep impairments were important in relation to cognitive issues, of which medical records showed was an issue prior to the date of injury. In her IME report, Dr. Basse noted that Claimant reported he has had insomnia since 2011. (Ex. L, p. 185).

24. Dr. Basse opined there are other explanations for ringing in the ears besides a concussion. Dr. Basse's opinion is supported by the fact that Claimant previously reported [after a 2012 shoulder injury] ringing in his ears prior to the date of injury in this matter. (See Ex. A, pp. 2, 4).

25. She also explained that there are other explanations for Claimant's current headaches other than from a concussion, including neck pain, cervical spine issues, like nerves or facet joints, arthritis, age, but that they are not likely due to concussion from the October 26, 2017 incident, based on his initial presentation and the normal course of recovery expected for this type of concussion.

26. Dr. Basse agreed with the DIME that Claimant's headaches were cervicogenic, but opined they were not the result of the October 26, 2017 incident. *Id* at 188. She testified that Claimant had previously reported headaches with neck pain since 2012, and headaches associated with sleep loss in 2014. Dr. Basse opined that early on, Claimant's headaches may have been related to his concussion from the October 26, 2017 incident, but his current headaches are not.

27. Dr. Basse stated that the neuropsychological evaluation objectively supports her opinion that Claimant's cognitive issues were not caused from a concussion, as the neuropsychologist opined Claimant's "pattern of test scores most likely associated with non-concussion etiologies and mild anxiety/sleep."

28. Dr. Basse also explained the brain MRI from June 27, 2019 showed mild diffuse parenchymal atrophy of the cerebrum and the cerebellum and chronic ischemia. She explained the cerebrum is the matter in the brain and the cerebellum is the smaller part in the back that controls motor and balance. She explained the MRI showed mild but diffuse atrophy or decreased in size atrophy of these areas throughout. She further opined it continued to show chronic microvascular ischemia, or decreased blood flow to the area and as a result become defunct.

29. Dr. Basse explained that these results were significant, as they show there is something else going on, and that there is a non-concussive, non-traumatic explanation for Claimant's current cognitive symptoms.

30. Dr. Basse opined that Dr. Zuehlsdorff's diagnosis of post-concussive syndrome as a result of the October 26, 2017 work injury was not supported by the medical evidence. She explained there was no documentation in the medical records to support that Claimant had a concussive event to the extent that it would be expected to have lasted this long, and to this degree. She explained Claimant's initial symptoms were consistent with a mild concussive event, which is supported by: 1) subsequent

course of full-time regular duty work, 2) the lack of significant complaints early on in the medical records, and 3) the objective diagnostic studies, including the MRI and the neuropsychological study, which results are not consistent with a concussion.

31. Dr. Basse opined Claimant does not have a post-concussive syndrome as a result of the October 26, 2017 event. Therefore, a 10% whole person permanent impairment rating for episodic neurological disorders is not proper in this case. She also opined that, based on her examination, Claimant's thoracic impairment rating would be 5% whole person, as his range of motion was slightly improved from Dr. Zuehlsdorff's measurements. (Ex. L, pp. 188-189).

32. Dr. Basse opined that Claimant does not require any ongoing maintenance care for his work-related injuries from October 26, 2017.

Maintenance Care

33. Claimant testified that Dr. Olson continues to prescribe ibuprofen and Flexeril [cyclobenzaprine] for this injury. Claimant mentioned no other medications or treatment modalities recommended by Dr. Olson for maintenance care in this claim. However, Claimant also testified that these are the same prescriptions, along with tramadol, he was receiving under his prior 2011 claim which he testified gave him headaches and caused dizziness.

34. The ALJ takes administrative notice of the fact Respondent has admitted to maintenance care for the 2011 work injury.

35. Claimant further testified that none of the other treatment he received under the present claim eliminated his pain - massage therapy "felt good but never really eliminated the pain" ; physical therapy "just hurt more"; acupuncture provided only temporary relief ; chiropractic therapy "just made matters worse for me"

36. The DIME physician did not recommend any maintenance care for this injury, except for treatment for claimant's post-concussive syndrome. He did not recommend any maintenance care directed to Claimant's thoracic back. (Ex. J, pp. 152-153).

37. Several of the medical maintenance treatment modalities recommended by the DIME report were adopted by the ATP, to include the neuropsychological exam and the brain MRI. As noted by Dr. Zuehlsdorff, the results therefrom did not change his DIME opinion on Impairment or MMI-*nor would other diagnostics*. Due to the passage of time, Dr. Zuehlsdorff felt that the effective window for certain treatments or diagnostic may have already opened and closed. There is secondhand information that the Elavil was discontinued by Claimant, and that Claimant found other modalities ineffective. Cognitive rehabilitation was recommended, but nothing in the record indicates if it was followed through.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S.

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

C. Assessing weight, credibility and sufficiency of evidence in a worker's compensation proceeding is the exclusive domain of the ALJ. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). In this case, the ALJ finds Claimant to be sincere, forthright, and credible at every stage of the process. He was candid with all medical practitioners, including the independent examiners. While unable to precisely articulate the difference between his prior headache symptoms, and those since the injury, he credibly has characterized them as qualitatively different.

D. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ as well. *Cordova v. Industrial Claim Appeals Office*, 55, P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968). In this instance, the ALJ finds that there are [as is commonly the case] sincere differences in medical opinion - often driven by sincere differences in medical

philosophy - which do not necessarily reflect on one's *credibility*. Rather, the ALJ must determine who is more *persuasive* in their assessments, remaining mindful of the burden of proof.

Overcoming a DIME Opinion, Generally

E. The finding of a Division Independent Medical Examiner (DIME) may be overcome only by clear and convincing evidence. (CRS 8-42-107(8)(c). "Clear and convincing" evidence is stronger than a preponderance, is unmistakable, and is free from serious or substantial doubt. *Martinez v. Triangle Sheet Metal, Inc.* (W.C. 4-595-741, ICAO, October 8, 2008), *citing Dilco v. Koltnow*, 613 P. 2d 318 (1980). A mere difference of medical opinions is insufficient. *Medina-Weber v. Denver Public Schools* (W.C. 4-782-625. ICAO May 24, 2010). The question whether a party has overcome the DIME by clear and convincing evidence is one of fact for the ALJ's determination. *Metro Moving and Storage Co. V. Gussert*, 914 P.2d 411 (Colo. App. 1995).

F. The decisions of a DIME physician are only to be given presumptive effect when provided by the statute. Maximum Medial Improvement is defined at 8-40-201(11.5), C.R.S. as: "a point in time when any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." When a course of treatment has a reasonable prospect of success and a claimant willingly submits to such treatment, a finding of MMI is premature. *See, Reynolds v. ICAO*, 794 P.2d 1080 (Colo. App.1990). The definition of MMI found in the above section contains two components or requirements for a finding of MMI; first, that the condition resulting from the injury be stable and secondly, that no further treatment is reasonably expected to improve the condition. The use of the conjunctive "and" in the definition of MMI connotes that both stability of the condition and the absence of further treatment reasonably expected to improve the condition must be present in order for MMI to exist. However, in this case, MMI is not at issue.

G. In resolving the question of whether the DIME physician's opinions have been overcome, the ALJ may consider a variety of factors including whether the DIME physician properly applied the AMA Guides and other rating protocols. *See Metro Moving and Storage Co. v Gussert*, 914 P.2d 411 (Colo. App. 1995); *Wackenhut Corp. v. Indus. Claim Appeals Office*, 17 P.3d 2002 (Colo. App. 2000); *Aldabbas v. Ultramar Diamond Shamrock*, W.C. No. 4-574-397 (ICAO August 18, 2004). The ALJ should also consider all of the DIME physician's written and oral testimony. *Lambert and Sons, Inc. v. Industrial Claim Appeals Office*, 984 P.2d 656, 659 (Colo. App. 1998).

Overcoming the DIME Impairment Rating for Episodic Neurological Disorders

H. The issue here is fairly narrow. Dr. Basse freely admitted she had a differing medical opinion than Dr. Zuehlsdorff, and that having different medical opinions did not render one opinion right and the other wrong. Her primary criticism of the DIME is that he did not have complete information when he rendered his opinion. Such a

critique might have carried greater weight had the DIME physician not testified at hearing – but he did. While both parties bear some responsibility for this lack of pertinent information [and which has been addressed by the ALJ at the beginning of this Order], the ALJ is satisfied that the DIME has now had time to digest the pertinent records. He has articulated that his DIME opinion has not changed - nor would it, even if his other medical maintenance recommendations were followed. Dr. Zuehlsdorff was simply not impressed by the neuropsych evaluation results [despite having recommended it]. *But he did not fail to consider them-despite both parties' failure to inform him via a Samms conference.* When confronted with a handful of additional records (none of which were apparently serious enough to warrant follow-up treatment by the physicians involved) wherein Claimant reported headaches, he indicated his analysis did not change. He felt, and still does, that Claimant's current complaints stem from this work accident, and not from periodic complaints of headaches or sleep issues occasionally occurring since a 2011 injury. Is it possible, perhaps even equally possible, that Dr. Basse is correct? Yes it is. But Respondents have a higher burden than that.

I. The DIME report itself has considerable detail. Much time was spent analyzing the medical history what was provided through proper channels. His physical examination appears to have been thorough. Lest he be accused of bias, his spinal Impairment Rating actually went down from that posited by the ATP. He made recommendations for follow-up treatment, some of which were adopted by the ATP. In the final analysis, Respondents disagreed with the Impairment Rating by the ATP. They then requested a DIME, with the expectation that the results of said exam would be presumptively valid, and only to be overcome by clear and convincing evidence. This is what occurred. In the end, the sincerely differing opinions of Dr. Zuehlsdorff, and those of Drs. Olson and Basse are exactly that - differing opinions. The ALJ has not been persuaded that the DIME opinion [as expressed in writing, and by phone testimony] is highly probably incorrect. To the contrary, substantial evidence supports the DIME's opinion.

Medical Maintenance Benefits

J. The issue here is also a narrow one. No medical maintenance is being requested for Claimant's spinal injury- just his cognitive issues. The primary diagnostics requested by Dr. Zuehlsdorff (brain MRI and neuropsych eval) were completed, and changed nothing. Dr. Zuehlsdorff himself felt that the window for certain modalities had perhaps already closed. It is unclear what those modalities were. There is conflicting evidence of what treatment might have been rejected, or deemed undesirable by Claimant. Cognitive rehabilitation was recommended, but that was almost a year ago from the date of this Order.

K. Because of the great uncertainty of what ongoing treatment might be effective at this juncture, the ALJ will refrain from specifying any modalities. Those would best be determined by his ATP, who, despite the DIME result, has Claimant's best interests in mind. For that reason, the ALJ will order only a general award of medical maintenance benefits, the specifics of which are to be determined by the ATP.

ORDER

It is therefore Ordered that:

1. Respondents have not overcome the DIME opinion of Dr. Zuehlsdorff.
2. Respondents shall pay for medical maintenance benefits, as determined by the ATP.
3. Respondents shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.
4. All matters not determined herein are reserved for future determination.

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

DATED: January 30, 2020

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

- I. Whether Dr. Yamamoto is an authorized provider based on Dr. Anderson-Oeser's referral.
- II. Whether Claimant has made a "proper showing" for a change of physician to Dr. Yamamoto pursuant to §8-43-404(5)(a)(VI)(A), C.R.S.

PRELIMINARY ISSUES

Objection to Respondent's Exhibit A:

At hearing, Claimant objected to the admission of Respondent's Exhibit A, a voicemail message from Diana O[Redacted], the referral coordinator at Dr. Anderson-Oeser's office, to Marleen Kordik, Respondent's counsel's paralegal, on the basis that it was an impermissible ex-parte communication with a treating physician contrary to *Samms v. District Court, Fourth Judicial Dist. of State of Colo.*, 908 P.2d 520 (1995).

The voicemail message is primarily a statement by Ms. O[Redacted] that Dr. Anderson-Oeser cannot accept Claimant's case and become a treating physician.

Samms allows a defense attorney to conduct informal interviews of a treating physician in the absence of a plaintiff or plaintiff's counsel as part of discovery when plaintiff is given notice of the proposed interview. *Id.* at 526. The holding in *Samms* does not apply to the voicemail message from Ms. O[Redacted] for several reasons. First, on August 2, 2019, when Ms. O[Redacted] left the voicemail message for Ms. Kordik, Dr. Anderson-Oeser was not a treating physician. The parties' Stipulation provides that Dr. McCranie shall remain the treating physician until the initial visit with Dr. Anderson-Oeser. (*Exhibit D*) The initial visit with Dr. Anderson-Oeser was not set to occur until August 14, 2019. (*Exhibit 7*) Second, the voicemail message from Ms. O[Redacted] was not an informal interview of Dr. Anderson-Oeser by defense counsel. Third, the voicemail message from Ms. O[Redacted] was not left for Ms. Kordik as part of discovery. The voicemail message was nothing more than an administrative function, via a statement, that Dr. Anderson-Oeser could not accept Claimant's case and therefore there would be no appointment on August 14, 2019.

Claimant also objected by asserting the voicemail was hearsay. Colorado Rule of Evidence 801 applies "only to statements of fact which could be considered true or false," and which derive evidentiary value

because of their character. See *People v. Phillips*, 315 P.3d 136, 160 (Colo. App. 2012). Moreover:

[i]mperative declarations, such as orders or instructions, which by their nature can be neither true nor false, cannot be offered for their truth.... Since there is no need to cross-examine the declarant of an imperative statement other than to determine whether the statement was in fact made, these utterances ordinarily fall outside the purview of the hearsay rule.

People v. Phillips at 160-161.

In this case, the purpose of the voicemail was to establish that the statement was made and that Claimant's counsel had notice on August 5, 2019, that someone from Dr. Anderson-Oeser's office called and stated Dr. Anderson-Oeser cannot accept Claimant's case, and despite having that notice, Claimant still showed up at Dr. Anderson-Oeser's office 9 days later. Therefore, the ALJ finds that Ms. O[Redacted]'s voicemail was a declaration or command and not covered by the hearsay rule.

FINDINGS OF FACT

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

1. Claimant sustained an admitted work related injury on June 22, 2016, when he was struck by a pickup truck while flagging for a road construction project on Highway 119. (*Exhibit B and C*)

Referral to Dr. Yamamoto

2. Dr. Kathy McCranie is the authorized provider for this claim.
3. On June 27, 2019, the parties agreed to a change of physician from Dr. McCranie to Dr. Anderson-Oeser. (*Exhibit D*) The parties' Stipulation utilizes the language set forth in §8-43-404(5)(a)(VI)(B), C.R.S. that Dr. McCranie shall remain the designated provider until Claimant's initial visit with Dr. Anderson-Oeser. Dr. Anderson-Oeser did not sign the Stipulation. (*Exhibit D*)
4. Claimant's initial visit to obtain medical treatment and establish a doctor-patient relationship with Dr. Anderson-Oeser was scheduled for August 14, 2019. (*Exhibit 7*)
5. Dr. Anderson-Oeser provided testimony via her deposition. Dr. Anderson-Oeser was asked whether she previously agreed to take over Claimant's care. In response to that question, she responded: "Initially when I received a few notes and I said, okay, I guess I'll see Mr. Clark." (Anderson-Oeser Depo. p. 4-5) Therefore, Dr. Anderson-Oeser did not explicitly agree to take over Claimant's case, but she did

agree to see Claimant, and an appointment was scheduled for her to see Claimant on August 14, 2019. *Id.*

6. Dr. Anderson-Oeser testified that after she agreed to see Claimant, “a huge box of [medical records] arrived in my office unexpectedly.” Dr. Anderson-Oeser stated that based on the volume of records that were sent to her regarding Claimant, there was no way she could take over Claimant’s care because she had just switched over to a new Electronic Medical Record (EMR) system, did not have a transcriptionist, and had to learn a new dictation system. Therefore, she told her staff to contact whomever sent Claimant to her and let them know that she could not take the case. (*Anderson-Oeser Depo. p. 5*)
7. On August 2, 2019, Diana O[Redacted] from Dr. Anderson-Oeser’s office called and left a voicemail message for Respondent’s counsel’s paralegal, Marleen Kordik, cancelling the August 14, 2019, appointment by stating that Dr. Anderson-Oeser was unable to accept and take over Claimant’s case. Ms. O[Redacted] concluded the message by saying that they could either send the medical records back or destroy them. (*Exhibit A*)
8. That voicemail message was forwarded to Claimant’s counsel on August 5, 2019 and again on August 12, 2019. (*Exhibit E*)
9. Despite Claimant’s counsel being notified on August 5, 2019, and August 12, 2019, that Dr. Anderson-Oeser could not take over Claimant’s treatment, Claimant showed up at Dr. Anderson-Oeser’s office on August 14, 2019.
10. Claimant testified that he was told by a staff member at Dr. Anderson-Oeser’s office that Dr. Anderson-Oeser could not take over Claimant’s claim. When asked on direct examination if he discussed options with Curtis Stepan, an owner of Ascent Medical Consultants where Dr. Anderson-Oeser is employed, regarding seeing Dr. Anderson-Oeser at a later date, Claimant testified that he was under the impression that Dr. Anderson-Oeser was not taking over his case so he did not have the option to see her at a later date.
11. Dr. Anderson-Oeser testified that she did not perform an evaluation of Claimant on August 14, 2019. (*Anderson-Oeser Depo. p. 6*) She also testified that she never met him or even saw him on that date. (*Anderson-Oeser Depo. p. 6*) And, there is no indication she reviewed the “huge box of medical records” to assess Claimant’s medical needs, if any, as a new treating physician. Therefore, there was no “visit,” i.e., medical appointment, with Claimant and Dr. Anderson-Oeser.
12. Moreover, Dr. Anderson-Oeser did not undertake any action to medically treat Claimant. Thus, Dr. Anderson-Oeser never became a treating physician or an authorized treating physician. As a result, any action she took was not in the normal progression of providing medical treatment or authorized medical treatment.
13. However, after a phone conference between Claimant, Claimant’s counsel, and Curtis Stepan, Claimant left Dr. Anderson-Oeser’s office that day with a referral to Dr. Yamamoto. (*Stepan Depo.*) Dr. Anderson-Oeser testified that she was under the mistaken belief that Dr. Yamamoto was Claimant’s treating physician so she referred Claimant back to Dr. Yamamoto. (*Anderson-Oeser Depo. pp. 5-7*) Thus, Dr.

Anderson-Oeser was not attempting to treat Claimant, by altering his treatment or the management of his treatment, but was merely attempting to keep the status quo when she wrote a referral for Claimant to go back to Dr. Yamamoto.

14. Due to Dr. Anderson-Oesser's refusal to treat Claimant, and her mistaken belief about Dr. Yamamoto's status, her referral was made in error and not in the normal progression of providing medical treatment. Moreover, the referral was not made and based on her exercising her independent medical judgment because she had not medically evaluated Claimant, or his case, which would be a prerequisite to making a referral to another medical provider in the normal progression of medical treatment. In other words, a physician does not use their independent medical judgment in making a referral, when the referral is not based on the underlying facts of the case.
15. The ALJ finds that Dr. Anderson-Oeser never became a treating physician; therefore, the referral was not made in the normal progression of treatment.
16. The ALJ also finds that Dr. Anderson-Oeser never became an authorized treating physician; therefore, the referral was not made in the normal progression of authorized treatment.
17. The ALJ also finds that the referral was not based on Dr. Anderson-Oeser's independent medical judgment; therefore, the referral is not a valid referral.
18. Claimant argues that Dr. Anderson-Oeser failed to cancel the August 14, 2019 appointment in accordance with §8-43-404(5)(a)(IV)(E), C.R.S. Claimant's argument is misplaced because §8-43-404(5)(a)(IV)(E), C.R.S. applies to a one time change of physician made within ninety days of the date of injury pursuant to §8-43-404(5)(a)(III), C.R.S. There is no similar statutory provision for a change of physician made under §8-43-404(5)(a)(VI)(A), C.R.S.
19. The ALJ finds that because Dr. Anderson-Oeser never became a treating physician or an authorized treating physician, and because her referral was not based on her independent medical judgment, and because her referral was not made within the normal progression of providing Claimant medical treatment, Dr. Yamamoto is not an authorized treating physician pursuant to her referral.

Dr. Yamamoto's Prior Role was Limited to Clearing Claimant for Surgery

20. Claimant was previously sent to Dr. Yamamoto for the limited purpose of clearing Claimant for surgery under this workers' compensation claim on two occasions. The limited purpose visits occurred on January 18, 2018, and May 22, 2019. (*Exhibit 5 and 6*)
21. The examination notes from January 18, 2018, indicate Claimant saw Dr. Yamamoto for a "pre-op" exam, since Dr. McCranie did not perform those types of examinations. The note further indicates Claimant was seen by Gina Hutchins, a Nurse Practitioner, who then consulted with Dr. Yamamoto. The report indicates Claimant was cleared for surgery on February 6, 2018. The WC164 form from that visit also indicates Claimant was cleared for surgery on February 6, 2018, and that no return appointment date was set, since Dr. Yamamoto's role was limited in scope to merely clearing Claimant for surgery. On May 22, 2019, Claimant returned to Dr.

Yamamoto for another limited evaluation to clear Claimant for surgery. Although just the WC164 form was submitted into evidence, the form also indicates there was no return appointment date set, since “Claimant [was] followed by Dr. McCranie” (See *Exhibit 5 and 6*) This is consistent with Dr. Yamamoto’s role being limited to just providing a pre-op examination.

22. There is a lack of credible and persuasive evidence in the record that Dr. Yamamoto was an authorized treating physician to treat Claimant for his work related injuries. While he did see Claimant twice previously to medically evaluate and clear Claimant for surgery, there is no referral in the record from an authorized physician for Dr. Yamamoto to become an authorized treating physician to treat Claimant for his work related injuries. The only information contained in the record is Dr. Yamamoto’s reports that indicate he saw Claimant for the limited purpose of medically clearing Claimant for surgery. Therefore, the ALJ finds that Dr. Yamamoto is not authorized to treat Claimant for his work related injuries, except for the limited purpose of providing the pre-operative evaluations that have already been provided.

Change of Physician

23. Claimant was given a list of physicians pursuant to §8-43-404(5). (*Exhibit J*) Claimant initially refused treatment (*Exhibit J, bate stamp 138*) but ultimately obtained treatment at Concentra in Boulder with Dr. Meza on June 23, 2016. (*Exhibit F*)
24. On February 9, 2017, Dr. Meza referred Claimant to Dr. Tentori, another Concentra physician, stating that because of Claimant’s ongoing symptoms and care, he would best be served by a delayed recovery specialist. (*Exhibit F, bate stamp 16-20*) At that time, Claimant was also treating with Dr. Tobey, Dr. Castro, Dr. Hatzidakis, and Mark Babcock. With regard to the change of physician from Dr. Meza to Dr. Tentori, Mark Babcock, Claimant’s treating therapist, noted that this was an “understandable” referral given the protracted nature of Claimant’s case. Claimant expressed concern with having to “start over” with a new physician. (*Exhibit H, bate stamp 102*)
25. On May 16, 2017, after reviewing medical records from Dr. Kawasaki, Dr. Richards, Dr. Tobey, and Dr. Castro, Dr. Tentori referred Claimant to Dr. McCranie for pain management. (*Exhibit F, bate stamp 21-27*)
26. Claimant began seeing Dr. McCranie for pain management on August 18, 2017. (*Exhibit G, bate stamp 37-42*) In order to familiarize herself with Claimant’s extensive treatment history prior to her psychiatric consult, Dr. McCranie reviewed records from Dr. Meza, Dr. Richards, Dr. Tobey, Dr. Kawasaki, Dr. Castro, Mark Babcock, and Dr. Tentori, among others. (*Exhibit G, bate stamp 31-36*)
27. On December 21, 2017, Dr. Tentori noted that he was leaving Concentra. He further noted that given the “significant complexity of this claim”, he was referring ongoing primary care to Claimant’s involved psychiatrist, Dr. McCranie. (*Exhibit F, bate stamp 28-30*) The following month, on January 5, 2018, Claimant told Dr. Robinson, Claimant’s treating psychologist, that he was hoping to stay with Dr. McCranie on the medical side and for medications. “I don’t want any new doctors. It takes a long

time for them to get to know me, and I have to spell everything out all over again. I'm doing well...." (*Exhibit I, bates stamp 106*)

28. On average, Claimant sees Dr. McCranie once per month. (*Exhibit G*) Throughout her treatment of Claimant, Dr. McCranie has managed Claimant's medications, has made referrals and/or recommended follow-ups with Dr. Hatzidakis, Dr. Tobey, Dr. Gutterman, Dr. Hammerberg, Dr. Richards, Dr. Chan, and Dr. Robinson. She has also made referrals for MRIs, physical therapy, Botox, neurologic evaluation, injections, and has verbally consulted with Claimant's other treating physicians regarding his care and their recommendations. (*Exhibit G*)
29. Claimant testified at hearing that he has several authorized treating physicians and that none of those physicians has refused to treat him.
30. Claimant testified that he does not think Dr. McCranie cares about him, that she does not treat all of his injuries, and that she does not have his medical issues at hand. However, Claimant's testimony is contrary to prior statements he made to other treating providers. For example, on September 24, 2018, Claimant told Dr. Robinson that Dr. McCranie had referred him for Botox and to a neurosurgeon. "It is a sure-fire fact that she cares about me". (*Exhibit I, bates stamp 109*) Claimant also reported to Dr. Robinson on August 24, 2018 that Dr. McCranie was "very responsive" to his complaints about headaches and that he thinks "she really cares about my comfort". (*Exhibit I, bates stamp 107*) On January 11, 2019, Claimant reported to Dr. Robinson that Dr. McCranie "has been really helpful in getting Dr. Hammerberg to see me" and on January 18, 2019, Claimant stated that "Dr. McCranie has been really helpful, always trying one more new thing to help me." (*Exhibit I, bates stamp 116-117*) As recent as May 3, 2019, Claimant reported to Dr. Robinson that Dr. McCranie "has been nice" and that if Dr. Hatzidakis recommends injections, she would approve them. (*Exhibit I, bates stamp 114*)
31. Contrary to Claimant's positive statements about Dr. McCranie set forth above, Claimant testified that Dr. McCranie abruptly took him off his pain medications and that he complained about it to Dr. Tentori. However, Claimant failed to mention that he was sent to Dr. McCranie so she could manage his pain medications because Dr. Tobey, who was previously prescribing his pain medications, did not want to continue prescribing and managing Claimant's pain medications. (*Exhibit F, bates stamp 23*) Moreover, a review of Dr. McCranie's medical reports indicates she did not abruptly stop his pain medication. Her reports demonstrate the following:
 - On June 12, 2017, Dr. McCranie began reviewing Claimant's medical records in order to take over his care and determine possible treatment recommendations.
 - On August, 18, 2017, Dr. McCranie formally took over Claimant's pain management and medication management when she evaluated Claimant. At the first appointment, Claimant rated his overall pain at a 6. After evaluating Claimant, she created a treatment plan. As part of that plan, she required Claimant to sign an opioid agreement. Pursuant to the agreement, Claimant was not to use alcohol or marijuana. Regarding his medications, she required Claimant to taper off his use of his benzodiazepine, valium, by cutting his

remaining pills in half and reducing his use until he ran out. She discussed the rationale with Claimant. She advised him that the combination of opioids and benzodiazepine causes respiratory depression and can lead to overdose and death. She also discussed the eventual goal of tapering his opioid medication. She further told him that the short-acting opioid medication he was taking was not generally recommended for the treatment of headaches as it can worsen headaches by causing rebound headaches. She further discussed the option of a slow taper of oxycodone versus switching to other types of opioid medications. And, for the time being, she recommended Claimant decrease the use of his oxycodone down to 2½ tablets per day over the next two weeks and prescribed Claimant 37 tablets, and then she would consider switching to a different pain reliever such as Nucynta or Burtans in two-weeks. She also increased his gabapentin, continued his amitriptyline, and recommended cyclobenzaprine at bedtime. (She further noted that the PDMP was reviewed and it noted Claimant had gone to the emergency room on August 11, 2017, one week earlier, and was prescribed 15 tablets of oxycodone.) (*Exhibit G, bate stamp 37-42*)

- On September 11, 2017, Claimant returned to Dr. McCranie. After the initial modification of medications, he rated his overall pain as going down, from 6 to 4. At this visit, he said “he threw away any remaining valium and has not used any benzodiazepines.” He also indicated he stopped using alcohol and marijuana. Based on Claimant’s progression, Dr. McCranie told Claimant to continue using oxycodone, 2 tablets per day, and then go down to 1½ tablets per day after his epidural steroid injection later that week. She also had him increase his gabapentin and amitriptyline. She also prescribed a new medication, sumatriptan, for his headaches, and considered adding an anti-inflammatory medication after his epidural steroid injection. (*Exhibit G, bate stamp 43-46*)
- On September 15, 2017, Dr. McCranie also noted that she reviewed the results of his August 18, 2017, drug screen and it was positive for the prescribed medications, as well as alcohol metabolites and cotinine. (*Exhibit G, bate stamp 47*)
- On October 2, 2017, Claimant returned to Dr. McCranie. At that time, he still rated his overall pain level at a 4. Although he was still using 1½ tablets of oxycodone per day, Dr. McCranie recommended tapering down to 1 tablet per day, but yet she added diclofenac sodium and increased his sumatriptan. (*Exhibit G, bate stamp 48-50*)
- On November 3, 2017, Claimant returned to Dr. McCranie. At that visit, she did not modify his medications or taper down his opioid use. She did, however, indicate that further tapering of the opioids would be evaluated at the next visit. (*Exhibit G, bate stamp 52-54*)
- On November 20, 2017, Claimant returned to Dr. McCranie. At this appointment, Dr. McCranie tapered his oxycodone down from 1 tablet per day to ½ tablet per day. (*Exhibit G, bate stamp 55-57*)

- In February of 2018, Claimant underwent shoulder surgery. His surgeon prescribed additional opioids. Approximately 10 weeks after surgery, Dr. McCranie again began tapering Claimant off his opioids.
- On April 20, 2018, Claimant was seen by Dr. McCranie. At this appointment, she recommended that Claimant should stop taking his oxycodone, but continue tapering down his use of the hydrocodone. Claimant was to return for a follow up appointment in one month at which time she anticipated reducing his opioid use. Her plan was to reduce his opioid use down to 1 tablet every day, for two weeks, and then 1 tablet, twice a week, during physical therapy, unless he had completed physical therapy. At the end of the appointment, she also had Claimant undergo another urine drug screen. (*Exhibit G, bates stamp 66-68*)

32. On May 4, 2018, Claimant was evaluated by his psychologist, Dr. Robinson. According to Dr. Robinson's notes, Claimant complained about the following:

- "I'm out of all of my medications for pain and sleep."
- "I feel awful."
- "My equilibrium is off."
- "I had to have my sons over to care of Crow."
- "I'm not eating. Yesterday I had a spare rib."
- "I can't eat breakfast."
- "I tried to eat oatmeal this morning and only had a couple of bites. I sometimes eat a smoothie with two tablespoons of protein powder, and that makes me feel awful."
- "I don't have any energy, and it's probably that I don't eat."

After that appointment, Dr. Robinson's assessment included the following: "He has a low quality of life and is constantly worried. He is reluctant to shop for groceries."

Claimant's Exhibit 14, bates stamp 284.

33. On May 18, 2018, Claimant returned to Dr. McCranie. Dr. McCranie noted that his drug screen was consistent with the prescriptions he was taking, but positive for marijuana. At this time, Dr. McCranie had tapered Claimant's opioid use down to 1 hydrocodone tablet per day. Consistent with the treatment plan outlined in her prior report, she reduced Claimant's hydrocodone down to 1 tablet twice per week for use after physical therapy appointments. She indicated that she would continue the hydrocodone for 1 more month, and then terminate it. But, she also recommended tapering his gabapentin and starting Topamax for his headaches. She also prescribed Claimant Imitrex for his headaches. (*Exhibit G, bates stamp 69-73*)
34. On June 15, 2018, Claimant was evaluated by Dr. McCranie. At that visit, she noted Claimant had completely tapered off his hydrocodone, but that he had started using marijuana 2-3 times a week. At that visit, she also modified some of this other

medications and they discussed return to work issues. (*Exhibit G, bates stamp 74-77*)

35. On September 8, 2018, Dr. McCranie wrote a letter to Respondent's counsel after being asked to review additional medical records and surveillance video of Claimant. After watching the video, Dr. McCranie stated the following:

On April 28, 2018, Claimant was seen at a boatyard. Shortly thereafter, he was seen driving a truck pulling a boat. He was viewed lifting his dog out of the truck while carrying a bag in his right hand. He stood and talked for some time with another individual. He was seen moving his left upper extremity freely below shoulder level while gesturing.

Dr. McCranie also stated that on May 5, 2018, additional surveillance video demonstrated the following:

He was seen walking his dog and smoking early in the morning. Later, he was seen in a speedboat on the water. He was wearing sunglasses, but no hat. Approximately a couple of hours were noted with him in the speed boat with a couple of companions and the boat moving quickly and bouncing along the water. After the boat docked, he was seen bending and walking on the dock. He drove the truck with a trailer, backed it up into the water. He was then viewed pushing the boat onto the trailer with his two companions. While attaching and unloading the boat, he was viewed lifting both arms overhead, squatting, again reaching overhead with his right upper extremity on several occasions. While unloading the boat, he was also seen freely using both arms in a forward extended position and below shoulder level to load items into the back of a truck. During all of these surveillance videos, no pain behaviors were observed.

(*Exhibit G, bates stamp 81-82*)

36. Dr. McCranie's observations were in stark contrast with Claimant's contentions the same day when he saw his psychologist, Dr. Robinson, and gave the impression that he could barely do anything.¹

¹ May 4, 2018, report from Dr. Robinson lists Claimant's complaints as follows:

- "I'm out of all of my medications for pain and sleep."
- "I feel awful."
- "My equilibrium is off."
- "I had to have my sons over to care of Crow."
- "I'm not eating. Yesterday I had a spare rib."
- "I can't eat breakfast."
- "I tried to eat oatmeal this morning and only had a couple of bites. I sometimes eat a smoothie with two tablespoons of protein powder, and that makes me feel awful."
- "I don't have any energy, and it's probably that I don't eat."

37. After reviewing the surveillance video, Dr. McCranie concluded in her September 8, 2018, letter that:

It is my opinion that the patient's abilities, as noted on this video, are greater than that which he reports to his providers. Therefore, future restrictions should be based on objective data such as the patient's surgical intervention and not the patient's subjective complaints. In reviewing these videos, there would be no restrictions in sitting, standing, walking, reaching, pushing, or driving. I would like to confer with Dr. Hatzidakis as to whether there is an objective anatomical reason to limit lifting based on the patient's surgical Intervention. Based on video surveillance, it appears the patient is currently capable of lifting at least 15 to 20 pounds.

(Exhibit G, bates stamp 81-82)

38. However, after reviewing the surveillance video, Dr. McCranie did not abruptly reduce his medications or change the manner in which she was treating Claimant for his work related injuries. For example, at Claimant's next appointment on October 15, 2018, Dr. McCranie increased his Topomax, and recommended a neurological evaluation with Dr. Hammerberg to see if there were any other medications that might help Claimant with his headaches.
39. Moreover, Dr. McCranie has continued treating Claimant in a thorough and diligent manner. There is no indication Dr. McCranie overreacted to the surveillance video in any way. In fact, there is no indication the surveillance video has had a negative impact, or an unwarranted impact, on the treatment being provided to Claimant by Dr. McCranie or the relationship between Dr. McCranie and Claimant.
40. Claimant also testified that he felt like Dr. McCranie was stopping his other doctors from treating him, such as preventing Dr. Tobey from providing Claimant injections. However, a review of Claimant's medical records indicates Dr. Tobey had previously performed cervical facet injections from C2 through C7, essentially injecting every facet level in the cervical spine, and provided epidural steroid injections and occipital nerve blocks, all without benefit. Moreover, based on the medical records, it appears Claimant merely asked about the prior injections provided by Dr. Tobey and he agreed with Dr. McCranie that additional injection treatment for his cervical spine was not warranted. *(Respondent's Exhibit G, bates stamp 98)* Therefore, Claimant's contention that Dr. McCranie prevented Dr. Tobey from providing additional injections is not accurate.
41. Overall, the ALJ does not find Claimant's testimony to be credible, reliable, or persuasive.
42. Claimant filed a Request for Change of Physician form seeking to change from Dr. McCranie to another provider on nine separate occasions. Six of the requests were filed between January 31, 2019 and March 28, 2019, which is almost one per week. Each of the six requests requested a change of physician from Dr. McCranie to Dr. Yamamoto. *(Exhibit 14)* Claimant contends that the mere volume of requests

provides additional evidence to support a proper showing that a change of physician is warranted. However, the ALJ does not find the mere volume of Claimant's requests to be credible or persuasive evidence that supports a change of physician.

43. Claimant has failed to make a "proper showing" to warrant a change of physician pursuant to §8-43-404(5)(a), C.R.S. Claimant testified that he no longer trusts Dr. McCranie and that he wants to treat with Dr. Yamamoto. However, evaluating Claimant's need for reasonable and necessary medical treatment while protecting Respondent's interest in being apprised of the course of treatment for which it may ultimately be liable in this protracted and complex claim suggests that Claimant has and continues to receive reasonable and necessary medical care from his authorized providers. Claimant has failed to produce credible and persuasive evidence that he reasonably developed a mistrust of Mr. McCranie. He has also failed to produce sufficient evidence that Dr. McCranie provided inadequate care or otherwise rendered unreasonable care. Claimant's assertions regarding his dissatisfaction with Dr. McCranie's medical treatment and recommendations are insufficient to constitute a proper showing warranting a change of physician, especially when Claimant's assertions are based on a mischaracterization of the medical record.
44. Claimant has been receiving adequate and appropriate medical treatment from Dr. McCranie for more than 2 years in this complex case. Dr. McCranie has routinely seen Claimant for follow-up appointments and has made appropriate referrals to other physicians, as necessary. Claimant's testimony - which the ALJ does not find to be reliable, credible, or persuasive - that he does not like Dr. McCranie and that Dr. Yamamoto is a pleasant guy is not sufficient to support a change of physician.

CONCLUSIONS OF LAW

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

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a

conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. See *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385, 389 (Colo. App. 2000).

The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 p.3d 558 (Colo. App. 2000). When determining credibility, the ALJ has considered, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

I. Whether Dr. Yamamoto is an authorized provider based on Dr. Anderson-Oeser's referral.

Referral to Yamamoto

A medical provider becomes authorized if another authorized physician refers Claimant for services in the normal progression of authorized medical treatment. *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985); *Bestway Concrete v. Industrial Claim Appeals Office*, 984 P.2d 680 (Colo. App. 1999). Authorized providers include those whom Claimant has initially selected and those to whom an ATP refers Claimant in the normal progression of authorized treatment. *Town of Ignacio v. Industrial Claim Appeals Office*, 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). Whether an ATP has made a referral in the normal progression of authorized treatment is a question of fact for the ALJ. *Suetrack USA v. Industrial Claim Appeals Office*, 902 P.2d 854 (Colo. App. 1995). The critical question is whether the authorized physician who made the referral exercised independent medical judgment regarding the advisability of the referral. The mere fact the claimant requested the referral does not necessarily establish the referral occurred outside the normal progression of authorized treatment. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997).

As found, pursuant to the Stipulation, Dr. McCranie was to remain Claimant's authorized treating physician until Dr. Anderson-Oeser took over Claimant's medical treatment by physically evaluating Claimant at a formal "visit," i.e., medical appointment. Thus, pursuant to the Stipulation, Dr. Anderson-Oeser would not become an authorized treating physician until she actually started treating Claimant. This required her to personally evaluate Claimant in her office and begin treating Claimant by reviewing his medical records, performing a physical examination, and actively applying her medical expertise and judgment to make treatment recommendations, which could include referrals to other physicians. However, Dr. Anderson-Oeser never actively started treating Claimant in any manner. There was no "visit." Therefore, the triggering event to make her a treating physician never occurred. The mere fact that Claimant visited her office and visited with some staff, after Claimant's attorney was told Dr. Anderson-Oeser could not take over his treatment, is insufficient to make Dr. Anderson-Oeser a treating physician.

Claimant argues that Dr. Anderson-Oeser failed to cancel the August 14, 2019, appointment in accordance with §8-43-404(5)(a)(IV)(E), C.R.S. Claimant's argument is misplaced. Section 8-43-404(5)(a)(IV)(E), C.R.S. applies to a one time change of physician made within ninety days of the date of injury pursuant to §8-43-404(5)(a)(III), C.R.S. There is no similar statutory provision for a change of physician made under §8-43-404(5)(a)(VI)(A), C.R.S.

Moreover, Claimant's attorney was notified, via the voicemail from Ms. O[Redacted], that Dr. Anderson-Oeser would not take over Claimant's care. Despite being notified of such, Claimant's attorney still had Claimant go to Dr. Anderson-Oeser's office on August 14, 2019. While Claimant's attorney argued that the voicemail message did not specifically say, "the August 14, 2019, appointment with Dr. Anderson-Oeser had been cancelled," there is no other reasonable conclusion to be drawn from the voicemail message, other than, the August 14, 2019, appointment had been cancelled. And, when Claimant showed up on August 14, 2019, the appointment had been cancelled and Claimant did not have an appointment or "visit" with Dr. Anderson-Oeser, sufficient to make Dr. Anderson-Oeser a treating physician or an authorized treating physician.

Furthermore, the testimony of Dr. Anderson-Oeser combined with the testimony of other members of her office, resulted in the ALJ finding and concluding that the referral to Dr. Yamamoto was not based on the independent medical judgment of Dr. Anderson-Oeser, but was based on the information provided to her by Claimant, via her staff, and Claimant's attorney, via her staff. This is further supported by the fact that Dr. Anderson-Oeser never reviewed his medical records, interviewed Claimant, evaluated Claimant, or took any other action to form the basis of any medically based treatment recommendations. According to Dr. Anderson-Oeser, the referral to Dr. Yamamoto was to keep the status quo, since she erroneously thought Dr. Yamamoto was managing Claimant's care, and merely keeping the status quo in this case is not tantamount to the provision of medical treatment. Therefore, the referral was not the provision of medical treatment based on Dr. Anderson-Oeser's independent medical judgement. Consequently, the referral was not made in the normal progression of Dr. Anderson-Oeser's treatment of Claimant since she was not treating him, via the use of her independent medical judgment.

Consequently, the ALJ finds and concludes Claimant has failed to establish by a preponderance of the evidence that Dr. Anderson-Oeser made a valid referral to Dr. Yamamoto. Therefore, Claimant failed to establish that Dr. Yamamoto is an authorized treating physician who can treat his work related injuries.

Any prior authorization regarding Dr. Yamamoto was limited.

Claimant also failed to establish by a preponderance of the evidence that Dr. Yamamoto is an authorized treating physician based on the two pre-surgical evaluations he provided Claimant.

As found, Claimant was previously sent to Dr. Yamamoto for the limited purpose of clearing Claimant for surgery under this workers' compensation claim on two

occasions. The limited purpose visits occurred on January 18, 2018, and May 22, 2019. Moreover, as found, the examination notes from January 18, 2018, indicate Claimant saw Dr. Yamamoto for a “pre-op” exam, since Dr. McCranie did not perform those types of examinations. The notes further indicate Claimant was seen by Gina Hutchins, a Nurse Practitioner, who then consulted with Dr. Yamamoto. The examination notes indicate Claimant was cleared for surgery on February 6, 2018. The WC164 form from that visit also indicates Claimant was cleared for surgery on February 6, 2018, and that no return appointment date was set, since Dr. Yamamoto’s role was limited in scope to merely clearing Claimant for surgery. As also found, on May 22, 2019, Claimant returned to Dr. Yamamoto for another limited evaluation to clear Claimant for surgery. Although just the WC164 form was submitted into evidence, the form also indicates there was no return appointment date set, since “Claimant [is] followed by Dr. McCranie.” (See *Exhibit 5 and 6*) This is consistent with Dr. Yamamoto’s role being limited to just providing a pre-op examination.

There is a lack of credible and persuasive evidence in the record that Dr. Yamamoto was authorized to treat Claimant for his work related injuries. While he did see Claimant twice previously to obtain medical clearance for surgery, there is no referral in the record from an authorized physician to Dr. Yamamoto for those examinations or for him to become a treating physician. The credible and persuasive evidence in the record establishes that any referral to Dr. Yamamoto was merely a limited referral for a pre-surgical evaluation to medically clear Claimant for surgery. *Gamboa v. ARA Group, Inc.*, W.C. No. 4-016-924 (November 20, 1996); *Clark v. Hudick Excavating, Inc.*, W.C. No. 4-524-162 (November 5, 2004); *Steele v. Charles Berardi & James Berardi*, W.C. No. 4-441-620 (June 15, 2001); *Gail v. U.S. West Service Link, Inc.*, W.C. No. 3-957-994 (June 18, 1991); *Benien v. Color Star Growers of Colorado, Inc.*, W.C. No. 4-226-236 (April 29, 1998). Therefore, the mere fact that Dr. Yamamoto saw Claimant for a very limited purpose does not establish that he was an authorized treating physician to treat Claimant for his work injuries. *Id. at 2*.

Therefore, Claimant has failed to establish by a preponderance of the evidence that the limited evaluations performed by Dr. Yamamoto caused him to become an authorized treating physician, beyond the pre-surgical evaluations that have already been provided.

II. Whether Claimant has made a “proper showing” for a change of physician to Dr. Yamamoto pursuant to §8-43-404(5)(a)(VI)(A), C.R.S.

Change of Physician

A claimant is not entitled to medical treatment by a particular physician. *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714 (Colo. 1994); *Vigil v. City Cab Co.*, W.C. No. 3-985-493 (May 23, 1995). Section 8-43-404(5)(a), C.R.S. allows Claimant to choose a treating physician from a list of providers proffered by Employer. Once Claimant has selected a treating physician, he may not change the physician without the insurer’s permission or “upon the proper showing to the division”. §8-43-404(5)(a), C.R.S.; *In re Tovar*, W.C. No. 4-597-412 (July 24, 2008). Because §8-

43-404 (5)(a), C.R.S. does not define “proper showing” the ALJ has discretionary authority to determine whether the circumstances warrant a change of physician. *Jones v. T.T.C. Illinois, Inc.*, W.C. No. 4-503-150 (May 5, 2006). The ALJ’s decision regarding a change of physician should consider the claimant’s need for reasonable and necessary medical treatment while protecting the respondent’s interest in being apprised of the course of treatment for which it may ultimately be liable. *Yeck v. Industrial Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999). An ALJ is not required to approve a change of physician for a claimant’s personal reasons including “mere dissatisfaction”. *Yeck, supra.*; *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985); *Jones v. T.T.C. Illinois, Inc.*, W.C. No. 4-503-150 (May 5, 2006); *In re Mark*, W.C. No. 4-570-904 (June 19, 2006); *Pohlod v. Colorado Springs School District 11*, W.C. No. 4-621-629 (May 2, 2007). Where an employee has been receiving adequate medical treatment, a Judge is not required to allow a change of physician. See *Greenwalt-Beltmain v. Department of Regulatory Agencies*, W.C. No. 3-896-932 (December 5, 1995); *Zimmerman v. United Parcel Service*, W.C. No. 4-018-264 (August 23, 1995); *Guynn v. Penkhus Motor Co.*, W.C. No. 3-851-012 (June 6, 1989).

Claimant’s request for a change of physician is based primarily upon his characterization of the care being provided by Dr. McCranie. However, based on a thorough review of the record, the ALJ finds and concludes Claimant’s request for a change of physician is based primarily on his mischaracterization of the care being provided by Dr. McCranie.

As found, Dr. McCranie has been managing Claimant’s medical treatment and prescription medications for over 2 years. Moreover, as found above, her care has been comprehensive, thoughtful, and effective in managing Claimant’s medication usage and overall care.

Furthermore, Claimant has numerous treating physicians. There is no need to change physicians to assure proper treatment in light of the fact that he has multiple physicians to attend to him. *Jones v. T.T.C. Illinois, Inc.*, W.C. No. 4-503-150 (May 5, 2006)

Therefore, the ALJ finds and concludes Claimant has failed to establish, by a preponderance of the evidence, that Claimant is entitled to a change of physician. As found, Claimant has failed to make a “proper showing” to warrant a change of physician pursuant to §8-43-404(5)(a), C.R.S. Claimant testified that he no longer trusts Dr. McCranie and that he wants to treat with Dr. Yamamoto. However, evaluating Claimant’s need for reasonable and necessary medical treatment while protecting Respondent’s interest in being apprised of the course of treatment for which it may ultimately be liable in this protracted and complex claim suggests that Claimant has and continues to receive reasonable and necessary medical care from his authorized providers. Moreover, Claimant’s contentions and negative characterization regarding the care being provided by Dr. McCranie are not found to be credible, reliable, or persuasive. Claimant has failed to produce, credible, reliable, or persuasive evidence that he reasonably developed a mistrust of Dr. McCranie. He has also failed to produce sufficient evidence that Dr. McCranie provided inadequate care or otherwise rendered unreasonable care. Consequently, Claimant’s alleged disagreement and alleged

dissatisfaction with Dr. McCranie's medical treatment and recommendations are insufficient to constitute a proper showing warranting a change of physician.

ORDER

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

1. Dr. Yamamoto is not an authorized treating physician to treat Claimant for his work related injuries.²
2. Claimant's request for a change of physician is denied and dismissed.
3. Any issues not resolved in this Order are reserved for future determination.

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

DATED: January 31, 2020.

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

² As found above, any authorization of Dr. Yamamto was limited to the pre-surgical evaluations and not to actively treat Claimant for his work related injuries.

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-111-492-001**

ISSUES

- Did Claimant prove she suffered a compensable injury on June 28, 2019?
- If Claimant proved a compensable injury, did she prove that Dr. Anaya and Dr. Khosla are authorized providers?
- Did Claimant prove Respondent is liable for treatment she received from Parkview Medical Center from June 28 through June 30, 2019, including reimbursement of \$198.94 for a bill Claimant paid from the emergency room physician?
- The parties stipulated to an average weekly wage of \$1,733.
- The parties agreed to reserve temporary disability benefits pending the decision regarding compensability.

FINDINGS OF FACT

1. Claimant works for Employer as the Director of Admissions, a position she has held for 14 years.

2. Claimant's job is very sedentary, requiring long periods of static sitting. Her shift starts at 7:00 AM, and she usually takes her first break at approximately 10:00 AM. Most days, she takes a brief 10-minute walk around the facility to relieve stiffness she develops after sitting in one spot for hours. She may walk inside or outside, depending on the weather. Claimant is a manager, and frequently asks if anyone under her supervision wants to walk with her. This provides an opportunity to discuss various topics, including current work projects and personal matters, which, in turn, fosters camaraderie and improves Claimant's ability to manage her employees.

3. Employer maintains information on its intranet regarding the importance of regular breaks during a workday. This information is readily available to all employees, including Claimant. One article states brief breaks "actually help you stay focused on your task," and many of one's "best ideas" occur during periods of "diffuse mode thinking." Another article advises the "best time" for a break is "mid-morning," and "the only requirement is that you derive pleasure from the task [performed during the break]." One article suggests taking "hourly laps around the office," and another lists "a 20-minute stroll" as one of "16 productivity-boosting activities for your break."

4. On June 28, 2019, Claimant intended to walk her usual route during her 10:00 AM break. A co-worker planned to accompany her but was called away briefly. While waiting for the co-worker, Claimant "warmed up" with some light stretching and "leg swings." She inadvertently caught her left leg on a nearby chair, which caused Claimant

to lose her balance and fall backward. She hit her head on a sink or exposed plumbing under the sink behind her.

5. Claimant was taken by ambulance to the Parkview Medical Center emergency department, where she was diagnosed with a closed head injury and admitted for observation. She was released on Sunday evening, June 30, 2019.

6. Treatment at Parkview Medical Center from June 28 through June 30, 2019 was reasonably necessary emergency treatment for Claimant's injuries.

7. Claimant followed up with her primary care physician, Dr. Lawrence Anaya, the next day, July 1, 2019. A physician at the hospital had suggested she see Dr. Rakesh Khosla, a concussion specialist. Claimant was already familiar with Dr. Khosla, having seen him previously for an unrelated issue. She asked Dr. Anaya about it and he agreed Dr. Khosla would be a good doctor for her injury. Dr. Anaya's office arranged an appointment with Dr. Khosla to take place the following day.

8. Claimant had her initial appointment with Dr. Khosla on July 2, 2019. He diagnosed a concussion, prescribed medication, and took Claimant off work.

9. Maria W[Redacted] is Employer's in-house workers' compensation specialist. She processes newly reported incidents and injuries within DHS, and, with Employer's TPA (Broadspire), handles the claims from inception through claim closure.

10. Employer sent Claimant two automated emails on June 28 with general information regarding the claim process, including a designated provider list. Ms. W[Redacted] emailed Claimant the designated provider list again on July 1. The emails informed Claimant, "if you have sought initial treatment at an Emergency Room, you must follow-up with an Authorized Treating Provider from the attached Designated Provider List within one (1) business day."

11. On July 3, 2019, Ms. W[Redacted] spoke with Claimant by phone regarding the status of her injury and her medical providers. Claimant had not been checking her work email and had not seen the previous messages. Ms. W[Redacted] explained Employer generally requires injured workers to follow up with a designated ATP after completing any emergency treatment for an injury. Claimant said she had already seen her primary care provider, Dr. Anaya, who directed her to a head injury specialist, Dr. Khosla. Ms. W[Redacted] told Claimant she would "need to check with Broadspire" about how Claimant should proceed since she had already seen her personal providers. After the conversation ended, Ms. W[Redacted] resent the documents, including the designated provider list. The email stated, "I will be sure to keep everyone updated on Broadspire's decision regarding compensability. . . . I have included the Workers' Compensation Policy and appropriate ATP list if this claim moves forward."

12. Sometime between July 8 and July 15, 2019, Ms. W[Redacted] learned that Broadspire had denied the claim. She left Claimant a voicemail relaying Broadspire's decision and indicating Claimant should not go to the designated provider because the claim was being denied.

13. Claimant continued treating with Dr. Khosla in July and August 2019 under her health insurance (Kaiser). Dr. Khosla referred Claimant to Centura Rehab for physical therapy. She has seen no provider on Employer's designated ATP list.

14. On August 19, 2019, Claimant paid a \$198.94 bill from the Parkview ER physician by personal check. As noted, the treatment Parkview, including the ER treatment, was reasonably necessary and related to the work accident.

15. Claimant proved she suffered a compensable injury on June 28, 2019 arising out of and in the course and scope of her employment.

16. Claimant proved the bill from the Parkview ER physician was for reasonably necessary emergent treatment for the compensable injury.

17. Claimant proved Dr. Khosla became authorized on July 15, 2019 after the voicemail message from Ms. W[Redacted].

18. Claimant failed to prove Dr. Khosla was authorized before July 15, 2019.

19. Claimant failed to prove Dr. Anaya is authorized.

CONCLUSIONS OF LAW

A. Claimant proved a compensable injury

To prove a compensable injury, a claimant must prove the injury occurred while performing service arising out of and in the course of her employment. Section 8-41-301(1)(b). The terms "arising out of" and "in the course of" are not synonymous. The "course of employment" requirement is satisfied if the injury occurred within the time and place limits of the employment relationship and during an activity that had some connection with the employee's job-related functions." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991). The term "arising out of" is narrower, and requires that an injury "has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered a part of the employee's employment contract." *Horodysyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001) The claimant need not actually be performing work duties at the time of the injury, nor must the activity be a strict employment requirement or confer an express benefit on the employer. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207, 210 (Colo. 1996). Rather, the question is whether the activity is sufficiently "interrelated to the conditions and circumstances under which the employee generally performs the job functions that the activity may reasonably be characterized as an incident of employment." *Id.* at 210. Whether an injury arises out of and in the course of employment are questions of fact for the ALJ. *Dover Elevator Co. v. Industrial Claim Appeals Office*, 961 P.2d 1141, 1143 (Colo. App. 1998).

The Act imposes additional limitations on the compensability of injuries occurring during recreational activities. Section 8-40-201(8) defines "employment" to exclude "the employee's participation in a voluntary recreational activity or program, regardless of whether the employer promoted, sponsored, or supported the recreational activity or

program.” Similarly, § 8-40-301(1) defines the term “employee” as excluding a person “while participating in recreational activity, who at such time is relieved of and is not performing any duties of employment.”

In *White v. Industrial Claim Appeals Office*, 8 P.3d 621 (Colo. App. 2000), the court held that the statutory term “recreational activity” should be given its plain and ordinary meaning, which can be “easily discerned by reference to a standard dictionary.” The *American Heritage College Dictionary* (3d Ed. 1993) defines “recreation” as “refreshment of one’s mind or body through activity that amuses or stimulates; play.” In determining whether an activity is “recreational,” the ALJ should consider the factors enumerated in *Price v. Industrial Claim Appeals Office*, 919 P.2d 707 (Colo. 1996), including whether the activity occurred during working hours, whether the injury occurred on the employer’s premises, whether the employer initiated the activity, whether the employer exerted control over the employee’s participation in the activity, and whether the employer stood to benefit from the employee’s participation in the activity. Whether an activity was “recreational” is a question of fact for determination by the ALJ. *Lopez v. American Lumber Construction*, W.C. No. 4-434-488 (October 29, 2003).

After considering the totality of circumstances, the ALJ concludes that Claimant’s injuries arose out of and within the course of her employment. In reaching this conclusion, the ALJ finds the following factors particularly significant: The accident occurred during the workday while Claimant was “on the clock.” It occurred on Employer’s premises in the area where Claimant generally works, and Claimant had no nonwork-related reason to be there performing the activity. Breaks are a common and expected element of most people’s workday. Indeed, Employer extolls the virtues of breaks as “productivity boosters” and encourages employees to consider brief walks on their breaks.

The walk Claimant intended to take was not a “recreational activity” within the meaning of § 8-40-201(8). Claimant’s walks were primarily intended to combat stiffness caused by long hours of static sitting, and also allowed Claimant to “recharge” and maintain focus on her work. She frequently used the walks to connect with employees under her supervision. The mere fact that Claimant enjoyed the walks does not change the fact they were reasonably ancillary to her employment. That an activity has some tendency to “refresh” the employee or entails some element of enjoyment does not necessarily convert it into a “recreational activity.” The recreational activity exclusion has primarily been applied to activities such as refereeing a volleyball game, lifting weights, playing sports such as hockey, basketball and volleyball, a weekend camping trip, and skiing. Although a walk during the workday could be “recreational” depending on the circumstances, it is a much less natural fit than games, sports, or other activities commonly referred to as recreation. In any event, the ALJ is persuaded Claimant’s planned walk was not “recreation.”

The Colorado courts have long recognized that ministerial activities such as eating, sleeping, resting, washing, toileting, seeking fresh air, getting a drink of water, and keeping warm have been held to be incidental to employment under the “personal comfort” doctrine. E.g., *Ocean Accident & Guaranty Corp. v. Pallaro*, 180 P. 95 (Colo. 1919; *In re Question Submitted by U.S. Court of Appeals*, 759 P.2d 17 (Colo. 1988);

Industrial Commission v. Golden Cycle Corporation, 246 P.2d 92 (Colo. 1952). The doctrine is based on the assumption that “personal comfort” is necessary to maintain an employee’s health, and is indirectly conducive to the employer’s purposes. *Ocean Accident & Guaranty Corp v. Pallaro*, *supra*. The doctrine extends to discretionary activities that have no duty component and provide no specific benefit to the employer. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). The list of activities that have been found incidental to employment under this doctrine is long and varied, including things such as arising from a chair, returning to work after a smoke break, walking to an adjacent building for a cup of coffee, driving across the street to get lunch from a food truck, and vaulting over a railing and garbage can while on a smoke break. *Geist v. Liberty Mutual Group*, W.C. No. 4-839-225 (April 15, 2011); *Even v. The Mining Exchange*, W.C. No. 4-892-465 (April 29, 2013); *Rodriguez v. Exempla Healthcare, Inc.*, W.C. No. 4-705-673 (April 30, 2008); *Padilla-Roldan v. Allstate Insurance Company*, W.C. No. 4-579-973 (June 30, 2005); *Wallace v. Personnel Pool, Inc.*, W.C. No. 4-455-463 (May 8, 2001). The ALJ agrees with Claimant her intended walk was an incident of employment under the “personal comfort” doctrine.

B. Respondent is liable for the Parkview hospital treatment from June 28 through June 30, 2019, including direct reimbursement to Claimant for the ER physician bill.

Respondents are liable for emergency treatment without regard to the right of selection or prior authorization. *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). As found, Claimant proved the treatment she received after being transported to Parkview Medical Center by ambulance was reasonably necessary emergent treatment for the industrial injury. Additionally, Respondents must reimburse Claimant directly for any compensable medical treatment she paid from her own pocket. Section 8-42-101(6)(a), (b); WCRP 16-10(F).

C. Dr. Khosla became authorized as of July 15, 2019; Dr. Anaya is not authorized.

Respondents must cover all authorized medical treatment reasonably necessary to cure or relieve the effects of an industrial injury. *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). “Authorization” refers to the physician’s legal authority to treat the injury at the respondents’ expense. *Popke v. Industrial Claim Appeals Office*, 944 P.2d 677 (Colo. App. 1997). Under § 8-43-404(5)(a), the employer has the right to choose the treating physician in the first instance. Where, as here, a claimant receives emergency treatment, the employer’s opportunity to designate is tolled until the emergency ends and the employer receives notice the claimant needs additional treatment. *Sims v. Industrial Claim Appeals Office*, *supra*. It is well established that an employer does not lose the right to designate a treating physician merely because it denies a claim. *Yeck v. Industrial Claim Appeals Office*, 966 P.2d 228 (Colo. App. 1999).

Once the employer has exercised its right of selection, the claimant may not unilaterally change physicians without prior approval from the respondents or an ALJ. Such permission may be express or implied, and a physician becomes authorized if the

“employer has expressly or impliedly conveyed to the employee the impression” that she has permission to treat with the physician. *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985).

Employer timely exercised its right to choose a physician after Claimant was released from the hospital, and sent a designated provider list at least four times. Without more, that would be the end of the inquiry. But Employer subsequently conveyed to Claimant the impression she could continue treating with Khosla after Broadspire denied the claim. Ms. W[Redacted] initially explained Employer’s general policy that injured workers must follow up with a designated provider after emergency treatment has concluded. But when Claimant asked what she should do since she had already seen her personal providers, Ms. W[Redacted] indicated she would “have to check with Broadspire.” The next communication from Ms. W[Redacted] indicated Claimant “should not” see a designated provider because the claim was denied. The ALJ concludes a reasonable person in Claimant’s position would have assumed she had permission to keep seeing Dr. Khosla after receiving Ms. W[Redacted]’ voicemail.

Dr. Khosla became authorized when Ms. W[Redacted] left the voicemail. Before that, Employer had done or said nothing that could reasonably be deemed permission to see her own providers. It is not clear exactly when Ms. W[Redacted] left Claimant the voicemail. Ms. W[Redacted] credibly testified it was sometime between July 8 and July 15, 2019, and Claimant presented no other persuasive evidence on this point. Claimant has the burden prove whether and when Dr. Khosla became authorized. Based on the evidence presented, the ALJ cannot say to the level of “more probably true than not” that the phone call occurred on any date before July 15, 2019. Thus, the ALJ concludes any treatment provided by Dr. Khosla was authorized on or after July 15, 2019, and any treatment before that date was not authorized.

Dr. Anaya is not authorized. Claimant did not have the right to select a physician when she saw Dr. Anaya on July 1, 2019, and there is no persuasive evidence she saw him or was referred to him after Ms. W[Redacted] left the voicemail.

ORDER

It is therefore ordered that:

1. Claimant’s claim for workers’ compensation benefits in W.C. No. 5-111-492 is compensable.
2. Claimant’s average weekly wage is \$1,733.
3. Respondent shall cover all reasonably necessary treatment from authorized providers to cure or relieve the effects of Claimant’s compensable injury, including, but not limited to the charges from Parkview Medical Center for June 28, 2019 through June 30, 2019, and treatment by or on referral from Dr. Khosla on or after July 15, 2019.
4. Claimant’s request for medical benefits for treatment from Dr. Khosla before July 15, 2019 is denied and dismissed

5. Claimant's request for medical benefits for treatment from Dr. Anaya is denied and dismissed.

6. Respondent shall reimburse Claimant \$198.94 for the Parkview ER physician bill.

7. All issues not decided herein are reserved for future determination.

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

DATED: January 31, 2020

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

- Whether the claimant has demonstrated, by a preponderance of the evidence, that medical treatment recommended by Dr. Kirk Clifford (including additional sacroiliac (SI) joint injections and an SI joint fusion) is reasonable medical treatment necessary to maintain the claimant at maximum medical improvement (MMI).
- Whether the claimant has demonstrated, by a preponderance of the evidence, that his claim should be reopened pursuant to Section 8-43-303, C.R.S. due to a worsening of his condition.
- If the claimant's claim is reopened, whether the claimant has demonstrated, by a preponderance of the evidence, that medical treatment recommended by Dr. Kirk Clifford (including additional SI joint injections and an SI joint fusion) is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury.
- Whether the respondent has demonstrated, by a preponderance of the evidence, that the claimant experienced an intervening event on October 29, 2017 that was sufficient to sever the respondent's liability and terminate the claimant's maintenance medical care.

FINDINGS OF FACT

1. The claimant was employed as a firefighter with the employer for 26 years. The claimant's duties included responding to emergency services calls. Each year the claimant underwent a "fit for duty" test.

Prior Medical Treatment

2. On May 23, 1999, the claimant suffered a work injury to his low back. On October 26, 1999, Dr. Jeff Bowman assessed a 9 percent whole person impairment rating for an L5-S1 disc derangement and chronic right sacroiliitis. Dr. Bowman noted that the claimant had a "long standing history of chronic left sided hip pain with chronic sacroiliitis requiring orthotics due to pedal abnormalities with gait and also reported a history of low back pain secondary to compensatory changes from irregular gait".

3. Thereafter, on January 17, 2004, the claimant felt a pop in his back and experienced right leg radiculopathy. After undergoing various modes of treatment to his low back, on March 23, 2005, the claimant underwent an L5-S1 transforaminal lumbar interbody fusion.

4. On January 12, 2006, Dr. Donald Corenman determined that the claimant had reached maximum medical improvement (MMI) for the January 17, 2004 injury. At that time, Dr. Corenman assessed a 23 percent whole person impairment. However, he also determined that the claimant did not have any permanent work restrictions. The claimant testified that he did not have any back issues and he was able to perform all of duties as a firefighter following the recovery from the 2006 surgery and prior to the February 1, 2015 injury.

Admitted February 1, 2015 Injury

5. The claimant was injured while working his normal duties as a fire captain on February 1, 2015. On that date, the claimant and his coworkers responded to an emergency services call involving an unconscious individual on the second floor of a home. It was necessary to transport the individual down the stairs in a sling-type apparatus. The claimant was not involved in the transport down the stairs. However, he was waiting to assist his coworkers in transferring the individual onto a gurney. During that transfer, the individual began to slip from the sling and the claimant reached across the gurney in an attempt to catch him. It was during that movement that the claimant was injured. The claimant testified that he tore the bicep tendon in his right shoulder and injured his back.

6. On February 5, 2015, the claimant's authorized treating physician, Dr. Craig Stagg, issued a WC 164 form outlining various work restrictions for the claimant including no lifting, carrying, pushing, or pulling over 30 pounds. At that time, Dr. Stagg referred the claimant to Dr. Corenman for consultation.

7. On February 12, 2015, a magnetic resonance image (MRI) of the claimant's lumbar spine showed evidence of his prior L5-S1 fusion; a mild to moderate circumferential disc bulge with bilateral foraminal annular tearing at the L3-L4 level; and a mild circumferential disc bulge with left foraminal annular tearing at the L4-L5 level.

8. The claimant was seen by Dr. Corenman on February 12, 2015. At that time, the claimant reported that on February 1, 2015 the experienced increased right SI joint pain after reaching to assist his coworkers. The claimant also reported that he developed pain that radiated down his right leg. Dr. Corenman opined that the claimant's pain was caused by the small annular tears at the L4-5 and L3-L4 levels. In addition, Dr. Corenman noted that if the claimant did not improve in five to six weeks, an epidural steroid injection could be pursued.

9. Subsequently, on April 6, 2015, Dr. Corenman administered transforaminal epidural steroid injections (TFESI) at the L4-5 and S1 levels. On April 23, 2015, the claimant returned to Dr. Corenman and reported that he did not experienced any relief from the injections. The claimant also reported that he had right SI joint pain and right leg S1 nerve root pain.¹

¹ The ALJ recognizes the anatomical difference between treatment of the claimant's S1 spinal level and the sacroiliac (SI) joint.

10. On June 17, 2015, the claimant underwent an independent medical examination through the Fire and Police Pension Association (FPPA). In a report to the FPPA, Dr. Robert Messenbaugh opined that the claimant was “permanently occupationally disabled” due to his chronic lumber spine disc pathology. Dr. Messenbaugh also opined that the claimant was “no longer capable of safely, effectively, consistently, and reliably (*sic*) capable of performing his required duties as a fire captain.” Following that FPPA report, the claimant’s employment with the employer ended.

11. The claimant continued to treat with Dr. Corenman who administered various injections and facet blocks. Dr. Thos Evans also administered injections, including a right SI joint injection on October 5, 2015.

12. On November 4, 2015, Dr. Evans performed medial branch radiofrequency ablation (RFA) at the left L3-4 and L4-5 levels. Thereafter on November 4, 2015, Dr. Evans performed right L5-S1 medial branch RFA and right S1, S2, and S3 lateral branch RFA.

13. On March 10, 2016, Dr. Stagg determined that the claimant had reached maximum medical improvement (MMI) for the February 1, 2015 injury. Dr. Stagg also determined that apportionment was necessary due to the claimant’s prior injury, which resulted in a 1 percent whole person impairment for this injury.²

14. On October 8, 2016, Dr. Evans authored a letter in which he reported that injections to the claimant’s facets, discs, and SI region were successful. In that same letter, Dr. Evans recommended a right L4-5 and L5-S1 TFESI.

15. On October 10, 2016, the claimant attended a Division Sponsored Independent Medical examination (DIME) with Dr. John Aschberger. In connection with the DIME, Dr. Aschberger reviewed the claimant’s medical records, obtained a history from the claimant, and completed a physical examination. In his DIME report, Dr. Aschberger noted significant findings of pelvic asymmetry. Dr. Aschberger opined that the claimant’s asymmetric pelvis could be the source of the claimant’s SI joint symptoms. In addition, Dr. Aschberger recommended no additional injections until the claimant’s pelvic dysfunction is corrected. Dr. Aschberger assessed a permanent impairment rating of 2 percent for the claimant’s spine. When combined with an impairment rating for the claimant’s right upper extremity, Dr. Aschberger assessed a whole person impairment rating of 8 percent.

16. The claimant continued to experience low back pain with radicular symptoms and returned to Dr. Evans on March 24, 2017. At that time, the claimant reported to Dr. Evans that he did not accurately report his relief from a prior injection. The claimant clarified that he experienced better than 80 percent relief following the RFA performed in April 2016 for two to three months. Dr. Evans diagnosed sacroiliitis

² Dr. Stagg also assessed permanent impairment of the claimant’s right shoulder for a total whole person impairment of 6 percent.

and recommended a right SI joint injection. The recommended right SI joint injection was administered by Dr. Evans on April 11, 2017.

17. The claimant returned to Dr. Evans on May 24, 2017 and reported 80 percent relief of his right leg radicular symptoms following the SI joint injection. At that time, Dr. Evans recommended a repeat right SI joint injection.

18. The respondent asked Dr. Kathy McCranie to review the reasonableness and necessity of the repeat right SI joint injection recommended by Dr. Evans. On September 25, 2017, Dr. McCranie issued a report in which she opined that the injection was reasonable and necessary. However, Dr. McCranie noted that the Colorado Medical Treatment Guidelines (MTG) require that certain steps are to be taken before and after such an injection, to properly document the claimant's pain reports and functional gains.

19. The recommended repeat right SI joint injection was administered by Dr. Evans on October 10, 2017. However, the pre and post injection documentation addressed in Dr. McCranie's report were not performed.

20. On November 16, 2017, the claimant was seen by Dr. Robert McLaughlin. At that time, the claimant reported that he had fallen while working for his new employer, Rocky Mountain Gun Club (RMGC). At the time of that appointment, the claimant had been working for RMGC for approximately one year. The claimant reported to Dr. McLaughlin that on October 29, 2017, he slipped on a slippery floor at work and fell onto his right and left buttocks and low back. The claimant also reported a new feeling of pain down his right leg. Dr. McLaughlin ordered an x-ray of the claimant's pelvis which showed no acute changes. Dr. McLaughlin opined that the claimant's recent fall might have exacerbated the claimant's preexisting lumbar spine condition. At that time, a referral was made for chiropractic treatment.

21. On December 8, 2017, Dr. McLaughlin noted that the claimant continued to complain of radicular pain down his right leg. The claimant also reported numbness in his right foot. At that time, Dr. McLaughlin opined that the claimant's SI joint was causing these symptoms.

22. On December 15, 2017, the claimant was seen by Dr. Stagg who noted that the claimant remained at MMI for his 2015 work injury.

23. On January 19, 2018, Dr. McLaughlin noted that the claimant was at MMI for the October 29, 2017 injury. It appears that Dr. McLaughlin made this determination of MMI based upon the claimant's report that he had returned to his "baseline". Dr. McLaughlin also noted that the claimant had long-term chronic pain in the lumbar spine and SI joint.

24. The claimant continued to report his low back and SI joint symptoms to Dr. Stagg. On May 21, 2018, Dr. Stagg referred the claimant to surgeon Dr. Kirk Clifford for consultation.

25. The claimant was first seen by Dr. Clifford on May 24, 2018. The claimant reported to Dr. Clifford that the SI joint injection was the most effective treatment of his symptoms. Dr. Clifford opined that the claimant's right SI joint was the claimant's pain generator. As a result, he recommended a right SI joint injection.

26. On June 4, 2018, Dr. Timothy O'Brien conducted a medical records review and issued a report in which he recommended denial of the right SI joint injection. In support of his opinion, Dr. O'Brien noted that the claimant experienced only two months of relief from the prior injection. In addition, Dr. O'Brien opined that the claimant's SI joint was not injured at the time February 1, 2015 work injury.

27. Based upon the opinion of Dr. O'Brien, the respondent initially denied authorization for a right sided SI joint injection. Subsequently, Dr. McCranie reviewed additional medical records and issued reports on August 30, 2018 and August 31, 2018. In her reports, Dr. McCranie recommended that the SI joint injection proceed. However, Dr. McCranie again recommended that the injections comply with the MTG and properly document the claimant's pain reports and functional gains.

28. On November 28, 2018, Dr. Clifford administered a right SI joint injection. On December 10, 2018, the claimant reported to Dr. Stagg that the injection provided 24 hours of improvement. The claimant also reported that he had received more relief from past injections. However, the pre and post injection documentation as recommended by Dr. McCranie were not performed.

29. The claimant returned to Dr. Clifford on December 19, 2018, and reported that he had 80 percent relief for two to four hours following the injection. At that visit, Dr. Clifford recommended that the claimant undergo a right sided SI joint fusion. On March 8, 2019, Dr. McLaughlin agreed with the recommended fusion. However, Dr. McLaughlin recommended that the claimant first undergo a diagnostic right SI joint injection.

30. Subsequently, Dr. Clifford also recommended a left sided SI joint injection. That left SI joint injection was administered by Dr. Clifford on May 29, 2019.

31. Dr. Clifford testified by deposition in this matter regarding his treatment recommendations. Dr. Clifford testified that the claimant has bilateral SI joint pain. Dr. Clifford reiterated that he has recommended that the claimant undergo a repeat right-sided SI joint injection. Dr. Clifford explained that the basis for this recommendation is that the claimant experienced 70 percent relief immediately following the last injection, with 80 percent improvement for "a few hours". Dr. Clifford also testified that he has recommended a right sided SI joint fusion to address the claimant's symptoms. Dr. Clifford explained that a repeat SI joint injection that provides 80 percent relief would

indicate that an SI joint fusion would be a treatment option for the claimant. In addition, Dr. Clifford opined that the claimant is also a candidate for a left sided SI joint fusion.

32. On June 11, 2019, the claimant attended an independent medical examination (IME) with Dr. Brian Reiss. In connection with the IME, Dr. Reiss reviewed the claimant's medical records, obtained a history from the claimant, and completed a physical examination. In his IME report, Dr. Reiss opined that the claimant's SI joint is not his pain generator. In support of this opinion, Dr. Reiss noted that the injections administered to the claimant have not diagnosed a pain generator. In addition, the injections have not been documented in accordance with the MTG. For example, there has been no definitive documentation of the claimant's pain level and function immediately prior to and after the injections. Nor have there been any pain diaries kept to document the success of each injection. As a result of these factors, Dr. Reiss noted that an SI joint fusion would not be indicated for the claimant pursuant to the MTG. Dr. Reiss also noted that the claimant has a long history of SI joint related issues beginning in 1999.

33. On August 2, 2019, Dr. McCranie reviewed Dr. Reiss' IME report and issued her own report in which she agreed with Dr. Reiss. Specifically, Dr. McCranie noted her agreement that the claimant remains at MMI for the February 1, 2015 work injury. Dr. McCranie also agreed that the claimant is not a candidate for an SI joint fusion. Finally, Dr. McCranie noted that pursuant to the MTG, SI joint fusions are not indicated for mechanical back pain.

34. On August 27, 2019, Dr. Reiss was asked to review additional medical records. Upon completing that review, Dr. Reiss issued a report in which he reiterated that repeat SI joint injections are not indicated pursuant to the MTG. In addition, an SI joint fusion is not indicated pursuant to the MTG. Dr. Reiss stated that his opinions were unchanged. On September 23, 2019, Dr. Reiss issued a reported after he was provided the transcript of Dr. Clifford's deposition. Dr. Reiss again stated his opinion that repeat SI joint injections and/or an SI joint fusion were not indicated. Based upon Dr. Reiss' opinions, the respondent denied authorization for both SI joint injections and an SI joint fusion.

35. Dr. Reiss' testimony by deposition was consistent with his written reports. Dr. Reiss reiterated his opinion that an SI joint fusion was not indicated for the claimant. In support of this opinion, Dr. Reiss noted that the MTG do not recommend an SI joint fusion to treat low back pain. Dr. Reiss also noted his opinion that a repeat SI joint injection is not indicated. It is the opinion of Dr. Reiss that such an injection would not be useful, given that ultimately an SI joint fusion is not indicated. Dr. Reiss testified that it is his understanding that the claimant has changed his position regarding the effectiveness of various injections he has received. Dr. Reiss also testified that it is still unclear that the SI joint is the claimant's pain generator.

36. The claimant testified that the most effective treatment of his symptoms occurred with the first SI joint injection. In addition, the claimant recalls that following the injections, he experienced 95 to 100 percent improvement in his pain symptoms. However, this pain relief was for a short period of time. The claimant also testified that his current symptoms include an inability to sit for very long because of his pain.

37. With regard to the October 29, 2017 incident at RMGC, the claimant testified that he slipped and landed on his “backside”. The claimant also testified that that incident did not cause any permanent impact to his condition.

38. The ALJ credits the medical records and the opinions of Drs. Reiss and McCranie over the contrary opinions of Dr. Clifford and finds that the claimant has failed to demonstrate that it is more likely than not that the recommended SI joint injections and SI joint fusion are reasonable and necessary to cure and relieve the claimant from the effects of the work injury. The ALJ also finds that the claimant has failed to demonstrate that it is more likely than not the claimant’s condition has worsened.

39. The ALJ credits the medical records and finds that the respondent has successfully demonstrated that it is more likely than not that the claimant’s slip and fall on October 29, 2017 was an intervening event necessitating the need for medical treatment. Specifically, the ALJ finds that the October 29, 2017 incident resulted in the need for the claimant to be seen by Dr. McLaughlin, an x-ray, and a referral to chiropractic treatment which establish evidence of a new injury.

CONCLUSIONS OF LAW

1. The purpose of the “Workers’ Compensation Act of Colorado” is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers’ Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers’ Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers’ Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ’s factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness’s testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and

action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2014).

4. Section 8-43-303(1) provides that “any award” may be reopened within six years after the date of injury “on the ground of fraud, an overpayment, an error, mistake, or a change in condition.” Reopening for “mistake” can be based on a mistake of law or fact. *Renz v. Larimer County School District Poudre R-1*, 924 P.2d 1177 (Colo. App. 1996). A claimant may request reopening on the grounds of error or mistake even if the claim was previously denied and dismissed. *E.g., Standard Metals Corporation v. Gallegos*, 781 P.2d 142 (Colo. App. 1989); see also *Amin v. Schneider National Carriers*, W.C. No. 4-81-225-06 (November 9, 2017). The ALJ has wide discretion to determine whether an error or mistake has occurred that justifies reopening the claim. *Berg v. Industrial Claim Appeals Office*, 128 P.3d 270 (Colo. App. 2005); *Travelers Ins. Co. v. Industrial Commission*, 646 P.2d 399 (Colo. 1981).

5. A change in condition refers to “a change in the condition of the original compensable injury or to a change in the claimant’s physical or mental condition which can be causally connected to the original compensable injury.” *Heinicke v. Industrial Claim Appeals Office*, 197 P.3d 222 (Colo. App. 2008). The ALJ is not required to reopen a claim based upon a worsened condition whenever an authorized treating physician finds increased impairment following MMI. *Id.* The party attempting to reopen an issue or claim shall bear the burden of proof as to any issues sought to be reopened. Section 8-43-303(4), C.R.S.

6. As found, the claimant has failed to demonstrate by a preponderance of the evidence that his condition has worsened. As found, the medical records and the opinions of Drs. Reiss and McCranie are credible and persuasive.

7. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; see *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). The need for medical treatment may extend beyond the point of maximum medical improvement where claimant requires periodic maintenance care to prevent further deterioration of his physical condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Section 8-42-101, C.R.S., thus authorizes the ALJ to enter an order for future maintenance treatment if support by substantial evidence of the need for such treatment. *Grover v. Industrial Commission, supra.*

8. The Colorado Workers’ Compensation Medical Treatment Guidelines (MTG) are regarded as accepted professional standards for care under the Workers’ Compensation Act. *Rook v. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005). The statement of purpose of the MTG is as follows: “In an effort to comply with its legislative charge to assure appropriate medical care at a reasonable cost, the director of the Division has promulgated these ‘Medical Treatment Guidelines.’ This rule provides a system of evaluation and treatment guidelines for high cost or high frequency categories of occupational injury or disease to assure appropriate medical care at a

reasonable cost.” WCRP 17-1(A). In addition, WCRP 17-5(C) provides that the MTG “set forth care that is generally considered reasonable for most injured workers. However, the Division recognizes that reasonable medical practice may include deviations from these guidelines, as individual cases dictate.”

9. While it is appropriate for an ALJ to consider the MTG while weighing evidence, the MTG are not definitive. See *Jones v. T.T.C. Illinois, Inc.*, W.C. No. 4-503-150 (May 5, 2006); *aff'd Jones v. Industrial Claim Appeals Office* No. 06CA1053 (Colo. App. March 1, 2007) (not selected for publication) (it is appropriate for the ALJ to consider the MTG on questions such as diagnosis, but the MTG are not definitive); see also *Burchard v. Preferred Machining*, W.C. No. 4-652-824 (July 23, 2008) (declining to require application of the MTG for carpal tunnel syndrome in determining issue of PTD); see also *Stamey v. C2 Utility Contractors et al*, W.C. No. 4-503-974 (August 21, 2008) (even if specific indications for a cervical surgery under the MTG were not shown to be present, ICAO was not persuaded that such a determination would be definitive).

10. As found, the claimant has failed to demonstrate by a preponderance of the evidence that the SI joint injections and SI joint fusion constitute reasonable and necessary medical treatment. As found, the medical records and the opinions of Drs. Reiss and McCranie are credible and persuasive.

11. If an intervening event triggers disability or need for medical treatment, then the causal connection between the original injury and the claimant’s condition is severed. See *Post Printing & Publishing Co. v. Erickson*, 94 Colo. 382, 384, 30 P.2d 327, 328 (1934). Respondents are only liable for subsequent injuries which “flow proximately and naturally” from the compensable injury. *Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970).

12. As found, the respondent has demonstrated by a preponderance of the evidence that on October 29, 2017, the claimant suffered an intervening event that was sufficient to sever the respondent’s liability and terminate claimant’s maintenance medical care. As found, the medical records are credible and persuasive.

ORDER

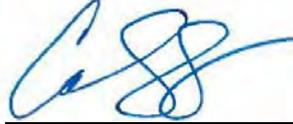
It is therefore ordered:

1. The claimant’s request that his claim be reopened is denied and dismissed.

2. The claimant’s request for medical treatment recommended by Dr. Clifford (including additional SI joint injections and an SI joint fusion) is denied and dismissed.

3. On October 29, 2017, the claimant suffered an intervening event that was sufficient to sever the respondent's liability and terminate the claimant's maintenance medical care.

Dated this 3rd day of February 2020.



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

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

ISSUES

- I. The determination of Claimant's average weekly wage under Section 8-42-102(2), C.R.S., or Section 8-42-102(3), C.R.S., to establish a fair approximation of Claimant's wage loss and diminished earning capacity.

FINDINGS OF FACT

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

1. Claimant is a credible witness and her testimony is both persuasive and consistent with the wage and medical records in the case.
2. Claimant has been employed in Employer's bakery department since approximately August 20, 2016.
3. The number of hours Claimant worked each workday varied. In addition, on some days, Claimant would work overtime. (*Exhibit 1*)
4. Shortly before her injury, Claimant's base rate of pay was \$11.50, per hour, plus overtime.
5. But about one week before her injury, on approximately January 8, 2018, Claimant's base rate of pay was increased to \$12.00 per hour, plus overtime.
6. On January 16, 2018, Claimant suffered a compensable injury for which liability has been admitted.
7. The General Admission of Liability ("GA") admits for an AWW of \$431.19. (*Exhibit 1*)
8. According to the notes on the GA, Respondent calculated Claimant's AWW by using Claimant's wages from a 20-day period, December 25, 2017 to January 13, 2018, which totaled \$1,231.74. According the GA, the admitted "AWW of \$431.12 is more reflective of what she makes." (*See Exhibit C, pp. 39-45*)
9. But a review of Claimant's wage records shows that using the specific 20-day period selected by Respondent - and the wages earned during that period - is not a fair and accurate method to calculate Claimant's AWW. Respondent's calculation is not fair and accurate for several reasons. First, it appears Claimant did not work for the first four days of the 20-day period used by Respondent to calculate Claimant's AWW.¹ Second, around two-thirds of the days used by Respondent to calculate Claimant's AWW did not include Claimant's increased hourly rate of pay in effect on the day of her injury. As a result, the information used by Respondent led to the understatement of Claimant's AWW.

¹ It looks like Claimant did not work on Christmas, 12/25/17, but was paid the equivalent of 3 hours, which was designated as "LHCHS" time and not "REG" - for regular time - and not "OT" - for overtime.

10. The exhibits, and Claimant's credible testimony, established that in 2017, Claimant's total earnings were \$25,058.86. (*Exhibit A*) However, in 2017, Claimant missed about 4½ weeks of work, towards the end of the year, for a non-work-related health problem.
11. Claimant argues that a fair approximation of her AWW would be to take her total earnings for 2017, which were \$25,058.86, and divide them by 48 weeks, because Claimant missed about a month from work in 2017. That method leads to an AWW of \$522.06.
12. Respondent argues that Claimant's admitted AWW is correct and rejects the calculation other than the one prepared by the adjuster. Alternately, Respondent argues that if one divides the total earnings of 2017 by 52 weeks, the proper AWW is \$481.90.
13. Claimant's wage records reveal she missed work from November 27, 2017, through December 28, 2017, which is 4 weeks and 4 days.² (*Exhibit A, pg. 2*) However, there was no credible and persuasive evidence presented that Claimant consistently developed a non-work related health problem every year that caused her to miss a block of 4½ weeks of work each year. In other words, there was no evidence submitted that Claimant consistently took an unexpected 4½ week sabbatical, or extra vacation, every year. Therefore, dividing Claimant's 47½ weeks of earnings during 2017, by 52 weeks, is not a fair and accurate method to calculate Claimant's AWW.
14. Dividing her total earnings in 2017 by 47½ weeks results in an average weekly wage (AWW) of \$527.55.
15. But the purpose of Section 8-42-102(2), C.R.S. and 8-42-102(3), C.R.S. is to establish a fair approximation of Claimant's wage loss and diminished earning capacity due to the work accident. Moreover, the proposed AWW calculations set forth by Claimant and Respondent both fail to fairly approximate Claimant's wage loss and diminished earning capacity.
16. Using Claimant's total earnings from 2017 does not fairly approximate her wage loss from this injury because:
 - i. During the first half of 2017, Claimant was only being paid \$11.00 per hour;
 - ii. During the second half of 2017, Claimant was only being paid \$11.50 per hour; and
 - iii. At the time of her injury in January 2018, Claimant was being paid \$12.00 per hour.
12. Thus, the best way to fairly approximate Claimant's wage loss and diminished earning capacity because of her work injury is to:

² The wage records show Claimant was paid 5.42 hours of sick time, totaling, \$62.33, for November 27, 2017. It also looks like Claimant was paid 3 hours of holiday pay, totaling \$34.50, for December 25, 2017, for Christmas. (*See Respondent's Exhibit A, bate stamp 002.*)

- i. Use the actual hours claimant worked during the 47½ weeks she worked in 2017,
 - ii. Adjust her 2017 total earnings by using the rate of pay in effect on the date she was injured, which is \$12.00 per hour, plus overtime, and
 - iii. Divide her adjusted total earnings by 47½ weeks.
13. In 2017, Claimant worked 1,959.43 regular hours, 210 overtime hours, and 48.42 “other hours,” which resulted in \$1,833.33 in “other earnings.” (*Exhibit A, p. 9.*)
14. The adjusted total earnings calculation based on the hours Claimant worked in 2017, during the 47½ week period, based on \$12.00 per hour, plus overtime, is as follows:
- i. Claimant’s 1,959.43 regular work hours, at \$12.00 per hour, equals \$23,513.16.
 - ii. Claimant’s 210 overtime hours, at \$18.00 per hour, equals \$3,780.00.
 - iii. Claimant’s “other earnings” equals \$1,833.33.³
- Therefore, Claimant’s total adjusted gross earnings for 2017, based on her 2018 hourly rate of pay of \$12.00, plus overtime, is \$29,126.49.
14. The next step is to divide Claimant’s adjusted gross earnings by the number of weeks she worked, during 2017, which is 47½. As a result, Claimant’s adjusted AWW is \$613.19.⁴
15. Based on the unique circumstances of this case, a fair approximation and determination of Claimant’s AWW is \$613.19.
16. An AWW of \$613.19 is a fair approximation of Claimant’s wage loss and diminished earning capacity due to her work injury.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge draws these conclusions of law:

General Provisions

The purpose of the “Workers’ Compensation Act of Colorado” is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the need for any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers’ Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-42-101, C.R.S.

³ The hourly rate used to determine Claimant’s “Other Earnings” on her wage records is unclear. The ALJ thus used the actual earnings paid to Claimant in 2017 for her “Other Hours” and “Other Earnings”, which equals \$1,833.33, and not adjusted for any increase in pay that occurred in 2017 and the beginning of 2018.

⁴ \$29,126.49 / 47½ weeks = \$613.19.

A preponderance of the evidence is what leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. Section 8-43-201, C.R.S.

The ALJ's factual findings concern only evidence dispositive of the issues involved. The ALJ has not addressed every piece of evidence leading to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

Substantial Evidence

An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office*, 240 P.3d 429 (Colo. App. 2010); *Leeway v. Indus. Claim Appeals Office*, 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office*, 131 P.3d 1172 (Colo. App. 2005).

Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by evidence which would warrant a reasonable belief in the existence of facts supporting a particular finding. See *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions therein. See *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo. App. 2001).

The ALJ makes the rational choice to accept Claimant's testimony and the plausible inferences drawn therefrom. A claim may be supported by lay testimony alone. See *Lymburn v Symbois Logic*, 952 P.2d 831 (Colo. App. 1997).

I. The determination of Claimant's average weekly wage under Section 8-42-102(2), C.R.S., or 8-42-102(3), C.R.S. to establish a fair approximation of Claimant's wage loss and diminished earning capacity.

Section 8-42-105(1), C.R.S., provides that a Claimant's TTD rate is sixty-six and two-thirds percent of her AWW.

Section 8-42-102(2), C.R.S., requires the ALJ to base the claimant's Average Weekly Wage (AWW) on his or her earnings at the time of injury. But under certain circumstances the ALJ may determine the claimant's AWW from earnings received on a date other than the date of injury. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Specifically, §8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective in

calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp., supra*.

Based on a totality of the evidence presented at hearing, and the unique facts of this case, the ALJ finds and concludes Claimant has established by a preponderance of the evidence that her AWW is \$613.19 under §8-42-102(3), C.R.S. The ALJ finds and concludes that the AWW of \$613.19 is a fair approximation of Claimant's wage loss and diminished earning capacity because of her work injury. As a result, Claimant's TTD rate is \$408.79.

ORDER

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

- A. Claimant's average weekly wage is \$613.19.
- B. Claimant's TTD and TPD rates from the date of her injury ongoing shall be based on this average weekly wage.
- C. Respondent shall pay to Claimant interest at the rate of 8% per annum on all amounts of compensation not paid when due.

Any issues not expressly decided herein are reserved to the parties for future determination.

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

DATED: February 3, 2020.

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- I. Whether Respondents proved by a preponderance of the evidence Claimant's indemnity benefits should be reduced by 50% for the willful violation of a safety rule pursuant to §8-42-112(1)(b), C.R.S.
- II. Whether Respondents proved by a preponderance of the evidence Claimant is responsible for his termination.

FINDINGS OF FACT

1. Claimant worked for Employer as a hardware sales associate. Claimant began his employment for Employer on January 13, 2016. Claimant's primary job duties included providing customer service and maintaining the store's appearance. It is undisputed Claimant was not an asset protection associate or member of management.

2. Claimant sustained an admitted industrial injury on February 9, 2019. Claimant observed an individual he suspected of shoplifting exit through the self-checkout area with a shopping cart of power tools. The cashier in the area made eye contact with Claimant and pointed to the individual, which Claimant believed was an indication the individual did not pay for the items. Claimant proceeded to follow the individual out of the store to the suspect's vehicle located in the store's parking lot.

3. Claimant testified he followed the individual outside with the intention of asking for a receipt. Claimant later testified that, if the suspect did not produce a receipt, his plan was to take the suspect and the stolen items back into the store. Claimant approached the suspected shoplifter while he was loading tools into the passenger side of his vehicle and asked for a receipt. At that time the suspect punched Claimant, ran to the other side of the vehicle and got into the driver's seat. Claimant proceeded to pull the shopping cart of items in front of the vehicle and followed the individual to the driver's side. Claimant testified a customer was standing in front of the suspect's vehicle and Claimant feared the suspect was going to strike the customer with the vehicle. Claimant testified he reached inside of the suspect's vehicle and put the vehicle in neutral. The suspect was able to put the vehicle in drive and drove off with Claimant hanging onto the driver's side window. Claimant hung onto the window for approximately 100 feet before letting go. Claimant sustained injuries to his head and extremities.

4. Employer terminated Claimant on February 15, 2019. Employer terminated Claimant for violating its Asset Protection External Policy. The written Progressive Disciplinary Notice terminating Claimant states Claimant committed "a major work rule

violation by chasing or apprehending a customer without being authorized, pursuing or apprehending a customer in a manner that creates a safety risk to associates or others.”

5. Exhibit H is Employer’s Asset Protection External Policy, updated September 2018. Per the policy, the only associates authorized to make external theft and fraud apprehensions are (1) asset protection associates who have successfully completed Employer’s required apprehension training and (2) salaried members of management who have received prior written approval from the Senior Director of Operations and completed the required apprehension training. The policy sets forth the guidelines for authorized associates in approaching and apprehending suspected thieves. The policy states one of its purposes is to help ensure the safety of associates, customers and others. The policy further provides that any violation may result in disciplinary action up to and including termination. The policy was in place at the time of Claimant’s work injury.

6. In outlining the requirements for certification of authorized asset protection, the policy refers to completing Class #3675- External Policy within Employer’s online training database, Knowledge Depot.

7. Exhibit J is a transcript of the Knowledge Depot training courses completed by Claimant since the date of hire. The transcript does not include Class #3675 - External Policy. The transcript reflects Claimant successfully completed Class #4012 - Loss Prevention Basics successfully completed on January 29, 2016. Claimant testified he did not specifically remember taking the Loss Prevention Basics class; however, he did not dispute the accuracy of the transcript.

8. Kevin G[Redacted], Operations Manager, testified on behalf of Employer. Mr. G[Redacted] testified that, pursuant to Employer’s Asset Protection External Policy, only trained asset protection associates are allowed to confront a suspected shoplifter. Mr. G[Redacted] testified that if a sales associate suspects shoplifting, the sales associate should provide customer service in the aisles to deter theft or contact asset protection. Mr. G[Redacted] testified that the policy is addressed at employee orientation and during trainings completed on the Knowledge Depot system. Mr. G[Redacted] testified that the Loss Prevention Basics course covers an associate’s basic responsibilities in loss prevention as well as how to handle external shoplifting. Mr. G[Redacted] testified that violation of the policy is enforced by termination and Employer has terminated other employees for violation of the policy. Mr. G[Redacted] further testified that it is common knowledge that associates are not supposed to pursue shoplifters and the policy is verbally enforced by managers.

9. Claimant testified he was never provided the Asset Protection External Policy during his employment and was unaware of policy prior to his termination. Claimant testified that if he had known there was a rule prohibiting his actions he would have abided by such rule. Claimant testified that, on multiple occasions, he and associates asked suspected shoplifters for receipts. He testified that, when a customer was suspected of shoplifting, the procedure was to contact asset protection associate if an

asset protection associate was on duty at the time. If not, sales associates would follow the suspect and ask for a receipt. Claimant testified that on prior occasions the head of security had instructed Claimant and other sales associates to go to the parking lot to write down license plate numbers. Claimant testified regarding an incident at work the night prior to his work injury when multiple associates covered emergency exits to prevent known shoplifters from exiting the store until the police arrived. Claimant testified he and other sales associates were praised by management for their efforts.

10. The ALJ finds Claimant's testimony more credible and persuasive than the testimony of Mr. G[Redacted].

11. The ALJ finds that, while Respondents adopted a reasonable rule regarding apprehending suspects that, in part, was for the safety of employees, Respondents failed to prove it is more likely than not Claimant was aware of the rule and willfully violated the rule.

12. The ALJ finds that the preponderant evidence fails to establish Claimant was aware of Employer's policy and reasonably expected that his actions would result in his termination. Respondents failed to prove it is more likely than not Claimant is responsible for his termination.

13. Evidence and inferences contrary to these findings were not credible and persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or

improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Safety Rule Violation

Section 8-42-112(1)(b), C.R.S. authorizes a fifty percent reduction in compensation for an employee's "willful failure to obey any reasonable rule adopted by the employer for the safety of the employee." A safety rule does not have to be either formally adopted or in writing to be effective. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office*, 907 P.2d 715, 719 (Colo. App. 1995). To establish that a violation of §8-42-112(1)(b), C.R.S. has been willful, a respondent must prove by a preponderance of the evidence that a claimant acted with "deliberate intent." *In re Alverado*, W.C. No. 4-559-275 (ICAO, Dec. 10, 2003). Willful conduct may be proven by circumstantial evidence including evidence of frequent warnings, the obviousness of the risk, and the extent of deliberation evidenced by claimant's conduct. See *In re Heien*; W.C. No. 5-059-799-01 (ICAO, Nov. 29, 2018).

Respondents need not establish that an employee had the safety rule in mind and decided to break it. *In re Alverado*, W.C. No. 4-559-275 (ICAO, Dec. 10, 2003). Rather, it is sufficient to show the employee knew the rule and deliberately performed the forbidden act. *Id.* However, willfulness will not be established if the conduct is the result of thoughtlessness or negligence. *In re Bauer*, W.C. No. 4-495-198 (ICAO, Oct. 20, 2003). "Willfulness" also does not encompass "the negligent deviation from safe conduct dictated by common sense." *In re Gutierrez*, W.C. No. 4-561-352 (ICAO, Apr. 29, 2004). Whether an employee has deliberately violated a safety rule is a question of fact to be determined by the ALJ. *Lori's Family Dining, Inc.*, 907 P.2d at 719.

An employer's failure to enforce its safety rule may render the rule unavailable as a basis to reduce compensation/impose a reduction of benefits. *Lori's Family Dining, Inc.* 907 P.2d at 719 ("The most frequent ground for rejecting imposition of a penalty, whether it be for violation of a safety rule or willful misconduct, is the lack of enforcement of the rule or policy by an employer with knowledge of and acquiescence in its violation").

As found, Respondents failed to meet their burden to establish Claimant willfully failed to obey a reasonable and known safety rule. The ALJ is persuaded Employer adopted the Asset Protection External Policy, which provides that only trained asset protection associates and certain members of management are authorized to make external apprehensions. The policy is, in part, for the safety of employees and is reasonable in its application and aim. Nonetheless, Respondents failed to prove by a preponderance of the evidence Claimant knew of the policy and willfully violated the policy.

Claimant credibly testified he was not aware of the policy prior to his termination. While the Knowledge Depot transcript confirms Claimant successfully completed a loss prevention basics course, there is no indication on the transcript Claimant completed the external policy course, which, as referenced in the policy, is a separate course. Although Mr. G[Redacted] testified the external policy is addressed in the loss prevention basics course, there is insufficient credible and persuasive evidence as to what the loss prevention basics course actually entailed and what was actually made known to Claimant. Claimant credibly testified that, on multiple occasions, he and other sales associates approached suspected shoplifters and asked for receipts, which is what Claimant did on the date of the work injury. There is insufficient credible and persuasive evidence Claimant was aware he was not permitted to follow the suspected shoplifter into the parking lot on the day of the work injury and ask the suspect for a receipt. While Claimant acknowledged he was aware of the procedure to call an asset protection associate when there he suspected shoplifting, he further stated his understanding was that such procedure applied when the asset protection associate was on duty. Claimant credibly testified there was no asset protection associate on duty at the time. Moreover, Claimant followed the suspected shoplifter to the parking lot to ask for a receipt, which Claimant had done in the store on multiple prior occasions. While the Asset Protection Policy provides only authorized persons are permitted to apprehend suspected shoplifters, the preponderant credible and persuasive evidence does not establish Claimant knew Employer's policy and deliberately violated the rule.

Responsible for Termination

Under the termination statutes in §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. a claimant who is responsible for his or her termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and wage loss. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1131 (Colo. App. 2008). The termination statutes provide that, in cases where an employee is responsible for her termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, W.C. No. 4-631-681 (ICAO, Apr. 24, 2006). A claimant does not act "volitionally" or exercise control over the circumstances leading to her termination if the effects of the injury prevent her from performing her assigned duties and cause the termination. *In re of Eskridge*, W.C. No. 4-651-260 (ICAO, Apr. 21, 2006). Therefore, to establish that Claimant was responsible for her termination, respondents must demonstrate by a preponderance of the evidence that Claimant committed a volitional act, or exercised some control over her termination under the totality of the circumstances. *See Padilla v.*

Digital Equipment, 902 P.2d 414, 416 (Colo. App. 1994). An employee is thus “responsible” if she precipitated the employment termination by a volitional act that she would reasonably expect to cause the loss of employment. *Patchek v. Dep’t of Public Safety*, W.C. No. 4-432-301 (ICAP, Sept. 27, 2001).

Violation of an employer’s policy does not necessarily establish the claimant acted volitionally with respect to a discharge from employment. *Gonzales v. Industrial Commission*, 740 P.2d 999 (Colo. 1987). An “incidental violation” is not enough to show that the claimant acted volitionally. *Starr v. Industrial Claim Appeals Office*, 224 P.3d 1056, 1065 (Colo. App. 2009). However, a claimant may act volitionally, and therefore be “responsible” for the purposes of the termination statute, if they are aware of what the employer requires and deliberately fails to perform accordingly. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008). This is true even if the claimant is not explicitly warned that failure to comply with the employer’s expectations may result in termination. See *Pabst v. Industrial Claim Appeals Office*, 833 P.2d 64 (Colo. App. 1992) (claimant disqualified from unemployment benefits after discharge for unsatisfactory performance when aware of expectations, even if not explicitly warned that job was in jeopardy). Ultimately, the question of whether the claimant was responsible for the termination is one of fact for determination by the ALJ. *Apex Transportation, Inc. v. Industrial Claim Appeals Office*, 321 P.3d 630, 632 (Colo. App. 2014).

As found, Respondents failed to prove by a preponderance of the evidence Claimant is responsible for his termination. Claimant credibly testified he was not aware of Employer’s policy and, had he been aware, he would not have taken the actions he took that lead to sustaining the work injury. Claimant credibly testified he and other sales associates, on multiple prior occasions, asked suspected shoplifters for receipts. Thus, while Claimant’s decision to follow the suspect to the parking lot to ask for a receipt was a volitional act, the credible and persuasive evidence does not establish it is more likely than not he reasonably expected such actions to cause his termination.

ORDER

1. Respondents failed to prove by a preponderance of the evidence Claimant willfully violated a reasonable safety rule adopted by Employer in violation of §8-42-112(1)(b) C.R.S. Claimant’s benefits shall not be reduced by 50%.
2. Respondents failed to prove by a preponderance of the evidence Claimant is responsible for his termination. Respondents shall pay Claimant temporary total disability benefits as admitted until terminated by law.
3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the

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

DATED: February 3, 2020

A handwritten signature in black ink, appearing to read 'Kara Cayce', written over a horizontal line.

Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she should be permitted to reopen her January 15, 2014 Workers' Compensation claim based on a change in condition pursuant to §8-43-303(1), C.R.S.

2. Whether Claimant has demonstrated by a preponderance of the evidence that she is entitled to receive Temporary Total Disability (TTD) benefits for the periods July 17, 2019 through November 11, 2019 and November 20, 2019 until terminated by statute.

STIPULATION

The parties agreed that Claimant earned an Average Weekly Wage (AWW) of \$485.60.

FINDINGS OF FACT

1. On January 15, 2014 Claimant suffered an admitted industrial injury when she twisted her left ankle. She received medical treatment through Robert Anderson-Oeser, M.D. at Concentra Medical Centers. Claimant underwent left ankle surgery with James Davis, D.P.M.

2. Claimant subsequently reached Maximum Medical Improvement (MMI). She received a 6% left lower extremity impairment rating.

3. On September 27, 2016 Claimant underwent a Division Independent Medical Examination (DIME) with John J. Aschberger, M.D. Dr. Aschberger determined that Claimant reached MMI on July 5, 2016 and assigned a 6% left lower extremity impairment rating.

4. On December 9, 2016 Respondents filed a Final Admission of Liability (FAL) consistent with the 6% lower extremity rating and acknowledged that Claimant was entitled to receive medical maintenance benefits.

5. Claimant subsequently received medical maintenance treatment from Dr. Anderson-Oeser about once every one to two months. Dr. Anderson-Oeser noted that Claimant suffered persistent left ankle pain but her condition remained stable.

6. Claimant explained that while shopping at Party City on June 24, 2019 she turned and her left ankle "snapped." However, Claimant visited Dr. Anderson-Oeser on June 10, 2019 and reported that "yesterday" when she was walking in a store, she turned and her left ankle "popped." She subsequently experienced severe left ankle

pain. Claimant testified that the specific pain differed from her prior left ankle symptoms.

7. On July 9, 2019 Dr. Davis took Claimant off work because of left ankle pain. He recommended a job where Claimant could remain seated with limited walking.

8. On July 17, 2019 Claimant filed a Petition to Reopen based on a worsening of condition. Claimant attached a note from Dr. Davis to the Petition. Dr. Davis remarked that Claimant had “a new twisting type injury to the left foot and ankle.” He concluded that Claimant’s “current injury appears to be related to her previous injury and a flare-up of the previous conditions.”

9. On August 8, 2019 Claimant underwent a left ankle MRI. The MRI revealed a chronic sprain of the anterior talofibular ligament with mild adjacent soft tissue edema that “may represent a mild acute superimposed on chronic sprain.” The MRI also reflected a small ganglion cyst of indeterminate age.

10. After additional medical treatment with Dr. Anderson-Oeser, Claimant underwent left ankle surgery with Dr. Davis on October 25, 2019. Dr. Davis stated in his operative report that Claimant’s left ankle injury at work that caused chronic pain and instability. Because of the failure of conservative treatment, Dr. Davis recommended surgical repair of the lateral collateral ligaments of the left ankle. In his post-operative diagnosis, Dr. Davis noted that Claimant exhibited an anterior talofibular ligament rupture and a calcaneofibular ligament rupture.

11. On October 16, 2019 Claimant underwent an independent medical examination with John Schwappach, M.D. Dr. Schwappach issued a report on October 27, 2019. He remarked that Claimant “appears to have an exacerbation of her previous left ankle injury.” Dr. Schwappach determined that Claimant had reached MMI with no additional impairment. Claimant’s range of motion was identical to Dr. Aschberger’s previous findings.

12. Dr. Schwappach also testified at the hearing in this matter. He commented that Claimant had been doing well prior to her June 2019 left ankle injury. Claimant recounted that in June 2019 she had been standing in a store, turned to the left and experienced a “popping” sensation in her left ankle. Claimant subsequently suffered increased pain, discomfort and acute disability. Dr. Schwappach determined that the June 2019 incident constituted a new injury.

13. Dr. Schwappach explained that the August 8, 2019 MRI revealed a new, acute left ankle injury. The MRI reflected that Claimant’s injury was well healed with no injury to the inside of her left ankle. The major tendons of the foot were in good position. The MRI demonstrated that the ligament on the outside of Claimant’s left ankle was thickened as a result of her prior injury. The MRI demonstrated new, mild soft tissue edema that was unrelated to the structural integrity of the left ankle. Dr. Schwappach summarized that Claimant’s prior left ankle injury was completely intact. The left ankle soft tissue edema thus constituted a new injury unrelated to the January 15, 2014

twisting accident. Specifically, there was no evidence of effusion, intraarticular loose bodies or tibial tear. All of the preceding would have existed if Claimant's original injury had been aggravated in June 2019. Dr. Schwappach concluded that Claimant did not aggravate her prior left ankle injury and remained at MMI.

14. Claimant has failed to establish that it is more probably true than not that she should be permitted to reopen her January 15, 2014 Workers' Compensation claim based on a change in condition. Initially, Claimant asserts that she suffered a worsening of her January 15, 2014 left ankle injury as a result of the June 2019 event. Dr. Davis determined that Claimant's June 2019 injury "appear[ed] to be related to her previous injury and a flare-up of the previous conditions."

15. In contrast, Dr. Schwappach persuasively explained that Claimant suffered a new left ankle injury in June 2019 that was unrelated to her prior January 15, 2014 Workers' Compensation claim. In his October 27, 2019 report, Dr. Schwappach remarked that Claimant suffered an exacerbation of her previous left ankle injury. However, during his testimony Dr. Schwappach noted that Claimant suffered increased pain, discomfort and acute disability as a result of the June 2019 incident. He detailed that the August 8, 2019 MRI revealed a new, acute left ankle injury. The MRI reflected that Claimant's original injury was well healed with no damage to the inside of her left ankle. The MRI demonstrated new, mild soft tissue edema that was unrelated to the structural integrity of the left ankle. Dr. Schwappach summarized that Claimant's prior left ankle injury remained intact and the left ankle soft tissue edema constituted a new injury unrelated to the January 15, 2014 twisting accident. Specifically, there was no evidence of effusion, intraarticular loose bodies or a tibial tear. All of the preceding would have existed if Claimant's original injury had been aggravated in June 2019. Dr. Schwappach concluded that Claimant did not aggravate her prior left ankle injury but remained at MMI.

16. Based on the medical records and persuasive testimony of Dr. Schwappach, the June 2019 accident constituted an intervening injury that severed the causal connection to Claimant's original January 15, 2014 work-related incident. The intervening event triggered Claimant's disability. Accordingly, Claimant has failed to establish that she suffered a worsening of her left ankle condition that is causally related to the January 2014 accident. Accordingly, Claimant's request to reopen her January 15, 2014 Workers' Compensation claim based on a change in condition is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197

Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. See *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. Section 8-43-303(1), C.R.S. provides that a worker's compensation award may be reopened based on a change in condition. In seeking to reopen a claim the claimant shoulders the burden of proving his condition has changed and that he is entitled to benefits by a preponderance of the evidence. *Osborne v. Industrial Commission*, 725 P.2d 63, 65 (Colo. App. 1986). A change in condition refers either to a change in the condition of the original compensable injury or to a change in a claimant's physical or mental condition that is causally connected to the original injury. *Jarosinski v. Industrial Claim Appeals Office*, 62 P.3d 1082, 1084 (Colo. App. 2002). A "change in condition" pertains to changes that occur after a claim is closed. *In re Caraveo*, W.C. No. 4-358-465 (ICAO, Oct. 25, 2006). The determination of whether a claimant has sustained his burden of proof to reopen a claim is one of fact for the ALJ. *In re Nguyen*, W.C. No. 4-543-945 (ICAO, July 19, 2004).

5. The existence of a weakened condition is insufficient to establish causation if the new injury is the result of an efficient intervening cause. *Owens v. Industrial Claim Appeals Office*, 49 P.3d 1187, 1188 (Colo. App. 2002); *In Re Lang*, W.C. No. 4-450-747 (ICAO, May 16, 2005). No liability exists when a later accident occurs as the direct result of an intervening cause. *Vargas v. United Parcel Service*, W.C. No. 4-325-149 (ICAO, Aug. 29, 2002). However, the intervening event does not sever the causal connection between the injury and the claimant's condition unless the disability is triggered by the intervening event. See *Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970); *Vargas v. United Parcel Service*, W.C. No. 4-325-149 (ICAO, Aug. 29, 2002). If the need for medical treatment occurs as the result of an independent intervening cause, then the subsequent treatment is not compensable. *Owens*, 49 P.3d at 1188. The new injury is not compensable "merely because the later accident might or would not have happened if the employee had retained all his former powers." *In Re Chavez*, W.C. No. 4-499-370 (ICAO, Jan. 23, 2004). The determination of whether an injury resulted from an efficient intervening cause is a question of fact for the ALJ. *Id.*

6. As found, Claimant has failed to establish by a preponderance of the evidence that she should be permitted to reopen her January 15, 2014 Workers' Compensation claim based on a change in condition. Initially, Claimant asserts that she suffered a worsening of her January 15, 2014 left ankle injury as a result of the June 2019 event. Dr. Davis determined that Claimant's June 2019 injury "appear[ed] to be related to her previous injury and a flare-up of the previous conditions."

7. As found, in contrast, Dr. Schwappach persuasively explained that Claimant suffered a new left ankle injury in June 2019 that was unrelated to her prior January 15, 2014 Workers' Compensation claim. In his October 27, 2019 report, Dr. Schwappach remarked that Claimant suffered an exacerbation of her previous left ankle injury. However, during his testimony Dr. Schwappach noted that Claimant suffered increased pain, discomfort and acute disability as a result of the June 2019 incident. He detailed that the August 8, 2019 MRI revealed a new, acute left ankle injury. The MRI reflected that Claimant's original injury was well healed with no damage to the inside of her left ankle. The MRI demonstrated new, mild soft tissue edema that was unrelated to the structural integrity of the left ankle. Dr. Schwappach summarized that Claimant's prior left ankle injury remained intact and the left ankle soft tissue edema constituted a new injury unrelated to the January 15, 2014 twisting accident. Specifically, there was no evidence of effusion, intraarticular loose bodies or a tibial tear. All of the preceding would have existed if Claimant's original injury had been aggravated in June 2019. Dr. Schwappach concluded that Claimant did not aggravate her prior left ankle injury but remained at MMI.

8. As found, based on the medical records and persuasive testimony of Dr. Schwappach, the June 2019 accident constituted an intervening injury that severed the causal connection to Claimant's original January 15, 2014 work-related incident. The intervening event triggered Claimant's disability. Accordingly, Claimant has failed to establish that she suffered a worsening of her left ankle condition that is causally related to the January 2014 accident. Accordingly, Claimant's request to reopen her January 15, 2014 Workers' Compensation claim based on a change in condition is denied and dismissed.

ORDER

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

Claimant's request to reopen her January 15, 2014 Workers' Compensation claim based on a change in condition is denied and dismissed.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or

service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at <http://www.colorado.gov/dpa/oac/forms-WC.htm>.*

DATED: February 3, 2020.

DIGITAL SIGNATURE:


Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether the claimant has demonstrated, by a preponderance of the evidence, that medical treatment of his right thumb, right wrist, and right hand; (including a right trigger thumb release recommended by Dr. Richard Knackendoffel); is reasonable, necessary, and related to the admitted August 27, 2018 work injury.

2. Whether the claimant has demonstrated, by a preponderance of the evidence, that medical treatment of his left upper extremity is reasonable, necessary, and related to the admitted August 27, 2018 work injury.

FINDINGS OF FACT

1. The claimant worked for the employer installing fiber cable in residences. On August 27, 2018, the claimant was performing his normal job duties when he fell while walking up an inclined area outdoors. The claimant testified that he tripped on a piece of rebar that was sticking out of the ground. At that time, the claimant held a splicer in his left hand and his tool bag in his right hand. As he was falling, the claimant dropped the tool bag and struck his right shoulder and right arm on pieces of river rock. The claimant reported the fall to the employer. The insurer has admitted liability for the claimant's August 27, 2018 fall.

2. The claimant received medical treatment on August 27, 2018. The claimant first sought treatment at West Elk Walk-In Clinic. At that time, the claimant was seen by Candi Lobenstein, NP. The medical record of that date indicates that the claimant was complaining of right shoulder pain. On exam, Ms. Lobenstein noted that the claimant's right shoulder was sitting lower than his left, but she did not believe it to be an anterior dislocation. In addition, Ms. Lobenstein observed that the claimant had full range of motion of this right hand, could make a fist, and moved both his wrist and forearm normally. Due to the condition of the claimant's right shoulder, Ms. Lobenstein immediately referred the claimant to the emergency room.

3. Also on August 27, 2018, the claimant was seen by Dr. Peter Pruett in the emergency department at Delta County Memorial Hospital. An x-ray of the claimant's right shoulder showed no evidence of a dislocation or subluxation. However, the x-ray did show significant degenerative joint disease and chronic deformity of the humeral head. Dr. Pruett opined that the claimant suffered an injury to his right rotator cuff. The claimant was provided a shoulder immobilizer and prescribed pain medications. In addition, Dr. Pruett recommended that the claimant obtain an orthopedic consultation.

4. On August 28, 2018, the claimant began treatment with Dr. Terry Wade. Dr. Wade is the claimant's authorized treating physician (ATP) for this claim. On that date, the claimant reported severe right shoulder pain. On exam, Dr. Wade noted that the claimant had virtually no range of motion of his right shoulder and tenderness on palpation. Dr. Wade also noted that the claimant had full range of motion in his right hand, but was reporting tingling in his index, middle, and ring finger. Dr. Wade ordered a magnetic resonance image (MRI) of the claimant's right shoulder.

5. On September 4, 2018, an MRI of the claimant's right shoulder showed marked arthrosis of the glenohumeral joint, a large cystic lesion on the supraspinatus, advanced degeneration of the acromioclavicular (AC) joint, and tendinosis of both the subscapularis and the biceps tendon.

6. On September 11, 2018, the claimant returned to Dr. Wade. In addition to his right shoulder symptoms, the claimant informed Dr. Wade that "his right thumb will not bend properly". Dr. Wade opined that the claimant suffered a right rotator cuff tear and referred the claimant for an orthopedic consultation. Dr. Wade did not state an opinion regarding the claimant's right thumb/hand complaints.

7. On September 19, 2018, the claimant was seen by Dr. Richard Knackendoffel for consultation regarding his right shoulder symptoms. At that time, the claimant reported his right shoulder symptoms as pain, numbness, tingling, locking, swelling, weakness, and decreased range of motion. The claimant also reported that he was experiencing locking in his right thumb with numbness and tingling in his right hand.

8. Dr. Knackendoffel opined that the severe glenohumeral arthritis in the claimant's right shoulder was aggravated by the August 27, 2018 fall. Dr. Knackendoffel recommended a computed tomography (CT) scan of the claimant's right shoulder. In addition, he opined that the claimant would benefit from a reverse total shoulder arthroplasty. With regard to the claimant's right hand and thumb, Dr. Knackendoffel opined that the claimant had right trigger thumb. On that same date, Dr. Knackendoffel administered steroid injections to both the claimant's right thumb and right carpal tunnel.

9. On September 27, 2018, the claimant returned to Dr. Knackendoffel and reported that the right thumb injection did not provide any relief. On that date, Dr. Knackendoffel continued to diagnose a right trigger thumb. In addition, Dr. Knackendoffel recommended that the claimant undergo a right trigger thumb release.

10. On January 19, 2019, the claimant attended an independent medical examination (IME) with Dr. Mark Failinger. In connection with the IME, Dr. Failinger reviewed the claimant's medical records, obtained a history from the claimant, and completed a physical examination. In his IME report, Dr. Failinger opined that the claimant's preexisting right shoulder condition of severe degenerative joint disease was exacerbated by the August 27, 2018 fall. Dr. Failinger also opined that the claimant's right trigger thumb was not related to the claimant's fall at work. Therefore, it was the opinion of Dr. Failinger that the recommended trigger thumb release would be

reasonable and necessary to treat the claimant's symptoms, but unrelated to the work injury. Dr. Failinger did not address any left sided symptoms or issues in his IME report.

11. After he had an opportunity to review the claimant's imaging studies, Dr. Failinger issued an addendum to his IME report. In that addendum, Dr. Failinger changed his opinion regarding the relatedness of the condition of the claimant's right shoulder to the fall on August 27, 2018 fall. Specifically, Dr. Failinger specifically noted his opinion that the need for a right shoulder replacement was due to the claimant's preexisting severe and ongoing degenerative joint disease. In support of this opinion, Dr. Failinger noted that the imaging studies showed that the claimant's rotator cuff was intact.

12. Initially the respondents denied authorization for the recommended right shoulder surgery. However, following a hearing, ALJ Keith Mottram determined that the surgery was reasonable, necessary, and related to the work injury.

13. On June 10, 2019, the claimant was seen by Dr. Wade. At that time, Dr. Wade noted that the claimant reported that he was a "having left shoulder and left arm pain secondary to overuse".

14. On June 24, 2019, the claimant returned to Dr. Wade. In the medical record of that date, Dr. Wade noted that the claimant wanted to return to Dr. Knackendoffel regarding his left shoulder symptoms. Dr. Wade opined that these left sided symptoms were the result of the "nonuse" of the claimant's right arm and shoulder.

15. On June 27, 2019, the claimant was seen by Dr. Knackendoffel and reported symptoms in his left shoulder and left hand. The claimant described the symptoms as pain, numbness, tingling, weakness, decreased range of motion, and stiffness. Dr. Knackendoffel ordered x-rays of the claimant's left shoulder and left hand. Dr. Knackendoffel noted that the x-rays showed osteoarthritis of the claimant's left glenohumeral joint and left metacarpal trapezial joint. On that date, Dr. Knackendoffel administered a steroid injection the claimant's left wrist. Dr. Knackendoffel did not indicate an opinion regarding the cause of the claimant's left sided symptoms.

16. On July 18, 2019, the claimant returned to Dr. Wade and continued to report left shoulder symptoms including pain and weakness. On that date, the claimant was taken off of all work.

17. On July 23, 2019, the claimant returned to Dr. Knackendoffel and reported that the injection to his right thumb in February 2019 was helpful. On that date, Dr. Knackendoffel administered a second injection into the claimant's right thumb. The claimant was also provided with a thumb brace.

18. On August 20, 2019, Dr. Knackendoffel submitted a request for authorization of a right trigger thumb release.

19. On September 5, 2019, the respondents notified the claimant that treatment of his right shoulder (including reverse total shoulder replacement) was authorized. In addition, the claimant was notified that treatment of the claimant's left shoulder and right trigger thumb was denied as it is the respondents' position that such treatment is unrelated to work injury.

20. On September 13, 2019, Dr. Sean Gray performed a right reverse total shoulder arthroplasty with allograft reconstruction of the glenoid.

21. The respondents asked Dr. Failinger to review additional medical records. Dr. Failinger was asked to opine as to whether the claimant's left sided symptoms were related to the August 27, 2018 work injury. On November 24, 2019, Dr. Failinger issued an addendum to his IME report. In that report, he opined that the claimant's left shoulder symptoms are not related to the claimant's fall onto his right shoulder on August 27, 2018. Dr. Failinger also opined that the claimant's limited use of his right upper extremity (and therefore additional use of this left upper extremity) did not cause the condition of the claimant's left shoulder. Dr. Failinger noted that it is likely that the claimant has the same degenerative condition in his left shoulder that was discovered in his right shoulder. Dr. Failinger also noted that greater use of one limb does not cause degenerative changes in that limb. Nor would said use of the claimant's left arm cause the symptoms reported by the claimant. Dr. Failinger went on to note that injury from "overuse" is a scientific fallacy. Dr. Failinger's testimony was consistent with his written reports.

22. Dr. Knackendoffel testified that he diagnosed the claimant with severe osteoarthritis in his right shoulder. Dr. Knackendoffel confirmed that he recommended the reverse right total shoulder replacement. In addition, he confirmed that he referred the claimant to a shoulder specialist, Dr. Grey, to perform the surgery due to the degenerative condition of the shoulder.

23. Dr. Knackendoffel also testified that he diagnosed a right trigger thumb. With regard to causation, Dr. Knackendoffel testified that the claimant's fall on August 27, 2018 could have caused the trigger thumb. He explained that trigger thumb is caused by an inflammation of the tendon and the tendon sheath. He also noted that the claimant's fall could have aggravated his right thumb condition, resulting in the triggering. Dr. Knackendoffel also noted that he recommended the trigger release because the claimant did not improve after conservative treatment of injections.

24. With regard to the claimant's left shoulder symptoms, Dr. Knackendoffel testified that the primary cause of those symptoms is underlying osteoarthritis. Dr. Knackendoffel agreed that the claimant's fall onto his right shoulder did not directly result in the current condition of the claimant's left shoulder. Dr. Knackendoffel testified that he agreed with Dr. Wade's opinion that the condition of the claimant's left shoulder was caused by overuse.

25. The ALJ credits the medical records and the opinions of Dr. Failinger over the contrary opinions of Dr. Knackendoffel and Dr. Wade. The ALJ finds that the claimant has failed to demonstrate that it is more likely than not that that medical treatment of his right thumb, right wrist, and right hand; (including a right trigger thumb release recommended by Dr. Knackendoffel); is reasonable, necessary, and related to the admitted August 27, 2018 work injury. The ALJ finds that the claimant has also failed to demonstrate that it is more likely than not that medical treatment of his left upper extremity is reasonable, necessary, and related to the admitted August 27, 2018 work injury.

26. The ALJ specifically credits the opinion of Dr. Failinger that greater use of one limb does not cause degenerative changes in the contralateral limb. While using one arm more than the other might result in soreness and fatigue, the ALJ finds that such “overuse” would not result in the degenerative condition of the claimant’s left upper extremity.

CONCLUSIONS OF LAW

1. The purpose of the “Workers’ Compensation Act of Colorado” is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers’ Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers’ Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers’ Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ’s factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness’s testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *CJI*, Civil 3:16 (2018).

4. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; see *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

5. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that medical treatment of his right thumb, right wrist, and right hand; (including a right trigger thumb release recommended by Dr. Richard Knackendoffel); is reasonable, necessary, and related to the admitted August 27, 2018 work injury. As found, the claimant has also failed to demonstrate, by a preponderance of the evidence, that medical treatment of his left upper extremity is reasonable, necessary, and related to the admitted August 27, 2018 work injury. As found, the medical records and the opinions of Dr. Failing are credible and persuasive.

ORDER

It is therefore ordered:

1. The claimant's request for medical treatment of his right thumb, right wrist, and right hand; (including a right trigger thumb release recommended by Dr. Knackendoffel); is denied and dismissed.

2. The claimant's request for medical treatment of his left upper extremity is denied and dismissed.

Dated this 3rd day of February 2020.



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

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

ISSUES

- Whether the claimant has demonstrated, by a preponderance of the evidence, that medical treatment recommended by Dr. Kirk Clifford (including additional sacroiliac (SI) joint injections and an SI joint fusion) is reasonable medical treatment necessary to maintain the claimant at maximum medical improvement (MMI).
- Whether the claimant has demonstrated, by a preponderance of the evidence, that his claim should be reopened pursuant to Section 8-43-303, C.R.S. due to a worsening of his condition.
- If the claimant's claim is reopened, whether the claimant has demonstrated, by a preponderance of the evidence, that medical treatment recommended by Dr. Kirk Clifford (including additional SI joint injections and an SI joint fusion) is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury.
- Whether the respondent has demonstrated, by a preponderance of the evidence, that the claimant experienced an intervening event on October 29, 2017 that was sufficient to sever the respondent's liability and terminate the claimant's maintenance medical care.

FINDINGS OF FACT

1. The claimant was employed as a firefighter with the employer for 26 years. The claimant's duties included responding to emergency services calls. Each year the claimant underwent a "fit for duty" test.

Prior Medical Treatment

2. On May 23, 1999, the claimant suffered a work injury to his low back. On October 26, 1999, Dr. Jeff Bowman assessed a 9 percent whole person impairment rating for an L5-S1 disc derangement and chronic right sacroiliitis. Dr. Bowman noted that the claimant had a "long standing history of chronic left sided hip pain with chronic sacroiliitis requiring orthotics due to pedal abnormalities with gait and also reported a history of low back pain secondary to compensatory changes from irregular gait".

3. Thereafter, on January 17, 2004, the claimant felt a pop in his back and experienced right leg radiculopathy. After undergoing various modes of treatment to his low back, on March 23, 2005, the claimant underwent an L5-S1 transforaminal lumbar interbody fusion.

4. On January 12, 2006, Dr. Donald Corenman determined that the claimant had reached maximum medical improvement (MMI) for the January 17, 2004 injury. At that time, Dr. Corenman assessed a 23 percent whole person impairment. However, he also determined that the claimant did not have any permanent work restrictions. The claimant testified that he did not have any back issues and he was able to perform all of duties as a firefighter following the recovery from the 2006 surgery and prior to the February 1, 2015 injury.

Admitted February 1, 2015 Injury

5. The claimant was injured while working his normal duties as a fire captain on February 1, 2015. On that date, the claimant and his coworkers responded to an emergency services call involving an unconscious individual on the second floor of a home. It was necessary to transport the individual down the stairs in a sling-type apparatus. The claimant was not involved in the transport down the stairs. However, he was waiting to assist his coworkers in transferring the individual onto a gurney. During that transfer, the individual began to slip from the sling and the claimant reached across the gurney in an attempt to catch him. It was during that movement that the claimant was injured. The claimant testified that he tore the bicep tendon in his right shoulder and injured his back.

6. On February 5, 2015, the claimant's authorized treating physician, Dr. Craig Stagg, issued a WC 164 form outlining various work restrictions for the claimant including no lifting, carrying, pushing, or pulling over 30 pounds. At that time, Dr. Stagg referred the claimant to Dr. Corenman for consultation.

7. On February 12, 2015, a magnetic resonance image (MRI) of the claimant's lumbar spine showed evidence of his prior L5-S1 fusion; a mild to moderate circumferential disc bulge with bilateral foraminal annular tearing at the L3-L4 level; and a mild circumferential disc bulge with left foraminal annular tearing at the L4-L5 level.

8. The claimant was seen by Dr. Corenman on February 12, 2015. At that time, the claimant reported that on February 1, 2015 the experienced increased right SI joint pain after reaching to assist his coworkers. The claimant also reported that he developed pain that radiated down his right leg. Dr. Corenman opined that the claimant's pain was caused by the small annular tears at the L4-5 and L3-L4 levels. In addition, Dr. Corenman noted that if the claimant did not improve in five to six weeks, an epidural steroid injection could be pursued.

9. Subsequently, on April 6, 2015, Dr. Corenman administered transforaminal epidural steroid injections (TFESI) at the L4-5 and S1 levels. On April 23, 2015, the claimant returned to Dr. Corenman and reported that he did not experienced any relief from the injections. The claimant also reported that he had right SI joint pain and right leg S1 nerve root pain.¹

¹ The ALJ recognizes the anatomical difference between treatment of the claimant's S1 spinal level and the sacroiliac (SI) joint.

10. On June 17, 2015, the claimant underwent an independent medical examination through the Fire and Police Pension Association (FPPA). In a report to the FPPA, Dr. Robert Messenbaugh opined that the claimant was “permanently occupationally disabled” due to his chronic lumber spine disc pathology. Dr. Messenbaugh also opined that the claimant was “no longer capable of safely, effectively, consistently, and reliably (*sic*) capable of performing his required duties as a fire captain.” Following that FPPA report, the claimant’s employment with the employer ended.

11. The claimant continued to treat with Dr. Corenman who administered various injections and facet blocks. Dr. Thos Evans also administered injections, including a right SI joint injection on October 5, 2015.

12. On November 4, 2015, Dr. Evans performed medial branch radiofrequency ablation (RFA) at the left L3-4 and L4-5 levels. Thereafter on November 4, 2015, Dr. Evans performed right L5-S1 medial branch RFA and right S1, S2, and S3 lateral branch RFA.

13. On March 10, 2016, Dr. Stagg determined that the claimant had reached maximum medical improvement (MMI) for the February 1, 2015 injury. Dr. Stagg also determined that apportionment was necessary due to the claimant’s prior injury, which resulted in a 1 percent whole person impairment for this injury.²

14. On October 8, 2016, Dr. Evans authored a letter in which he reported that injections to the claimant’s facets, discs, and SI region were successful. In that same letter, Dr. Evans recommended a right L4-5 and L5-S1 TFESI.

15. On October 10, 2016, the claimant attended a Division Sponsored Independent Medical examination (DIME) with Dr. John Aschberger. In connection with the DIME, Dr. Aschberger reviewed the claimant’s medical records, obtained a history from the claimant, and completed a physical examination. In his DIME report, Dr. Aschberger noted significant findings of pelvic asymmetry. Dr. Aschberger opined that the claimant’s asymmetric pelvis could be the source of the claimant’s SI joint symptoms. In addition, Dr. Aschberger recommended no additional injections until the claimant’s pelvic dysfunction is corrected. Dr. Aschberger assessed a permanent impairment rating of 2 percent for the claimant’s spine. When combined with an impairment rating for the claimant’s right upper extremity, Dr. Aschberger assessed a whole person impairment rating of 8 percent.

16. The claimant continued to experience low back pain with radicular symptoms and returned to Dr. Evans on March 24, 2017. At that time, the claimant reported to Dr. Evans that he did not accurately report his relief from a prior injection. The claimant clarified that he experienced better than 80 percent relief following the RFA performed in April 2016 for two to three months. Dr. Evans diagnosed sacroiliitis

² Dr. Stagg also assessed permanent impairment of the claimant’s right shoulder for a total whole person impairment of 6 percent.

and recommended a right SI joint injection. The recommended right SI joint injection was administered by Dr. Evans on April 11, 2017.

17. The claimant returned to Dr. Evans on May 24, 2017 and reported 80 percent relief of his right leg radicular symptoms following the SI joint injection. At that time, Dr. Evans recommended a repeat right SI joint injection.

18. The respondent asked Dr. Kathy McCranie to review the reasonableness and necessity of the repeat right SI joint injection recommended by Dr. Evans. On September 25, 2017, Dr. McCranie issued a report in which she opined that the injection was reasonable and necessary. However, Dr. McCranie noted that the Colorado Medical Treatment Guidelines (MTG) require that certain steps are to be taken before and after such an injection, to properly document the claimant's pain reports and functional gains.

19. The recommended repeat right SI joint injection was administered by Dr. Evans on October 10, 2017. However, the pre and post injection documentation addressed in Dr. McCranie's report were not performed.

20. On November 16, 2017, the claimant was seen by Dr. Robert McLaughlin. At that time, the claimant reported that he had fallen while working for his new employer, Rocky Mountain Gun Club (RMGC). At the time of that appointment, the claimant had been working for RMGC for approximately one year. The claimant reported to Dr. McLaughlin that on October 29, 2017, he slipped on a slippery floor at work and fell onto his right and left buttocks and low back. The claimant also reported a new feeling of pain down his right leg. Dr. McLaughlin ordered an x-ray of the claimant's pelvis which showed no acute changes. Dr. McLaughlin opined that the claimant's recent fall might have exacerbated the claimant's preexisting lumbar spine condition. At that time, a referral was made for chiropractic treatment.

21. On December 8, 2017, Dr. McLaughlin noted that the claimant continued to complain of radicular pain down his right leg. The claimant also reported numbness in his right foot. At that time, Dr. McLaughlin opined that the claimant's SI joint was causing these symptoms.

22. On December 15, 2017, the claimant was seen by Dr. Stagg who noted that the claimant remained at MMI for his 2015 work injury.

23. On January 19, 2018, Dr. McLaughlin noted that the claimant was at MMI for the October 29, 2017 injury. It appears that Dr. McLaughlin made this determination of MMI based upon the claimant's report that he had returned to his "baseline". Dr. McLaughlin also noted that the claimant had long-term chronic pain in the lumbar spine and SI joint.

24. The claimant continued to report his low back and SI joint symptoms to Dr. Stagg. On May 21, 2018, Dr. Stagg referred the claimant to surgeon Dr. Kirk Clifford for consultation.

25. The claimant was first seen by Dr. Clifford on May 24, 2018. The claimant reported to Dr. Clifford that the SI joint injection was the most effective treatment of his symptoms. Dr. Clifford opined that the claimant's right SI joint was the claimant's pain generator. As a result, he recommended a right SI joint injection.

26. On June 4, 2018, Dr. Timothy O'Brien conducted a medical records review and issued a report in which he recommended denial of the right SI joint injection. In support of his opinion, Dr. O'Brien noted that the claimant experienced only two months of relief from the prior injection. In addition, Dr. O'Brien opined that the claimant's SI joint was not injured at the time February 1, 2015 work injury.

27. Based upon the opinion of Dr. O'Brien, the respondent initially denied authorization for a right sided SI joint injection. Subsequently, Dr. McCranie reviewed additional medical records and issued reports on August 30, 2018 and August 31, 2018. In her reports, Dr. McCranie recommended that the SI joint injection proceed. However, Dr. McCranie again recommended that the injections comply with the MTG and properly document the claimant's pain reports and functional gains.

28. On November 28, 2018, Dr. Clifford administered a right SI joint injection. On December 10, 2018, the claimant reported to Dr. Stagg that the injection provided 24 hours of improvement. The claimant also reported that he had received more relief from past injections. However, the pre and post injection documentation as recommended by Dr. McCranie were not performed.

29. The claimant returned to Dr. Clifford on December 19, 2018, and reported that he had 80 percent relief for two to four hours following the injection. At that visit, Dr. Clifford recommended that the claimant undergo a right sided SI joint fusion. On March 8, 2019, Dr. McLaughlin agreed with the recommended fusion. However, Dr. McLaughlin recommended that the claimant first undergo a diagnostic right SI joint injection.

30. Subsequently, Dr. Clifford also recommended a left sided SI joint injection. That left SI joint injection was administered by Dr. Clifford on May 29, 2019.

31. Dr. Clifford testified by deposition in this matter regarding his treatment recommendations. Dr. Clifford testified that the claimant has bilateral SI joint pain. Dr. Clifford reiterated that he has recommended that the claimant undergo a repeat right-sided SI joint injection. Dr. Clifford explained that the basis for this recommendation is that the claimant experienced 70 percent relief immediately following the last injection, with 80 percent improvement for "a few hours". Dr. Clifford also testified that he has recommended a right sided SI joint fusion to address the claimant's symptoms. Dr. Clifford explained that a repeat SI joint injection that provides 80 percent relief would

indicate that an SI joint fusion would be a treatment option for the claimant. In addition, Dr. Clifford opined that the claimant is also a candidate for a left sided SI joint fusion.

32. On June 11, 2019, the claimant attended an independent medical examination (IME) with Dr. Brian Reiss. In connection with the IME, Dr. Reiss reviewed the claimant's medical records, obtained a history from the claimant, and completed a physical examination. In his IME report, Dr. Reiss opined that the claimant's SI joint is not his pain generator. In support of this opinion, Dr. Reiss noted that the injections administered to the claimant have not diagnosed a pain generator. In addition, the injections have not been documented in accordance with the MTG. For example, there has been no definitive documentation of the claimant's pain level and function immediately prior to and after the injections. Nor have there been any pain diaries kept to document the success of each injection. As a result of these factors, Dr. Reiss noted that an SI joint fusion would not be indicated for the claimant pursuant to the MTG. Dr. Reiss also noted that the claimant has a long history of SI joint related issues beginning in 1999.

33. On August 2, 2019, Dr. McCranie reviewed Dr. Reiss' IME report and issued her own report in which she agreed with Dr. Reiss. Specifically, Dr. McCranie noted her agreement that the claimant remains at MMI for the February 1, 2015 work injury. Dr. McCranie also agreed that the claimant is not a candidate for an SI joint fusion. Finally, Dr. McCranie noted that pursuant to the MTG, SI joint fusions are not indicated for mechanical back pain.

34. On August 27, 2019, Dr. Reiss was asked to review additional medical records. Upon completing that review, Dr. Reiss issued a report in which he reiterated that repeat SI joint injections are not indicated pursuant to the MTG. In addition, an SI joint fusion is not indicated pursuant to the MTG. Dr. Reiss stated that his opinions were unchanged. On September 23, 2019, Dr. Reiss issued a reported after he was provided the transcript of Dr. Clifford's deposition. Dr. Reiss again stated his opinion that repeat SI joint injections and/or an SI joint fusion were not indicated. Based upon Dr. Reiss' opinions, the respondent denied authorization for both SI joint injections and an SI joint fusion.

35. Dr. Reiss' testimony by deposition was consistent with his written reports. Dr. Reiss reiterated his opinion that an SI joint fusion was not indicated for the claimant. In support of this opinion, Dr. Reiss noted that the MTG do not recommend an SI joint fusion to treat low back pain. Dr. Reiss also noted his opinion that a repeat SI joint injection is not indicated. It is the opinion of Dr. Reiss that such an injection would not be useful, given that ultimately an SI joint fusion is not indicated. Dr. Reiss testified that it is his understanding that the claimant has changed his position regarding the effectiveness of various injections he has received. Dr. Reiss also testified that it is still unclear that the SI joint is the claimant's pain generator.

36. The claimant testified that the most effective treatment of his symptoms occurred with the first SI joint injection. In addition, the claimant recalls that following the injections, he experienced 95 to 100 percent improvement in his pain symptoms. However, this pain relief was for a short period of time. The claimant also testified that his current symptoms include an inability to sit for very long because of his pain.

37. With regard to the October 29, 2017 incident at RMGC, the claimant testified that he slipped and landed on his “backside”. The claimant also testified that that incident did not cause any permanent impact to his condition.

38. The ALJ credits the medical records and the opinions of Drs. Reiss and McCranie over the contrary opinions of Dr. Clifford and finds that the claimant has failed to demonstrate that it is more likely than not that the recommended SI joint injections and SI joint fusion are reasonable and necessary to cure and relieve the claimant from the effects of the work injury. The ALJ also finds that the claimant has failed to demonstrate that it is more likely than not the claimant’s condition has worsened.

39. The ALJ credits the medical records and finds that the respondent has successfully demonstrated that it is more likely than not that the claimant’s slip and fall on October 29, 2017 was an intervening event necessitating the need for medical treatment. Specifically, the ALJ finds that the October 29, 2017 incident resulted in the need for the claimant to be seen by Dr. McLaughlin, an x-ray, and a referral to chiropractic treatment which establish evidence of a new injury.

CONCLUSIONS OF LAW

1. The purpose of the “Workers’ Compensation Act of Colorado” is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers’ Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers’ Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers’ Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ’s factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2014).

4. Section 8-43-303(1) provides that "any award" may be reopened within six years after the date of injury "on the ground of fraud, an overpayment, an error, mistake, or a change in condition." Reopening for "mistake" can be based on a mistake of law or fact. *Renz v. Larimer County School District Poudre R-1*, 924 P.2d 1177 (Colo. App. 1996). A claimant may request reopening on the grounds of error or mistake even if the claim was previously denied and dismissed. E.g., *Standard Metals Corporation v. Gallegos*, 781 P.2d 142 (Colo. App. 1989); see also *Amin v. Schneider National Carriers*, W.C. No. 4-81-225-06 (November 9, 2017). The ALJ has wide discretion to determine whether an error or mistake has occurred that justifies reopening the claim. *Berg v. Industrial Claim Appeals Office*, 128 P.3d 270 (Colo. App. 2005); *Travelers Ins. Co. v. Industrial Commission*, 646 P.2d 399 (Colo. 1981).

5. A change in condition refers to "a change in the condition of the original compensable injury or to a change in the claimant's physical or mental condition which can be causally connected to the original compensable injury." *Heinicke v. Industrial Claim Appeals Office*, 197 P.3d 222 (Colo. App. 2008). The ALJ is not required to reopen a claim based upon a worsened condition whenever an authorized treating physician finds increased impairment following MMI. *Id.* The party attempting to reopen an issue or claim shall bear the burden of proof as to any issues sought to be reopened. Section 8-43-303(4), C.R.S.

6. As found, the claimant has failed to demonstrate by a preponderance of the evidence that his condition has worsened. As found, the medical records and the opinions of Drs. Reiss and McCranie are credible and persuasive.

7. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; see *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). The need for medical treatment may extend beyond the point of maximum medical improvement where claimant requires periodic maintenance care to prevent further deterioration of his physical condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Section 8-42-101, C.R.S., thus authorizes the ALJ to enter an order for future maintenance treatment if support by substantial evidence of the need for such treatment. *Grover v. Industrial Commission, supra.*

8. The Colorado Workers' Compensation Medical Treatment Guidelines (MTG) are regarded as accepted professional standards for care under the Workers' Compensation Act. *Rook v. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005). The statement of purpose of the MTG is as follows: "In an effort to comply with its legislative charge to assure appropriate medical care at a reasonable cost, the

director of the Division has promulgated these 'Medical Treatment Guidelines.' This rule provides a system of evaluation and treatment guidelines for high cost or high frequency categories of occupational injury or disease to assure appropriate medical care at a reasonable cost." WCRP 17-1(A). In addition, WCRP 17-5(C) provides that the MTG "set forth care that is generally considered reasonable for most injured workers. However, the Division recognizes that reasonable medical practice may include deviations from these guidelines, as individual cases dictate."

9. While it is appropriate for an ALJ to consider the MTG while weighing evidence, the MTG are not definitive. See *Jones v. T.T.C. Illinois, Inc.*, W.C. No. 4-503-150 (May 5, 2006); *aff'd Jones v. Industrial Claim Appeals Office* No. 06CA1053 (Colo. App. March 1, 2007) (not selected for publication) (it is appropriate for the ALJ to consider the MTG on questions such as diagnosis, but the MTG are not definitive); see also *Burchard v. Preferred Machining*, W.C. No. 4-652-824 (July 23, 2008) (declining to require application of the MTG for carpal tunnel syndrome in determining issue of PTD); see also *Stamey v. C2 Utility Contractors et al*, W.C. No. 4-503-974 (August 21, 2008) (even if specific indications for a cervical surgery under the MTG were not shown to be present, ICAO was not persuaded that such a determination would be definitive).

10. As found, the claimant has failed to demonstrate by a preponderance of the evidence that the SI joint injections and SI joint fusion constitute reasonable and necessary medical treatment. As found, the medical records and the opinions of Drs. Reiss and McCranie are credible and persuasive.

11. If an intervening event triggers disability or need for medical treatment, then the causal connection between the original injury and the claimant's condition is severed. See *Post Printing & Publishing Co. v. Erickson*, 94 Colo. 382, 384, 30 P.2d 327, 328 (1934). Respondents are only liable for subsequent injuries which "flow proximately and naturally" from the compensable injury. *Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970).

12. As found, the respondent has demonstrated by a preponderance of the evidence that on October 29, 2017, the claimant suffered an intervening event that was sufficient to sever the respondent's liability and terminate claimant's maintenance medical care. As found, the medical records are credible and persuasive.

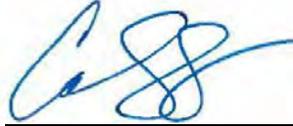
ORDER

It is therefore ordered:

1. The claimant's request that his claim be reopened is denied and dismissed.
2. The claimant's request for medical treatment recommended by Dr. Clifford (including additional SI joint injections and an SI joint fusion) is denied and dismissed.

3. On October 29, 2017, the claimant suffered an intervening event that was sufficient to sever the respondent's liability and terminate the claimant's maintenance medical care.

Dated this 4th day of February 2020.



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

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

ISSUES

1. Whether the claimant has demonstrated, by a preponderance of the evidence, that medical treatment of his right thumb, right wrist, and right hand; (including a right trigger thumb release recommended by Dr. Richard Knackendoffel); is reasonable, necessary, and related to the admitted August 27, 2018 work injury.

2. Whether the claimant has demonstrated, by a preponderance of the evidence, that medical treatment of his left upper extremity is reasonable, necessary, and related to the admitted August 27, 2018 work injury.

FINDINGS OF FACT

1. The claimant worked for the employer installing fiber cable in residences. On August 27, 2018, the claimant was performing his normal job duties when he fell while walking up an inclined area outdoors. The claimant testified that he tripped on a piece of rebar that was sticking out of the ground. At that time, the claimant held a splicer in his left hand and his tool bag in his right hand. As he was falling, the claimant dropped the tool bag and struck his right shoulder and right arm on pieces of river rock. The claimant reported the fall to the employer. The insurer has admitted liability for the claimant's August 27, 2018 fall.

2. The claimant received medical treatment on August 27, 2018. The claimant first sought treatment at West Elk Walk-In Clinic. At that time, the claimant was seen by Candi Lobenstein, NP. The medical record of that date indicates that the claimant was complaining of right shoulder pain. On exam, Ms. Lobenstein noted that the claimant's right shoulder was sitting lower than his left, but she did not believe it to be an anterior dislocation. In addition, Ms. Lobenstein observed that the claimant had full range of motion of this right hand, could make a fist, and moved both his wrist and forearm normally. Due to the condition of the claimant's right shoulder, Ms. Lobenstein immediately referred the claimant to the emergency room.

3. Also on August 27, 2018, the claimant was seen by Dr. Peter Pruett in the emergency department at Delta County Memorial Hospital. An x-ray of the claimant's right shoulder showed no evidence of a dislocation or subluxation. However, the x-ray did show significant degenerative joint disease and chronic deformity of the humeral head. Dr. Pruett opined that the claimant suffered an injury to his right rotator cuff. The claimant was provided a shoulder immobilizer and prescribed pain medications. In addition, Dr. Pruett recommended that the claimant obtain an orthopedic consultation.

4. On August 28, 2018, the claimant began treatment with Dr. Terry Wade. Dr. Wade is the claimant's authorized treating physician (ATP) for this claim. On that date, the claimant reported severe right shoulder pain. On exam, Dr. Wade noted that the claimant had virtually no range of motion of his right shoulder and tenderness on palpation. Dr. Wade also noted that the claimant had full range of motion in his right hand, but was reporting tingling in his index, middle, and ring finger. Dr. Wade ordered a magnetic resonance image (MRI) of the claimant's right shoulder.

5. On September 4, 2018, an MRI of the claimant's right shoulder showed marked arthrosis of the glenohumeral joint, a large cystic lesion on the supraspinatus, advanced degeneration of the acromioclavicular (AC) joint, and tendinosis of both the subscapularis and the biceps tendon.

6. On September 11, 2018, the claimant returned to Dr. Wade. In addition to his right shoulder symptoms, the claimant informed Dr. Wade that "his right thumb will not bend properly". Dr. Wade opined that the claimant suffered a right rotator cuff tear and referred the claimant for an orthopedic consultation. Dr. Wade did not state an opinion regarding the claimant's right thumb/hand complaints.

7. On September 19, 2018, the claimant was seen by Dr. Richard Knackendoffel for consultation regarding his right shoulder symptoms. At that time, the claimant reported his right shoulder symptoms as pain, numbness, tingling, locking, swelling, weakness, and decreased range of motion. The claimant also reported that he was experiencing locking in his right thumb with numbness and tingling in his right hand.

8. Dr. Knackendoffel opined that the severe glenohumeral arthritis in the claimant's right shoulder was aggravated by the August 27, 2018 fall. Dr. Knackendoffel recommended a computed tomography (CT) scan of the claimant's right shoulder. In addition, he opined that the claimant would benefit from a reverse total shoulder arthroplasty. With regard to the claimant's right hand and thumb, Dr. Knackendoffel opined that the claimant had right trigger thumb. On that same date, Dr. Knackendoffel administered steroid injections to both the claimant's right thumb and right carpal tunnel.

9. On September 27, 2018, the claimant returned to Dr. Knackendoffel and reported that the right thumb injection did not provide any relief. On that date, Dr. Knackendoffel continued to diagnose a right trigger thumb. In addition, Dr. Knackendoffel recommended that the claimant undergo a right trigger thumb release.

10. On January 19, 2019, the claimant attended an independent medical examination (IME) with Dr. Mark Failinger. In connection with the IME, Dr. Failinger reviewed the claimant's medical records, obtained a history from the claimant, and completed a physical examination. In his IME report, Dr. Failinger opined that the claimant's preexisting right shoulder condition of severe degenerative joint disease was exacerbated by the August 27, 2018 fall. Dr. Failinger also opined that the claimant's right trigger thumb was not related to the claimant's fall at work. Therefore, it was the opinion of Dr. Failinger that the recommended trigger thumb release would be

reasonable and necessary to treat the claimant's symptoms, but unrelated to the work injury. Dr. Failinger did not address any left sided symptoms or issues in his IME report.

11. After he had an opportunity to review the claimant's imaging studies, Dr. Failinger issued an addendum to his IME report. In that addendum, Dr. Failinger changed his opinion regarding the relatedness of the condition of the claimant's right shoulder to the fall on August 27, 2018 fall. Specifically, Dr. Failinger specifically noted his opinion that the need for a right shoulder replacement was due to the claimant's preexisting severe and ongoing degenerative joint disease. In support of this opinion, Dr. Failinger noted that the imaging studies showed that the claimant's rotator cuff was intact.

12. Initially the respondents denied authorization for the recommended right shoulder surgery. However, following a hearing, ALJ Keith Mottram determined that the surgery was reasonable, necessary, and related to the work injury.

13. On June 10, 2019, the claimant was seen by Dr. Wade. At that time, Dr. Wade noted that the claimant reported that he was a "having left shoulder and left arm pain secondary to overuse".

14. On June 24, 2019, the claimant returned to Dr. Wade. In the medical record of that date, Dr. Wade noted that the claimant wanted to return to Dr. Knackendoffel regarding his left shoulder symptoms. Dr. Wade opined that these left sided symptoms were the result of the "nonuse" of the claimant's right arm and shoulder.

15. On June 27, 2019, the claimant was seen by Dr. Knackendoffel and reported symptoms in his left shoulder and left hand. The claimant described the symptoms as pain, numbness, tingling, weakness, decreased range of motion, and stiffness. Dr. Knackendoffel ordered x-rays of the claimant's left shoulder and left hand. Dr. Knackendoffel noted that the x-rays showed osteoarthritis of the claimant's left glenohumeral joint and left metacarpal trapezial joint. On that date, Dr. Knackendoffel administered a steroid injection the claimant's left wrist. Dr. Knackendoffel did not indicate an opinion regarding the cause of the claimant's left sided symptoms.

16. On July 18, 2019, the claimant returned to Dr. Wade and continued to report left shoulder symptoms including pain and weakness. On that date, the claimant was taken off of all work.

17. On July 23, 2019, the claimant returned to Dr. Knackendoffel and reported that the injection to his right thumb in February 2019 was helpful. On that date, Dr. Knackendoffel administered a second injection into the claimant's right thumb. The claimant was also provided with a thumb brace.

18. On August 20, 2019, Dr. Knackendoffel submitted a request for authorization of a right trigger thumb release.

19. On September 5, 2019, the respondents notified the claimant that treatment of his right shoulder (including reverse total shoulder replacement) was authorized. In addition, the claimant was notified that treatment of the claimant's left shoulder and right trigger thumb was denied as it is the respondents' position that such treatment is unrelated to work injury.

20. On September 13, 2019, Dr. Sean Gray performed a right reverse total shoulder arthroplasty with allograft reconstruction of the glenoid.

21. The respondents asked Dr. Failinger to review additional medical records. Dr. Failinger was asked to opine as to whether the claimant's left sided symptoms were related to the August 27, 2018 work injury. On November 24, 2019, Dr. Failinger issued an addendum to his IME report. In that report, he opined that the claimant's left shoulder symptoms are not related to the claimant's fall onto his right shoulder on August 27, 2018. Dr. Failinger also opined that the claimant's limited use of his right upper extremity (and therefore additional use of this left upper extremity) did not cause the condition of the claimant's left shoulder. Dr. Failinger noted that it is likely that the claimant has the same degenerative condition in his left shoulder that was discovered in his right shoulder. Dr. Failinger also noted that greater use of one limb does not cause degenerative changes in that limb. Nor would said use of the claimant's left arm cause the symptoms reported by the claimant. Dr. Failinger went on to note that injury from "overuse" is a scientific fallacy. Dr. Failinger's testimony was consistent with his written reports.

22. Dr. Knackendoffel testified that he diagnosed the claimant with severe osteoarthritis in his right shoulder. Dr. Knackendoffel confirmed that he recommended the reverse right total shoulder replacement. In addition, he confirmed that he referred the claimant to a shoulder specialist, Dr. Grey, to perform the surgery due to the degenerative condition of the shoulder.

23. Dr. Knackendoffel also testified that he diagnosed a right trigger thumb. With regard to causation, Dr. Knackendoffel testified that the claimant's fall on August 27, 2018 could have caused the trigger thumb. He explained that trigger thumb is caused by an inflammation of the tendon and the tendon sheath. He also noted that the claimant's fall could have aggravated his right thumb condition, resulting in the triggering. Dr. Knackendoffel also noted that he recommended the trigger release because the claimant did not improve after conservative treatment of injections.

24. With regard to the claimant's left shoulder symptoms, Dr. Knackendoffel testified that the primary cause of those symptoms is underlying osteoarthritis. Dr. Knackendoffel agreed that the claimant's fall onto his right shoulder did not directly result in the current condition of the claimant's left shoulder. Dr. Knackendoffel testified that he agreed with Dr. Wade's opinion that the condition of the claimant's left shoulder was caused by overuse.

25. The ALJ credits the medical records and the opinions of Dr. Failinger over the contrary opinions of Dr. Knackendoffel and Dr. Wade. The ALJ finds that the claimant has failed to demonstrate that it is more likely than not that that medical treatment of his right thumb, right wrist, and right hand; (including a right trigger thumb release recommended by Dr. Knackendoffel); is reasonable, necessary, and related to the admitted August 27, 2018 work injury. The ALJ finds that the claimant has also failed to demonstrate that it is more likely than not that medical treatment of his left upper extremity is reasonable, necessary, and related to the admitted August 27, 2018 work injury.

26. The ALJ specifically credits the opinion of Dr. Failinger that greater use of one limb does not cause degenerative changes in the contralateral limb. While using one arm more than the other might result in soreness and fatigue, the ALJ finds that such “overuse” would not result in the degenerative condition of the claimant’s left upper extremity.

CONCLUSIONS OF LAW

1. The purpose of the “Workers’ Compensation Act of Colorado” is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers’ Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers’ Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers’ Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ’s factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness’s testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *CJI*, Civil 3:16 (2018).

4. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; see *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

5. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that medical treatment of his right thumb, right wrist, and right hand; (including a right trigger thumb release recommended by Dr. Richard Knackendoffel); is reasonable, necessary, and related to the admitted August 27, 2018 work injury. As found, the claimant has also failed to demonstrate, by a preponderance of the evidence, that medical treatment of his left upper extremity is reasonable, necessary, and related to the admitted August 27, 2018 work injury. As found, the medical records and the opinions of Dr. Failing are credible and persuasive.

ORDER

It is therefore ordered:

1. The claimant's request for medical treatment of his right thumb, right wrist, and right hand; (including a right trigger thumb release recommended by Dr. Knackendoffel); is denied and dismissed.

2. The claimant's request for medical treatment of his left upper extremity is denied and dismissed.

Dated this 4th day of February 2020.



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

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

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-102-664-001**

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he sustained a compensable work related mental impairment injury.
2. Whether Claimant's claim for compensation is barred pursuant to the statute of limitations in § 8-43-103(2), C.R.S.

FINDINGS OF FACT

1. Claimant is a 38-year-old male who was employed by Employer as a Deputy Sheriff. Claimant began his employment with Employer on August 18, 2008 as a Deputy Sheriff I. Claimant was supervised throughout his employment by Patrol Division Commander Kurt C[Redacted]. See Exhibit B.
2. As a Deputy Sheriff, Claimant's job duties included the requirement to wear a sidearm. Claimant also was required to have available to him in his patrol cruiser an AR-15 rifle and a 12-gauge shot gun.
3. Commander C[Redacted] testified that the number one purpose for the firearms was to allow Claimant to use those firearms against armed offenders who posed a threat to either Claimant or to innocent people and to, if needed, engage in a firefight with them.
4. Claimant was required to be proficient in firearm use. Claimant completed target practice using human silhouettes. Commander C[Redacted] testified that human silhouettes were used because that is what Claimant would be shooting at if he were required to use his firearm.
5. As part of his job duties, Claimant was required to participate in numerous training programs.
6. The training programs included "force on force" a defensive tactics program. This program included training on how to arrest suspects, what to do if the suspects became combative, how to defend oneself if attacked by a suspect, and how to keep oneself from being disarmed. See Exhibit B.
7. The training programs included an annual program "active shooter" which trained deputies on what to expect in an active shooter incident. This program included training where Claimant actually exchanged gunfire with simulated suspects in different scenarios. See Exhibit B.

8. The training programs also included “select firearm class.” This program included training on how to use a fully automatic gun, or machine gun. See Exhibit B.

9. The training programs also included “bulletproof mind” which focused on psychological, emotional, and tactical preparation for law enforcement situations where gunfire is exchanged. See Exhibit B.

10. Claimant also became a member of Employer’s All-Hazards Response Team (AHRT), commonly known as the county’s SWAT team between August of 2010 and November of 2011. As a member of the AHRT team, Claimant was required to undergo a one week 80 hour training program. In training, Claimant participated in scenario based situations included large active shooter drills. To be a member of the AHRT team Claimant had to fulfill psychological, physical, and ethical conditions.

11. The standard operating guideline manual for AHRT includes guidelines as to the use of deadly force and specifically provides that a member of AHRT may use deadly force when it is to protect the officer or others from what is reasonably believed to be a threat of death or serious bodily harm. Commander C[Redacted] testified that this provision in the AHRT manual was to address the exchange of gunfire with armed defenders. See Exhibit B.

12. Claimant testified that he had training during his employment as a Deputy Sheriff to prepare him for situations when he would be involved in the exchange of gunfire.

13. Commander C[Redacted] testified that given the nature of what law enforcement officers are asked to do, the sheriff’s office in particular has reasonable belief that it will be necessary for its deputies to use firearms they are issued or they purchase themselves in exchange of gunfire incidents to protect themselves or other citizens from armed suspects.

14. Commander C[Redacted] testified that this type of training is universal throughout law enforcement agencies and is not unique to Employer’s county. He testified that training starts at the academy level and progresses throughout every officer’s career. Commander C[Redacted] testified that it would not be unusual for Claimant to be involved in the potential of exchanged gunfire especially given Claimant’s specialty assignment to AHRT.

15. During his first year of employment as a Deputy Sheriff from August of 2008 through August of 2009, Claimant was rated in a performance appraisal at a 2.62. A rating of 2.0 is considered developing and a rating of 3.0 is considered proficient. See Exhibit 3.

16. During his second year of employment from August 2009 through August 2010, Claimant was rated in a performance appraisal at a 2.75. See Exhibit 4.

17. During his third year of employment from August of 2010 through November of 2011, Claimant was rated in a performance appraisal at a 3.0. See Exhibit 5.

18. On November 16, 2011, Claimant was recommended for and promoted to the position of Deputy Sheriff II. See Exhibit 6.

19. On December 12, 2011, while working as a Deputy Sheriff, Claimant was dispatched to perform a welfare check. The dispatch was not as an emergency situation but a situation in which a man might need medical assistance. When Claimant went to the front door, a man opened the door holding a firearm pointed at Claimant and held Claimant at gunpoint for some time. Claimant was able to backtrack to his patrol truck and the man ultimately fired at Claimant and the patrol truck four or five times. The man was eventually placed under arrest for attempted murder.

20. Employer completed an internal investigation of Claimant's conduct during the shooting incident and concluded that Claimant acted in accordance with Employer's policies during the shooting event.

21. Claimant testified credibly that he had the onset of psychological symptoms approximately two months following the December 2011 shooting. Claimant testified that his symptoms included daily recurrent involuntary and intrusive distressing memories of the shooting. Claimant for no apparent reason began imagining how it would be if a bullet entered his head. Claimant developed intense psychological distress when seeing something that resembled shooting either in real life or not in real life. This included firearms in hands, or killing of person in a fiction book. Claimant began having marked physiological reactions to external cues resembling the shooting and would have tightened muscles, fingers, trembling arms, and the like. Claimant began having persistent and exaggerated negative feelings about others in the world like believing no one could be trusted. Claimant began living in a persistent negative emotional state having anger and fear daily. Claimant began feeling detached and estranged from others. Claimant began to develop a persistent inability to experience positive emotions and became at almost all times irritable having angry outbursts with little provocation. Claimant began to always be on the lookout for threats and began to be startled by unexpected things like loud unexpected noises. Claimant began having trouble sleeping.

22. Claimant testified that he believed his symptoms would just be a temporary thing and that he lost the pleasure of going to work during this time. Claimant testified that things that had been a source of pride and accomplishment for him prior to the shooting became a burden that he avoided.

23. After his involvement in the shooting incident, Claimant's performance appraisal rating went down. From November of 2011 through November of 2012 he was rating at a 2.12. Included in this appraisal were statements that Claimant had been involved in a traumatic incident towards the end of 2011 and that after he did not seem to be the same person. It also included a statement that Claimant's detail in some of his reports had improved but it could be due to Claimant wanting to stay in the patrol room

and not interact with others. The appraisal also contained a statement indicating that Claimant did a good job when he put his mind and heart into his work but that he was very proactive, and in the last year had gone to performing a bare minimum level. See Exhibit 8.

24. Claimant testified that he felt like no one he attempted to talk to could really relate to his experience and that no one he talked to had actually been in a situation like he had. Claimant testified that after the shooting he began approaching cars on routine traffic stops with his gun pulled because he didn't want to be caught empty handed again. Claimant testified that he also began to stop pulling cars over because he didn't want to be in a situation and tried to avoid stopping cars and only responded to calls. Claimant testified that before the shooting, he rarely took time off work and looked for opportunities to work overtime, but that after the shooting he worked just the minimum amount of hours required and used up most if not all of his accumulative leave.

25. In June of 2013, the man who shot at Claimant on December 12, 2011 was sentenced to prison. Claimant testified at the sentencing hearing and reported that the incident had changed him. Claimant testified that attending the sentencing hearing for this man while in uniform had become a goal that Claimant wanted to achieve before he would honor himself to take steps to leave law enforcement.

26. Shortly after the sentencing hearing, and on August 5, 2013, Claimant submitted a letter of resignation to Employer. Claimant indicated that his last day of employment would be August 23, 2013. Claimant testified that he viewed his symptoms as burnout and that it did not cross his mind that it might be considered an injury. Claimant testified that at the time he resigned the symptoms he was experiencing made it difficult for him to perform his job duties as a Sheriff Deputy.

27. Claimant testified that between 2013 and 2017 the frequency and intensity of his symptoms changed somewhat better or worse depending on time and situations. Claimant testified that some symptoms including sleep disturbance or hypervigilance partially lost intensity but that other symptoms like persistent negative emotional state and persistent negative beliefs about others in the world became stronger and more set in.

28. Claimant testified that in the summer of 2017 he began to track a debate in Colorado about first responders who struggled with posttraumatic stress disorder (PTSD). Claimant testified that was when it occurred to him that what he was struggling with might not just be something that comes with the job or that he needed to get over.

29. Claimant testified that prior to January of 2018, he considered returning to a career in law enforcement and took preliminary steps in the application process but realized that his problems had not gone away and that, even if hired, he would be in the same position as he was back in 2012 and 2013.

30. In January of 2018, Claimant moved to Poland. Claimant testified that in Poland he underwent a psychological evaluation and a psychiatric assessment.

31. On November 30, 2018, Claimant underwent a psychological assessment performed by Ewa Cwalina. Dr. Cwalina is identified as a psychologist and behavioural and cognitive psychotherapist with certificate number PTPPB 67 from the Polish Association for Behavioural and Cognitive Psychotherapies. Dr. Cwalina noted that the psychological assessment demonstrated that Claimant suffered from PTSD developed as a consequence of the incident that happened on December 12, 2011 during the performance of his professional duties. Dr. Cwalina advised Claimant to undergo individual psychotherapy and to be provided consultation by a psychiatrist. The plan was noted to include brief eclectic psychotherapy 16 hourly sessions, reassessment of Claimant's mental status, and a further intervention plan if needed. See Exhibits 11, 15, C.

32. A medical certificate dated December 28, 2018 was entered into evidence. This certificate indicates that Claimant was a patient and had been diagnosed with enduring personality change after catastrophic experience and PTSD. It was authored by Adrian Kostulski, PhD, M.D., psychiatrist and specialist in adult and child psychiatry, 1349768. See Exhibit 12.

33. On February 18, 2019 Claimant filed a Worker's Claim for Compensation. Claimant indicated that he had a date of injury of December 12, 2011, that the injury involved mental health problems of PTSD, and that the injury occurred due to being held at gunpoint and being shot at. See Exhibit A.

34. On March 29, 2019, Respondents filed a Notice of Contest denying liability for the claim. See Exhibit A.

35. On May 2, 2019, Claimant filed an Application for Hearing endorsing the issue of compensability of the claim. See Exhibit A.

36. Claimant testified credibly at hearing. Claimant was clear, concise, organized, and provided consistent answers.

37. Similarly, Commander C[Redacted] testified credibly at hearing.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. See § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. See § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Statute of Limitations

Section 8-43-103(2) of the WC Act provides that the right to compensation and benefits provided by the WC Act shall be barred unless, within two years after the injury...a notice claiming compensation is filed with the division. This period is extended by one year if a "reasonable excuse" exists for not bringing the claim within three years. See 8-43-102(2), C.R.S. The statute of limitations begins to run when the claimant, as a reasonable person, should recognize the nature, seriousness and probable compensable character of the injury. *City of Durango v. Dunagan*, 939 P.2d 496, 498 (Colo. App. 1997) *City of Boulder v. Payne*, 426 P.2d 194, 196 (Colo. 1967). The determination of when a claimant recognized the probable compensable character of her injury is a question of fact for the resolution of the ALJ. *Kersteins v. All American Four Wheel Drive*, W.C. No. 4-865-825 (ICAO, August 1, 2013). A "compensable" injury for purposes of the statute of limitations is one which is "disabling." *Payne*, 426 P.2d at 197. A "disability" is found in workers compensation cases under two circumstances; one such circumstance is a "medical incapacity" as evidenced by the loss or impairment of body function, the second is a temporary loss of earning capacity evidenced by the inability to perform regular employment. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). This second circumstance creating disability may be shown by an inability to work or by restrictions which impair the claimant's ability to perform regular job duties. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

The weight of the evidence establishes that Claimant should have recognized the nature, seriousness, and probable compensable character of the December 12, 2011 shooting incident by August 23, 2013 when he left employment because the symptoms he was experiencing made it difficult for him to perform his job duties. As found above, Claimant credibly testified that he had significant psychological symptoms that began approximately two months after the shooting that continued to August of 2013 (and to date) and that caused him to resign. Claimant attributed the symptoms to the December 2011 shooting incident. As a result of the significant psychological issues that followed the shooting, Claimant resigned shortly after the shooter was sentenced to prison as his psychological condition had become disabling and caused him difficulty with performing his normal duties as a Deputy Sheriff. The evidence established that by August 23, 2013, Claimant should have recognized the probable compensable character of his injury.

In August of 2013, there was a provision of the WC Act that would have allowed Claimant to file a claim for compensability of a mental impairment injury. Specifically, the provisions of Section 8-41-301(2), C.R.S. that were in effect in August of 2013 provided that:

A claim of mental impairment must be proven by evidence supported by the testimony of a licensed physician or psychologist. For purposes of this subsection (2), "mental impairment" means a recognized, permanent disability arising from an accidental injury arising out of and in the course of employment when the accidental injury involves no physical injury and consists of a psychologically traumatic event that is generally outside of a worker's usual experience and would evoke significant symptoms of distress in a worker in similar circumstances.

In August of 2013, Claimant could have filed a claim for a compensable mental impairment injury and he would have had to establish that the psychologically traumatic event was generally outside of his usual experience and that the event would have evoked significant symptoms of distress in a worker in similar circumstances. However, as found above, Claimant did not submit a claim for compensation until February 18, 2019. Since he should have recognized the probable compensable nature of the December 12, 2011 shooting incident by August 23, 2013, Claimant would have had two years following August of 2013 in which to file a claim (or three years if a reasonable excuse existed). The statute of limitations would thus have run by August 23, 2015 or August 23, 2016. Claimant failed to file a claim during the applicable time limitation.

Claimant argues that PTSD first became compensable under a change in 8-41-301(2), C.R.S. that became effective July 1, 2018. He also argues that before that date, the symptoms he was experiencing were not compensable under the WC Act. He thus argues that he had no way of filing a claim sooner and argues that the statute of limitations should begin to run for his injury on July 1, 2018 because before that date, a reasonable person in his situation would assume that the injury did not have a probable compensable character.

It is true, as pointed out by Claimant, that 8-41-301(2), C.R.S. changed effective July 1, 2018. After that date, mental impairment consisting of a psychologically traumatic

event began to include an event *within* a worker's usual experience if a worker is diagnosed with PTSD by a licensed psychiatrist or psychologist and if a worker experiences exposure to certain listed events. The events include the attempt by another person to cause the worker serious bodily injury or death through the use of deadly force and the worker reasonably believes the worker is the subject of the attempt. See § 8-41-301(3), C.R.S.

This change may have made it easier for Claimant to establish a mental impairment claim had his condition become disabling on or after July 1, 2018. However, as found above, his condition became disabling by August 23, 2013. Claimant's arguments that his symptoms were not compensable and that he could not have filed a claim sooner than after the change in law are rejected. Although the change in law makes it easier in some circumstances to establish a mental impairment claim, the ability to file a claim for mental impairment existed prior to July 1, 2018 and existed on the date Claimant should have recognized the probable compensable nature of his injury in August of 2013. Thus, Claimant had at maximum until August of 2016 to file a claim. There is no indication the change in statute was intended to retroactively cover all possible mental impairment claims where a worker was disabled prior to July 1, 2018. Rather, the date of the disabling compensable injury would have to be on or after July 1, 2018 for the change in law to be applicable. Claimant's arguments are thus rejected. His claim is barred by the statute of limitations.

Compensability

Even assuming that Claimant's claim is not barred by the statute of limitations, Claimant did not present sufficient evidence to establish by preponderant evidence that his mental impairment is compensable. The shooting incident and any disability therefrom occurred prior to July 1, 2018 so the provisions of § 8-41-301(2), C.R.S. in effect prior to July 1, 2018 would apply to his case.

The requirement to establish a claim of mental impairment include establishing that there was a psychologically traumatic event generally outside of a worker's usual experience that would evoke significant symptoms of distress in a worker in similar circumstances. See § 8-41-301(2), C.R.S. In determining whether the traumatic event would generally be considered outside of a worker's usual experience, one looks at what the worker's occupational actually is, and compares whether that traumatic event would be considered unusual. *Ashton v. City and County of Denver*, W.C. No. 5-010-884 (ICAO June 8, 2017). Testimony from Commander C[Redacted] presented at hearing indicated that it would not be unusual that Claimant would experience an exchange of gunfire. There was insufficient evidence or follow up to indicate whether being shot at would be unusual, for example, how many deputies on the force had been shot at? How frequent were shootings? The evidence, as presented, would not have allowed the ALJ to conclude that being shot at was outside the usual experience (although it might have been). Similarly, there was insufficient evidence presented to indicate that other workers (deputies) in a similar circumstance (who had been previously shot at in the line of duty) had significant symptoms of distress similar to Claimant.

Claimant's claim is barred by the statute of limitations. Additionally, and in the alternative, Claimant failed to establish preponderant evidence to support a compensable mental impairment claim.

ORDER

It is therefore ordered that:

1. Claimant's claim is barred by the statute of limitations at § 8-43-103(2), C.R.S. His claim is denied and dismissed.

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

DATED: February 5, 2020

/s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-112-736-001**

ISSUES

1. Whether Respondents have established, by a preponderance of the evidence, that Claimant was responsible for the termination of her employment on August 15, 2019 after failing to return multiple phone calls and messages from Employer.
2. Whether Respondents' petition to terminate temporary total disability (TTD) benefits should be granted.

FINDINGS OF FACT

1. Claimant is a 50 year-old female who was employed by Employer as a customer service specialist. Claimant was employed by Employer for approximately 4 and was in the position of customer service specialist for approximately 1 year.
2. Claimant's job duties involved placing phone calls to customers and documenting responses or complaints with customer service provided by Employer's dealership. She used a normal phone and hand wrote the responses. Claimant is right handed.
3. On March 21, 2019, Claimant sustained a compensable work related injury to her right shoulder after she sustained a fall at work.
4. Claimant underwent medical treatment and continued to work her regular job duties from March 21, 2019 through July 9, 2019 without any restrictions. Ultimately, her surgeon recommended and scheduled a right shoulder rotator cuff repair surgery. See Exhibits D, E.
5. On June 6, 2019, authorized treating provider James Rafferty, D.O. recommended that Claimant proceed with right shoulder surgery with Dr. Coonan and to follow up with him one week post-operation. See Exhibits 2, F.
6. On July 2, 2019, Claimant underwent a pre-operative evaluation with surgeon William Cooney, M.D. Dr. Cooney noted in his July 2, 2019 report that with regards to Claimant's work and work restrictions post surgically, she would not work until her follow up appointment with him. He also noted that depending on the surgery and the potential modifications to her regular duty work, they may consider return to work shortly after the follow up appointment. He noted that Claimant would be in a shoulder immobilizer for 6 weeks after surgery which might limit her ability to type, use a mouse, and do other functional work-related detail. See Exhibit E.
7. After the pre-operative evaluation, Employer asked Claimant how long she would be out of work following surgery. Claimant reported to Employer that her doctor

indicated she would initially be off work three weeks and then she would have a post-operative evaluation where the doctor would let her know how much additional time off work was needed, but that the doctor estimated about six weeks off work.

8. On July 10, 2019, Claimant underwent surgery performed by Dr. Cooney. The procedure included extensive debridement of the right shoulder, subacromial decompression with acromioplasty, and rotator cuff repair. See Exhibit E.

9. Respondents began paying TTD benefits on July 10, 2019 as Claimant was off work due to surgery. See Exhibit B.

10. On July 23, 2019, Claimant underwent her first post-operative evaluation with surgeon Dr. Cooney. Claimant reported that her symptoms were improved and that her post-operative pain had been mild. Claimant reported that she was taking oxycodone and Tylenol for post-operative pain control and that she had been complaint with splint immobilization. Dr. Cooney refilled her oxycodone and discussed weaning from pain medications over the next few weeks. Dr. Cooney removed her sutures. Dr. Cooney opined that Claimant could remove her sling to perform gentle range of motion of her right elbow, hand, and wrist. Dr. Cooney advised Claimant that she needed to remain in her splint for 4 more weeks but could take it off for showers and to stretch her elbow, hand, and wrist. Dr. Cooney noted that she could begin physical therapy in one week and provided her a prescription. Claimant was advised that the rotator cuff repair involved a long and slow require and that full recovery of her shoulder with unrestricted activity could be as long as 4-6 months. Dr. Cooney noted that Claimant was currently off work and that they would keep her off work for now but he anticipated that Claimant may be able to return to one-handed duty after her next visit. He noted Claimant would return for follow up with him in 5 weeks. See Exhibit E.

11. Claimant testified that at the July 23, 2019 post-operative evaluation she received a letter from Dr. Cooney indicating that she would be off work for 5-6 more weeks and that her daughter took that report to Employer within two days of the appointment. There is no report in evidence indicating that Claimant was to be off work for 5-6 more weeks. Rather, the reports in evidence indicate that on July 23 she was still off work, but that she would follow up with Dr. Cooney in 5 weeks.

12. On August 7, 2019, Claimant received a voicemail from Employer's owner Peter V[Redacted] asking for Claimant to call him. The message indicates he was calling to see what was going on with Claimant especially since she was supposed to get back to work a week or so ago and that he didn't know what was going on. See Exhibit 1.

13. Claimant testified that she believed Mr. V[Redacted] thought she was due back to work because she had previously told him she would be off work for three weeks following surgery before a further post-operative evaluation to see what additional time was needed.

14. Claimant testified that she called Mr. V[Redacted] back and that she was confused as to why he indicated on the voicemail that he did not know what was going

on with Claimant since her daughter had taken Mr. V[Redacted] the most doctor's recent report that Claimant believed said Claimant would be off work for 5-6 additional weeks.

15. Claimant testified that when she called Mr. V[Redacted] back and spoke to him, he seemed to be pretty mad and was questioning her as to why another 5-6 weeks was needed, told her that she was putting Employer in a bind, and asked her why don't you just come back to work. Claimant testified that she responded by telling him she was also in a bind, was in a lot of pain, was not on vacation, and that it had been hard on her too. Claimant testified that the conversation ended with him saying good luck and with her saying that she would keep him posted. Claimant testified that she felt intimidated after that phone call.

16. On August 8, 2019, Dr. Rafferty evaluated Claimant. Claimant reported that she was doing well. Claimant reported that she had no pain at rest but shoulder discomfort if her shoulder was jarred or moved. Claimant reported no pain as she sat in the exam room that day. Claimant reported she was happy with her progress overall. Dr. Rafferty noted that Claimant was in a sling, but had begun physical therapy. Claimant reported that she was using ibuprofen and occasionally oxycodone at night for pain. Dr. Rafferty advised Claimant to discontinue Tylenol given Claimant's concern about side effects and to continue physical therapy. Dr. Rafferty advised Claimant to continue with the sling. Dr. Rafferty opined that Claimant was able to return to modified duty work that day with temporary restrictions of no use of the right upper extremity, wearing sling at all times, and no walking on uneven or slippery surfaces. Dr. Rafferty also provided the restriction of no safety sensitive tasks when using oxycodone. See Exhibits 2, 3, F.

17. Claimant testified that when she got home she saw the report that Dr. Rafferty had released her to work and that she was confused because she believed her surgeon had told her she could not return to work. She testified that on August 8, 2019 she called her surgeon Dr. Cooney's office and called the insurance adjuster. Claimant testified that she told the insurance adjuster about the call from Employer the day prior. Claimant testified that the insurance adjuster told her that Employer shouldn't be calling Claimant and should be directing any questions to the adjuster. Claimant testified that the insurance adjuster told Claimant that the adjuster would call the surgeon and Dr. Rafferty to get everyone on the same page and that the adjuster would get back to Claimant. Claimant also testified that the adjuster advised her not to contact Employer.

18. Claimant testified that between the call with the adjuster on August 8, 2019 and August 14, 2019, Employer called her multiple times. She testified that Employer's owner Mr. V[Redacted] left her more than one message during that time. A message in evidence shows that office manager Tammy left Claimant at least one message during that timeframe and on August 13, 2019. Claimant testified that she did not respond to Employer because she was waiting to hear back from the insurance adjuster. Claimant testified that she didn't know what to tell Employer and that she had been intimidated on the August 7, 2019 call, was just waiting for the adjuster to get back to her, and was scared to call Employer back. See Exhibit 1.

19. On August 14, 2019, Employer issued a letter to Claimant. The letter indicated that they had been trying to reach Claimant for the past several days. The letter noted that Employer received a physician's report on August 8, 2019 releasing Claimant to come back to work on August 8 but that Claimant did not report for work on that day and had not reported to work for the past 5 work days with no call to anyone at Employer's dealership. The letter noted that office manager Tammy N[Redacted] had left Claimant a few messages over the past several days with no return call and that owner Peter V[Redacted] had left her a message to return his call on August 12, left several messages on August 13, and again left two messages that day on August 14. Mr. V[Redacted] indicated in the letter that as of 12:15 p.m. on August 14, 2019 he had not received any communication from Claimant. He noted that Claimant's job was essential to the success of the dealership and noted that Claimant could consider the letter as notice of termination of her employment. See Exhibits 7, C, H.

20. On August 15, 2019, Mr. V[Redacted] filled out an employee performance document noting Claimant was the employee and the type of offense was absenteeism and abuse of sick leave. In the details, Mr. V[Redacted] listed that Claimant was released to work by her doctor stating she could come back to work on August 8. He indicated Claimant had not shown up for work as of August 15, 2019. He also noted that he had called and left Claimant several messages to discuss the situation with the first message on the evening of August 8. He noted that on August 12 he left three messages for Claimant to get back to Employer about her work status. He indicated that on August 13, he left two more messages and that office manager Tammy N[Redacted] left a message. He indicated that on August 14 he called Claimant again and let her know that her job was in jeopardy and that he left her two messages the morning of August 14. Mr. V[Redacted] noted that after numerous attempts with no reply he terminated Claimant's employment effective August 15, 2019. See Exhibits 7, C, I.

21. On August 15, 2019, Shana G[Redacted], Claims Representative for Insurer, sent an email to Claimant and to Employer's office manager. The email indicated that she had not heard back from surgeon Dr. Cooney's office regarding a request to modify Claimant's restrictions. The letter noted that she had previously discussed with Claimant and Ms. N[Redacted] that the authorized treating physician (Dr. Rafferty) determines work restrictions. Ms. G[Redacted] noted that Dr. Rafferty advised that Claimant could work at modified duty and that Employer had advised that they had modified duty available which she had advised Claimant of the day prior. See Exhibit 1.

22. On August 27, 2019, Dr. Cooney evaluated Claimant. Claimant reported overall feeling well, that she was pleased with her progress, and that her shoulder was feeling good. Claimant reported no pain while at rest. Claimant reported that certain shoulder movements caused pain. Claimant reported that she was still taking oxycodone at night but that she also takes it for her Lupus pain, which was prescribed by her rheumatologist. Dr. Cooney did not refill Claimant's oxycodone. Claimant also reported that her rheumatologist started her on prednisone for her joint pain related to lupus. Dr. Cooney discharged Claimant from her sling and advised her to be careful now that she was out of the sling. Claimant reported to Dr. Cooney that physical therapy was going well and Dr. Cooney encouraged Claimant to work on pulleys and wall walks at home for

gentle stretching. Claimant was encouraged to continue to follow her work restrictions provided by her workers' compensation doctor. See Exhibits 3, E.

23. On September 17, 2019, Dr. Rafferty evaluated Claimant. Again, Claimant reported that she continued to do well. Claimant reported that she was attending physical therapy at least twice per week and that she had improved range of motion. Claimant reported still having moderate pain in her shoulder especially with elevation of her arm and that she was unable to sleep on her right side without discomfort. Claimant reported that she was not using any pain medications. Dr. Rafferty again recommended she continue physical therapy. See Exhibit 2.

24. On October 9, 2019, Respondents filed a Petition to Modify, Terminate, or Suspend Compensation with the Division of Workers' Compensation. The petition noted that Respondents paid TTD benefits through October 9, 2019 but that Respondents were requesting to terminate compensation because Claimant voluntarily resigned when Employer had modified duty available to her at full wages. Respondents noted reliance on Rule 6-4(c). See Exhibit C.

25. Claimant testified that her normal job duties involve calling customers and that she uses her right hand to pick up the phone and dial the phone number. She testified that she normally then moves the phone to her left hand and writes the customers' responses manually with her right hand and that what she writes has to be legible. She testified that was her job and what she did all day. Claimant testified that she was never trained to write responses on a computer and always hand wrote them. Claimant testified that the person in the position before her typed the reports but that she always handwrote them because no one could figure out how to open the prior employee's system. Claimant testified that she never used a headset.

26. Claimant testified that she never received a letter from Employer indicating that they had a modified job for her. Claimant also testified that she did not receive the termination letter dated August 14, 2019 and that she saw it for the first time when her attorney showed it to her.

27. Tammy N[Redacted], Employer's office manager testified at hearing. Ms. N[Redacted] supervised Claimant and is familiar with Claimant's job duties as a customer relations specialist. Ms. N[Redacted] testified that in August of 2019 she called Claimant because she wanted to talk with Claimant to tell Claimant that they could modify Claimant's job duties. Ms. N[Redacted] testified that Mr. V[Redacted], Employer's owner, could not get a hold of Claimant. Ms. N[Redacted] testified that Claimant did not call her back. Ms. N[Redacted] testified that between herself and the owner, there were probably ten to eleven attempts to contact Claimant to advise Claimant they could accommodate her to allow Claimant to return to work.

28. Ms. N[Redacted] testified that she knew in August of 2019 that Claimant's restrictions were no use of the right arm. Ms. N[Redacted] testified that Claimant could have completed her job duties even with that restriction. Ms. N[Redacted] testified that Claimant could have typed with her left hand, dial phone numbers with her left hand, and

could have had a headset to make calls. Ms. N[Redacted] acknowledged that Claimant was not left-handed and may have been a lot slower, but that they could have accommodated Claimant's restrictions had Claimant returned their calls.

29. Ms. N[Redacted] testified that Claimant never returned to work. Ms. N[Redacted] testified that Claimant was separated from employment with Employer. Ms. N[Redacted] testified that the separation had nothing to do with Claimant's work restrictions but was due to Claimant's failure to return Employer's phone calls.

30. Ms. N[Redacted] testified that Claimant advised her prior to surgery that she would probably be out of work for 5-7 weeks following surgery. She testified that Employer then received a note from Claimant's doctor indicating Claimant could return to work on August 8, 2019 with restrictions and that Employer received this note on August 8th or 9th.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. See § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. See § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or

every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Termination for Cause

Under the termination statutes in §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. a claimant who is responsible for his or her termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and wage loss. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1131 (Colo. App. 2008). The termination statutes provide that, in cases where an employee is responsible for her termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, W.C. No. 4-631-681 (ICAO, Apr. 24, 2006). A claimant does not act “volitionally” or exercise control over the circumstances leading to her termination if the effects of the injury prevent her from performing her assigned duties and cause the termination. *In re of Eskridge*, W.C. No. 4-651-260 (ICAO, Apr. 21, 2006). Therefore, to establish that Claimant was responsible for her termination, respondents must demonstrate by a preponderance of the evidence that Claimant committed a volitional act, or exercised some control over her termination under the totality of the circumstances. *See Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994). An employee is thus “responsible” if she precipitated the employment termination by a volitional act that she would reasonably expect to cause the loss of employment. *Patchek v. Dep’t of Public Safety*, W.C. No. 4-432-301 (ICAP, Sept. 27, 2001).

A claimant may act volitionally, and therefore be “responsible” for the purposes of the termination statute, if they are aware of what the employer requires and deliberately fails to perform accordingly. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008). This is true even if the claimant is not explicitly warned that failure to comply with the employer’s expectations may result in termination. *See Pabst v. Industrial Claim Appeals Office*, 833 P.2d 64 (Colo. App. 1992). Ultimately, the question of whether the claimant was responsible for the termination is one of fact for determination by the ALJ. *Apex Transportation, Inc. v. Industrial Claim Appeals Office*, 321 P.3d 630, 632 (Colo. App. 2014).

Respondents have established, by a preponderance of the evidence, that Claimant was responsible for the termination of her employment. Their request to terminate TTD benefits is granted. Any wage loss Claimant sustained was not due to her industrial injury but due to her failure to communicate with Employer. Respondents have established that Claimant’s termination was due to Claimant’s volitional decision not to return multiple phone calls and messages from her Employer.

As found above, Claimant spoke with Employer’s owner Mr. V[Redacted] on August 7, 2019 and ended the conversation by telling him she would keep him posted on her work status. The next day, August 8, 2019, Claimant’s authorized treating physician Dr. Rafferty released Claimant to modified duty work. Although Claimant disagreed with Dr. Rafferty’s release and testified that she was confused because she thought her

surgeon still wanted her to remain off work, claims adjuster Ms. G[Redacted] noted that she discussed with Claimant that Dr. Rafferty was the person who determined work restrictions.

Claimant argues that Dr. Cooney's July 23, 2019 report indicates that she was to remain off work for another five to six weeks. That is not consistent with what is in the report. The July 23, 2019 report indicates that Dr. Cooney anticipated that Claimant may be able to return to one-handed duty after her next visit. Her next visit was two weeks later on August 8, 2018 with Dr. Rafferty. At that visit, Dr. Rafferty did what Dr. Cooney had anticipated and he released Claimant to work modified duty work that day with temporary restrictions of no use of the right upper extremity, wearing sling at all times, and no walking on uneven or slippery surfaces. Dr. Rafferty also provided the restriction of no safety sensitive tasks when using oxycodone. Claimant testified that another reason she couldn't work was because she was restricted from driving because she was on oxycodone. This is rejected. On August 8, 2019, Claimant reported using oxycodone only occasionally at nighttime. Dr. Rafferty did not restrict driving. He restricted driving while using oxycodone, which Claimant was only using occasionally at night. Further, Dr. Cooney's August 27, 2019 report supports the inference that he agreed with the release to work provided by Dr. Rafferty on August 8, 2019. On August 27, 2019 Dr. Cooney recommended Claimant continue with her work restrictions.

Claimant disagreed with her release to work and she subjectively did not believe she could perform her job duties. However, Claimant had full volitional control over her decision to ignore Employer's multiple phone calls and messages between August 8, 2019 and August 14, 2019. Claimant's testimony that the claims adjuster advised her not to talk to Employer is not found credible or persuasive. Rather, the claims adjuster discussed with Claimant that Dr. Rafferty determined work restrictions and advised Claimant on August 14, 2019 that Employer had modified duty available.

Employer was left in a situation where it received a doctor's report indicating Claimant could return to work on August 8, 2019 but Claimant failed to return multiple calls and messages to coordinate any kind of return or modified job. Although Claimant testified she was intimidated by owner Mr. V[Redacted] due to the August 7, 2019 phone conversation, she did not present any testimony indicating she was intimidated by office manager Ms. N[Redacted]. Claimant also testified that she ended her August 7, 2019 phone call with Mr. V[Redacted] by telling him she would keep him updated and by him wishing her luck. If Claimant had made one return phone call to let Employer know what was going on, i.e. that she believed the release to work was incorrect and different from what her surgeon had recommended and that she was working with the claims adjuster to sort things out, she might not be in this predicament. Instead, she completely refused to communicate with Employer even after Insurer advised her that Dr. Rafferty's restrictions controlled and that Employer had modified work available. Failure to communicate and return multiple calls and messages is a volitional decision on Claimant's part and Respondents have established that she was responsible for her termination.

Claimant focuses a significant part of her argument on a portion of the WC Act that allows TTD benefits to be terminated when an attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment. See § 8-42-105(3), C.R.S. Although that is one way Respondents in general can seek to terminate TTD, that is not why the specific Respondents in this case are seeking termination of TTD benefits. Here, they are seeking termination of benefits based on Claimant's failure to communicate with Employer and failure to return numerous phone calls and messages. If Employer had offered modified employment in Claimant to writing and Claimant had failed to show up, then they could have terminated her TTD benefits. However, that does not preclude Employer from seeking to terminate Claimant's TTD benefits on other grounds including, specifically in this case, Claimant's failure to communicate with Employer.

ORDER

It is therefore ordered that:

1. Respondents have established, by a preponderance of the evidence, that Claimant was responsible for the termination of her employment on August 15, 2019.
2. Respondents' petition to terminate temporary total disability (TTD) benefits is granted.
3. All issues not decided herein are reserved for future determination.

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

DATED: February 6, 2020

/s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

- I. What is the opinion of the DIME physician?
- II. Once the DIME opinion has been determined, have Respondents, by clear and convincing evidence, overcome the DIME opinion on the assigned Whole Person Impairment Rating?
- III. If the DIME opinion has been overcome, what Whole Person Impairment Rating should be assigned, as determined by the ALJ?

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

1. Claimant sustained an admitted work injury to his left eye on November 6, 2018 when hot grease splashed into his eye while working for the Employer. Claimant explained at hearing that a co-worker, for some unknown reason, had dropped a bucket into a deep fryer from approximately chest height, causing the grease to splash and strike Claimant in the face, particularly his left eye. Claimant went to the Emergency Room at Mount San Rafael hospital almost immediately after the incident.

2. The emergency room record states that Claimant had hot grease from a fryer splash into his eye at work and he was not having a "foreign body sensation" and pain of the left eye with decreased vision. It was noted that Claimant does not wear contact or glasses. Physical examination documented 'injected' conjunctiva of the left eye.

3. Claimant's left eye visual acuity was 20/70 whereas his right eye was 20/20, both tests done without corrective lenses. While no corneal abrasion was noted to be present, his discharge instructions were to treat it as such. He was prescribed erythromycin ointment, and instructed to follow up with an ophthalmologist. (Ex. 4, pp. 19-21).

4. Claimant went to Rocky Mountain Eye Center the next day on November 7, 2019 for evaluation. (Ex. 5). Claimant reported that he was splashed in the eye with hot grease at work the day prior. He was given antibiotic ointment for his left eye at the emergency room, was told he had a corneal abrasion, and to follow up with the ophthalmologist. *Id.* at 23.

5. The intake note documents, "[Claimant] states that he has a pretty severe headache, lots of discharge, it is effecting (sic) his vision, not so much as blurry, but

cloudy.” Claimant further indicated that his left eye was now “very sensitive to the light.” *Id.* Visual acuity examination now reported 20/25 vision of the right eye and 20/200 vision of the left eye. *Id.* at 24.

6. Claimant first went to his ATP, Dr. Douglas McFarland, on November 9, 2018. (Ex. 6). Dr. McFarland documented that Claimant reported a co-worker dropping a fryer basket from about chest height into the fryer, causing grease to splash in his eye. *Id.* at 32-33. Dr. McFarland noted, “[Claimant] reports feeling left-sided headaches and pressure behind his eye. He also reports the light bothers him.” *Id.* at 33. Dr. McFarland provided a diagnosis of photophobia in addition to the left corneal burn.

7. Claimant followed up at the Rocky Mountain Eye Center on November 14, 2018. (Ex. 5, p. 28). The history of present illness indicated that Claimant’s condition was improving; however, he continued to have some degree of ongoing light sensitivity, discomfort, and blurriness. Visual acuity examination documented that Claimant’s left eye was now 20/70. *Id.* at 29. The provider indicated Claimant’s corneal abrasion had healed. He also gave Claimant a prescription for glasses. *Id.* at 30. At hearing, Claimant testified that he had never worn glasses or contacts in his life prior to this work event, and that he seldom had headaches prior to this incident.

8. The ophthalmologist’s note did not mention anything about Claimant’s ongoing headaches at the November 14, 2018 visit, while Dr. McFarland documented the ongoing headaches from his visit the same day. (Ex. 6, p. 35). The review of symptoms documents Claimant’s reported, ongoing light sensitivity and resulting headaches. *Id.* at 36. In his ‘Patient Instructions’, Dr. McFarland stated: “Remain off work for now. He will be finishing up his eye drops on Saturday and I think he may have some further improvements in his eyes without the irritation of the drops.” *Id.*

9. Dr. McFarland examined Claimant again on November 21, 2018. (Ex. 6, p. 38). During the physical examination, Claimant asked that Dr. McFarland not shine the light directly in his eyes due to concern of making his headaches worse. Dr. McFarland did re-check Claimant’s vision with a “pinhole” and measured Claimant’s right eye to be a normal 20-20, but the left eye to decrease to 20-40 *Id.* Dr. McFarland kept the diagnosis of photophobia and added “Tension-type headache” to the assessment. *Id.* As of November 30, 2018, Claimant reported that his eyes were still very sensitive and “causing him to have headaches,” albeit slightly improved. *Id.* at 43.

10. Dr. McFarland placed Claimant at MMI on January 15, 2019, noting that the vision was improved and ‘near normal.’ (Ex. 6, p. 47). Claimant continued to report some vision change. Dr. McFarland kept the assessment of corneal burn, photophobia, and tension-type headaches. *Id.* “He says at times exposure to light does seem to cause a headache.” Dr. McFarland declined to assign any impairment rating. *Id.*

11. Claimant then requested a DIME examination. (Ex. 7). The DIME physician, Dr. Anjmun Sharma, performed a physical examination, which revealed the abnormal ocular motility and binocular diplopia. *Id.* There was no nystagmus or any

other neurological concerns. His final diagnoses included corneal abrasion and tension headaches. *Id* at 53. The DIME report was clear that any refractive error was not caused by the work injury. It was equally clear that any headaches that Claimant suffered from were not due to traumatic brain injury. *Id* at 52. There was no mental impairment. *Id*.

12. The paragraph under **Impairment Rating, with Apportionment if Necessary** reads, in its entirety and unedited, as follows:

In this case, no apportionment is necessary. There is only one system that I think for which rating can be offered to this patient and is not the visual system rather the complaint of headaches. Referencing table 1 chapter 4, page 109 of the AMA Guide we can look the brain injury. The patient does not necessary to have brain injury but he does have headaches. This would fall under the criteria of evaluation for headaches. While it is not clear to me why the patient has headaches. I do not have a reason why. I do not know what underlying condition could possibly exist, that cause his headaches. The patient however is complaining number of subjective symptoms but there are not any consistent objective findings to really support an impairment to be given, but nevertheless, he does have a visual acuity which is refractive error, which needs to be managed with glasses. This is a pre-existing long-standing issue. There is no impairment that can be given just for having refractive error. For headaches possibly the improvement can be given in this case I will refer to chapter 4, table 1, page 109. We can refer to this as episodic neurological disorders. That is slight interference with daily living, which ranges from 5 to 15 %. The only thing that could really assign in good faith after review of this case is probably a final whole person impairment of 10% for episodic neurological disorders for the brain. I cannot provide any other impairment. I do not find any other significant body parts that are claim related for which impairment can be assigned. This is the final whole person impairment of 10%.

It is apparent to this ALJ from the grammatical non-sequiturs in the preceding paragraph that the DIME physician used some sort of voice-recognition dictation software, and then did not proofread his own work. Confusion has now ensued in trying to divine his intent.

13. Respondents subsequently retained Dr. Allison Fall to perform a records review and to provide her written opinion regarding Claimant's impairment rating and the DIME report. (Ex. A). Dr. Fall states in her report that a subjective complaint is not to be rated without correlating objective findings per the *AMA Guides*. Dr. Fall provided no specific citation other than simply stating "the *AMA Guides*." *Id* at 2. After an exhaustive search of the *AMA Guides*, for such citation, the ALJ was unable to locate such a citation *in the AMA Guides*. Dr. Fall, however, makes no reference in her report to the *Division of Workers' Compensation Desk Aid #11, Impairment Rating Tips ("Rating Tips")*.

14. Dr. Fall indicated that physicians are instructed in the Level II reaccreditation course that they may rate headaches if caused by a brain injury utilizing the “episodic neurologic deficits” but, again, this subjective headache is of unknown cause, and there was no work-related traumatic brain injury.” (Ex. A, p. 2). She indicated that Dr. Sharma did not know what underlying condition that could possibly exist that caused the headaches. Dr. Fall further went on to indicate that there was no diagnosis of neurological headaches and Claimant does not have a traumatic brain injury. *Id.*

15. Dr. McFarland responded via letter to Respondents regarding question of permanent impairment. He found that it was “not medically probable” that Claimant’s ongoing headaches were work related. (Ex. B). Dr. McFarland felt that Claimant’s headaches might be related to visual strain caused by Claimant’s pre-existing visual impairment.

16. Dr. McFarland indicated that at the time he saw Claimant on January 15, 2019, it did not appear that the occasional headaches were being caused by the eye injury nor did it appear that the headaches were frequent or severe enough to be considered an impairment. Dr. McFarland went on to say that it was not appropriate for Dr. Sharma to assign an impairment rating for headaches related to the patient’s eye injury of November 6, 2018. Dr. McFarland did not believe there was any basis for causation of the headaches related to the reported injury.

17. Dr. McFarland indicated that as Dr. Sharma says, the cause of the headaches is not known. Dr. McFarland indicated that the statement by itself shows a lack of causation of the headaches related to the reported injury. Dr. McFarland went on to say that the patient may have headaches because of visual strain related to his pre-existing visual impairment, but that condition was not caused by the reported injury. (Ex. B, p. 4).

18. Claimant testified at hearing that his ongoing headaches significantly affect his activities of daily living. Claimant now has difficulty reading for more than short periods of time before the reading will cause him to have a headache. Claimant testified that he remains significantly sensitive to light, which he indicated limits his ability to participate in activities outdoors, especially activities such as playing in the snow with his grandson, given how bright the white snow can be.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

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

C. Assessing weight, credibility and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the ALJ. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55, P.3d 186 (Colo. App. 2002). In this instance, the only witness is the Claimant. While Claimant has no medical background, the ALJ finds that Claimant has been sincere in his testimony regarding the symptoms he has experienced since his work injury.

Overcoming the DIME as to the assigned Impairment Rating, Generally

D. A DIME physician's findings of causation, MMI and impairment are binding on the parties unless overcome by "clear and convincing evidence." Section 8-42-107(8)(b)(III), C.R.S.; *Qual-Med v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998); *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion is incorrect and that said opinion is "free from substantial doubt." *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995) The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable

medical opinion. *Qual-Med v. Industrial Claim Appeals Office, supra*. A mere difference of medical opinions is insufficient. *Medina-Weber v. Denver Public Schools W.C. No. 4-782-625* (ICAO, May 24, 2010).

E. If the DIME physician offers ambiguous or conflicting opinions concerning MMI or impairment, it is for the ALJ to resolve the ambiguity and determine the DIME physician's true opinion as a matter of fact. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000); *Stephens v. North & Air Package Express Services*, W. C. No. 4-492-570 (February 16, 2005), *aff'd*, *Stephens v. Industrial Claim Appeals Office*, Colo. App. 05CA0491 (Jan. 26, 2006) (NSOP).

What does the DIME Report actually Say?

F. In this case, the ALJ is tasked with figuring out what Dr. Sharma is really saying in his DIME report. The ALJ summarizes the position of Dr. Sharma as follows:

1. Claimant's eye injury has completely healed.
2. Claimant is now at MMI.
3. Claimant continues to suffer from tension headaches.
4. Claimant's refractive errors with visual acuity are pre-existing, and not work-related.
5. Claimant has not suffered a traumatic brain injury.
6. There are no objective symptoms of Claimant's tension headaches; one must therefore assume they occur as self-reported by Claimant.
7. There is no mental impairment.
8. The DIME physician cannot identify an underlying medical condition which would cause the headaches suffered by Claimant.
9. The DIME physician cannot link the headaches to any particular cause, whether or not any objective symptoms have been identified.
10. Nonetheless, the DIME has noted the temporal correlation between the work injury to Claimant's eye, and the headaches he now reports.
11. It is *possible* to assign an Impairment Rating for Claimant's headaches; if so, it must come only from Chapter 4, Table 1, page 109 of the AMA Guides, under *episodic neurological disorders*.
12. As a result of Claimant's *headaches*, he suffers from a slight interference with daily living, for which a possible range of Impairment Ratings is from 5% to 15% of the Whole Person. In this case, the DIME chose the midpoint of 10%.

Has the DIME Report been overcome?

G. While Dr. Fall did not identify where in the *AMA Guides* the requirement appears to correlate subjective complaints with objective findings, such requirement does appear in the Division's *Rating Tips*. Under General Principles, paragraph 1 reads as follows:

1. Impairment Ratings Based on Objective Pathology: **Impairment ratings are given when a specific diagnosis and objective pathology is identified.** (Reference: C.R.S. §8-42-107(8)(c)) In cases with multiple symptoms, the clinician must determine whether separate diagnoses are established which warrant an impairment rating OR the impairment rating provided for a specific diagnosis incorporates the accompanying symptoms of the patient. (emphasis added).

H. The ALJ references, then, C.R.S. 8-42-107(8)(c), [applicable to ATPs, but for which no exception can be identified for its applicability to a DIME as well] which reads in pertinent part:

.....For purposes of determining medical impairment, the physician shall not render a medical impairment rating based on chronic pain without anatomic or physiologic correlation....(emphasis added).

I. In this case, Dr. Sharma was explicit (at least in this ALJ's interpretation) that no objective findings appear in the record that support the existence of the headaches. There was no anatomic or physiologic correlation, by his own analysis. There is no identified underlying condition. While the ALJ has found Claimant to be sincere in his recounting of recurring headaches, they are, in effect, intermittent, but *chronic pain*. The headaches are subjective, and lacking any anatomic or physiologic correlation. They are not related to any *specific diagnosis*.

J. Claimant makes an appealing argument in support of the DIME, to wit: The DIME has assigned an Impairment Rating, ipso facto, he has found causation. The ALJ simply cannot concur with this reasoning. The DIME himself hedged on assigning an Impairment Rating at all, even while limiting himself to *episodic neurologic disorders* under the *AMA Guides* – if at all.

K. The ALJ finds and concludes, by clear and convincing evidence, that the DIME physician erred in assigning an Impairment Rating for headaches, without requiring some anatomic or physiologic correlation. There was no underlying specific diagnosis to link to any episodic neurological disorder. The DIME report is highly probably incorrect, and has therefore been overcome. As such, the ALJ concludes that this amounts to more than a mere difference in medical opinion between Dr. Sharma, and Drs. Fall and McFarland.

Impairment Rating to be Assigned, Generally

L. Where the ALJ determines that the DIME physician's rating has been overcome, the question of the claimant's correct medical impairment rating then becomes a question of fact for the ALJ. The only limitation is that the ALJ's findings must be supported by the record and consistent with the *AMA Guides* and other rating protocols. Thus, once the ALJ determines that the DIME's rating has been overcome in

any respect, the ALJ is free to calculate the claimant's impairment rating based upon the preponderance of the evidence. *Garlets v. Memorial Hospital*, W.C. No. 4-336-566 (September 5, 2001). Further, the ALJ is not required to reject every other component of a DIME physician's rating. *Lee v. J. Garlin Commercial Furnishings*, W.C. No. 4- 421-442 (December 17, 2001). Nor is the ALJ is precluded from crediting any part of the DIME physician's rating. Rather, where the ALJ determines that the DIME physician's rating has been overcome, the ALJ may independently determine the correct rating. *McNulty v. Eastman Kodak Company*, W. C. No. 4-432-104 (September 16, 2002); *Lungu v. North Residence Inn*, W.C. No. 4-561-848 (March 19, 2004).

Impairment Rating in this case, as Applied

M. In this instance, the ALJ is persuaded by the reasoning of the ATP, Dr. McFarland, and Dr. Fall, that there is no established correlation between the headaches Claimant complains of and his work injury. It is certainly possible that they are caused by Claimant's lack of corrective lenses, and his refusal to obtain them. There could also still be some unknown, undiagnosed condition that causes his headaches; however, in this instance, insufficient evidence exists to link Claimant's headaches to the work injury, despite the temporal correlation. This compensable left eye injury has completely healed, with no need for medical maintenance benefits. The ALJ, therefore, assigns a Whole Person Impairment Rating of 0%.

ORDER

It is therefore Ordered that:

1. The DIME report has been overcome.
2. Claimant's Whole Person Impairment Rating is 0%.
3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures

to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: <http://www.colorado.gov/dpa/oac/forms-WC.htm>. In addition, it is recommended that you send a copy of your Petition to Review to the Colorado Springs OAC via email at oac-csp@state.co.us.

DATED: February 6, 2020

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

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| STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 1525 Sherman Street, 4th Floor, Denver, CO 80203 | <p style="text-align: center;">▲ COURT USE ONLY ▲</p> |
| In the Matter of the Workers' Compensation Claim of: [Redacted], Claimant, vs. [Redacted], Employer, and [Redacted], Insurer, Respondents. | |
| <p>CASE NUMBER:</p> <p>WC 4-845-025-03</p> | |
| <p>FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER</p> | |

Hearings in this matter were held on May 3, 2018, August 6, 2018 and January 7, 2019, before Kimberly Turnbow, Administrative Law Judge. This matter was digitally recorded from 1:30 p.m. to 5:00 p.m. on May 3, 2018, from 8:40 a.m. to 5:03 p.m. on August 6, 2018, and from 1:35 p.m. to 5:03 p.m. on January 7, 2019, each time in Courtroom 3 of the Office of Administrative Courts in Denver, Colorado.

[Redacted], Esq. represented Claimant who was present and [Redacted], Esq. represented Respondents.

The ALJ admitted Claimant's Exhibits 1 through 36 and Respondents' Exhibits A through WW without objection.

Claimant testified on his own behalf, and presented the in-person testimony of [Redacted], Claims Representative Tameria S[Redacted], and Christopher Ryan, M.D. Respondents presented the in-person testimony of Albert Hattem, M.D.

In this order, the ALJ refers to Jimmy Graham as "Claimant," APT Service, Inc. as "Employer," and Pinnacol Assurance as "Insurer." The ALJ refers to Employer and Insurer collectively as "Respondents." Also in this order, "Judge" or "ALJ" refers to the Administrative Law Judge, "C.R.S." refers to Colorado Revised Statutes (2019); "OACRP" refers to the Office of Administrative Courts Rules of Procedure, 1 CCR 104-1, and "WCRP" refers to Workers' Compensation Rules of Procedure, 7 CCR 1101-3.

ISSUES

- Whether Claimant proved by a preponderance of the evidence that he had a change of condition after maximum medical improvement (MMI).
- Whether Claimant proved by a preponderance of the evidence that his condition has worsened and he is no longer at MMI.
- If Claimant is no longer at MMI, whether he is entitled to temporary total disability (TTD) benefits.
- If Claimant is no longer at MMI, whether he is entitled to continued maintenance medical benefits.
- If Claimant is no longer at MMI, and is entitled to continued maintenance medical benefits, the identity of his authorized provider.
- Whether Respondents established by a preponderance of the evidence the affirmative defenses of waiver and/or laches.
- The parties stipulated to hold in abeyance the issue of whether Claimant is permanently and totally disabled.

FINDINGS OF FACT

1. On December 11, 2010, Claimant suffered an admitted injury while working for Employer as a tow truck driver.

2. The work injury aggravated Claimant's pre-existing underlying spondylosis, stenosis, and degenerative disc disease. Claimant underwent conservative treatment and diagnostic testing under Dr. Frederick Zimmerman's care. Claimant's December 28, 2010 non-contrast MRI of his cervical spine showed broad based disc bulges at C5-6 and C6-7, smaller bulging discs at C3-4, C4-5, and a minimal bulging disc at C7-T1.

3. Claimant experienced bilateral symptoms, left worse than right, radiating to his left and right shoulders, and sometime tingling into his left fingers and the right elbow.

4. Dr. Zimmerman referred Claimant to orthopedic surgeon Dr. David Wong, and neurosurgeon, Dr. Steven Johnson. On February 1, 2011, Drs. Wong and Johnson performed a single level fusion and discectomy at C6-7. The surgery was a routine single level fusion that was completed uneventfully and without complications.

5. On September 22, 2011, Dr. Zimmerman placed Claimant at MMI.

- Dr. Zimmerman assigned Claimant a whole body impairment rating of 15%. The doctor noted that Claimant would experience permanent waxing and waning of his symptoms and accounted for that in his impairment rating.

- Dr. Zimmerman imposed work restrictions of 20 pound lift and 40 pound push/pull occasionally, limit driving to one hour at a time, no more than 3 times per day, and infrequent bending, squatting and kneeling. A functional capacity evaluation placed Claimant in the light to medium category.
- Dr. Zimmerman recommended maintenance medical care of six months of Percocet; six months of follow up visits with his psychologist; and a 1-year gym pass with three to four trainer visits.

6. On November 10, 2011, Dr. Zimmerman revised his September 22, 2011 report, increasing Claimant's impairment rating to 19% for reduced cervical range of motion (ROM) and neurological symptoms. The doctor noted that Claimant was also having psychological difficulty coping with his level of function.

7. On December 14, 2011, Respondents filed a Final Admission of Liability per Dr. Zimmerman. On January 12, 2012, Claimant filed a hearing application on PPD and disfigurement. On March 12, 2012, the OAC rejected Claimant's application for failure to set. Thus, the claim closed on January 12, 2012.

8. Claimant's condition improved, and he was able to return to full time work with Employer.

9. Claimant has a number of conditions that interplay with his work injury and his recovery from it.

- Claimant has age related arthritis, more advanced than an average man his age, throughout his cervical spine at multiple levels. The nature of the disease is to naturally worsen over time.
- Claimant is a long-time smoker which limited treatments available to him and delayed his healing process.
- Claimant has significant, non-work related arthritis and osteoarthritis diffusely throughout his body, including both knees and lumbar spine. In 2017 Claimant saw a knee surgeon and on January 25, 2017 he had a lumbar spine fusion.
- Claimant is diabetic. His medical history is significant for poorly controlled diabetes, which can cause neuropathy, diabetic mellitus, and polyneuropathy.
- Claimant's medical history also includes decreased lung function from smoking, hepatitis C, and respiratory depression from living at an altitude of 9000 feet.
- Claimant has a prior methamphetamine addiction. Claimant's methamphetamine addiction was problematic because the potential for cross-addiction and relapse existed with prolonged use of narcotics. Medication changes and adjustments, including use of neuropathic drugs in lieu of narcotics, rhizotomies, and other forms of long-term pain control, were made throughout the course of treatment in effort to avoid relapse and to maintain MMI.

- Over the course of his treatment, Claimant's pain medications included but were not limited to: Percocet, Valium, Oxycodone, Celebrex, medical marijuana, Tramadol, and Marinol.

10. Claimant's symptoms continued to wax and wane as anticipated, due to activity level, changes in weather and medications, and progression of underlying, pre-existing disease. On October 11, 2011, Claimant was working 40 hours per week without major difficulty. Dr. Carbaugh noted in November 2011 that Claimant was looking into other business opportunities. On January 19, 2012, Claimant discontinued Percocet and continued only on Valium. Dr. Zimmerman told Claimant to return in three months for his next maintenance visit.

11. Intervening events also complicated treatment and recovery. These included a motor vehicle collision with an elk, and working at an ergonomically incorrect work station. On December 13, 2011 Claimant hit an elk with his car driving at 55 miles per hour. The accident killed the elk, put a ten inch dent in his vehicle, and left his vehicle un-drivable. Claimant sought treatment from his personal physician who determined that the fusion remained intact. Dr. Wong opined this aggravated Claimant's condition, and that he might be experiencing mechanical pain from levels above and below the fusion and he also had chronic problems from old pathology with some new radicular symptoms.

12. On March 22, 2012, Claimant reported having "more good days than bad." At Claimant's request, Dr. Zimmerman relaxed his permanent driving restriction on April 19, 2012. Claimant's medications were stable with prescriptions of Oxycodone for severe pain (for flare-ups from barometric changes in the weather and storms) and Valium. On June 29, 2012, Claimant complained of persistent bilateral neck and shoulder pain with burning into the upper arms, into the left hand and numbness in the left thumb, index and middle fingers, and bicep weakness. Dr. Wong noted that Claimant had "an episode last week where he felt light headed with wobbly legs for 30 seconds."

13. Due to ongoing complaints and concerns related to cervical stenosis, Dr. Wong recommend a cervical MRI and referred Claimant to Dr. Johnson. A cervical MRI was done with contrast on July 11, 2012, Dr. Johnson reviewed the MRI which "showed no evidence of a new problem in the [entire] cervical area that would explain [Claimant's] recent symptoms." Dr. Johnson copied his report to Drs. Zimmerman and Wong and attributed Claimant's increased symptoms to his office setting job and suggested ergonomic changes to keep his neck in neutral position. On July 19, 2012, Dr. Zimmerman opined that the MRI showed no abnormality. Claimant's cervical ROM was normal in all directions. Notably, neither Dr. Zimmerman, Dr. Johnson nor Dr. Wong opined that Claimant's condition worsened or that he was no longer at MMI. Nor did the physicians suggest that Claimant had a "new" disc bulge adjacent to the fusion at T1-2 or that any of his pre-existing bulges had worsened.

14. On August 14, 2012, Claimant told Dr. Carbaugh he was concerned about a worsening structural problem in his neck. When questioned about "the possible etiology of increased pain," Claimant responded he was not going to the gym regularly and was not compliant with his diabetes requirements. Claimant had relief from neck symptoms but tingling in the left upper extremity and more frequent paresthesia with numbness, after

waking up in the morning. Dr. Zimmerman prescribed 4 to 6 maintenance physical therapy visits.

15. On September 6, 2012, Claimant quit his job with Employer due to conflicts with a co-employee. His symptoms continued to wax and wane. Dr. Zimmerman continued physical therapy, prescribed Celebrex and recommended medial branch blocks if pain persisted. Claimant responded well to Celebrex finding it very helpful in controlling pain.

16. On January 17, 2013, Dr. Zimmerman reported: “[a]s part of the maintenance, I recommend proceeding with bilateral C4-5, C5-6 radiofrequency neurotomy to treat pain. [Claimant] remains at MMI dated 9/22/11 for his original neck injury.” The doctor anticipated adjusting Claimant’s impairment rating to account for the procedure. On January 23, 2013, Claimant underwent the maintenance rhizotomy which initially provided relief. Dr. Hattem testified that the rhizotomy was performed as maintenance because it was done “to maintain [Claimant] at his current stable condition.”

17. Claimant experienced weather-related increased symptomology.

- He reported that he could “feel the snow coming in” which increased his pain.
- Claimant could feel his shoulders tense and a knot on the left side of his neck when barometric pressure dropped.
- Claimant reported that “he [was] sore from weather changes.”
- Claimant cancelled an appointment with Dr. Zimmerman because he was “hurting today with winter storms coming in,” which caused neck stiffness and increased pain.
- Dr. Carbaugh noted Claimant “again clearly identifie[d] changes in the weather as a prominent trigger for increased headache activity.”
- Dr. Zimmerman reported that Claimant lived in the mountains at 9000 feet and daily afternoon storms caused increased neck pain and headaches.
- Dr. Wong identified changes in weather and barometric pressure caused increased symptoms of arthritis.

18. On March 21, 2013, Claimant presented for repeat ROM measurements and Dr. Zimmerman noted that Claimant was “hurting” and complained of persistent neck pain due to winter storms. Dr. Zimmerman wrote that Claimant was at MMI for the revision as of that day “3/21/13” with 7% impairment for loss of ROM. It is undisputed that Dr. Zimmerman did not take Claimant off of MMI. Rather, based on the totality of the evidence, the ALJ finds that Dr. Zimmerman intended to convey that Claimant had fully recovered from the rhizotomy procedure as of March 21, 2013.

19. Claimant did not file a petition to reopen for worsening of medical condition

and attach a copy of the “new” MMI date or impairment rating. Nor did he apply for hearing on MMI, TTD or PPD (for additional 7% impairment). Instead, Claimant continued to receive PPD benefits from Insurer for the admitted 19% impairment rating from September 22, 2011 through November 8, 2013. Over the following several years Claimant continued to receive medical maintenance care, without alleging that his condition worsened or that he was not at MMI and should be receiving TTD or pre-MMI treatment.

20. Several medical records mention that Claimant was working with his attorney to build a Permanent Total Disability (PTD) case. These include but are not limited to

- Retaining a vocational expert, Cynthia Bartman, who issued a vocational report on May 2, 2013.
- In June 2013, Claimant told Dr. Carbaugh he was pursuing a “permanent total disability” case.
- On March 25, 2014, Dr. Cohen noted Claimant was trying to build a permanent total disability claim.
- On July 5, 2016, Dr. Zimmerman reported that Claimant continued to do well and was pursuing a permanent total disability claim.
- Claimant also testified that his counsel had scheduled a number of settlement conferences with Respondents, but that Respondents had not participated or had cancelled.

21. On April 30, 2013, Insurer sent Dr. Zimmerman a letter confirming that he placed claimant at MMI on September 22, 2011 with six months of maintenance care. Dr. Zimmerman responded with more maintenance recommendations, but did not state that he had taken Claimant off of MMI or that the September 22, 2011 MMI date had changed.

22. On May 2, 2013, Claimant’s counsel contacted Insurer by telephone inquiring whether it would be filing a new FAL accounting for Dr. Zimmerman’s March 21, 2013 MMI date and additional 7% impairment rating. Insurer responded that it would not be filing a new FAL because Dr. Zimmerman did not take claimant off of MMI and that the claim was closed. Tameria S[Redacted], managed Claimant’s claim for Insurer beginning in 2015. Ms. S[Redacted] testified that an Insurer is not obligated to admit or take any position when an ATP gives an additional impairment without taking claimant off MMI, even if the ATP places a claimant “back at MMI.” She also testified that Dr. Zimmerman billed the rhizotomy using the code for a medical maintenance procedure.

23. On May 2, 2013 Claimant’s expert, Cynthia Bartman, issued a vocational report concluding that since reaching MMI on September 22, 2011, Claimant had good and bad days and his pain level had a direct correlation to the weather pattern. She documented Claimant’s specific pain complaints which did not include right-sided symptoms. Ms. Barman cited “new” work restrictions in response to a questionnaire signed by Dr. Zimmerman that day, after completing it by phone with Claimant who “agreed to all of the responses.” It is unclear what prompted Dr. Zimmerman’s completion of the form or

if he based it solely upon Claimant's input, and whether or not he considered Claimant's pre-existing cervical disease, non-work related back condition, diabetes, hepatitis C, and lung condition. Dr. Zimmerman never changed Claimant's permanent work restrictions other than removing/reducing the driving restriction. Dr. Zimmerman also completed a cost determination for a Medicare set-aside. The ALJ finds that if the questionnaire and cost determination indicated a worsened condition, Dr. Zimmerman, who authored both documents, had the opportunity to take Claimant off MMI rather than continue to provide maintenance for the next three years.

24. On May 15, 2013, Insurer sent a second letter to Dr. Zimmerman confirming that Dr. Zimmerman placed Claimant at MMI on September 22, 2011. Again, Dr. Zimmerman did not state that he had taken claimant off of MMI or that there was a new MMI date.

25. On June 12, 2013, Dr. Rashbacher performed a physician adviser ("PA") report, opining that Claimant "remained at MMI" since 9/22/11 and that continued care "directed at other anatomic structures" was "well beyond the maintenance period." On June 18, 2013, Dr. Carbaugh reported Claimant was taking Percocet for peak pain periods, Claimant associated increased pain with activity and changes in weather/barometric pressure, and he was pursuing a "permanent total disability" case and hoped for a "rapid resolution." On July 7, 2013, Claimant complained of disabling headaches. Dr. Zimmerman administered a left occipital nerve block, resumed medical marijuana for pain and discontinued Oxycodone, suggesting Tramadol as a rescue medication.

26. On August 12, 2013, Dr. Wong reported that it was 2 ½ years post-fusion and Claimant consistently reported experiencing "good times and bad times" with residual discomfort mostly in the neck and the top of shoulder area. Claimant's symptoms were aggravated by mechanical activities and weather changes, but the fusion was solid. Dr. Wong assessed cervicgia, multifactorial symptom complex, and mechanical neck pain secondary to degenerative changes with no signs of instability. He noted that Claimant could have had radicular irritation to the arm from levels above his fusion, but there was no evidence of major radiculopathy stemming from C6 or T1-2. In response to Claimant's specific questions, Dr. Wong indicated that only 1 in 10 to 1 in 5 patients require operative treatment for adjacent level disease and "weather and barometric pressure [was] an aggravating factor for arthritis." Dr. Wong explained that "arthritis at adjacent levels can worsen over time" but that it was statically unlikely Claimant would need another surgery.

27. On December 12, 2013, Claimant complained of two episodes of burning pain, one down the RUE two weeks prior and one down the LUE over Thanksgiving. The symptoms lasted 2 hours and self-resolved. No narcotics were prescribed due to Claimant's reliance on medical marijuana. Dr. Zimmerman encouraged Claimant to "find other physicians for pain management who may be willing to accept his low narcotic use" and he scheduled a cervical MRI. On December 23, 2013, Claimant underwent a cervical MRI without contrast which did not show a disc bulge at T1-2, adjacent to the fusion. The radiologist's impression was prior fusion without evidence of complication, mild degenerative disk disease, and spondylosis in the mid cervical spine. Per Dr. Zimmerman, the MRI showed degenerative disc disease and spondylosis with no evidence of disk herniation or nerve root impingement. Claimant reported difficulty with his disability from

an emotional standpoint. A referral was made to Dr. Cohen for “maintenance psychological counseling.” On February 6, 2014, Claimant was “doing pretty well” and rated his pain a 4/10. He was prescribed Marinol. Claimant continued to report “he [was] doing very well” and on March 13, 2014, Dr. Zimmerman noted a “[h]istory of myofascial pain and headaches sensitive to barometric changes, relatively stable” with minimal exacerbations over the last month. Chronic RUE radiculopathy pain was controlled on medications. Dr. Cohen recommended Claimant stay busy with hobbies or light duty employment to keep his mind off the pain.

28. Per Dr. Cohen’s notes on March 25, 2014, Claimant was trying to build a permanent total disability claim. On March 9, 2014, Joseph Fillmore, M.D., did a PA, noting Claimant reached MMI on 9/22/11 and that Marinol should be denied as maintenance because it was illegal under Federal law. Dr. Gellrick performed a PA on April 18, 2014, and on May 1, 2014 she evaluated Claimant on referral by Dr. Zimmerman whom she noted was trying to manage Claimant’s ongoing pain complaints, while also attempting to differentiate them from pain related to diabetic mellitus disease as Claimant was not following his sugars closely. Dr. Gellrick opined that diabetic polyneuropathy may be contributing to upper extremity symptoms and recommended an EMG to delineate the cause of neuropathy. She suggested Claimant avoid the use of substances that could cause a relapse and that pain medications be monitored and/or changed over time to account for addiction, diabetes, lung function from smoking, hepatitis C, and respiratory depression from living at an altitude of 9000 feet. She further opined that if Dr. Zimmerman recommended more rhizotomies to maintain pain, his recommendation should be followed and that Celebrex or other NSAIDs could be increased to help with pain management. On April 24, 2014, Claimant expressed concern that Insurer denied payment for continued use of Marinol because the effectiveness of that had allowed him to discontinue all narcotic use and he did not want to become addicted again to narcotics. On May 22, 2014, Claimant was reportedly doing “so-so.” On July 1, 2014, Claimant was struggling with poor pain control. A repeat rhizotomy was considered and Claimant requested a referral to Dr. Wong. On July 29, 2014, Dr. Cohen reported Marinol provided Claimant with the most benefit but Insurer would not authorize it. On August 7, 2014, Claimant had no significant benefit from injections.

29. Albert Hattem, M.D., performed his first Respondent sponsored IME on September 8, 2014 and agreed with Dr. Wong that Claimant’s ongoing complaints were “multi-factorial”: persistent pain was related to non-work related degenerative cervical spine arthritis, addiction disorder with ongoing opioid dependency, behavioral issues, and somatization disorder. He recommended Claimant wean off benzodiazepine and opioids and that detoxification be achieved within 6 to 9 months. At his October 9, 2014 evaluation, Claimant’s neck and upper extremity pain was stable. Claimant ran out of Percocet but said he used it infrequently, as needed. On October 16, 2014, Dr. Zimmerman stated he would not wean Claimant off of narcotics because: “[i]n order to maintain [his] level of function, the current pain medications are necessary. I have worked with [Claimant] for over 4 years and based on trial and error, I have determined that this is likely the lowest medication regimen to maintain his level of function.”

30. From March 21, 2013, the date that Dr. Zimmerman stated Claimant was at

MMI for the rhizotomy and increased his impairment for the maintenance rhizotomy, through October 16, 2014, Dr. Zimmerman saw Claimant a total of 16 times where his medical records for each visit repeats the same sentence: “cervical spondylosis status post bilateral C4-5 and C5-6 radiofrequency neuropathy, placed at MMI on 3/21/13.”

31. Beginning the next visit, on October 23, 2014 and continuing through January 28, 2016, Dr. Zimmerman saw Claimant a total of 10 times where his medical record for each visit repeats the same sentence: “cervical spondylosis status post bilateral C4-5 and C5-6 radiofrequency neuropathy, placed at MMI on . . . 6/21/13” not 3/21/13. As with the March 21, 2013 MMI date used in records from March 21, 2013 through October 9, 2014, Dr. Zimmerman’s records from October 23, 2014 through January 28, 2016 all repeat the wrong MMI date of 6/21/13.¹ Throughout treatment, Dr. Zimmerman also provided “physician work activity status reports,” which repeatedly provide different MMI dates that do not correlate to this claim. In total, thirty-three of Dr. Zimmerman’s records physician work activity status reports contain thirty-three different and erroneous MMI dates.

32. Dr. Zimmerman referred Claimant to Dr. Aschberger for an EMG of the left UE to determine if there was overlying peripheral neuropathy secondary to diabetes and also recommended four to six therapy visits to evaluate and treat “lumbar radiculitis down the left LE.” On November 12, 2014, Dr. Aschberger concluded that the EMG was consistent with Claimant’s history and that remote C-5-C6 radicular changes were mild. On February 18, 2014 and March 15, 2015, Claimant’s pain was fairly well managed on medications. On April 2 2015, Claimant reported “doing okay” since discontinuing Percocet. His neck and LUE pain remained unchanged and tolerable, and he had recurrent headaches from barometric changes. On June 25, 2015, he received injections for headaches. On September 24, 2015, Dr. Zimmerman noted that Claimant presented for his 3-month follow up with unchanged neck pain and episodes of locking up with stiffness when he woke up over the last 2 years but were increasing in frequency. Claimant stated Dr. Cohen offended him by opining there was nothing acute to justify continued treatment, so Claimant requested an evaluation with a new psychologist, Dr. George Rossi, who had treated one of Claimant’s friends who also had a WC claim. Dr. Zimmerman referred Claimant to Dr. Rossi for 4 to 6 visits of maintenance psychological counseling.

33. On October 13, 2015, Dr. Sharma performed a PA opining that Claimant remained at MMI as of 9/22/11 and no further maintenance care was needed. On November 19, 2015, Claimant reported his neck pain had become more problematic in recent weeks. Claimant inquired about a repeat radiofrequency neurotomy, and Dr. Zimmerman declined, stating that the last one was performed on January 23, 2013, and another one would be “outside of the 12-15 month grace period for maintenance. Any further rhizotomies will need to be performed outside of workers’ compensation.” Claimant did not see Dr. Zimmerman again until January 28, 2016 and “as usual, the winter months caused increased neck pain and stiffness.” Dr. Zimmerman recommended an additional six counseling sessions with Dr. Rossi. On February 19, 2016, Michael Janssen, D.O., performed a PA and recommended that facet blocks and rhizotomies “may be palliative to

¹ The parties stipulated that the “6/21/13” MMI date was a typo or error. Claimant does not claim he was placed at MMI by Dr. Zimmerman on 6/21/13.

continue to relieve [Claimant's] symptomatology from a maintenance standpoint" for current level/adjacent level disease." It is undisputed that although Dr. Zimmerman expressly stated that the rhizotomy would have to be done outside of WC, Insurer authorized and paid for the April 27, 2016 maintenance rhizotomy. As with the first rhizotomy, Dr. Zimmerman did not take claimant off MMI. On 5/20/16, Claimant was "doing fairly well"; on May 27, 2016, he was feeling "pretty good."

34. On June 9, 2016, Dr. Sharma performed a PA, again opining Claimant remained at MMI since 9/22/11, and had "exhausted all medical care at this point." On June 16, 2016, Claimant complained of a headache possibly related to withdrawal from quitting smoking. On July 5, 2016, Dr. Zimmerman reported that Claimant continued to do well and was pursuing a permanent total disability claim due to combined neck and back symptoms. Claimant experienced psychological problems, and Dr. Zimmerman recommended continued medications and an independent exercise program. Dr. Sharma performed another PA on August 10, 2016, opining that Claimant had undergone extensive maintenance treatment after being placed at MMI on 9/22/11 and recommended Metformin be denied because Claimant took it in 2010 for diabetes and there was no correlation between the work injury and diabetes. Gary Gutterman, M.D., performed a psych IME on August 16, 2016, summarized the care provided by Drs. Carbaugh, Cohen and, Rossie, and opined that no further treatment would provide Claimant with pain management strategies.

35. On August 16, 2016, Dr. Zimmerman reported that Claimant was concerned about chronic degenerative changes in the cervical spine. He sought authorization to schedule new cervical MRI to determine if the underlying degenerative process had advanced; and to send Claimant to Dr. Wong to review the MRI and the psych IME for treatment options. On August 25, 2016, Insurer denied the request for prior authorization for psychological treatment, attaching Dr. Gutterman's IME to the denial. Brian Mathwich, M.D., performed a PA on August 31, 2016, stating that "Dr. Zimmerman is requesting an MRI as the patient is concerned about chronic degenerative changes which are not considered work related and no MRI should be completed under workers' compensation for chronic degenerative changes." He concluded that "all maintenance care should be discontinued at this time."

36. On September 1, 2016, Ms. S[Redacted] denied authorization of payment for a gym pass renewal, medications, MRI of the cervical spine, and follow up with Dr. Zimmerman, using the routine Insurer form that states "the condition for which the care is requested is not compensable" and attaching Dr. Mathwich's PA. After September 28, 2016, Ms. S[Redacted] authorized payment for prescription medication on 8/31/16, 9/11/16, 9/16/16, 10/4/16, and 11/5/16. She received no additional requests for prior authorization from any provider.

37. On September 22, 2016, Claimant's attorney sent a certified letter to Insurer stating that Claimant would treat with Dr. Ryan if Insurer did not authorize the MRI and visits with Drs. Wong and Zimmerman by September 26, 2016. Claimant did not send the letter via certified mail to Drs. Wong or Zimmerman. On September 27, 2016, Ms. S[Redacted] received a phone call from Dr. Wong's office requesting authorization for payment of an evaluation by Dr. Wong which Ms. S[Redacted] denied. On September 28,

2016, Insurer sent a letter to Dr. Wong, copying Claimant, denying authorization for the MRI and continued maintenance care with Drs. Zimmerman and Wong. Neither physician appealed. Per Ms. S[Redacted], after September 27, 2016, none of the five ATPs, neither Dr. Wong, Dr. Zimmerman, Dr. Johnson, Dr. Gellrick, Dr. Aschberger, nor anyone from their offices, communicated in any manner to Insurer that any physicians refused to treat Claimant because Insurer denied authorization for payment for continued care.

38. On June 16, 2016, Claimant filed a petition to reopen for error, mistake, and “change of medical condition” but crossed out the word “medical,” attaching a letter alleging Claimant was PT because of a change of financial condition. On June 16, 2016, Insurer denied the petition to reopen. Ms. S[Redacted] testified that there was no other action required of Insurer to deny the petition.

39. On December 8, 2017, Claimant applied for hearing on PT, medical benefits and reopening. Claimant did not endorse MMI, TTD, or increased PPD. The parties went to prehearing where PALJ Erickson ordered that Respondents could pursue recovery of attorneys’ fees because PT was not ripe since MMI was 9/22/11.

40. On February 23, 2018, ten weeks before the initial day of hearing in this matter, Claimant moved to add MMI and TTD.

41. Claimant called Dr. Ryan as a medical expert at hearing. Claimant sought treatment from Dr. Ryan at his attorney’s suggestion.

- Claimant saw Dr. Ryan for treatment on at least four occasions:
 - November 10, 2016 for 2 ½ hours,
 - December 16, 2016 for 2 hours,
 - March 29, 2017 for 1 ½ to 2 hours, and
 - August 17, 2017, for an unspecified amount of time.
- Dr. Ryan did not create or maintain *any* record of *any* of these visits. Thus, no records exist to confirm what, if any, treatment Dr. Ryan may or may not have performed, or what, if any, observations he may or may not have made of Claimant’s condition. Dr. Hattem testified that the standard of care required doctors to complete reports every time they saw a patient.

42. Dr. Ryan admitted he did not provide any actual medical treatment: “I was going to provide medical care for him, and there was a difficult circumstance. I didn’t want to involve myself honestly, in the administrative aspects of the claim. Probably not a very good treating physician workers’ compensation, but I’d like to say, I really don’t do that anymore.” He also testified that he “wasn’t really sure what [his] role was going to be,” and that he was “pinch-hitting.”

43. Dr. Ryan issued his first opinions in a letter dated November 6, 2017. There

he opined Claimant was at MMI on 9/22/11, needed additional maintenance care and increased permanent work restrictions to account for a few “bad” days per month. He also opined that Dr. Zimmerman’s treatment was “reasonable, necessary, logical and compassionate, demonstrating exceptional skill under very challenging conditions,” and that Dr. Zimmerman should remain the ATP.

44. On January 19, 2018, Dr. Ryan gave a second and inconsistent opinion that Claimant’s July 11, 2012 MRI was “concrete evidence” of a worsened condition and “the reason that [Dr. Ryan] recommended a follow up high resolution cervical MRI scan.” But Dr. Ryan had not recommended a high resolution MRI in his first opinion, he recommended simply an “updated” MRI.

45. At the August 16, 2018 hearing, Dr. Ryan gave his third and fourth opinions. On direct, he testified he did not know if Claimant reached MMI after the purported July 11, 2012 worsening. But on cross, he testified Claimant reached MMI on March 21, 2013, but a second worsening occurred, although he did not know when, where or how, and Claimant reached MMI again by April 26, 2016, the date of the second maintenance rhizotomy. He also testified he considered himself to be Claimant’s ATP as of the first time he saw Claimant.

46. Dr. Ryan’s opinion changed for the fifth and several more times during the second day of hearing. Dr. Ryan first testified he did not know whether Claimant reached MMI by September 22, 2011. Claimant’s condition worsened on July 11, 2012, and Dr. Zimmerman erred by placing Claimant at MMI again on March 21, 2013, because Claimant never reached MMI. When asked whether Claimant was at MMI on March 21, 2013, Dr. Ryan testified “[t]hat’s a tough one, I don’t know.” When asked “is he at MMI today,” Dr. Ryan stated: “there are too many questions. I don’t know.” However, when asked “has he ever been at MMI since July of 2012,” Dr. Ryan testified that Claimant had experienced multiple worsenings and MMI dates “back and forth.” However, he could not identify when any of the multiple worsenings or multiple MMI dates occurred.

47. The ALJ observed that throughout Dr. Ryan’s testimony, he used the terms “worse” and “worsening” both colloquially and as a term of art. He testified,

You know honestly, I didn’t really pay attention to Colorado workers’ compensation in terms of art. It was sloppy use of language. You know, you guys live in this world, and you know when somebody says something it is supposed to mean something. You know, I didn’t – I didn’t really attach any significance. I probably should have, but I didn’t.

48. Dr. Ryan did not understand the case. His testimony was littered with expressions such as, “I have more questions than answers,” “I’m not prepared to say right now,” “If I recall, and I don’t recall very well,” “I honestly can’t tell you if that was the case or not,” and “You know, gees, was he at MMI or not?” He also testified that he was unable to answer hypothetical questions. When asked if a procedure was performed as maintenance, Dr. Ryan responded, “As to whether that were [sic] something that changed his MMI status, I don’t think there’s enough information to be able to say.” When asked

when Claimant's conditioned for the second time, Dr. Ryan responded, "And that's my arbitrary solution to that problem...I mean its' sloppy. I don't know how else to solve this problem."

49. Dr. Ryan based his opinion that Claimant's condition worsened on an inaccurate understanding of the facts.

- First, Dr. Ryan testified that the July 11, 2012 MRI showed a T1-2 disc bulge adjacent to the fusion that was not present on the December 23, 2010 MRI, and that the MRIs were comparable because they both were performed with contrast. Per Dr. Ryan, the fact that the T1-2 disc bulge was no longer present on the December 23, 2013 MRI was not relevant because the third MRI was the only one performed without contrast, and comparing a non-contrast MRI to a contrast MRI is like "comparing apples to oranges."
 - The ALJ rejects Dr. Ryan's opinion because the December 23, 2013 MRI, like the 12/28/13 MRI, was done without contrast. The only MRI done with contrast was performed on July 11, 2012. The most important basis for Dr. Ryan's opinion was his erroneous understanding that the first two MRIs were done with contrast but the third MRI was not.
- The second bases for his opinion were: (i) Claimant had "new" symptoms of headaches and right sided neck, extremity and thumb pain that he did not have a year or two before the alleged July 11, 2012 worsening; (ii) these "new" symptoms were continuous and unexplainable; and (iii) previous left sided symptoms were "remedied" by the February 2011 fusion.
 - Dr. Ryan misapprehended that facts. Claimant had left greater than right sided symptoms, in the right neck, shoulder, arm, hand, trapezius, elbow and upper extremity, days after his injury which continued pre and post fusion; (ii) He also had left greater than right numbness on February 8, 2012 attributed to the elk MVA and increased symptoms in July 2012, with one complaint of thumb pain, explainable by an ergonomically deficient work station; and (iii) left sided symptoms were never "remedied." Claimant continued to have good and bad days with waxing and waning of left greater than right symptoms and headaches, from weather changes and storms, and also from changes in medications to avoid addiction, level of activity, natural progression of underlying cervical disease and osteoarthritis, residing at high altitude, withdrawal from trying to quit smoking and diabetic polyneuropathy, throughout the claim. Dr. Ryan conceded that it was "certainly possible" to attribute the new and increased symptoms from the summer of 2012, to the MVA with the elk in December 2011.

50. Dr. Hatter performed a second IME on April 3, 2018. He testified "*there is absolutely no objective evidence of worsening.*"

- Claimant underwent typical maintenance care, including rhizotomies, and his

condition and the 3 MRIs, never changed.

- His symptoms waxed and waned as anticipated at his September 22, 2011 MMI. “Claimant’s pain “has waxed and waned and waxed and waned. His condition really hasn’t changed over the years.” “There is no objective evidence for any changes...There is no objective evidence I could find that he is worse.”
- In his 26 years of experience, it was extremely unusual to see a single level fusion requiring ten years of maintenance care. “[Claimant] had some trigger point injections, some medications, a couple of rhizotomies. Just typical things that we do as maintenance care. He had it for a lot – lot longer than most patients who have this type of surgery.”
- The 7% impairment for loss of ROM for the “maintenance rating” on March, 21 2013, was not confirmation that Claimant’s condition worsened and was not objective evidence of a worsened condition. Rather, it was simply a reflection that Claimant’s ROM on that specific day and was likely impacted by the weather.
- Dr. Hattem agreed with Drs. Zimmerman, Janssen and Gellrick that neither rhizotomy improved Claimant’s condition and that both were done as maintenance.

51. The ALJ is most persuaded by the totality of the evidence and consistent opinions of Drs. Hattem, Zimmerman, Wong, and Johnson, that Claimant reached MMI on September 22, 2011 and his condition never worsened.

52. The ALJ finds Dr. Ryan not credible. His opinion contained significant factual errors. His opinion changed numerous times resulting in him rendering unreliable and contradictory opinions. Dr. Ryan disagreed with all of the physicians involved in this claim, including Dr. Zimmerman, who Dr. Ryan initially claimed demonstrated “exceptional skill under very challenging conditions” and opined “should remain the ATP.”

53. The ALJ specifically finds that Claimant did not prove by a preponderance of the evidence that his condition has worsened or that he is no longer at MMI.

54. The ALJ specifically finds that Claimant did not prove by a preponderance of the evidence that he is entitled to additional medical maintenance care.

CONCLUSIONS OF LAW

Petition to Reopen

At any time within 6 years of the date of injury, an ALJ may reopen any award on the ground of fraud, overpayment, error or mistake, or change in condition. Section 8-43-303(1) C.R.S. A change of condition refers to a change of mental or physical condition which is causally connected to the original injury. A claim may not be reopened for change

of financial or economic condition. *Lucero v. Climax Molybdenum*, 732 P.2d. 642 (Colo. 1987). The question of whether a claimant is permanently and totally disabled is determined as of the date claimant reached MMI. *Colorado AFL –CIO v. Donlon*, 914 P.2d 396 (Colo. App. 1995). MMI does not mean that a claimant’s symptoms or condition will not change. As defined in section 8-40-201(11.5), C.R.S., MMI “means a point in time when any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition.” Respondents’ obligation to provide medical benefits to cure the industrial injury terminates at MMI. Thereafter, respondents are only responsible for medical benefits to maintain or prevent a deterioration of claimant’s condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Claimant bears the burden of proof in seeking to reopen a claim. *Richards v. ICAO*, 996 p.2d. 756 (Colo. App. 2000). WCRP 7-2(A) requires that a petition to reopen be filed stating the basis for reopening and supporting documentation must accompany the request.

As found, the supporting documentation attached to Claimant’s petition was a letter stating Claimant had a change in financial condition and was now permanently totally disabled. No medical records were attached, and the letter did not state that Claimant’s medical condition worsened. It does not mention Claimant’s medical condition. As found, Claimant applied for hearing on the issues of reopening, PT and MB. He did not endorse MMI or TTD (and he has never endorsed PPD which was not an issue for hearing). It was not until after the PALJ granted Respondents’ motion to pursue recovery of attorneys’ fees because the issue of PT was ripe at MMI in 2011, that Claimant moved to add the issues of MMI and TTD, 10 weeks before hearing commenced on 5/3/18.

Claimant represented to the ALJ that Claimant had to “wait” for Dr. Ryan’s 11/6/17 report until he could apply for hearing on 12/8/17 on worsening of medical condition. But Dr. Ryan’s 11/6/17 report does not opine that Claimant’s condition worsened. It opines that Claimant reached MMI on 9/22/11, needed additional medical maintenance care and his permanent work restrictions should be increased. The first time Dr. Ryan opined Claimant’s condition worsened was on 1/19/18 after Claimant applied for hearing on 12/8/17. Dr. Ryan proceeded to give one contradictory opinion after another: (i) claimant’s condition worsened on 7/11/12 and he reached MMI on 3/21/13 and then it worsened again, but he does not know when, where or how, but claimant was at MMI again by the second rhizotomy on 4/26/16; (ii) claimant may not have been at MMI on 9/22/11 and was never at MMI; (iii) after claimant’s condition worsened on 7/11/12, he has never again been at MMI and the 3/21/13 MMI date is erroneous; and (iv) after the 7/11/12 worsening, claimant has multiple MMI dates and multiple worsenings “going back and forth” but Dr. Ryan can provide no information on when, why and how any of the worsenings occurred or what the dates are that he repeatedly reached MMI after each worsening.

Dr. Ryan himself initially claimed Dr. Zimmerman’s treatment was reasonable, necessary, logical and compassionate, demonstrating exceptional skill under very challenging conditions and should remain the ATP. Drs. Wong and Johnson are very well regarded surgeons. All three physicians provided maintenance care to claimant for 3-5 years post MMI. They were fully aware of the MRI findings, copied each other on their medical reports, and repeatedly examined Claimant and listened to his pain complaints. If

any of them at any time believed Claimant's condition worsened, they would have said so. Drs. Wong and Johnson were not narrowly focused on doing surgery. During his last visit, Dr. Wong answered all of Claimant's questions and recommended specific conservative care including comprehensive pain rehabilitation, chronic pain management, and rhizotomy to maintain Claimant's level of functioning and try to improve his pain. Dr. Johnson recommended ergonomic changes to Claimant's work station. These are not surgical recommendations. Rather, Claimant's surgeons found ways to maintain Claimant's pain in the face of numerous complicating factors.

In February 2011, Claimant had a single level fusion without complications. He did well with surgery that he was placed at MMI seven months later. He returned to work 40 hours per week at a desk job and continued to work that job for 14 months, from 7/1/11 through 9/6/12. His condition did not permanently worsen on 7/11/12. He is genetically predisposed to arthritis and osteoarthritis and has it diffusely throughout his body in his neck, back and both knees. The nature of this condition is to naturally progress over time. That the condition did progress is supported by his later lumber spine fusion for the same condition he has in his neck. He also had multiple disc bulges in his lumbar spine and was referred to a surgeon for his bilateral knee osteoarthritis. In addition to natural progression of disease, his symptoms were aggravated by the MVA with the elk because he was still complaining about them when he saw Dr. Wong a few months later. His symptoms were aggravated again by the ergonomically deficient work station in July 2012. But after both intervening events, his symptoms continued to wax and wane and he continued to have good and bad days. He also has uncontrolled diabetes which causes peripheral neuropathy. He experienced weakness, numbness, and tingling in his upper extremities and sometimes his hands or fingers, he also experienced these same symptoms radiating down his lower extremities and asked Dr. Bess to refer him for an EMG for his left foot to assess diabetic peripheral neuropathy.

Both rhizotomies, done on 1/23/13 and 4/26/16, were done as maintenance. Claimant's symptoms continued to wax and wane pre and post both rhizotomies. Where the authorized treating physician issues conflicting opinions concerning MMI, it is for the ALJ to resolve the conflict. *Blue Mesa Forest v. Lopez*, 92 P.2d 821, 833 (Colo. App. 1996). The ALJ rejects the belated claim that the new 3/21/13 MMI date and 7% rating for loss of ROM after the first rhizotomy supports a worsening of condition or that it was error or mistake for Insurer to not file a new FAL, which the law does not require. *Pavelko v. Southwest Heating & Cooling*, W.C. No. 4-897-489 (Sept. 4, 2015) (holding that rhizotomy was done as maintenance to relieve claimant's symptoms, not to improve his underlying work related medical condition, even though claimant had a recalculated impairment rating). *See also, Crowell v. New Hampshire Ins. Co.*, W.C. No. 4-777-591 (ICAO December 30, 2011) (rhizotomy as maintenance).

Moreover, the recent allegation that Insurer should have filed a new FAL for this increased rating appears to be an after-thought. Claimant did not endorse PPD as a hearing issue and consequently would not be entitled to the additional 7% rating.

Finally, Dr. Hattem and the seven physician advisors did address MMI. Drs. Sharma, Mathwich, Raschbacher and Gutterman expressly opined that Claimant remained at MMI as of 9/22/11 and all maintenance care should be discontinued. Drs. Gellrick,

Janssen and Fillmore made specific treatment recommendations to address pain and symptoms for claimant to maintain his 9/22/11 MMI.

The ALJ finds and concludes that Claimant did not meet his burden of proof to establish a worsening of condition or that Claimant does not remain at MMI. The ALJ declines to reopen this case.

The ALJ declines to address the additional issues.

ORDER

It is therefore ordered that:

1. Claimant's petition to reopen for error, mistake and/or change of medical condition is denied and dismissed.
2. Claimant's claim that Dr. Christopher Ryan is or ever has been his authorized treating physician is denied and dismissed.
3. Claimant's claim for any further medical maintenance care, including cervical MRI and follow up with Dr. Zimmerman and Dr. Ryan and psychological care is denied and dismissed.
4. Claimant's claim for TTD benefits is denied and dismissed.

DATED: February 7, 2020

/s/ Kimberly Turnbow
Administrative Law Judge
Office of Administrative Court
1525 Sherman St., 4th Floor
Denver, CO 80203

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-032-582-002**

ISSUES

1. Whether Claimant has proven by a preponderance of the evidence that he is incapable of earning any wages and is entitled to receive Permanent Total Disability (PTD) benefits as a result of admitted industrial injuries that he sustained during the course and scope of his employment with Employer on November 25, 2016.
2. Whether Claimant is entitled to a disfigurement award pursuant to §8-42-108, C.R.S.

FINDINGS OF FACT

Claimant's Initial Injury and Treatment

1. Claimant was born on August 16, 1958 and he is currently 61 years old. He lives in Aurora, Colorado and is in the commutable labor market for the Denver Metropolitan Area. His last employment was with Employer.
2. On November 25, 2016 Claimant suffered a admitted industrial injuries when he fell from a trash dumpster. A lumbar CT revealed an acute burst fracture. Claimant thus underwent a T11-L-3 fusion surgery on November 26, 2016 performed by Bernard Guiot, M.D. at Littleton Adventist Hospital. Barton Goldman, M.D. testified that Claimant had a relatively unstable spine as a result of the fracture and the surgery was successful in re-stabilizing his spine through instrumentation. A head CT showed a bilateral subarachnoid hemorrhage, right greater than left. A Spanish-speaking RN evaluated Claimant and noted that he had some mild cognitive deficits on testing, but was likely close to his usual level of functioning. Claimant did not demonstrate overt signs or symptoms of post-concussive syndrome.
3. Upon discharge from Littleton Adventist Hospital, Claimant was admitted to Spaulding Rehabilitation Hospital. At Spaulding Claimant underwent a Spanish-Language SLUMS test for cognitive ability. His score of 25/30 placed him in the range of minimal cognitive impairment. The results corresponded to his reports that he had returned to normal in terms of memory, attention and organizational abilities.
4. Beginning February 15, 2017 Claimant received conservative treatment from Authorized Treating Physician (ATP) J. Tashof Bernton, M.D. On August 29, 2017 Dr. Bernton determined Claimant had reached Maximum Medical Improvement (MMI) and assigned a 44% whole person impairment rating. He assigned the following work restrictions: (1) alternate sitting and standing at will; (2) rare to occasional lifting, twisting, or bending; and (3) maximum lifting of 10 pounds on an occasional basis.
5. On December 14, 2017 Respondents filed a final Admission of Liability (FAL) consistent with Dr. Bernton's MMI and impairment determinations. Included in the

44% whole person impairment was a 7% rating for the residual effects and brain impairment from Claimant's subarachnoid hemorrhage.

Claimant's Extensive Pre-Existing Conditions

6. Claimant suffers from an extensive list of pre-existing conditions that are unrelated to his November 25, 2016 work injury. The conditions include end-stage renal disease since 2013 for which he requires dialysis three times per week. Claimant also suffers from type 2 diabetes mellitus with proliferative diabetic retinopathy, hypertension, hyperlipidemia, hyperthyroidism and 70% right internal carotid stenosis. He also has congenital lumbosacral stenosis particularly involving L3-5 and diffuse idiopathic skeletal hyperostosis (DISH) resulting in substantial static immobility of T3-12 as well as fused sacroiliac joints.

7. One of the most significant pre-existing issues facing Claimant is his end stage renal failure. Claimant's end-stage renal failure associated with long-standing hypertension, diabetes and hyperlipidemia progressed to the point where he required dialysis treatment three times per week in November of 2013. Further complicating Claimant's serious kidney condition is his long-standing non-compliance with treatment. Multiple instances of non-compliance resulting in hospital visits occurred prior and subsequent to Claimant's work injury. Dr. Goldman explained that the multiple hospitalizations from complications of Claimant's pre-existing conditions would "negatively affect his health in every which way. It's going to negatively affect his cognition it's going to negatively affect his balance, it's going to negatively affect his immune system...if it happens more than once or twice, it's going to create a chronic cascade that's going to lead to a global deterioration of health."

8. In considering Claimant's ability to work and the effects of his November 26, 2016 industrial injuries, Dr. Goldman explained, "the main factor in terms of the patient's inability to work was already established at the time and before this injury, independent of this particular injury." Although Dr. Goldman acknowledged that "there is no doubt that there's temporary disability...occurring in the year following this injury, at least until the patient is at MMI. But within medical probability Claimant] would have been or by this point in time would be unable to work."

9. Dr. Goldman's opinion that Claimant was disabled and unable to work independent of his work injury is supported by the determination of the Social Security Administration that Claimant became disabled on November 15, 2016 or shortly prior to the November 25, 2016 work injury. Claimant had applied for Social Security disability benefits based on his end-stage kidney failure and need for dialysis.

10. Claimant also suffered significant spinal stenosis prior to his industrial injury and developed further adjacent segment disease after his injury and initial surgery. He treated conservatively with Dr. Bernton for the condition from approximately February to August of 2019. However, Dr. Guiot and Dr. Bernton advised Claimant against further conservative treatment and strongly recommended additional surgery to decompress Claimant's spine and possibly extend the fusion. Dr. Goldman concurred that the

recommended surgery is the only treatment likely to improve Claimant's condition and prevent further deterioration. Because Claimant has refused the surgery, Dr. Bernton placed him at MMI and provided work restrictions.

Claimant's Cognitive Issues

11. Claimant testified at the hearing in this matter that he struck his head on November 25, 2016 and may have been unconscious for about five minutes. He explained that he suffers from occasional dizziness and his industrial injury has negatively impacted his short-term memory.

12. Claimant has undergone several head CT scans. A November 25, 2016 head CT scan showed a right greater than left bilateral subarachnoid hemorrhage. A repeat head CT performed on the same day showed the condition was stable with no new intracranial hemorrhage or significant mass effect. A follow up head CT on July 17, 2017 revealed no evidence of acute intracranial abnormality and a resolution of the previous hemorrhage.

13. Dr. Bernton testified that the subarachnoid hemorrhage, Claimant's memory complaints and dizziness suggest that Claimant's complicated mild traumatic brain injury on November 25, 2014 caused his cognitive issues. However, Dr. Bernton did not conduct any cognitive testing during his entire course of treatment with Claimant. He testified that he never received nor reviewed any medical records from Littleton Adventist, Spaulding Rehab, or DaVita. Although Dr. Bernton remarked that there were no prior diagnoses of uremic encephalopathy in the medical records, the UC Health records list final diagnoses of encephalopathy and delirium on several occasions after Claimant's hospitalizations for poorly managed end-stage renal failure. In fact, one of Claimant's hospitalizations for elevated toxin levels occurred on August 26-27, 2017 or just two days prior to Dr. Bernton's impairment rating and MMI determination.

14. In contrast, Dr. Goldman explained that Claimant's subjective complaints and CT scans are indications that he should undergo cognitive testing. Dr. Goldman testified that Littleton Adventist conducted an evaluation and concluded that, although Claimant had mild cognitive deficits, he was likely close to his usual level of functioning. In reviewing the records from Spaulding, Dr. Goldman noted that Spanish language cognitive testing revealed a very minimal cognitive event that was improving. In addition, Dr. Goldman summarized that the medical records reveal that the November 25, 2016 injury did not substantially contribute to any of Claimant's cognitive issues.

15. Dr. Bernton testified that acknowledged that Claimant suffered cognitive impairment when BUN levels increased. However, the condition is reversible long as long as Claimant continues dialysis and maintains his Blood Urea Nitrogen (BUN) levels within a normal range. Nevertheless, Dr. Bernton recognized that very high levels over a period of time may cause chronic residual symptoms.

16. To the extent Claimant suffers from cognitive deficiencies, Dr. Goldman explained that they are the result of chronic uremic encephalopathy. The condition was caused by multiple instances of significant toxin and urea and urea build-up because Claimant's failure to comply with kidney dialysis treatment recommendations. The medical records reflect multiple instances of extremely high BUN values and creatinine levels. Dr. Goldman reviewed records from Spaulding, Littleton Adventist, DaVita and UC Health. The following chart details Claimant's excessive BUN and creatinine levels at various times from 2013-2017:

| Exhibit & Bates number | Date | Medical Provider | BUN (blood urea nitrogen) value Normal range: 7 – 25 mg/dL | Creatinine value Normal range: 0.70-1.30 mg/dL |
|---|-------------|--|---|---|
| Ex. 17, bates no. 974 | 11/25/2013 | St. Joseph Hospital | 126 | 9.8 |
| Ex. 17, bates no. 980 | 11/26/2013 | St. Joseph / Da Vita | 130 | 10 |
| Ex. 17, bates no. 978 | 11/27/2013 | St. Joseph / Da Vita | 82 | 7.8 |
| Ex. 8, bates no. 516 | 4/14/2016 | UC Health | 60 | 6.68 |
| Ex. 8, bates no. 517 | 04/15/2016 | UC Health | 69 | 7.78 |
| Ex. 8, bates nos. 524 & 528 | 04/16/2016 | UC Health | 56 | 7.23 |
| Ex. 8, bates no. 477 | 08/26/2016 | UC Health | 91 | 12.0 |
| Exhibit 12, bates nos. 650 & 833 | 11/25/2016 | Littleton Adventist Hospital | 90 | 8.57 |
| Exhibit 12, bates no. 813 / Exhibit 15, bates no. 917 | 11/27/2016 | Littleton Adventist Hospital / Spaulding records | 70 | 7.96 |
| Exhibit 12, bates no. 808 | 11/28/2016 | Littleton Adventist Hospital | 97 | 10.8 |
| Exhibit 12, bates no. 801 | 11/30/2016 | Littleton Adventist Hospital | 78 | 7.91 |
| Exhibit 12, bates no. 704 / Exhibit 15, bates no. 917 | 12/1/2016 | Littleton Adventist Hospital / Spaulding records | 92 | 9.01 |
| Exhibit 12, bates no. 701 | 12/2/2016 | Littleton Adventist Hospital | 103 | 9.33 |
| Exhibit 12, bates no. 694 | 12/3/2016 | Littleton Adventist Hospital | 59 | 5.95 |
| Ex. 15, bates no. 908/ Ex. 16, bates no. 943 | 12/05/2016 | Spaulding records / Da Vita | 87 | 8.14 |
| Ex. 16, bates no. 941 | 12/09/2016 | Da Vita | 87 | 8.14 |
| Ex. 8, bates 370 | 10/23/2017 | UC Health | 117 | 15.2 |
| Ex. 8, bates no. 366 | 10/24/2017 | UC Health | 99 | 13.48 |

Claimant's Education and Vocational Background

17. Claimant was born in Mexico and briefly attended school there through 3rd grade. He subsequently worked on cattle ranches in Mexico. Claimant immigrated to the United States in 1981 and has lived in the United States for approximately 38 years. Claimant does not read or speak English and can read little Spanish.

18. Claimant has previously worked in a casino where he cleaned the kitchen and supervised 20 dishwashers. He subsequently worked as an auto parts delivery driver and transported parts weighing approximately 10 pounds. Claimant then worked for a company that manufactured hubcaps for about five years. He subsequently relocated from California to Kansas and worked in a slaughterhouse. Claimant also worked for a couple of years installing doors in mobile homes. After moving to South Dakota, Claimant again worked in a slaughterhouse. Beginning in 2002, he worked as a janitor and auto detailer at Employer. Claimant continued to work for Employer until his November 25, 2016 industrial injury.

Vocational Evaluations

19. On June 24, 2018 Vocational Expert Doris Shriver prepared a Workers' Compensation Evaluation for Claimant. Ms. Shriver considered Claimant's physical restrictions of: (1) alternating sitting and standing at will; (2) not performing more than rare to occasional lifting/twisting/bending; and (3) maximum lifting not to exceed 10 pounds on an occasional basis. Based on her review of Claimant's educational background, prior work experience and medical records, Ms. Shriver concluded that Claimant was unable to earn any wages in any capacity. She specified that Claimant's weaknesses in employability include his limited understanding of the English language, low reading comprehension, limited fine motor skills and physical limitations. Ms. Shriver explained that, because Claimant cannot sustain production and pace on a consistent basis, prospective employer will not pay him. Ms. Shriver thus concluded that Claimant could not earn any wages or perform any of the potential job positions identified by Patricia Anctil in her vocational report.

20. In determining that Claimant is unable to obtain employment, Ms. Shriver only considered Claimant's work with Employer in his vocational history because other work experience was not relevant. She also did not perform a transferable skills analysis. Her assessment of physical activity did not include any objective validity testing. Ms. Shriver also relied on testing in English to evaluate Claimant's academic functioning and abilities despite recognizing that Claimant is a monolingual Spanish speaker. Furthermore, without specifically testing Claimant's ability to count money or use a cash register, Ms. Shriver determined that he could not work a position that requires counting change or operating a cash register.

21. In contrast, Vocational Expert Patricia Anctil employed a recognized methodology in accordance with professional industry standards. Ms. Anctil met with the Claimant on November 12, 2018 and obtained information about his work history and education. She also spoke with him about his activities of daily living, physical capacities,

medical situation, medications, language skills and ability to handle money. During her interview, Ms. Anctil also obtained additional information from Claimant as they discussed the job titles she had identified from the Dictionary of Occupational Titles (DOT). Using the additional information, Ms. Anctil performed a transferable skills analysis. After she obtained automated responses, Ms. Anctil adjusted Claimant's profile utilizing his work restrictions. Ms. Anctil then contacted employers to obtain specific information about available jobs in Claimant's commutable labor market to determine whether they matched his skills and physical capabilities. Ms. Anctil noted that Ms. Shriver did not obtain a complete job history from Claimant, review DOT titles with Claimant, perform a transferable skills analysis or consider labor market research by contacting prospective employers.

22. Considering Claimant's significant physical limitations, monolingual Spanish speaking ability, vocational history, low education level and requirements for modified sedentary employment, Ms. Anctil identified job positions in Claimant's commutable labor market. The job positions she identified included the following:

(1) McDonalds take out window order taker and cashier – Ms. Anctil determined the employer hires monolingual Spanish speakers and they are able to accommodate workers with certain hours. Claimant could then attend his dialysis treatment and use a stool to alternate sitting and standing. This is an unskilled position and Ms. Anctil was able to verify that the physical requirements do not exceed Claimant's physical restrictions.

(2) CPI Cards Assembler – This employer, produces high security plastic cards. Ms. Anctil noted that the employer offers entry-level positions not requiring computer tasks or education. They employ non-English speaking employees and provide on the job training. Some basic English skills are required but they provide ESL classes. The physical demands require lifting one six-pound sleeve of cards at a time. The job can be performed seated, standing or alternating positions. There is no bending and the job is classified as sedentary.

(3) Dawn industries plastic part assembly – This position requires working with small plastic parts. The production rate is self-paced, the duties are mostly performed while sitting and there is occasional standing. Positions with this employer can include polisher, assembler and shipping. From experience, Ms. Anctil is aware that this employer is willing to provide reasonable accommodations, including no lifting over five pounds and no repetitive upper extremity use. She determined that the positions are unskilled and within the Claimant's demonstrated aptitude levels.

Using accepting methods in the field of vocational rehabilitation, Ms. Anctil assessed the information she obtained and concluded that there are employment options based upon the Claimant's specific circumstances that would allow him to earn a wage in his commutable labor market.

23. Dr. Goldman considered Ms. Ancil's vocational report and specifically reviewed the job positions she identified for Claimant. He testified that Claimant could perform the McDonald's takeout window position, the CPI card assembler work and the Dawn Industries assembler duties. Dr. Goldman concluded that the preceding jobs are appropriate considering Claimant's restrictions, work-related injury and comorbidities.

Factual Summary

24. Claimant has failed to prove that it is more probably true than not that he is incapable of earning any wages and is entitled to receive PTD benefits as a result of his November 25, 2016 admitted industrial injuries. Initially, on November 25, 2016 Claimant suffered a burst fracture and bilateral subarachnoid hemorrhage when he fell from a trash dumpster at work. He subsequently underwent T11-L3 fusion surgery. Claimant received a 44% whole person impairment rating. Claimant asserts that his industrial injury rendered him unable to earn any wages in any capacity. However, to the extent Claimant is unable to work, his industrial injury did not constitute a significant causative factor in rendering him disabled. Moreover, in considering Claimant's physical abilities, education, vocational training, former employment, mental capabilities and availability of work within his commutable labor market the record, reflects that Claimant is capable of earning wages.

25. Claimant's contention that he is unable to earn wages fails because his industrial injury is not a significant causative factor in rendering his disabled. He suffers from pre-existing, independently disabling medical conditions. The conditions include end-stage renal failure and complications due to chronic non-compliance with medical treatment recommendations. Dr. Bernton testified that Claimant's subarachnoid hemorrhage, subjective memory complaints and dizziness suggest that his November 25, 2016 work accident caused his cognitive issues. Although Dr. Bernton remarked that there were no prior diagnoses of uremic encephalopathy in the medical records, the UC Health records list final diagnoses of encephalopathy and delirium on several occasions after Claimant's hospitalizations for poorly managed end-stage renal failure. In contrast, Dr. Goldman noted that Littleton Adventist conducted an evaluation and concluded that, although Claimant had mild cognitive deficits, he was likely close to his usual level of functioning. In reviewing the records from Spaulding, Dr. Goldman noted that Spanish language cognitive testing showed a minimal and improving cognitive event. Moreover, to the extent Claimant suffers from cognitive deficiencies, Dr. Goldman explained that they are the result of chronic uremic encephalopathy. The condition was caused by multiple instances of significant toxin and urea build-up because of Claimant's failure to comply with kidney dialysis treatment recommendations. The medical records from Spaulding, Littleton Adventist, DaVita and UC Health reflect multiple instances of extremely high BUN values and creatinine levels. Accordingly, based on the medical records and persuasive opinion of Dr. Goldman, Claimant has minimal to no residual cognitive impairment from his work injury. Any cognitive deficits can be attributed to Claimant's chronic uremic encephalopathy due to multiple instances of significant build-up of toxins because of his failure to follow kidney dialysis treatment recommendations.

26. In considering Claimant's ability to work and the effects of his November 25, 2016 industrial injuries, Dr. Goldman explained, "the main factor in terms of [Claimant's] inability to work was already established at the time and before this injury, independent of this particular injury." Dr. Goldman opinion that Claimant was disabled and unable to work independent of his work injury is supported by the determination of the Social Security Administration that Claimant became disabled on November 15, 2016 or shortly prior to the November 25, 2016 work injury. Claimant had applied for Social Security disability benefits based on end-stage kidney failure and need for dialysis. Accordingly, based on Claimant's extensive pre-existing conditions, his November 25, 2016 industrial accident did not constitute a significant causative factor in his ability to earn wages. Claimant has not demonstrated a direct causal relationship between his industrial injuries and inability to earn wages.

27. Alternatively, the persuasive vocational records reveal that Claimant is capable of obtaining employment and earning wages. Ms. Ancil completed a thorough vocational assessment and identified several job positions in Claimant's commutable labor market through her labor market research and direct contact with potential employers. She performed a transferable skills analysis. Considered jobs from the DOT, adjusted Claimant's profile utilizing his work restrictions and contacted employers to obtain specific information about available jobs. Considering Claimant's significant physical limitations, monolingual Spanish speaking ability, vocational history, low education level and requirements for modified sedentary employment, Ms. Ancil identified job positions in Claimant's commutable labor market. The job positions she identified included the following: (1) McDonalds take out window order taker and cashier; (2) CPI Cards assembler; and (3) Dawn Industries plastic part assembler. Dr. Goldman considered Ms. Ancil's vocational report and specifically reviewed the job positions she identified for Claimant. He testified that Claimant could perform the McDonald's takeout window position, the CPI card assembler work and the Dawn Industries assembler duties. Dr. Goldman concluded that the preceding jobs are appropriate considering Claimant's restrictions, work-related injury and comorbidities.

28. In contrast, based on her review of Claimant's educational background, prior work experience and medical records, Ms. Shriver concluded that Claimant was unable to earn any wages in any capacity. She specified that Claimant could not maintain a production pace and perform any of the potential job positions identified by Ms. Ancil in her vocational report. However, Ms. Shriver only considered Claimant's work with Employer in his vocational history because other work experience was not relevant. She also did not perform a transferable skills analysis. Her assessment of physical activity did not include any objective validity testing. Ms. Ancil confirmed that Ms. Shriver did not obtain a complete job history from Claimant, review DOT titles with Claimant, perform a transferable skills analysis or consider labor market research by contacting prospective employers. Considering Claimant's vocational attributes and human factors including age, education, work history, transferable skills, communication skills and work restrictions, Claimant is capable of earning wages in some capacity. The record reflects that employment exists that is reasonably available to Claimant under his particular circumstances. Accordingly, Claimant's request for PTD benefits is denied and dismissed.

29. Claimant underwent a disfigurement evaluation at the hearing in this matter. As a result of his November 25, 2016 admitted industrial injuries and subsequent surgery, Claimant sustained permanent disfigurement. The disfigurement consists of an approximately eight inch long vertical scar on the center of his back. Claimant further exhibited a noticeable limp. The disfigurement is serious, permanent and normally exposed to public view. Accordingly, Claimant is entitled to receive a disfigurement award in the amount of \$2,600.00. .

CONCLUSIONS OF LAW

1. The purpose of the “Workers’ Compensation Act of Colorado” (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers’ Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers’ Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers’ Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge’s factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. See *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Permanent Total Disability Benefits

4. Prior to 1991 the Act did not define PTD. *Weld County School Dist. RE-12 v. Bymer*, 955 P.2d 550, 553 (Colo. 1998). Under the prevailing case law standard the ability of a claimant to earn occasional wages or perform certain types of gainful work did not preclude a finding of PTD. *Id.* at 555. A PTD determination prior to 1991 “turned on the claimant’s loss of earning capacity or efficiency in some substantial degree in a field of general employment.” *Id.*

5. In 1991 the General Assembly added a definition of PTD to the Act. See §8-40-201(16.5)(a), C.R.S. Under §8-40-201(16.5)(a), C.R.S. PTD means “the employee

is unable to earn any wages in the same or other employment.” The new definition of PTD was intended to tighten and restrict eligibility for PTD benefits. *Bymer*, 955 P.2d at 554. A claimant thus cannot obtain PTD benefits if he is capable of earning wages in any amount. *Id.* at 556. Therefore, to establish a claim for PTD a claimant shoulders the burden of proving by a preponderance of the evidence that he is unable to earn any wages in the same or other employment. See §8-43-201, C.R.S. The phrase, “to earn any wages in the same or other employment,” “provides a real and non-illusory bright line rule for the determination whether a claimant has been rendered permanently totally disabled.” *Lobb v. Indus. Claim Appeals Office*, 948 P.2d 115, 119 (Colo. App. 1997). Finally, there is no requirement that respondents must locate a specific job for a claimant to overcome a prima facie showing of permanent total disability. *Hennenberg v. Value-Rite Drugs, Inc.*, W.C. No. 4-148-050 (ICAO, Sept. 26, 1995); *Rencehausen v. City and County of Denver*, W.C. No. 4-110-764 (ICAO, Nov. 23, 1993).

6. The term “employment” is defined in the Workers’ Compensation Act in §8-40-201(8), C.R.S. This section states that employment is, “[a]ny trade, occupation, job, position, or process of manufacture or any method of carrying on any trade, occupation, job, position or process of manufacture in which any person may be engaged.” Section 8-40-201(19), C.R.S. defines “wages” as the money rate for which the employee is to be compensated for services. For purposes of PTD “any wages” means more than zero. See *McKinney v. Indus. Claim Appeals Office*, 894 P.2d 42 (Colo. App. 1995) (determining that the ability to earn wages in “any” amount is sufficient to disqualify a claimant from receiving PTD benefits).

7. Although a claimant is not required to establish that an industrial injury is the sole cause of his inability to earn wages, he must nonetheless prove that the industrial injury is a “significant causative factor” in his permanent disability. *In Re Grant*, W.C. No. 4-905-009-006 (ICAO, Mar. 18, 2019). A “significant causative factor” requires a “direct causal relationship” between the industrial injuries and a PTD claim. *In Re of Dickerson*, W.C. No. 4-323-980 (ICAO, July 24, 2006); see *Seifried v. Industrial Comm’n*, 736 P.2d 1262, 1263 (Colo. App. 1986). The preceding test requires the ALJ to ascertain the “residual impairment caused by the industrial injury” and whether the impairment was sufficient to result in PTD without regard to subsequent intervening events. *In Re of Dickerson*, W.C. No. 4-323-980 (ICAO, July 24, 2006). Resolution of the causation issue is a factual determination for the ALJ and must be upheld if supported by substantial evidence in the record. *In Re Grant*, W.C. No. 4-905-009-006 (ICAO, Mar. 18, 2019).

8. In ascertaining whether a claimant is able to earn any wages, the ALJ may consider various “human factors,” including a claimant’s physical condition, mental ability, age, employment history, education, and availability of work that the claimant could perform. *Bymer*, 955 P.2d at 556; *Holly Nursing v. ICAO*, 992 P.2d 701, 703 (Colo. App. 1999). The critical test, which must be conducted on a case-by-case basis, is whether employment exists that is reasonably available to the claimant under his particular circumstances. *Bymer*, 955 P.2d at 557. Ultimately, the determination of whether a Claimant suffers from a permanent and total disability is an issue of fact for resolution by the ALJ. *In Re Selvage*, W.C. No. 4-486-812 (ICAO, Oct. 9, 2007). The ALJ is entitled

to the “widest possible discretion” in determining the issue of PTD. *In Re Grant*, W.C. No. 4-905-009-006 (ICAO, Mar. 18, 2019).

9. As found, Claimant has failed to prove by a preponderance of the evidence that he is incapable of earning any wages and is entitled to receive PTD benefits as a result of his November 25, 2016 admitted industrial injuries. Initially, on November 25, 2016 Claimant suffered a burst fracture and bilateral subarachnoid hemorrhage when he fell from a trash dumpster at work. He subsequently underwent T11-L3 fusion surgery. Claimant received a 44% whole person impairment rating. Claimant asserts that his industrial injury rendered him unable to earn any wages in any capacity. However, to the extent Claimant is unable to work, his industrial injury did not constitute a significant causative factor in rendering him disabled. Moreover, in considering Claimant’s physical abilities, education, vocational training, former employment, mental capabilities and availability of work within his commutable labor market the record, reflects that Claimant is capable of earning wages.

10. As found, Claimant’s contention that he is unable to earn wages fails because his industrial injury is not a significant causative factor in rendering his disabled. He suffers from pre-existing, independently disabling medical conditions. The conditions include end-stage renal failure and complications due to chronic non-compliance with medical treatment recommendations. Dr. Bernton testified that Claimant’s subarachnoid hemorrhage, subjective memory complaints and dizziness suggest that his November 25, 2016 work accident caused his cognitive issues. Although Dr. Bernton remarked that there were no prior diagnoses of uremic encephalopathy in the medical records, the UC Health records list final diagnoses of encephalopathy and delirium on several occasions after Claimant’s hospitalizations for poorly managed end-stage renal failure. In contrast, Dr. Goldman noted that Littleton Adventist conducted an evaluation and concluded that, although Claimant had mild cognitive deficits, he was likely close to his usual level of functioning. In reviewing the records from Spaulding, Dr. Goldman noted that Spanish language cognitive testing showed a minimal and improving cognitive event. Moreover, to the extent Claimant suffers from cognitive deficiencies, Dr. Goldman explained that they are the result of chronic uremic encephalopathy. The condition was caused by multiple instances of significant toxin and urea build-up because of Claimant’s failure to comply with kidney dialysis treatment recommendations. The medical records from Spaulding, Littleton Adventist, DaVita and UC Health reflect multiple instances of extremely high BUN values and creatinine levels. Accordingly, based on the medical records and persuasive opinion of Dr. Goldman, Claimant has minimal to no residual cognitive impairment from his work injury. Any cognitive deficits can be attributed to Claimant’s chronic uremic encephalopathy due to multiple instances of significant build-up of toxins because of his failure to follow kidney dialysis treatment recommendations.

11. As found, in considering Claimant’s ability to work and the effects of his November 25, 2016 industrial injuries, Dr. Goldman explained, “the main factor in terms of [Claimant’s] inability to work was already established at the time and before this injury, independent of this particular injury.” Dr. Goldman opinion that Claimant was disabled and unable to work independent of his work injury is supported by the determination of the Social Security Administration that Claimant became disabled on November 15, 2016

or shortly prior to the November 25, 2016 work injury. Claimant had applied for Social Security disability benefits based on end-stage kidney failure and need for dialysis. Accordingly, based on Claimant's extensive pre-existing conditions, his November 25, 2016 industrial accident did not constitute a significant causative factor in his ability to earn wages. Claimant has not demonstrated a direct causal relationship between his industrial injuries and inability to earn wages.

12. As found, alternatively, the persuasive vocational records reveal that Claimant is capable of obtaining employment and earning wages. Ms. Anctil completed a thorough vocational assessment and identified several job positions in Claimant's commutable labor market through her labor market research and direct contact with potential employers. She performed a transferable skills analysis. Considered jobs from the DOT, adjusted Claimant's profile utilizing his work restrictions and contacted employers to obtain specific information about available jobs. Considering Claimant's significant physical limitations, monolingual Spanish speaking ability, vocational history, low education level and requirements for modified sedentary employment, Ms. Anctil identified job positions in Claimant's commutable labor market. The job positions she identified included the following: (1) McDonalds take out window order taker and cashier; (2) CPI Cards assembler; and (3) Dawn Industries plastic part assembler. Dr. Goldman considered Ms. Anctil's vocational report and specifically reviewed the job positions she identified for Claimant. He testified that Claimant could perform the McDonald's takeout window position, the CPI card assembler work and the Dawn Industries assembler duties. Dr. Goldman concluded that the preceding jobs are appropriate considering Claimant's restrictions, work-related injury and comorbidities.

13. As found, in contrast, based on her review of Claimant's educational background, prior work experience and medical records, Ms. Shriver concluded that Claimant was unable to earn any wages in any capacity. She specified that Claimant could not maintain a production pace and perform any of the potential job positions identified by Ms. Anctil in her vocational report. However, Ms. Shriver only considered Claimant's work with Employer in his vocational history because other work experience was not relevant. She also did not perform a transferable skills analysis. Her assessment of physical activity did not include any objective validity testing. Ms. Anctil confirmed that Ms. Shriver did not obtain a complete job history from Claimant, review DOT titles with Claimant, perform a transferable skills analysis or consider labor market research by contacting prospective employers. Considering Claimant's vocational attributes and human factors including age, education, work history, transferable skills, communication skills and work restrictions, Claimant is capable of earning wages in some capacity. The record reflects that employment exists that is reasonably available to Claimant under his particular circumstances. Accordingly, Claimant's request for PTD benefits is denied and dismissed.

Disfigurement Benefits

14. Section 8-42-108, C.R.S. provides that a claimant may obtain additional compensation if he is seriously disfigured as the result of an industrial injury. As found, Claimant underwent a disfigurement evaluation at the hearing in this matter. As a result

of his November 25, 2016 admitted industrial injuries and subsequent surgery, Claimant sustained permanent disfigurement. The disfigurement consists of an approximately eight inch long vertical scar on the center of his back. Claimant further exhibited a noticeable limp. The disfigurement is serious, permanent and normally exposed to public view. Accordingly, Claimant is entitled to receive a disfigurement award in the amount of \$2,600.00.

ORDER

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

1. Claimant's request for PTD benefits is denied and dismissed
2. Claimant shall receive a disfigurement award in the amount of \$2,600.00.
3. Any issues not resolved in this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at <http://www.colorado.gov/dpa/oac/forms-WC.htm>.*

DATED: February 7, 2020.

DIGITAL SIGNATURE:


Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- I. Whether the viscosupplementation injections for the left knee are reasonable and necessary medical treatments, which are related to Claimant's work-related injury of March 31, 2019.
- II. Whether Claimant is entitled to temporary total disability benefits from May 24, 2019 through October 8, 2019.
- III. Whether Claimant is at-fault for her termination on May 24, 2019 and not entitled to temporary total disability benefits between May 24, 2019 and October 8, 2019.

STIPULATIONS

- A. Respondents stipulated at the beginning of the hearing that the right knee injections ordered by Dr. Failinger have been approved.¹ (*Hearing Transcript, p. 9, ll. 20-23*)

FINDINGS OF FACT

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

1. Claimant worked for Employer as a Hotel Restaurant Manager. Claimant's job responsibilities are set forth in her job description. The physical requirements of her job required her to:
 - Lift and carry objects, 30-40 pounds.
 - Push and pull objects from 50-100 pounds.
 - Sitting 10%, walking 40%, standing 30%, 20% bending, kneeling, lifting, and climbing.(*Exhibit H, pp. 141-142*)
2. Claimant has two workers' compensation claims involving the same Employer and the same body parts. The date of injury for the first claim is April 13, 2018. The date of injury for the second claim is March 31, 2019.

¹ Respondents contend the left knee injections were not approved because a formal request for approval had only been made in association with Claimant's April 13, 2018, claim, but not under the March 31, 2019, claim. (*Hearing Transcript, p. 10, ll. 1-7*)

Viscosupplementation Injections

3. On April 13, 2018, Claimant fell at work and injured her right shoulder and both knees. Respondents have admitted liability for this claim.
4. Claimant came under the care of Dr. Mark Failinger, an orthopedic surgeon, for the April 13, 2018, work injury and he is an authorized treating physician (ATP). Under the first Claim, Claimant underwent left shoulder surgery, which was performed by Dr. Failinger.
5. On January 17, 2019, Dr. Failinger ordered - or requested authorization for - viscosupplementation injections for Claimant's left knee. (*Exhibit 3*) It does not appear Respondents authorized this injection.
6. On approximately March 15, 2019, Dr. Failinger released Claimant from his care. However, it is not clear whether he released her from his care for all of her injuries.
7. On March 31, 2019, Claimant fell again while working for Employer, and reinjured her right shoulder and both knees. Claimant indicated at hearing, and to her medical providers, that both of her knees were worse after the second fall of March 31, 2019. Respondents have admitted liability for this second accident. The second accident has been assigned W.C. No. 5-105-117.
8. On April 5, 2019, Claimant treated at Concentra with Dr. Draper for the injuries she sustained in the second accident on March 31, 2019. Claimant reported to Dr. Draper that she slipped on a slippery floor while walking out of the walk-in cooler. A co-worker grabbed her right arm to prevent her from falling, but such attempt was unsuccessful. Claimant fell and landed on her right hand and both of her knees. Claimant reinjured her right shoulder and both of her knees. Claimant was diagnosed, in part, with a knee contusion, and a right shoulder injury. Claimant was put on restricted duty, which included no reaching above her shoulder, constantly wear her shoulder sling, and to perform only seated work. (*Exhibit 9*)
9. On April 9, 2019, Claimant returned to Concentra, and was seen by Richard Shouse, a Physicians' Assistant (PA). At this appointment, PA Shouse noted Claimant reinjured her right shoulder and suffered a contusion to her left knee. He also noted Claimant had been released from care approximately 2 weeks before the second injury and only had a little pain, which was limited to her shoulder, when she overworked it. He further noted that since the second injury, Claimant's left knee pain was worse. The second injury also resulted in Claimant limping. Based on his assessment, he ordered left knee x-rays, and referred Claimant back to Dr. Failinger to evaluate and treat Claimant. He also continued Claimant's work restrictions. (*Exhibit 10*)
10. The second accident resulted in compensable injuries to Claimant's right shoulder and both of her knees.
11. On May 21, 2019, Claimant returned to Concentra and was seen by PA Shouse. At this appointment, PA Shouse noted Claimant had continued knee pain and that the status of Claimant's left knee MRI was pending, but that Claimant was

only “25% of the way toward meeting the physical requirements of her job.” Therefore, he continued Claimant’s work restrictions. Claimant was directed to follow up with Dr. Failinger the following week for the second injury to her left knee. It was also noted that her knee was worse with excessive walking and standing. (*Exhibit 11*)

12. On May, 23, 2019, while on restricted duty, Claimant was suspended from work. At the time of her suspension, Claimant was on modified duty and could not perform the full physical requirements of her job due to the second work injury that occurred on March 31, 2019.
13. On June 4, 2019, Claimant returned to Concentra for a recheck, and was seen by Mr. Shouse, the Physicians’ Assistant. Claimant was not seen by one of her attending physicians, such as Dr. Failinger or Dr. Draper. It was noted, however, that Claimant was scheduled to see two of her attending physicians, Drs. Failinger and Draper on June 13, 2019, and June 21, 2019, respectively. (*Exhibit 5*)
14. On June 13, 2019, Claimant saw Dr. Failinger for her left knee, and other injuries, under the second claim. As noted on the report from this visit, the “Injury Date” is March 31, 2019. At this appointment, Dr. Failinger noted that Claimant recently had an MRI of her left knee on May 17, 2019, but he could not view the MRI due to a technical problem. However, he recommended Claimant undergo viscosupplementation for both knees. He also indicated that he would try to obtain approval for the viscosupplementation injections, for the left and right knee, through “work comp.” (*Exhibit 13*) Therefore, Dr. Failinger recommended Claimant undergo viscosupplementation injections for her left knee. He also did not return Claimant to full duty at this appointment.
15. The ALJ finds Dr. Failinger’s opinions regarding Claimant’s inability to work full duty, based on not returning her to full duty, and Claimant’s need for the left knee injections to treat the March 31, 2019, injury to be credible and persuasive.
16. On September 13, 2019, at the request of Respondents, Claimant attended an independent medical exam with Dr. David Elfenbein, an orthopedic surgeon. Dr. Elfenbein noted that Claimant had first been hurt while working for Employer on April 13, 2018, which involved injuries to her right rotator cuff, right knee, and left knee. He further noted that she had returned to work in October 2018. He further noted that while working for Employer, Claimant apparently sustained a second work-related injury of March 31, 2019, in which she again slipped on the floor, hit both knees as well as her hands. (*Exhibit 1*)
17. Dr. Elfenbein addressed specific questions posed to him by Respondents. Question number one asked: “In your medical opinion is the reported injury industrially caused or aggravated by the March 31, 2019 mechanism of injury? His response stated: “Her patellofemoral chondromalacia bilaterally was aggravated by the March 31, 2019 fall causing contusions of the knees”. (*Exhibit 1*)

18. The third question posed to him was: "Discuss fully the industrial diagnosis, the significance and how the patient's job is the proximate cause of the diagnosis". Dr. Elfenbein responded "In addition, she did have symptoms in her knees prior to the March 31, 2019 fall though it was worse on the left. After the fall, it remained worse on the left but was increased bilaterally. The chondromalacia patella was not caused by the fall however, the contusions sustained in the fall directly on the knees caused increased inflammation and pain from the chondromalacia patella". (*Exhibit 1*)
19. The eighth question posed to Dr. Elfenbein asked: "What treatment is warranted and further needed if baseline is not met?" In response, he concluded:
- Revision right rotator cuff repair, viscosupplementation injections both knees. Though viscosupplementation injection is not indicated for patellafemoral issues, in this case, since she has not responded long term to the cortisone, it is reasonable to try the viscosupplementation and see how she responds." (*Exhibit 1*)
20. Dr. Elfenbein's opinion is found to be credible and persuasive.
21. The ALJ finds that the viscosupplementation injections prescribed by Dr. Failinger, an ATP, for the left knee are reasonable and necessary. The ALJ also finds that need for such treatment arises from the March 31, 2019, work accident.

TTD and Termination for Cause

22. On April 5, 2019, following Claimant's second work-related injury on March 31, 2019, one of her authorized attending physicians, Dr. Draper, placed Claimant on restricted duty. The work restrictions assigned by Dr. Draper limited Claimant to: "no reaching above shoulders with affected extremity, wear sling and right upper extremity constantly, no use of the right upper extremity." Claimant was also restricted to performing "seated duties only." (*Exhibit 4*). These restrictions precluded Claimant from performing her regular job duties.
23. On June 4, 2019, Claimant was seen by Mr. Shouse, a Physicians' Assistant. However, although Mr. Shouse is an authorized provider, he is not an attending physician. Therefore, his comment on Claimant's ability to return to full duty is insufficient to terminate TTD. Moreover, his comment regarding Claimant's ability to perform full duty is inconsistent with the work restrictions provided by the attending physicians, Drs. Draper, Failinger, and Pook, none of whom returned Claimant to full duty at this time.
24. On June 13, 2019, Claimant saw Dr. Failinger, another one of her authorized attending physicians, for her left knee, and other injuries, under the second claim. As noted in the report from this visit, the "Injury Date" is March 31, 2019. At this appointment, Dr. Failinger noted that Claimant recently had an MRI of her left knee on May 17, 2019, but he could not view the MRI due to a technical problem. However, he recommended Claimant undergo viscosupplementation for both knees. He also indicated that he would try to obtain approval for the viscosupplementation injections, for the left and right knee, through "work comp."

(*Exhibit 13*) Therefore, Dr. Failinger recommended Claimant undergo viscosupplementation injections for her left knee. Moreover, he also did not did not return Claimant to full duty at this appointment.

25. On July 9, 2019, Claimant returned to Concentra and was evaluated by Dr. Pook. At this appointment, Dr. Pook, an additional attending physician, continued Claimant's work restrictions that precluded Claimant from performing her regular job duties.
26. Claimant continued to be under physician assigned work-related restrictions up to, and including, October 8, 2019. (*See Claimant's Exhibits 6, 7 and 8*)
27. Pursuant to the General Admission of Liability filed by Respondents on October 18, 2019, Respondents have admitted and acknowledged that Claimant was entitled to TTD from October 8, 2019 and continuing.
28. Employer contends they have a policy that dictates that three (3) written disciplinary warnings to an employee within a 12-month period will result in termination. In this matter, the Employer had issued written warnings to Claimant on May 31, 2018, July 26, 2018, and May 24, 2019. For purposes of this hearing, Claimant did not contest the validity of the written warnings issued on May 31, 2018 or July 26, 2018. However, Claimant did contest the factual basis for the written warning premised upon her alleged conduct of May 23, 2019.
29. Claimant testified that on May 23, 2019, she was scheduled to work. Claimant was also scheduled to have an appointment with her worker's compensation physician, Dr. Mark Failinger, at noon. Claimant acknowledged that most requests for time off from work went through an electronic system utilized by Employer and known as Unifocus.
30. However, Claimant acknowledged that she had failed to timely submit a request for time off through the Unifocus platform. As a result, Claimant approached the General Manager, Niels V[Redacted], to seek time off. This occurred around 11:00 a.m. on May 23, 2019.
31. Claimant further testified she advised her General Manager that the restaurant was fully staffed, meaning that there were sufficient servers, bartenders and support staff to run the restaurant without problems, and that she needed to leave for a worker's compensation related medical appointment.
32. Claimant testified that General Manager, Niels V[Redacted], replied "Kevin is on the schedule at 10, contact him" referring to Kevin F[Redacted], the rooftop Bar Manager.
33. Claimant understood General Manager, Niels V[Redacted], to mean that she should contact Kevin F[Redacted] so that he could cover any problems requiring a manager's intervention while she was gone and at her medical appointment.
34. Claimant further testified that Mr. F[Redacted] had served as her back up on prior occasions when she needed to leave work during her shift.

35. Claimant sent a text message to Kevin F[Redacted] at 11:07 a.m. stating "I have a doctor's appointment. The restaurant is fully staffed. I'm having you as my backup person."
36. Claimant did not receive any response from Mr. F[Redacted]. But, she reasonably assumed he would cover for her as he had done in the past.
37. Claimant informed her staff that she was leaving for a doctor's appointment and that Kevin F[Redacted] was the backup manager.
38. Claimant then left the restaurant and began walking to her parked vehicle, approximately three (3) blocks away. Before arriving at her parked vehicle, Claimant received a text message or phone call from the Assistant General Manager (AGM), Alison M[Redacted], asking of Claimant's whereabouts. In response, Claimant called Ms. M[Redacted] who told Claimant that she must return to the restaurant because there was no manager in the restaurant. Therefore, Claimant immediately returned to the restaurant.
39. The time between when Claimant left the restaurant and returned to the restaurant after her communication with the Assistant General Manager, Ms. M[Redacted], was about 20 minutes.
40. Upon her return to the restaurant, AGM Ms. M[Redacted] and GM Niels V[Redacted] met with Claimant to discuss the circumstances of her leaving the restaurant.
41. Claimant testified that she was never instructed that Mr. F[Redacted] was expected to be physically present in the restaurant, as opposed to being present in his office, while he was covering for her.
42. Later that day, at approximately 1:30 p.m., Kevin F[Redacted] came to the restaurant and inquired of Claimant how her doctor's appointment had gone, indicating an awareness of her text message, and that he was able to cover for her.
43. Claimant's testimony is found to be credible and persuasive.
44. Respondents called General Manager Mr. Niels V[Redacted] as a witness.
45. Mr. V[Redacted] corroborated that he was approached by Claimant on May 23, 2019, to request time off from work to go to her doctor's appointment.
46. Mr. V[Redacted] contends that he told Claimant to contact Kevin F[Redacted] to see if Mr. F[Redacted] would come in early to work to cover Claimant's managerial shift. He further testified that Mr. F[Redacted] was scheduled to work at 1:00 p.m. that day.
47. Mr. V[Redacted] testified that it is desirable to have a manager on the floor during "peak periods" by that it is always necessary to have a manager in the building. He did not define what constituted a "peak period." Mr. V[Redacted] specifically claimed that Claimant was the only manager in the building at the time and that Mr. F[Redacted] was not scheduled to work until 1:00 p.m., because the rooftop bar did not open until 3:00 p.m.

48. Mr. V[Redacted], testified that a manager's presence in the hotel building was required to assist with decision-making and potential comp voids.
49. Shortly after the conversation with Claimant, Mr. V[Redacted] testified that he walked up to the restaurant and noted no management presence. At that point, he said he contacted Assistant General Manager, Alison M[Redacted], to find out where management was.
50. Mr. V[Redacted], testified that his exact instructions to Claimant were "that she needed to get in contact with Mr. F[Redacted]."
51. However, Mr. V[Redacted], was unable to confirm whether or not Mr. F[Redacted] was at the hotel at the time that Claimant left.
52. The manager work schedule was introduced for the week encompassing May 23, 2019, which such schedule reflected that Bar Manager, Kevin F[Redacted], was scheduled to work at 10:00 a.m. on May 23, 2019. (*Exhibit 16*) Such exhibit directly refutes Mr. V[Redacted]' testimony that Mr. F[Redacted] was scheduled to work at 1:00 p.m. and that Mr. F[Redacted] was not onsite and covering for Claimant.
53. Mr. V[Redacted], testified that Claimant was suspended on May 24, 2019, because "she left the property without permission from her direct report."
54. Mr. V[Redacted], testified that a subsequent investigation also concluded that Claimant left the property without permission from her direct report.
55. He also testified that as a result, Claimant was issued a written warning. However, because this was her third written warning, Claimant was terminated.
56. Claimant's Exhibit 15 constitutes a page from the Employer's "Associate Handbook" (employment manual), which sets forth the criteria for leaving property during work hours. Such manual requires that an employee obtain permission before leaving the property, punch out when leaving the property and punch back in when returning, checking with a manager at the time of return, and leave company property on the premises.
57. No written policy was introduced by either party supporting Respondents' contention that a manager was required to be on the restaurant floor.
58. The ALJ finds that Respondents failed to establish that Mr. F[Redacted], the Bar Manager, was not present in the hotel when Claimant left for her medical appointment.
59. The ALJ finds that Employer did not have a policy that a manager must be "on the floor" of the restaurant at all times, though there was an unwritten policy that a manager must be present in the building.
60. The ALJ notes that both the GM and AGM were present in the building at the time Claimant left for her medical appointment.
61. The ALJ finds that the GM granted permission to Claimant to attend her appointment with the only condition being that Claimant contact Bar Manager, Mr. F[Redacted], which Claimant did.

62. The ALJ finds that General Manager, Niels V[Redacted]', testimony regarding Kevin F[Redacted]'s schedule on May 23, 2019 is not credible.
63. The ALJ finds that Claimant complied with the Employer's policy for leaving the work premises during a scheduled shift.
64. Mr. V[Redacted] also testified that Employer has a "three-strike" rule that requires termination after three written warnings in a 12-month period.
65. However, the Disciplinary Action Forms provide:

Note Any Three (3) Written Warnings within a 12-month period is grounds for Suspension/Termination
(emphasis in original).

(Exhibit G – J)

66. Moreover, the Disciplinary Action Form from March 2, 2019, indicates that:

The type of disciplinary action taken will depend on the specific circumstances, seriousness of the problem and the likelihood of improvement over time.

(Exhibit G)

67. Therefore, although three written warnings are grounds for suspension or termination, the Exhibits submitted by Respondents do not indicate that termination is mandatory upon three written warnings. As indicated in the March 2, 2019 Form, the type of action taken will depend upon the "specific circumstances, seriousness of the problem and the likelihood of improvement over time." Therefore, whether termination is appropriate is discretionary and based upon the specific circumstances.
68. Thus, the ALJ finds that even if Claimant violated a company policy on May 23, 2019, termination was not mandatory.
69. The ALJ finds that Employer's characterization of Claimant's actions on May 23, 2019, their policy, and their reasoning, (i.e., application of their policy and basis for terminating Claimant) is not found to be credible.
70. The ALJ finds that Claimant did have the approval to go to her doctor appointment and reasonably arranged for Mr. F[Redacted] to cover for her while she was gone as requested by management.
71. The ALJ finds Claimant did not violate a company policy on May 23, 2019.
72. Moreover, once it appeared there might have been a misunderstanding about the coverage needed, based on the statements made to Claimant by Mr. V[Redacted], Claimant was contacted by phone before she reached her car to drive to her medical appointment and immediately came right back to work. The total amount of time Claimant was out of the office due to the possible misunderstanding was approximately 20 minutes.
73. Employer's actions of terminating Claimant were not reasonable under the circumstances.

74. Claimant is not at-fault for her termination.
75. Respondents have failed to establish by a preponderance of the evidence that Claimant is responsible for her termination.
76. The ALJ further finds that Claimant was under injury-related work restrictions from May 23, 2019 and continuing through reinstatement of her TTD benefits on October 9, 2019 by General Admission of Liability dated October 18, 2019.

CONCLUSIONS OF LAW

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

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether the viscosupplementation injections for the left knee are reasonable, necessary medical treatments, which are related to Claimant's work-related injury of March 31, 2019.

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School District #11*, W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012).

As found:

- On March 31, 2019, Claimant fell again while working for Employer, and reinjured her right shoulder and both knees. Both of her knees hurt more after the second fall of March 31, 2019. Respondents admitted liability for this second accident.
- On April 9, 2019, Claimant returned to Concentra, and was seen by Richard Shouse, a Physicians' Assistant. At this appointment, PA Shouse noted Claimant reinjured her right shoulder and suffered a contusion to her left knee. He also noted Claimant had been released from care approximately 2 weeks before the second injury and only had a little pain, which was limited to her shoulder, when she overworked it. He further noted that since the second injury, Claimant's left knee pain was worse. The second injury also resulted in Claimant limping. Based on his assessment, he ordered left knee x-rays, and referred Claimant back to Dr. Failinger to evaluate and treat Claimant.
- On June 13, 2019, Claimant saw Dr. Failinger for her left knee, and other injuries, under the second claim. As noted on the report from this visit, the "Injury Date" is March 31, 2019. At this appointment, Dr. Failinger noted that Claimant recently had an MRI of her left knee on May 17, 2019, but he could not view the MRI due to a technical problem. However, he recommended Claimant undergo viscosupplementation injections for both knees. He also indicated that he would try to obtain approval for the viscosupplementation injections, for the left and right knee, through "work comp." Therefore, Dr. Failinger recommended Claimant undergo viscosupplementation injections for her left knee due to her second injury of March 31, 2019.
- On September 13, 2019, at the request of Respondents, Claimant attended an independent medical exam with Dr. David Elfenbein, an orthopedic surgeon. Dr. Elfenbein noted that Claimant had first been hurt while working for Employer on April 13, 2018, which involved injuries to her right rotator cuff, right knee, and left knee. He further noted that she had returned to work in October 2018. He further noted that while working for Employer, Claimant apparently sustained a

second work-related injury of March 31, 2019, in which she again slipped on the floor, hit both knees as well as her hands.

- Dr. Effenbein addressed specific questions posed to him by Respondents. Question number one asked: “In your medical opinion is the reported injury industrially caused or aggravated by the March 31, 2019 mechanism of injury? His response stated: “Her patellofemoral chondromalacia bilaterally was aggravated by the March 31, 2019 fall causing contusions of the knees”.
- The third question posed to Dr. Effenbein was: “Discuss fully the industrial diagnosis, the significance and how the patient’s job is the proximate cause of the diagnosis”. Dr. Effenbein responded “In addition, she did have symptoms in her knees prior to the March 31, 2019 fall though it was worse on the left. After the fall, it remained worse on the left but was increased bilaterally. The chondromalacia patella was not caused by the fall however, the contusions sustained in the fall directly on the knees caused increased inflammation and pain from the chondromalacia patella”.
- The eighth question posed to Dr. Effenbein asked: “What treatment is warranted and further needed if baseline is not met?” In response, he concluded:

Revision right rotator cuff repair, viscosupplementation injections both knees. Though viscosupplementation injection is not indicated for patellafemoral issues, in this case, since she has not responded long term to the cortisone, it is reasonable to try the viscosupplementation and see how she responds.

The ALJ finds Dr. Effenbein’s opinion that the viscosupplementation injections for Claimant’s left knee are reasonable, necessary, and related to the March 31, 2019, work accident to be credible and persuasive.

The ALJ finds Dr. Failinger’s opinion that the viscosupplementation injections for Claimant’s left knee are reasonable, necessary, and related to the March 31, 2019, work accident to be credible and persuasive.

The ALJ finds the opinions of Drs. Failinger and Effenbein to be credible and persuasive because they are consistent with Claimant’s testimony and the remainder of Claimant’s medical record.

Respondents argue that the left knee injections cannot be ordered to be provided by the ALJ because Dr. Failinger failed to make a formal request for approval or failed to request prior authorization. However, Section 8-42-101(1)(a), C.R.S., provides that Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of the industrial injury. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). As noted in *Repp v. Prowers Medical Center*, W.C. No. 4-530-649 (September 12, 2005), aff’d, Case No. 05CA2085 (Colo. App. May 11, 2006) (not selected for official publication), the purpose of prior

authorization under the Workers' Compensation Rules of Procedure, 16, 7 Code Colo. Reg. 1101-3, is to facilitate a determination of the reasonableness of treatment in advance of the treatment being provided, by directing the physician to submit a request for prior authorization, which is either granted or denied by the insurer. The rule merely protects the provider from providing treatment that the insurer might consider not reasonable, necessary, or related. Therefore, even though Rule 16 addresses "authorization" for treatment, the purpose of the rule is to establish the "reasonableness and necessity" of treatment recommended by an authorized treating physician before the treatment is provided. Thus, if authorization is granted, this confirms payment for the procedure will be made and that litigation can be avoided if Respondents do not object to the treatment. Accordingly, Claimant is not precluded from having the issue of the left knee viscosupplementation injections - which have been recommended and prescribed by her authorized treating physician Dr. Failinger - adjudicated by an ALJ merely because Dr. Failinger did not complete a formal request for prior authorization pursuant to Rule 16. Moreover, Respondents' argument seems specious. If Respondents merely required a formal Rule 16 request from Dr. Failinger in order to authorize the treatment, they could have just asked for it.

Respondents also contend that the ALJ lacks jurisdiction to order treatment recommended solely by an IME and not an authorized treating physician. *Torres v. City and County of Denver*, W.C. No. 4-937-329-03 (May 15, 2018); *Short v. Property Management of Telluride*, W.C. No. 3-100-726 (May 4, 1995). Respondents' contention regarding the law is correct. However, as found, Dr. Failinger is an authorized treating physician and he has recommended Claimant undergo viscosupplementation injections for her left knee. Therefore, Respondents' contention that the ALJ is without jurisdiction to award the injections is inapplicable to the facts of this case.

Consequently, the ALJ finds and concludes Claimant has established by a preponderance of the evidence that Dr. Failinger, who is an authorized treating physician, prescribed and recommended viscosupplementation injections for Claimant's left knee on June 13, 2019. The ALJ further finds and concludes Claimant has established by a preponderance of the evidence that the left knee injections are reasonable, necessary, and related to the March 31, 2019, work accident.

II. Whether Claimant is entitled to temporary total disability benefits from May 24, 2019 through October 8, 2019.

To prove entitlement to Temporary Total Disability (TTD) benefits, Claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that she left work as a result of the disability, and that the disability resulted in an actual wage loss. See Sections 8-42-(1)(g), 8-42-105(4); *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office*, 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical

incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions that impair Claimant's ability to effectively and properly perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (citing *Ricks v. Industrial Claim Appeals Office*, P.2d 1118 (Colo. App. 1991)). Because there is no requirement that Claimant must produce evidence of medical restrictions, Claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic*, 952 P.2d 831, 833 (Colo. App. 1997).

As found:

- Claimant's March 31, 2019 work injury resulted in Claimant being provided restrictions that precluded her from performing all physical aspects of her job duties.
- Claimant worked for Employer as a Hotel Restaurant Manager. The physical requirements of her job required her to:
 - Lift and carry objects, 30-40 pounds.
 - Push and pull objects from 50-100 pounds.
 - Sitting 10%, walking 40%, standing 30%, 20% bending, kneeling, lifting, and climbing.
- On April 5, 2019, following Claimant's second work-related injury on March 31, 2019, one of her authorized attending physicians, Dr. Draper, placed Claimant on restricted duty. The work restrictions assigned by Dr. Draper limited Claimant to: "no reaching above shoulders with affected extremity, wear sling and right upper extremity constantly, no use of the right upper extremity." Claimant was also restricted to performing "seated duties only." These restrictions precluded Claimant from performing her regular job duties.
- On June 4, 2019, Claimant was seen by Mr. Shouse, a Physicians' Assistant. Although Mr. Shouse is an authorized provider, he is not an attending physician. Therefore, his comment on Claimant's ability to return to full duty is insufficient to terminate TTD. Moreover, his comment regarding Claimant's ability to perform full duty is inconsistent with the work restrictions provided by the attending physicians, Drs. Draper, Failing, and Pook, none of whom returned Claimant to full duty at this time.
- On June 13, 2019, Claimant saw Dr. Failing, another one of her authorized attending physicians, for her left knee, and other injuries, under the second claim. At this appointment, Dr. Failing noted that Claimant recently had an MRI of her left

knee on May 17, 2019, but he could not view the MRI due to a technical problem. Regardless, he did not return Claimant to full duty at this appointment.

- On July 9, 2019, Claimant returned to Concentra and was evaluated by Dr. Pook. At this appointment, Dr. Pook, an additional attending physician, continued Claimant's work restrictions and these restrictions still precluded Claimant from performing her regular job duties.
- Claimant continued to be under physician assigned work-related restrictions up to, and including, October 8, 2019.

Therefore, the ALJ finds and concludes that Claimant has established by a preponderance of the evidence that she is entitled to temporary total disability benefits as of May 24, 2019.

III. Whether Claimant is at-fault for her termination on May 24, 2019, and not entitled to temporary total disability benefits from May 24, 2019 to October 8, 2019.

Under the termination statutes in §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. a Claimant who is responsible for his or her termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and wage loss. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1131 (Colo. App. 2008). The termination statutes provide that, in cases where an employee is responsible for her termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, W.C. No. 4-631-681 (ICAO, Apr. 24, 2006). Moreover, Claimant does not act "volitionally" or exercise control over the circumstances leading to her termination if the effects of the injury prevent her from performing her assigned duties and cause the termination. *In re of Eskridge*, W.C. No. 4-651-260 (ICAO, Apr. 21, 2006). Therefore, to establish Claimant was responsible for her termination, Respondents must demonstrate by a preponderance of the evidence that Claimant committed a volitional act, or exercised some control over her termination under the totality of the circumstances. See *Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994). An employee is thus "responsible" if she precipitated the employment termination by a volitional act that she would reasonably expect to cause the loss of employment. *Patchek v. Dep't of Public Safety*, W.C. No. 4-432-301 (ICAP, Sept. 27, 2001).

Violation of an employer's policy does not necessarily establish Claimant acted volitionally with respect to a discharge from employment. *Gonzales v. Industrial Commission*, 740 P.2d 999 (Colo. 1987). An "incidental violation" is not enough to show that the claimant acted volitionally. *Starr v. Industrial Claim Appeals Office*, 224 P.3d 1056, 1065 (Colo. App. 2009). However, Claimant may act volitionally, and therefore be "responsible" for the purposes of the termination statute, if she was aware of what the employer requires and deliberately fails to perform accordingly. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008). This is true even if

Claimant is not explicitly warned that failure to comply with the employer's expectations may result in termination. See *Pabst v. Industrial Claim Appeals Office*, 833 P.2d 64 (Colo. App. 1992) (claimant disqualified from unemployment benefits after discharge for unsatisfactory performance when aware of expectations, even if not explicitly warned that job was in jeopardy). Ultimately, the question of whether Claimant was responsible for her termination is one of fact for determination by the ALJ. *Apex Transportation, Inc. v. Industrial Claim Appeals Office*, 321 P.3d 630, 632 (Colo. App. 2014).

The ALJ found the following:

- The Employer failed to establish that they had a policy that a manager must be “on the floor” of the restaurant at all times, though there was an unwritten policy that a manager must be present in the building. The ALJ found that both the GM and AGM were present in the building at the time Claimant left for her medical appointment. The ALJ further found that the GM granted permission to Claimant to attend her appointment with the only condition being that Claimant contact Bar Manager, Mr. F[Redacted], which Claimant did, so he could cover for her.
- General Manager, Niels V[Redacted]’, testimony regarding Kevin F[Redacted]’s schedule on May 23, 2019, and that he was not scheduled to work when Claimant left for her medical appointment was not credible. The ALJ also found Claimant complied with the Employer’s policy for leaving the work premises during a scheduled shift.
- Mr. V[Redacted] also testified that Employer has a “three-strike” rule that requires termination after three written warnings in a 12-month period. However, the ALJ found that whether termination is appropriate is discretionary and based upon the specific circumstances of each matter. Therefore, even if Claimant violated the company policy on May 23, 2019, which the ALJ found she did not, termination was not mandatory.
- Moreover, Claimant did not volitionally violate any policy of the Employer. Furthermore, once Claimant was advised - while walking to her car to drive to her medical appointment - that they wanted her to come back because they wanted to have a manager on the floor, she immediately turned around came back to work. Claimant did not continue on to her work related medical appointment. In the end, Claimant missed about 20 minutes from work.
- The Employer’s characterization of Claimant’s actions on May 23, 2019, their termination policy, and their reasoning, (i.e., application of their termination policy), for terminating Claimant was neither reasonable nor credible.

Therefore, the ALJ finds and concludes Respondents have failed to establish by a preponderance of the evidence that Claimant is responsible for her termination. The

ALJ further finds that Claimant established by a preponderance of the evidence she was under injury-related work restrictions from May 23, 2019 and continuing through reinstatement of her TTD benefits on October 9, 2019 by General Admission of Liability dated October 18, 2019. Consequently, Claimant is entitled to temporary total disability benefits from May 24, 2019, through October 8, 2019.

ORDER

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

1. Respondents shall pay for Claimant to undergo the left knee viscosupplementation injections with Dr. Failingner.
2. Respondents shall pay Claimant temporary total disability benefits from May 24, 2019, through October 8, 2019.
3. Respondents shall pay to Claimant interest at the rate of 8% per annum on all amounts of compensation not paid when due.
4. The issue of unemployment offsets is reserved for future determination.
5. Issues not expressly decided herein are reserved to the parties for future determination.

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

DATED: February 11, 2020.

/s/ Glen B. Goldman

Glen B. Goldman
Administrative Law Judge

Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-997-454-002**

ISSUES

- Are Claimant's claims for additional indemnity and medical benefits closed by a May 1, 2018 Final Admission of Liability (FAL)?
- Did Claimant prove entitlement to permanent total disability benefits by a preponderance of the evidence?
- Did Claimant prove entitlement to a general award of medical benefits after MMI by a preponderance of the evidence?
- Did Claimant prove a basis to amend the admitted average weekly wage (AWW) of \$744.91?
- Did Respondent prove Claimant received an overpayment of \$45,141.01 or \$58,191.83?
- Did Respondent prove PPD benefits paid in 2016 based on the DIME's 18% rating are now an overpayment because the claim was reopened and Claimant ultimately received a lower rating when she returned to MMI in February 2018?
- Did Respondent prove Claimant received an overpayment of TTD benefits from March 16, 2017 through April 23, 2018?
- If the ALJ finds Claimant received an overpayment, the parties agreed to reserve the specific repayment terms for future determination.

FINDINGS OF FACT

1. Claimant worked for Employer as a CAO Coordinator. The job entailed tasks such as ordering groceries, assembling end caps, and stocking product. The work was physically demanding and required lifting and moving boxes of products, as well as prolonged standing and walking.

2. Claimant suffered an admitted injury to her low back on October 8, 2014 while stocking 12-packs of soda. She heard a "pop" in her back and experienced immediate low back pain and left leg "sciatica."

3. Claimant had significant low back problems before the October 2014 work injury, dating to at least 2006. She had an L4-5 decompression in 2008. Her symptoms returned in 2012, and she underwent several lumbar ESIs. Eventually, she had a second L4-5 decompression on April 9, 2014 with Dr. Todd Thompson. Claimant did relatively well after the second surgery, with resolution of her leg symptoms and less low back pain. Claimant returned to work with no restrictions and worked without restriction until the

October 2014 accident. She used Percocet daily to manage the residual low back pain. A September 4, 2014 report¹ from Claimant's PCP, Dr. Willis, shows active prescriptions for oxycodone-acetaminophen 10/325 every 6 hours, and 300 mg gabapentin per day.

4. Employer referred Claimant to CCOM after the work accident. She initially saw Stephen Byrne, PA-C, who opined she had aggravated her underlying pre-existing condition. Eventually she came under the care of Dr. Daniel Olson, who served as the primary ATP.

5. A lumbar MRI on November 30, 2014 showed 4 mm of anterolisthesis at L4-5 with moderate-to-severe facet arthropathy, but no recurrent disc herniation or central stenosis.

6. Claimant saw Dr. Thompson on January 12, 2015, who recommended a lumbar fusion. Claimant was hesitant to have a fusion and requested a second opinion.

7. Claimant saw Dr. David Wong for a second opinion on March 30, 2015. Dr. Wong noted the spondylolisthesis was "mildly unstable" on flexion-extension x-rays. He also thought the facet joints were probable pain generators. Dr. Wong gave Claimant two options: (1) continue conservative care, including facet injections, possible SI joint injections, and therapy, or (2) an L4-5 decompression and fusion. Claimant wanted to consider her options because she was "not particularly keen on additional surgery."

8. Claimant had an IME with Dr. John Raschbacher on May 20, 2015 at Respondent's request. Dr. Raschbacher opined Claimant's symptoms were causally related to the October 8, 2014 accident, which he believed had aggravated her pre-existing low back problems. He thought Claimant might be a surgical candidate but recommended she try additional conservative care first.

9. Claimant agreed with Dr. Raschbacher's recommendation and decided to try the conservative care option instead of surgery. She had an SI joint injection, trigger point injections, and a lumbar ESI, but received insufficient benefit to justify additional injections.

10. Claimant ultimately declined to pursue the fusion, and Dr. Olson put her at MMI on October 26, 2015, with a 16% whole person impairment rating. Dr. Olson also assigned permanent restrictions of lifting 10 pounds frequently and 20 pounds occasionally, avoid frequent bending and allowance for frequent postural shifts.

11. Claimant saw Dr. Joseph Fillmore for a DIME on January 26, 2016. Dr. Fillmore agreed with Dr. Olson and Dr. Raschbacher that Claimant's low back symptoms were caused by the October 2014 work accident. He agreed she was at MMI on October 26, 2015. He also agreed with Dr. Olson's rating methodology but calculated an 18% rating based on slight differences in range of motion measurements. Dr. Fillmore opined

¹ This is the last report in evidence pre-dating the October 8, 2014 work accident.

apportionment was not indicated despite the prior back surgeries because “she went back to work full-time with occasional pain and without restrictions.” (Emphasis in original).

12. Respondent filed a Final Admission of Liability (FAL) on March 30, 2016 based on Dr. Fillmore’s rating. The FAL admitted for reasonably necessary post-MMI medical treatment. Claimant did not contest the FAL, and the claim closed.

13. The PPD award for the 18% rating was \$54,347.90. Respondent made two regular bi-weekly PPD payments, and the remainder of the award was paid by lump sum. Had Claimant not requested a lump sum, the PPD would have paid from October 26, 2015 through January 7, 2018, at the rate of \$484.44 per week.

14. Claimant’s symptoms acutely worsened in January 2016. Dr. Olson referred her back to Dr. Wong, and Claimant decided to pursue the fusion surgery because she could not tolerate her ongoing symptoms.

15. Dr. Wong performed an L4-5 revision decompression and instrumented fusion on May 26, 2016. The surgery was covered by Claimant’s health insurance.

16. The surgery was marginally helpful, and Claimant remained symptomatic thereafter. On November 29, 2016, Dr. Wong documented residual low back pain and leg symptoms including weakness, numbness, and tingling in the foot and leg.

17. Dr. Henry Roth performed an IME for Respondent on January 30, 2017.² Although Dr. Roth was not impressed with the surgical outcome, he nevertheless opined the May 26 fusion was reasonably necessary and causally related to the work accident. He agreed Claimant was at MMI in October 2015 as determined by Dr. Fillmore but acutely worsened in January 2016 and came off MMI. He opined Claimant reached MMI again on November 26, 2016, six months after the surgery. He recommended no maintenance care through the claim, because he thought Claimant had returned to her preinjury “baseline chronic low back pain personal circumstance.” He added, “She certainly can continue to see her PCP for the same medications and medical attention she was receiving prior to the worker’s compensation claim of 10/8/14.”

18. Dr. Roth issued an addendum report on March 6, 2017 after reviewing additional records. He concluded, “There is no change to my opinions as previously offered.”

19. On March 8, 2017, Respondent filed a General Admission of Liability (GAL) reopening the claim and commencing TTD effective the day of surgery, May 26, 2016. The “remarks” section of the GAL stated:

A portion of the prior PPD paid is credited towards TTD benefits from 5/26/16 - 3/1/17 in the amount of \$19,377.60. A lump-sum discount of

² Dr. Roth’s report is misdated January 30, 2016.

\$1,339.86 was taken. That leaves the remaining PPD paid of \$33,630.44 which is reserved as a credit against future PPD benefits.

20. Claimant briefly returned to modified work in March 2017. She was primarily “facing,” which involves pulling product forward to the front edge of shelves and ensuring labels are facing forward. The work flared her pain significantly. She worked approximately two weeks until Dr. Olson took her off work on April 11, 2017. Employer terminated Claimant in January 2018 because she could not return to regular duties.

21. Claimant saw Dr. Wong the last time on April 17, 2017. He noted she was taking baclofen, amitriptyline, gabapentin 300 mg, diazepam, and oxycodone. He ordered spine x-rays. The report contains minimal discussion, but combined with Claimant’s testimony and other records, the ALJ infers of the fusion appeared solid and Dr. Wong saw no obvious indication for additional surgery. He released Claimant to follow-up “PRN.”

22. Claimant started treating with Dr. Dwight Caughfield in late 2016 or early 2017.³ On April 19, 2017, Dr. Caughfield documented Claimant’s pain was “unchanged” with low back pain radiating to the left leg and foot. Her pain level was 7/10, increasing to 9/10 with activity, and decreasing to 6/10 with lying down. Claimant was having depression related to her chronic pain, for which she was taking duloxetine (Cymbalta). Physical examination showed decreased sensation to pinprick and light touch on the left leg, calf, and ankle, and 4/5 strength with left foot dorsiflexion. Dr. Caughfield recommended an EMG and L5-S1 selective nerve root blocks.

23. On May 23, 2017, Dr. Olson noted the oxycodone, baclofen, and gabapentin were helping Claimant’s pain but her Claimant feel “zoned out.” He referred Claimant for psychotherapy to help with her “frustration” and ongoing chronic pain.

24. Dr. Ford performed spinal injections on May 31, 2017. Claimant received excellent relief of her back and leg symptoms for the duration of the anesthetic.

25. Claimant saw Dr. Caughfield for the EMG on June 27, 2017. Her back pain was unchanged, but her leg pain was getting worse. Claimant’s depression was also worsening and her psychologist had suggested increasing the duloxetine. Dr. Caughfield increased the duloxetine from 60 mg to 90mg per day and discontinued amitriptyline. The EMG did not show radiculopathy, but Dr. Caughfield opined Claimant’s response to the injections “would indicate nerve root active involvement.” He recommended Claimant follow up with Dr. Wong “to discuss options.”

26. Claimant saw Dr. Olson later that day. She was having trouble getting her medications approved. She had been off gabapentin for three weeks and was noticing numbness and tingling in her right leg, similar to the symptoms in her left leg. She was worried she might not be able to drive safely if it continued to get worse.

³ Dr. Caughfield’s initial note is not in the record.

27. Claimant saw Dr. Olson a final time on August 1, 2017. Her husband had been transferred and she was moving to Florida. Dr. Olson recommended claimant follow-up with a “work comp doctor as well as back specialists” in Florida.

28. Respondent authorized Claimant to see Dr. Roger Arumugam, an occupational medicine physician in Florida. Her initial visit was on August 29, 2017. Dr. Arumugam performed a brief examination and renewed Claimant’s medications.

29. Claimant was seen at the Florida Hospital Heartland on November 3, 2017 after she fell at home. X-rays showed no acute injury to the low back, and she was released with instructions to follow up with her regular treating physicians. This fall produced a temporary symptomatic exacerbation but no permanent change to Claimant’s condition.

30. At the January 8, 2018 appointment with Dr. Arumugam, Claimant requested different medications or treatment to relieve her pain. Dr. Arumugam increased the amitriptyline to 75 mg per day.

31. Respondent obtained video surveillance of Claimant on January 9 and 16, 2018. The video shows Claimant shopping at multiple stores with her mother, including Walmart, Michael’s, and a grocery store. Claimant enters and exits a Chevy Tahoe several times, loads groceries into her vehicle, and carries groceries into her home. At one point, Claimant carries several bags of groceries in one hand with a case of bottled water in the other. Claimant demonstrated no overt pain behaviors or any observable difficulty performing the activities depicted in the video.

32. Dr. Arumugam referred Claimant to Dr. Witiford Reid, a pain management specialist in Sebring, Florida. At her February 1, 2018 appointment, Claimant described constant and worsening back pain, and numbness, tingling, and burning her legs. She also reported muscle spasms in her lower back and legs. She indicated her pain was worsened by sitting, turning, and bending, and made better by laying down. The pain was interfering with her sleep and making her depressed and irritable. Dr. Reid prescribed tizanidine for the muscle spasms, gabapentin 1500 mg per day for neuropathic pain, and amitriptyline 75 mg at bedtime. He also performed transforaminal ESIs at L3-4, L4-5, and L5-S1. Dr. Reid anticipated performing a series of ESIs.

33. On February 7, 2018, Dr. Reid requested authorization for the second set of ESIs. Dr. Frank Polanco performed a Rule 16 review on February 14, 2018, and recommended Respondent deny the second set of ESIs because there was insufficient documentation of “substantial and sustained pain relief and functional improvement.

34. Dr. Arumugam put Claimant at MMI on February 26, 2018. His report did not address impairment or post-MMI treatment. He opined Claimant could “go back to any job description where she can pace herself.”

35. Because Dr. Arumugam was not Level II accredited and did not address impairment, Respondent arranged for Claimant to return to Colorado for an impairment evaluation with Dr. John Burriss. Claimant saw Dr. Burriss on April 3, 2018. Claimant

described pain throughout her low back, extending down the back of the left leg to the foot and down the back of the right leg to the knee. She also endorsed numbness in both legs. She described constant pain from 4-10/10, depending on activity. Her pain was worse with prolonged walking, sitting, bending, or lifting, and better when laying down. Claimant told Dr. Burris she had fallen several times because her left leg frequently gave out. Dr. Burris opined,

Her examination today is obscured by pain behaviors, is significantly inconsistent with her activity and motion seen on the video surveillance, and reveals no objective findings or signs of radiculopathy.

Given her lack of response to the extensive treatment provided, including multiple injections and surgeries, it is not reasonable to expect benefit from additional treatment. Thus, she reached MMI at her 3/16/2017 evaluation with Dr. Roth.⁴

36. Dr. Burris calculated a 16% whole person impairment rating, but opined apportionment was indicated. He ultimately assigned a 1% whole person rating after apportionment. Dr. Burris opined Claimant required no further injury-related medical treatment and required no work restrictions.

37. Respondent filed an FAL on May 1, 2018 based on Dr. Burris' report. The FAL took the position Claimant was at MMI on March 16, 2017 with a 1% whole person impairment, as opined by Dr. Burris. Respondent denied liability for post-MMI medical care and asserted an overpayment of \$45,141.01. Respondent's rationale for the overpayment was set forth in the "remarks" section of the FAL:

Per Dr. Burris' medical report dated 4/3/2018, claimant is awarded an impairment rating of 1% to the whole person. Impairment is calculated as follows: $400 \times 1.46 \text{ age factor} = 584 \times 1\% = 5.84 \times \$484.44 = \$2,829.13$. She was paid TTD to 04/23/18. There is an OP of TTD/TPD in the amount of \$45,141.01 as TTD was paid to 04/23/18 and total PPI previously paid was \$53,008.04. Total OP of indemnity is \$45,141.01 for which we will pursue reimbursement.

38. Claimant objected to the FAL and filed a DIME Notice and Proposal on May 9, 2018. The parties could not agree on a DIME physician, and Claimant filed a DIME Application on June 12, 2018. The DIME Unit received the Application but did not issue a DIME Panel. Respondent's counsel's paralegal contacted the DIME Unit in mid-July 2018, and learned the Division had rejected Claimant's DIME Application. Respondent did not convey that information to Claimant's counsel. In mid-September 2018, Claimant's counsel's paralegal (Tammy Garcia) contacted the DIME Unit to ask about the status of the DIME Application. Ms. Garcia was told the Division had rejected the DIME Application

⁴ There is no evidence of a March 16, 2017 evaluation with Dr. Roth. It appears Dr. Burris was incorrectly referring to Dr. Roth's March 6, 2017 addendum report, which was simply a record review, with no additional evaluation.

because Claimant had already had a DIME and Respondent would need to file the request. Claimant took no further action regarding the DIME process.

39. On October 9, 2018, Respondent applied for a hearing seeking to recover the claimed overpayment. Claimant filed a Response to the Application for Hearing on October 12, 2018, endorsing medical benefits, average weekly wage, permanent total disability, and overpayment. A hearing on Respondent's application was set for March 21, 2019 in Colorado Springs. On March 14, 2019, the parties agreed to withdraw the application for hearing without prejudice and vacate the hearing.

40. Claimant filed an Application for Hearing that same day, March 14, 2019, endorsing medical benefits, average weekly wage, and permanent total disability. Respondent filed a Response on April 12, endorsing several issues, including overpayment.

41. Claimant participated in two vocational evaluations in connection with her claim for PTD benefits. Katie Montoya evaluated Claimant for Respondent via Skype on January 7, 2019. Rodney Wilson subsequently evaluated Claimant at her counsel's request on February 23, 2019. Both experts testified at hearing to elaborate on the opinions expressed in their respective reports.

42. Mr. Wilson opined Claimant cannot reliably earn any wages and is permanently and totally disabled because of the work accident. He noted Claimant's inability to tolerate modified duty when she tried to return to work in March 2017. He relied on the last specific restrictions from Dr. Olson, dated March 28, 2017 that Claimant could lift a maximum of 10 pounds, walk no more than an hour, and avoid extensive bending. He emphasized Claimant's need for narcotic pain medications as a major impediment to obtaining and maintaining employment. According to Mr. Wilson, the combination of Claimant's ongoing symptoms, depression, and the sedating effects of medications will make it impossible for her to maintain gainful employment in any occupation.

43. Ms. Montoya opined Claimant can work in a variety of semi-skilled occupations at the sedentary-light level, with limitations on pace, i.e., no production work and no quick-paced environments. Ms. Montoya did not consider any psychological limitations because Claimant neither mentioned nor exhibited any emotional or cognitive difficulties during the vocational interview.⁵ Ms. Montoya noted Dr. Arumugam's admonition that Claimant "pace herself" is the only treating source opinion in the record regarding current permanent restrictions. Claimant told Ms. Montoya her doctor⁶ had completed a medical source statement for her Social Security disability claim, but Ms. Montoya did not have the report.⁷ Claimant said her doctor limited her to 10-20 pounds lifting, which Ms. Montoya incorporated into her analysis because it was consistent with Dr. Olson's permanent restrictions from 2015. Ms. Montoya opined some employers might refuse to hire Claimant if they knew she was taking narcotics but that is not universally true, particularly with a note from the prescribing physician. Ms. Montoya

⁵ Claimant demonstrated no apparent cognitive deficits during her testimony at hearing.

⁶ The ALJ presumes Claimant was referring to her PCP.

⁷ No such document was offered into evidence at hearing.

considered a 30-40 mile radius around Claimant's home as a reasonable commutable labor market. She indicated the job titles she relied on had "fairly consistent availability" during the period of her review. Claimant is relatively young, with a college education and acquired skills from past work that would transfer to a range of sedentary-light jobs. Ms. Montoya identified multiple suitable administrative and clerical positions, both full-time and part-time. Representative occupations include receptionist, PBX operator, office assistant, patient registration representative, hotel desk clerk, restaurant host, retail cashier, and bank teller.

44. Dr. Burris testified at hearing consistent with his report. He noted Claimant appeared to "move freely with no evidence of difficulty" in the video, which differed greatly from the "significant pain behaviors" she displayed in his office. He opined there was no objective basis for any work restrictions and saw nothing to prevent Claimant from performing "any activity she wants to do." He did not recall Claimant mentioning or demonstrating any mental problems or limitations. Dr. Burris opined Claimant requires no further injury-related treatment because she has returned to her preinjury "baseline" and none of the treatment she received through her claim made any significant difference in symptomology or function.

45. Dr. Burris' opinion that Claimant has no limitations despite a lumbar fusion and residual back and leg symptoms is unreasonable and unpersuasive. Ms. Montoya's assessment Claimant can perform sedentary-light work with pace-related limitations is reasonable and appropriate.

46. The opinions offered in Ms. Montoya's report and testimony regarding Claimant's ability to work are credible and persuasive. The ALJ agrees Claimant can work and earn wages within her commutable labor market as discussed by Ms. Montoya. Claimant failed to prove she is permanently and totally disabled.

47. Claimant proved entitlement to a general award of medical benefits after MMI. She has not returned to her preinjury "baseline" as opined by Dr. Roth and Burris. Claimant's current symptoms are greater than before the accident, and she requires more medication to manage her pain. Her level of function is lower than before the accident. Claimant credibly testified she takes amitriptyline (for sleep and pain), tizanidine (for muscle spasms), duloxetine (for depression and pain), and hydrocodone (for pain). Before the accident, she was only taking hydrocodone and 300 mg per day of gabapentin. The most recent prescription for gabapentin was 1500 mg per day from Dr. Reid in February 2018. It is unclear why gabapentin was stopped, but the last dose is a significant change from the preinjury level. Claimant's medications are reasonably necessary to relieve the effects of her industrial injury and prevent deterioration of her condition.

48. Claimant presented no persuasive evidence of entitlement to any specific medical benefits. Although her medications are reasonably necessary, she did not prove they are being prescribed by an authorized provider. There is no persuasive evidence of any other specific treatment recommended by any authorized provider.

49. Claimant failed to prove a basis to amend the admitted AWW of \$744.91. She was an hourly worker whose wages fluctuated from week to week. Claimant was an hourly worker whose wages fluctuated from week to week. It is not clear what period Respondent used to calculate the admitted AWW, but the ALJ is satisfied it fairly approximates her typical preinjury earnings. For example, Claimant averaged \$739.10 in the 12 weeks before the accident and \$745.21 in the 13 weeks before the accident. Other periods produce similar results. The admitted AWW provides a fair approximation of Claimant's preinjury wages and her injury-related wage loss.

50. Respondent failed to prove an overpayment of \$45,141.01 or \$58,191.83.

51. Respondent failed to prove Claimant received an overpayment of TTD or TPD benefits from March 16, 2017 through February 25, 2018 based on Dr. Burris' retroactive determination of MMI. Dr. Burris is not an authorized treating physician and has no authority to declare MMI.

52. Respondent proved Claimant received an overpayment of \$3,944.73 in TTD benefits after Dr. Arumugam put her at MMI on February 26, 2018. Respondent paid Claimant \$3,944.73 in TTD from February 26, 2018 through April 23, 2018 (57 days ÷ 7 x \$484.44 = \$3,944.73).

53. Respondent failed to prove a PPD overpayment of \$30,801.31. The prior PPD award was based on binding determinations of MMI and impairment by an uncontested DIME. Claimant's case was subsequently reopened because her condition worsened after MMI. Payment for the 18% rating gave Respondent a credit against any future rating, but did not convert the previously admitted and paid rating into an overpayment.

CONCLUSIONS OF LAW

A. Threshold question: Are the issues endorse by Claimant closed?

Respondent has raised a threshold jurisdictional defense that this claim was closed by the May 1, 2018 FAL because Claimant did not timely request a hearing on ripe and disputed issues. The disagrees with this argument. Claimant objected to the FAL and filed a DIME Notice and Proposal within the requisite 30-day window. Claimant subsequently filed a DIME application on June 12, 2018, which was rejected by the DIME Unit. The reason for rejecting the application is not entirely clear, but it appears the DIME Unit mistakenly believed Claimant was requesting a so-called "follow-up" DIME, which would have to be requested by Respondent and scheduled with Dr. Fillmore (who conducted a previous DIME in 2016). For unknown reasons, the DIME Unit neglected to notify either party it had rejected the application. Claimant did not learn the application had been rejected until calling the DIME Unit to inquire about the status in mid-September 2018. Respondent requested a hearing on October 8, 2018, and Claimant filed a Response to Application for Hearing on October 19, 2018 endorsing medical benefits, average weekly wage, and permanent total disability benefits.

The DIME Notice and Proposal is the only “jurisdictional” prerequisite to a DIME. Once the DIME process is initiated by a timely Notice and Proposal, the Act imposes no jurisdictional time limits on completion of the process. Subsequent steps, such as the notice of failed IME negotiation, the application, and scheduling or completing the DIME are not jurisdictional. See e.g., § 8-42-107.2(2)(b); *Adams v. Manpower*, W.C. No. 4-389-466 (August 2, 2005); *Reichert v. Maxtor*, W.C. No. 4-585-635 (April 4, 2005); *Romero v. Gerald Martin, LTD.*, W.C. No. 4-55*-142 (March 8, 2004).

Moreover, § 8-43-203(2)(b)(II)(A) provides that initiation of the DIME process tolls the requirement to request a hearing on ripe and disputed issues “until the [DIME] process is terminated for any reason.” Respondent acknowledges the tolling provision but argues the DIME process terminated when the DIME Unit rejected Claimant’s June 12, 2018 application. The ALJ disagrees for several reasons. First, there was no legal justification for rejecting Claimant’s DIME application. The prior DIME with Dr. Fillmore was complete in 2016 and the claim was closed by an uncontested FAL. Respondent subsequently agreed to reopen the claim based on a worsened condition. Claimant’s June 12, 2018 application requested a new DIME in response to a new MMI determination, not a “follow-up” DIME. The DIME Unit should have issued a new panel after receiving Claimant’s application. The DIME Unit then compounded its error by failing to notify either party it had rejected the application. Claimant did not know the application had been rejected until she made a phone inquiry in September 2018. Finally, the DIME Unit did not purport to terminate the DIME process. Rather, it told Claimant that Respondent would need to file the DIME application. The ALJ sees no event or circumstance that could reasonably be deemed “termination” of the DIME process at any time before Claimant filed her Response to Application for Hearing on October 18, 2018. The issues Claimant has endorsed for hearing are not closed.

B. Claimant’s request to proceed with a DIME

Claimant’s December 16, 2019 Supplemental Position Statement requested, for the first time, that the pending proceedings be suspended and held in abeyance so she can complete the DIME process.

A claimant generally has a due process right to a DIME. *Whiteside v. Smith*, 67 P.3d 1240 (Colo. 2003). Nevertheless, a party may waive its right to a DIME through inaction, delay, or similar conduct. E.g., *Munoz v. JBS Swift & Company*, W.C. No. 4-780-871 (March 1, 2010); *Rodriguez v. Safeway Stores, Inc.*, W.C. No. 4-712-019 (June 3, 2009); *Stein v. Community Agriculture Alliance*, W.C. No. 4-533-782 (October 5, 2004); *Shouland v. Argenbright Security*, W.C. No. 4-415-403 (June 16, 2004).

Waiver is the intentional relinquishment of a known right, and may be explicit or implicit. An explicit waiver occurs when a party states its intention to abandon an existing right or privilege. An implied waiver is demonstrated by conduct that is inconsistent with assertion of the right. *Johnson v. Industrial Commission*, 761 P.2d 1140 (Colo. 1998). To constitute an implied waiver, the conduct must be free from ambiguity and clearly manifest the intent not to assert the right. *Burlington Northern Railroad Co. v. Stone*

Container Corporation, 934 P.2d 902 (Colo. App. 1997). A waiver requires full knowledge of all the relevant facts. *Johnson, supra*.

The ALJ agrees with Respondent that Claimant waived her right to pursue a DIME. As found, Claimant learned the DIME Unit rejected her application in mid-September 2018, but took no further action to advance the DIME process for well over a year. In fact, Claimant took no action at all until Respondent forced the issue by filing an Application for Hearing on October 9, 2018. Instead of addressing the DIME at that time, Claimant endorsed permanent total disability and the parties prepared for hearing. Claimant made no request or otherwise mentioned the DIME as the case moved toward hearing. More important, Claimant said nothing about pursuing a DIME during the first two hearings, or even during the third hearing on December 6, 2019. Claimant's initial post-hearing position statement dated November 12, 2019 did not mention pursuing a DIME. When Claimant filed her position statement, she had every reason to believe the record was complete the case was ready for an order. That the undersigned convened the December 6 hearing *sua sponte* does not change the fact that Claimant was content to let the matter proceed to decision without asking for a DIME. Not until Claimant's December 16, 2019 supplemental position statement did she broach the subject of pursuing the DIME for the first time.

Claimant's decision to litigate permanent total disability was inconsistent with a desire to pursue a DIME. A DIME serves but two functions: (1) to review a determination of MMI and (2) to review a determination regarding whole person impairment. Both issues were rendered moot by Claimant's decision to litigate permanent total disability. Questions of permanency are premature until a claimant reaches MMI, and litigating PTD evidenced Claimant's intent to accept the determination of MMI. Likewise, endorsing and trying only the issue of PTD shows Claimant was unconcerned with and elected not to pursue any issue relating to PPD.

Allowing Claimant to move forward with the DIME now would be highly prejudicial to Respondent. In reasonable and detrimental reliance on Claimant's silence regarding the DIME process, coupled with her active pursuit of a PTD claim, Respondent incurred considerable expense and inconvenience defending the claim, including expert witness charges and attorney fees for multiple hearings.

Taken together, Claimant choice to litigate the claim for PTD benefits through to closing argument unambiguously evidences her intent to abandon the DIME, to accept MMI as of February 26, 2018, and to forgo any opportunity to dispute permanent partial impairment. Claimant's Motion to hold the hearing process in abeyance and complete a DIME is DENIED.

C. Permanent total disability

A claimant is considered permanently and totally disabled if she cannot "earn any wages in the same or other employment." Section 8-40-201(16.5)(a), C.R.S. The term "any wages" means wages in excess of zero. *McKinney v. Industrial Claim Appeals Office*, 894 P.2d 42 (Colo. App. 1995). To prove permanent total disability, the claimant

need not show the industrial injury is the sole cause of her inability to earn wages. Rather, the claimant must demonstrate that the industrial injury is a “significant causative factor” in her permanent total disability. *Seifried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986). It is not sufficient that an industrial injury merely creates *some* disability that ultimately contributes to permanent total disability. Rather, *Seifried* requires the claimant to prove a “direct causal relationship” between the industrial injury and the disability. *Lindner Chevrolet v. Industrial Claim Appeals Office*, 914 P.2d 496 (Colo. App. 1995).

In determining whether the claimant can earn wages, the ALJ may consider a wide variety of “human factors.” *Weld County School District RE-12 v. Bymer*, 955 P.2d 550 (Colo. 1988). These factors include the claimant’s physical condition, mental abilities, age, employment history, education, training, and the “availability of work” the claimant can perform within her commutable labor market. *Id.* Another human factor is the claimant’s ability to obtain and maintain employment within her limitations. See *Professional Fire Protection, Inc. v. Long*, 867 P.2d 175 (Colo. App. 1993). The ability to earn wages inherently includes consideration of whether the claimant can be hired and sustain employment. See e.g., *Case v. The Earthgrains Co.*, W.C. No. 4-541-544 (ICAO, September 6, 2006); *Cotton v. Econo Lube N. Tune*, W.C. No. 4-220-395 (ICAO, January 16, 1997). If the evidence shows the claimant cannot “sustain” employment, the ALJ can find she is not capable of earning wages. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office*, 21 P.3d 866, 868 (Colo. App. 2001).

As found, Claimant failed to prove she is permanently and totally disabled. The persuasive evidence demonstrates Claimant can sustain employment in a variety of sedentary-light occupations. The ALJ does not doubt Claimant suffers residual pain and associated limitations from her back injury. But the question is whether those limitations are severe enough to render her totally disabled as opposed to merely partially disabled. There is insufficient persuasive evidence to support a finding of permanent total disability under Colorado’s strict “any wages” standard. The record is devoid of any detailed opinion from a treating provider regarding Claimant’s current limitations and activity tolerances. Ms. Montoya adequately accounted for Dr. Arumugam’s “restriction” regarding self-paced work by eliminating jobs with production requirements or fast-paced environments. Although one of Claimant’s doctors completed a medical source statement for her Social Security claim, no such report is in evidence. According to Claimant, her doctor thinks she can tolerate lifting 10-20 pounds, which Ms. Montoya used in conducting her labor market research. Similarly, Dr. Olson had limited Claimant to modified light work when she reached MMI the first time in 2015, which also supports Ms. Montoya’s analysis. Admittedly, Claimant testified to limitations — such as frequent postural changes, needing to lie down, and remaining in bed for several days during flare-ups — that would significantly erode (and probably eliminate) all work. But the ALJ is also impressed by the lack of apparent limitation or difficulty during any of the activities shown on the surveillance video, including carrying armloads of groceries after a long day of shopping. Although Claimant does not have to support her claim with expert testimony, in this case the ALJ is not inclined to base the RFC determination solely on her testimony without corroboration from an examining or treating medical source.

D. General award of medical benefits after MMI

Respondents are liable for authorized medical treatment reasonably needed to cure or relieve the employee from the effects of the injury. Section 8-42-101(1)(a); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Medical benefits may extend beyond MMI if a claimant requires treatment to relieve symptoms or prevent deterioration of their condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). If the claimant establishes the probability of a need for future treatment, she is entitled to a general award of medical benefits after MMI, subject to the respondents' right to dispute causation or reasonable necessity of any particular treatment. *Hanna v. Print Expeditors, Inc.*, 77 P.3d 863 (Colo. App. 2003). A claimant need not be receiving treatment at the time of MMI or prove a particular course of treatment has been prescribed to obtain a general award of *Grover* medical benefits. *Miller v. Saint Thomas Moore Hospital*, W.C. No. 4-218-075 (September 1, 2000). Proof of a current or future need for "any" form of treatment will suffice for an award of post-MMI benefits. *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995). The claimant must prove entitlement to post-MMI medical benefits by a preponderance of the evidence. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997).

A pre-existing condition does not preclude a claim for medical benefits if an industrial injury aggravated, accelerated, or combined with the pre-existing condition to produce the need for medical treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). The ultimate question is whether the need for treatment was the proximate result of an industrial aggravation or merely the direct and natural consequence of the pre-existing condition. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Carlson v. Joslins Dry Goods Company*, W.C. No. 4-177-843 (March 31, 2000).

As found, Claimant proved a probable need for future treatment to relieve the effects of her industrial injury. Claimant is currently taking amitriptyline, tizanidine, duloxetine, and hydrocodone. These medications are reasonably needed and related to the industrial injury. Although Claimant had pre-existing back problems, the work injury substantially aggravated her pre-existing condition, and she has never returned to "baseline."

E. Average weekly wage

Section 8-42-102(2) provides compensation shall be paid based on the employee's average weekly earnings "at the time of the injury." The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. But § 8-42-102(3) gives the ALJ wide discretion to "fairly" calculate the employee's AWW in any manner that seems most appropriate under the circumstances. The entire objective of AWW calculation is to arrive at a "fair approximation" of the claimant's actual wage loss and diminished earning capacity because of the industrial injury. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993).

As found, Claimant did not prove a basis to change the admitted AWW of \$744.91. Claimant was an hourly worker whose wages fluctuated from week to week. It is not clear

what period Respondent used to calculate the admitted AWW, but the ALJ is satisfied it fairly approximates Claimant's typical preinjury earnings. For example, Claimant averaged \$739.10 in the 12 weeks before the accident and \$745.21 in the 13 weeks before the accident. One can arbitrarily choose some other number of weeks to produce slightly different figures. Claimant raised no objection to the admitted AWW for over four years, and provided no explanation for why she believes it is inaccurate or inappropriate. Based on the record presented, the ALJ sees no reason to disturb the admitted AWW.

F. Overpayment

Section 8-40-201(15.5) defines an overpayment as:

[M]oney received by a claimant that exceeds the amount that should have been paid, or which the claimant was not entitled to receive, or which results in duplicate benefits because of offsets that reduce disability or death benefits payable For an overpayment to result, it is not necessary that the overpayment exist at the time the claimant received disability or death benefits

The statute creates three categories of overpayments. The first category is for overpayments created when a claimant receives money "that exceeds the amount that should have been paid"; the second category is for money that a claimant "was not entitled to receive"; and the third category is for money received that "results in duplicate benefits because of offsets." *Simpson v. Industrial Claim Appeals Office*, 219 P.3d 354 (Colo. App. 2009).

Respondent has the burden to prove Claimant received an overpayment. *City and County of Denver v. Industrial Claim Appeals Office*, 58 P.3d 1162 (Colo. App. 2002).

The May 1, 2018 FAL claimed an overpayment of \$45,141.01. Respondent's post-hearing brief alleges an overpayment of \$58,191.83. Regardless of the amount, the claimed overpayment rests on two factors: (1) TTD benefits paid after Dr. Burris's MMI date of March 16, 2017, and (2) the 18% PPD award paid based on Dr. Fillmore's DIME rating in 2016 before the claim was reopened.

Respondent's first theory of overpayment can be resolved quickly. Under § 8-42-105(3)(a), TTD benefits "shall continue" until the injured worker reaches MMI. Section 8-42-107(8)(b)(I) provides that only "an authorized treating" can determine a claimant has reached MMI (absent a DIME). Dr. Burris never treated Claimant and was not "an authorized treating physician." Rather, Dr. Burris evaluated Claimant under § 8-42-107(8)(b.5)(I)(B) because she lived out of state when her ATP put her at MMI in February 2018. Dr. Burris' role was strictly limited to determining Claimant's impairment rating; he had no authority to determine MMI. Accordingly, Claimant was entitled to ongoing MMI benefits until Dr. Arumugam put her at MMI on February 26, 2018. TTD benefits before February 26, 2018 were not an overpayment.

Respondent actually paid TTD through April 23, 2018. The TTD Claimant received from February 26, 2018 through April 23, 2018 is an overpayment of \$3,944.73.

Respondent's second theory of overpayment presents a more challenging question. For the reasons set forth below, the ALJ concludes the 18% DIME rating from Claimant's first MMI date in October 2015 is not an overpayment, notwithstanding the 1% assigned by Dr. Burris when she got back to MMI in February 2018.

Three provisions of the Act are central to the ALJ's analysis. First, §§ 8-42-107(8)(b)(III) and 107(8)(c) provide that the DIME's determinations regarding MMI and whole person impairment are binding unless overcome by clear and convincing evidence. Section 8-43-203(2)(b)(II)(A) provides that an uncontested FAL closes a claim "as to the issues admitted." Sections 8-43-303(1) and (2)(a) allow a claim to be reopened for, *inter alia*, a change of condition or an overpayment. But the reopening statute explicitly states that "No such reopening shall affect the earlier award as to monies already paid except in cases of fraud or overpayment." The question thus becomes, does the caveat "except in cases of . . . overpayment" mean a claimant can be forced to repay a PPD award she received based on an uncontested DIME rating simply because she received a lower rating at a subsequent MMI date?

Respondent cited no case addressing this particular fact pattern, and the ALJ is aware of none. But two cases are instructive. The first is *Mesa Manor v. Industrial Claim Appeals Office*, 881 P.2d 443 (Colo. App. 1994), which held that a claimant can receive concurrent awards of PPD and TTD after a claim is reopened based on a change of condition. As pertinent here, *Mesa Manor* stands for the proposition that reopening for a change of condition does not negate a prior PPD award based on the prior rating.

The next helpful case is *Cooper v. Industrial Claim Appeals Office*, 109 P.3d 1056 (Colo. App. 2005). The claimant in *Cooper* received a lump sum PPD award based on an admitted rating, but later died before the PPD otherwise would have paid out at the weekly rate. The respondents argued the portion of the PPD award that covered weeks after the claimant's death was an "overpayment" because she no longer suffered any loss of earning capacity. The court rejected that argument because the PPD award "became a vested right" once the lump sum was paid. The upshot of *Cooper* is that an uncontested PPD award paid by lump sum is a "vested right" and does not become an overpayment based on subsequent changes in the claimant's physical condition.

Mesa Manor and *Cooper*, combined with the binding nature of an uncontested DIME and the statutory prohibition on affecting "monies already paid" persuade the ALJ that Claimant's prior PPD award is not an "overpayment." A subsequent change in the degree of permanency after reopening does not negate a vested permanency benefit paid for a prior MMI date.

The caselaw cited in Respondent's brief does not mandate a different conclusion. True, many of those cases involved overpayments created by retroactive MMI dates or reduced ratings assigned by DIMEs. *E.g.*, *Marquez v. Americold Logistics*, W.C. No. 4-896-504-04 (August 7, 2014); *Mattorano v. United Airlines*, W.C. No. 4-861-379-01 (July 25, 2013). Some resulted from ALJ determinations that removed the legal basis upon which TTD or PPD benefits had previously been paid. *E.g.*, *Joshue v. Anheuser-Busch*, W.C. No. 4-954-271-04 (June 17, 2016). It is by now well established that payments made

under a GAL or a contested FAL can become overpayments based on subsequent developments before the case is closed. *E.g., Franco v. Denver Public Schools*, W.C. No. 4-818-579-05 (November 13, 2014). And there is no dispute respondents can retroactively recover overpayments created by offsets or payment errors. *E.g., Simpson v. Industrial Claim Appeals Office*, 219 P.3d 354 (Colo. App. 2009); *Garrett v. Trinidad Drilling U.S.A., Inc.*, W.C. No. 4-704-929 (January 16, 2008). But all the cases cited by Respondent are distinguishable from Claimant's case based on three crucial differences: (1) they all involved payments made before a claim was closed, (2) none involved PPD paid based on an uncontested DIME, and (3) none involved a new rating at a subsequent MMI date after a case was reopened.

As previously noted, §§ 8-43-303(1) and (2)(a) provide that reopening for a change of condition shall not "affect the earlier award as to monies already paid except in cases of fraud or overpayment." The exception clause was added to the reopening statute in 1997, and changed a rule that had previously been in effect for decades.⁸ Of course, the General Assembly is free to change the statute whenever it pleases, but it is important to bear in mind *how* the Act was amended in 1997. The General Assembly could have simply deleted the sentence relating to "monies already paid." But it did not. Rather, the General Assembly *added* the exception relating to fraud and overpayments, thereby affirming the original rule with caveats. The statute must be interpreted and applied in a way that gives effect to both the rule and the exceptions. *E.g., Henderson v. RSI, Inc.*, 824 P.2d 91 (Colo. App. 1991) (courts must construe the entire statutory scheme in a way that gives consistent, harmonious, and sensible effect to all its parts).

The exception clause relating to overpayments only makes sense if read in conjunction with the provision allowing a case to be reopened "solely as to overpayments." The right to reopen a claim and collect an overpayment would be meaningless if the respondents could not reach money already paid, because by definition overpayments were "already paid." But Respondent's position here is that Claimant's entire 18% award immediately became an overpayment when the claim was reopened, which she must now repay to the extent it was not offset against some additional liability that accrued after the case was reopened. If Respondent is correct, and Claimant's prior rating based on an uncontested DIME became an overpayment *simply because her claim was reopened* for a change of condition, the exception would essentially swallow the rule and read the first clause out of the statute. Indeed, the logic of Respondent's argument would mean even if Claimant received the *identical* 18% rating when she reached MMI the second time in February 2018, there would still be an "overpayment" of PPD because she was three years older and the age factor would reduce the corresponding award. The ALJ is unpersuaded the General Assembly intended such results.

Claimant was at MMI on October 26, 2015 with an 18% whole person impairment determined by a DIME. Neither party challenged the rating and it became binding by as a matter of law. The rating was admitted, paid in full, and became a "vested right." There

⁸ This provision has been included in the Act in some form since at least 1921. *E.g., Colorado Fuel & Iron Co. v. Industrial Commission*, 275 P. 910 (Colo. 1929).

is no indication the rating was miscalculated, paid erroneously, or subject to any unclaimed offset. Claimant's condition subsequently worsened, and she was no longer MMI as of May 26, 2016. The original MMI date was not rescinded or amended. Claimant had surgery and reached MMI again on February 26, 2018. At that time, she received a 1% rating. Respondent had already paid Claimant for an 18% rating, so they owed no additional PPD based on Dr. Burris' 1% rating. But Dr. Burris' rating did not convert the prior award into an overpayment.

ORDER

It is therefore ordered that:

1. Claimant's Motion to hold the hearing process in abeyance and attend a DIME is denied.
2. Claimant's claim for permanent total disability benefits is denied and dismissed.
3. Claimant's request to amend the admitted average weekly wage of \$744.91 is denied and dismissed.
4. Respondent shall cover medical treatment from authorized providers reasonably needed to relieve the effects of Claimant's industrial injury or prevent deterioration of her condition.
5. Respondent's claim for an overpayment of \$45,141.01 or \$58,191.83 is denied and dismissed.
6. Respondent's claim for an overpayment of PPD based on the previously admitted 18% DIME rating is denied and dismissed.
7. Respondent's claim for an overpayment of TTD from March 16, 2017 through February 25, 2018 based on Dr. Burris' MMI determination is denied and dismissed.
8. Claimant shall repay Respondent the TTD overpayment of \$3,944.73 from February 26, 2018 through April 23, 2018. The specific payment terms are reserved for future determination if the parties cannot reach an agreement.

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

when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: <http://www.colorado.gov/dpa/oac/forms-WC.htm>.

DATED: February 12, 2020

s/ Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-024-706-002**

ISSUES

- Claimant is seeking a general award of medical benefits after MMI.
- Disfigurement.
- Claimant presented an unpaid medical bill, but Respondent's counsel only learned about the bill a few days before the hearing. Respondents' counsel indicated she would transmit the bill to the claims adjuster for review. The ALJ explained to Claimant she can request a hearing regarding the bill in the future should Insurer decline to cover it.

FINDINGS OF FACT

1. Claimant suffered an admitted right knee injury on June 6, 2016 in a slip and fall accident.

2. Claimant underwent multiple surgical procedures on her right knee, including revision of a pre-existing total knee arthroplasty on September 7, 2016, a right knee saphenous nerve decompression with neuroma excision on April 19, 2017, and placement of a hinged knee implant on November 17, 2018.

3. Dr. James Fox was Claimant's primary ATP. Dr. Fox put Claimant at MMI on May 29, 2019. Dr. Fox opined Claimant required "maintenance" treatment including periodic follow-up with her surgeons and ongoing pain management with Dr. Chen.

4. Respondent filed a Final Admission of Liability (FAL) on July 1, 2019. The FAL denied liability for medical treatment after MMI.

5. Claimant timely objected to the FAL and requested a hearing on medical benefits, medical benefits after MMI, and disfigurement.

6. Respondents filed an amended FAL on January 5, 2020, eighteen days before the hearing. The amended FAL admitted for medical benefits after MMI consistent with Dr. Fox's recommendations. The ALJ interprets the FAL as admitting to a general award of reasonably necessary and related medical treatment after MMI from authorized providers, consistent with § 8-42-107(8)(f).

7. After a thorough advisement and lengthy discussion on the record, Claimant agreed the January 5, 2020 amended FAL resolves the endorsed issue of medical benefits after MMI.

8. Claimant has received two previous disfigurement awards relating to her right knee.

9. The first disfigurement award was entered on July 27, 2015 by Administrative Law Judge Cannici in connection with a different injury (W.C. No. 4-740-567-01). Judge Cannici awarded \$2,500 for disfigurement, described as:

[A]n approximately 5 inch long scar across her right knee and approximately 3 inch long scar below her right knee. Claimant's right knee also bows inward and she exhibited a slight limp.

10. Claimant received another disfigurement award on May 8, 2018 from Administrative Law Judge Michelle Jones. The award from Judge Jones is the only prior award relating to the June 6, 2016 injury, because Judge Cannici's award was in a previous claim. Judge Jones knew of Judge Cannici's 2015 disfigurement award, and awarded \$300 for additional scarring associated with the September 2016 arthroplasty revision surgery and the April 2017 neuroma excision.

11. At the January 23, 2020 hearing, Claimant demonstrated visible disfigurement consisting of: (1) a 9 inch long by $\frac{1}{4}$ inch to $\frac{1}{2}$ inch wide discolored, irregular, partially raised, partially indented surgical scar on the midline of the right knee. (2) The overall noticeability of the aforementioned scar is enhanced by numerous small staple scars running along its length. (3) A $\frac{1}{4}$ inch wide discolored, irregular, partially raised, partially indented surgical scar, originating at approximately the tibial tuberosity and traversing medially and superiorly approximately 5 inches. (4) Three 1-inch diameter discolored, irregular, partially raised, partially indented surgical scars, originating at approximately the tibial tuberosity and traversing laterally and superiorly approximately 5 inches. Scars 1, 3, and 4 combine to create the appearance of a downward arrow on Claimant's right knee. (5) Noticeable swelling about the right knee and lower leg. (6) Four "blotchy" areas of discoloration on the upper abdomen relating to a post-surgical infection. (7) A small bump on the mid left shin. (8) A significant limp favoring the injured right leg.

12. Claimant gave the ALJ a photograph of her right knee dated August 18, 2018, before the most recent November 17, 2018 surgery. (Ex. 1). The scar on the midline of Claimant's knee is considerably larger and more noticeable now than before the last surgery. The scar on the medial knee appears similar to when observed by Judge Jones, so no additional disfigurement will be awarded for that. There is no indication the lateral knee scars were considered previously, nor does it appear Judge Cannici or Judge Jones appreciated swelling of the knee. Judge Cannici described a "slight" limp, whereas this ALJ observed a significant limp. Neither prior order mentions any scarring on the abdomen or left shin.

13. The ALJ finds Claimant should be awarded \$3,000 for additional disfigurement caused by the June 6, 2016 accident and not considered by Judge Cannici or Judge Jones.

CONCLUSIONS OF LAW

Respondents are liable for authorized medical treatment reasonably needed to cure or relieve the employee from the effects of the injury. Section 8-42-101(1)(a); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Medical benefits may extend beyond MMI if a claimant requires treatment to relieve symptoms or prevent deterioration of their condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). If the claimant establishes the probability of a need for future treatment, she is entitled to a general award of medical benefits after MMI, subject to the respondents' right to dispute causation or reasonable necessity of any particular treatment. *Hanna v. Print Expeditors, Inc.*, 77 P.3d 863 (Colo. App. 2003). If an authorized treating physician recommends medical treatment after MMI and there is no conflicting medical opinion in the record, the respondents shall admitted for related, reasonably necessary medical benefits by an authorized treating physician. Section 8-42-107(8)(f).

As found, Claimant agreed on the record the January 5, 2020 amended FAL adequately resolved her endorsed issue regarding medical benefits after MMI.

Section 8-42-108(1) provides for additional compensation if a claimant is "seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view." The compensation to be awarded is left to the ALJ's discretion, subject to the maximum applicable award for the claimant's date of injury. *E.g.*, *Landers v. Federal Express*, W.C. No. 4-989-931-02 (December 19, 2016). The maximum disfigurement award for a June 6, 2016 date of injury is \$4,840.14, or \$9,678.66 if the claimant has "extensive facial scars or facial burn scars, extensive body scars or burn scars, or stumps due to loss or partial loss of limbs." The \$2,500 previously awarded by Judge Cannici does not affect the maximum disfigurement payable in this claim, because it was paid in a different claim. The ALJ only referenced Judge Cannici's prior order to help determine what disfigurement pre-dated the June 2016 accident. Judge Jones' May 2018 award counts against the maximum limit because it was awarded on this claim.

As found, Claimant suffered visible disfigurement to parts of the body normally exposed to public view. The disfigurement compensated by this ALJ was caused by the June 6, 2016 accident and not considered by any prior judge. The ALJ concludes Claimant should be awarded \$3,000 for additional disfigurement, beyond what was previously awarded by Judge Cannici and Judge Jones.

ORDER

It is therefore ordered that:

1. Insurer shall pay Claimant \$3,000 for additional injury-related disfigurement beyond that previously observed by Judge Cannici or Judge Jones.
2. Insurer shall cover reasonably necessary and related medical treatment after MMI from authorized providers.
3. All issues not decided herein are reserved for future determination.

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

DATED: February 12, 2020

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

- Whether the claimant has demonstrated, by a preponderance of the evidence, that on November 20, 2018, he suffered an injury arising out of and in the course and scope of his employment with the employer.
- If the claimant proves a compensable injury, whether the claimant has demonstrated, by a preponderance of the evidence, that medical treatment, including a recommended cervical surgery, is reasonable, necessary, and related to the work injury.
- If the claimant proves a compensable injury, what is the claimant's average weekly wage (AWW)?
- At hearing, the claimant withdrew the endorsed issue of temporary total disability (TTD) benefits.

FINDINGS OF FACT

1. The claimant has been employed with the employer, or its predecessors, for approximately 30 years as a heavy equipment operator. The claimant's job duties include operating loaders, bulldozers, backhoes, and excavators.

2. On November 7, 2018, the claimant sought chiropractic treatment with Dr. Rita Peterson. The claimant testified that he sought treatment with Dr. Peterson because he had pain in his neck and left shoulder after he pulled a wrench at work. The November 7, 2018 medical record identified the claimant's symptoms as pain in his neck and left shoulder, with numbness down his left arm. Dr. Peterson opined that the claimant had "a disc injury at C5-6". Dr. Peterson recommended the claimant undergo steroid injections with his personal care provider. The claimant did not obtain the recommended injections.

3. On November 15, 2018, the claimant returned to Dr. Peterson and reported "not much improvement" in his symptoms. On that date, Dr. Peterson recommended an orthopedic referral. The claimant testified that he did not return to Dr. Peterson because his symptoms improved.

4. The claimant testified that on November 20, 2018, he was assigned to operate a front-end loader. While operating that equipment the claimant drove over a pile of frozen dirt clods. The claimant testified that this caused him to be jarred from side to side. The claimant also testified that following the jarring incident, he experienced numbness and tingling in his left arm. The claimant continued to perform his normal job duties and completed his scheduled shift.

5. The claimant testified that he reported this incident to his supervisor, Glen M[Redacted]. The claimant further testified that Mr. M[Redacted] prepared a written report of the incident the following day, November 21, 2018. The report prepared by Mr. M[Redacted] was dated November 26, 2018, and indicated that on November 21, 2018, the claimant “jammed his neck”.

6. On approximately November 29, 2018, the claimant was laid off due to a seasonal slowdown. Between November 20, 2018 and the lay off on November 29, 2018, the claimant worked his normal duties. The claimant testified that on the day he was laid off he requested medical treatment from John Mueller, Superintendent. However, the claimant did not receive medical treatment on that date. The claimant returned to work on or about February 13, 2019.

7. During the period when the claimant was laid off, his symptoms included numbness and tingling in his left arm. The claimant testified that over time his symptoms became worse.

8. Following the November 20, 2018 incident, the claimant first received medical treatment on March 8, 2019. The claimant testified that this delay was caused by the employer’s failure to schedule an appointment for him.

9. On March 8, 2019, the claimant was seen by Dr. Lori Fay with Work Partners. At that time, the claimant reported that he jarred his neck and had neck pain with numbness and tingling into his left arm. Dr. Fay diagnosed paresthesia of the skin and cervicgia. Dr. Fay ordered an x-ray of the claimant’s cervical spine and an electromyography (EMG) study.

10. On April 2, 2019, Dr. Mitchell Burnbaum administered an EMG study of the claimant’s left upper extremity. In his report, Dr. Burnbaum noted that he found no evidence of carpal tunnel and nothing to suggest issues at the brachial plexus. Dr. Burnbaum opined that the claimant had a root compression at the C6 level. However, Dr. Burnbaum did not believe that the claimant was a surgical candidate. Dr. Burnbaum recommended physical therapy and a magnetic resonance image (MRI) of the claimant’s cervical spine.

11. On June 5, 2019, the claimant reported to Dr. Fay that his symptoms were stable and his pain was at zero out of ten. On that same date, Dr. Fay ordered an MRI of the claimant’s cervical spine and made a referral to Dr. Kirk Clifford for a surgical consultation.

12. On June 12, 2019, an MRI of the claimant’s cervical spine showed congenital narrowing of the spinal canal, with degenerative changes resulting in mild to moderate spinal stenosis at C5-6 and C6-7, with mild spinal stenosis at C3-4. The MRI also showed multilevel neural foraminal narrowing due to degenerative facet and uncinat process osteophytes, at levels C5-6 and C6-7.

13. On July 2, 2019, the claimant was seen in Dr. Clifford's practice, Western Colorado Spine. At that time, the claimant was seen by Jason Bell, PA-C. Mr. Bell diagnosed a left lateral disc herniation at the C5-6 level and recommended surgical intervention. However, Mr. Bell noted that as a smoker, the claimant would have to be nicotine free for six weeks prior to undergoing any surgery.

14. On August 12, 2019, the claimant was seen by Dr. Clifford and reported that his symptoms had worsened. Dr. Clifford noted that the claimant had a left C5-6 herniated disc with cervical radiculopathy. Dr. Clifford recommended the claimant undergo a C5-6 anterior cervical discectomy and fusion. On August 19, 2019, a request for authorization of the recommended surgery was submitted to the insurer. On September 19, 2019, the respondents filed a Notice of Contest of the claimant's claim.

15. On October 4, 2019, the claimant attended an independent medical examination (IME) with Dr. Anant Kumar. In connection with the IME, Dr. Kumar reviewed the claimant's medical records, obtained a history from the claimant, and completed a physical examination. In his IME report, Dr. Kumar opined that the claimant suffered a minor trauma that does not necessitate surgical intervention. In support of this opinion, Dr. Kumar noted that the claimant is neurologically intact. In addition, Dr. Kumar diagnosed the claimant with degenerative disc disease of the cervical spine.

16. Dr. Kumar's testimony by deposition was consistent with his written report. Dr. Kumar testified that the claimant has age related stenosis that was not caused or aggravated by an acute injury. Dr. Kumar clarified that he reviewed the imaging studies and not just the radiology reports. Based upon his review of the claimant's MRI, Dr. Kumar opined that the claimant has a disc osteophyte complex, which is a "degenerative bony spur". Dr. Kumar further opined that the claimant has a chronic condition rather than an acute condition. In addition, Dr. Kumar testified that the symptoms the claimant reported to him were the same as those reported to Dr. Peterson on November 7, 2018. Dr. Kumar further opined that treatment of the claimant's cervical spine condition does not require interventional treatment. In addition to the issue of causation, Dr. Kumar opined that the mechanism of injury reported by the claimant would not cause the level of degenerative changes present in the claimant's spine.

17. Based upon the opinions of Dr. Kumar, the respondents denied authorization of the recommended surgery. The respondents continue to contest the claimant's claim.

18. In 2018, the claimant's total earnings from this employment was \$64,070.41. The claimant has calculated an average weekly wage (AWW) of \$1,346.83. The claimant calculated this AWW based on the premise that prior to November 20, 2018; there were 333 days in 2018.¹ The respondents calculated the

¹ The ALJ calculates that 333 days is equal to 47.57 weeks. When the claimant's total wages of \$64,070.41 is divided by 47.57 weeks, it results in an average of \$1,346.87.

AWW as \$1,054.40. This calculation is based upon the claimant's hourly rate of \$26.36 at 40 hours per week.

19. The ALJ credits the medical records and the opinions of Dr. Kumar over the contrary opinions of Dr. Clifford and finds that the claimant has failed to demonstrate that it is more likely than not that he suffered a work injury. The ALJ also finds that the claimant has failed to demonstrate that it is more likely than not that his preexisting spinal condition was aggravated or accelerated by his alleged November 20, 2018 mechanism of injury. The claimant was complaining of identical symptoms when he treated with Dr. Peterson prior to the date of the alleged injury. The ALJ is not persuaded by the claimant's testimony that he suffered an injury when he drove his loader over frozen dirt clods.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2018).

4. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. See *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); see also *Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with a preexisting

disease or infirmity to produce disability or need for treatment.” See *H & H Warehouse v. Vicory, supra*.

5. As found, the claimant has failed to demonstrate by a preponderance of the evidence, that he suffered an injury arising out of and in the course and scope of his employment with the employer. As found, the claimant has failed to demonstrate by a preponderance of the evidence, that his preexisting spinal condition was aggravated or accelerated by his alleged November 20, 2018 mechanism of injury. As found, the medical records and the opinions of Dr. Kumar are credible and persuasive.

ORDER

It is therefore ordered the claimant’s claim for workers’ compensation benefits is denied and dismissed.

Dated this 14th day of February 2020.



ALJ Cassandra M. Sidanycz
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

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

ISSUES

- I. Have Respondents, by clear and convincing evidence, overcome the DIME opinion of Dr. Rook for Whole Person Impairment rating?
- II. Has Claimant shown, by a preponderance of the evidence, that he is entitled to a general award of ongoing Medical Maintenance Benefits?
- III. Has Claimant shown that he is entitled to a change of physician?

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

History of the Work Injury

1. Claimant sustained an admitted injury for the Employer on May 29, 2017. (Ex. 3). At that time, Claimant was employed by the City of Colorado Springs as a police officer, and had been so employed for 16 years.
2. Claimant testified at hearing. On the day of the injury, he was acting as a training officer and was on patrol, seated in the passenger seat of the police vehicle. He hand his trainee then responded to a disturbance around noon. The trainee parked the police vehicle behind a pickup truck, which had been described as the one involved in the disturbance. The driver of the truck put his vehicle in reverse, striking Claimant's vehicle. It knocked the Claimant's vehicle backward approximately 15 feet, bending the push bumper of the police vehicle back into the hood.
3. The driver of the truck sped off, and Claimant and the trainee pursued the suspect, with trainee still driving. The suspect then rammed another vehicle, at which point the suspect exited his vehicle, then carjacked another vehicle. At this point Claimant, saw that the suspect had an AK-47. Claimant then exited his vehicle, gun drawn, and went across the hood of the vehicle that the suspect carjacked. The suspect was able to flee the scene.
4. The Claimant did not know initially if he had been hurt, either by the suspect striking his vehicle initially, or when he went across the hood of the carjacked vehicle. He did fill out an injury report with the Employer either that evening or the next morning, as his neck was sore, and by the next day, the soreness had increased.

Prior Injuries

5. Claimant had previously sustained a work injury in a 2010 car crash to the middle of his back, just to the right side, for which he received physical therapy through the Employer's occupational clinic. A MRI was ordered after that event, and Claimant continues to have a little bit of pain in his mid-back, just to the right of his spine since that injury.
6. Claimant did not sustain any injuries to his neck at the time of this 2010 injury. At the time of this May 29, 2017 injury, Claimant testified he was not having any other physical problems other than to his mid back, with a little bit of burning pain.

Treatment for this Work Injury

7. On May 31, 2017, Claimant was first seen in the Employer's occupational clinic by P.A. Homberger. Claimant was complaining of neck pain. Upon physical examination, there was left-sided cervical paraspinal tenderness and tightness. P.A. Homberger diagnosed him with a cervical strain, and referred him to physical therapy. The pain diagram (pain level 5/10) was marked for (sharp) left sided cervical pain. (Ex. 13, pp. 107-108).
8. The Claimant's first physical therapy visit was on June 6, 2017. At that time, Claimant noted constant, sharp, neck pain that had decreased somewhat since the initial injury. Pain was aggravated with wearing his vest, and increased at night. Assessment was left sided muscle strain with kyphosis, and massage therapy was initiated. (Ex. 17, p. 202).
9. Claimant treated on June 12 and June 14 of 2017 by the Employer's physical therapists. He continued with left sided neck pain, and had a new complaint of right sided neck pain when wearing his camera that hung down from his neck. (Ex. 17, p. 201). On June 14, 2017, the Claimant reported having pain along the left side of his neck. The physical therapist observed *tightness* along the left side of the cervical spine. (Ex. 17, p. 200).
10. The Claimant continued to see P.A. Homberger, and was treated by physical therapists in the Employer's occupational clinic until October 4, 2017. The clinic notes and physical therapy for dates of service of 6/21/2017 through 10/4/2017 indicate ongoing left sided neck pain and tightness, and left sided occipital pain with tightness in the Claimant's sub-occipital musculature.
11. The Claimant was examined by Dr. Jay Neubauer on July 18, 2017. At that time, Claimant noted constant left sided neck pain that was mild in the morning but increased with work activities throughout the day. Dr. Neubauer noted tenderness along the left paraspinous muscles. (Ex. 13, p. 100).

12. P.A. Homberger's note of October 4, 2017 indicates the Claimant was complaining of ongoing pain. Upon examination, P.A. Homberger noted left cervical paraspinal *tightness* and left occipital tenderness and tightness. Treatment plan was to continue physical therapy, medication, heat therapy and to schedule an MRI of the cervical spine. (Ex. 13, p. 94).
13. MRI of the cervical spine was performed on October 12, 2017 with Colorado Springs Imaging. That MRI showed mild spondylosis of the C5-6 and C6-7 disc spaces with minimal posterior osteophyte formation. The facet joints were normal. (Ex. 18, p. 208).
14. Claimant followed up with P.A. Homberger on November 6, 2017 with increased neck pain. P.A. Homberger noted that Claimant stated that by day three of his shift, the pain would increase, and that he had a constant dull pain at the base of his neck, which bothered him the most. Physical examination showed left sided cervical paraspinal tenderness and *tightness* along with left occipital tightness and tenderness. He also demonstrated good range of motion on this date. P.A. Homberger, at that point, elected to have the Claimant change physical therapists, and the Claimant was sent to Falcon Physical Therapy. PA Homberger opined that Claimant was not at MMI as of that date, but could continue to work full-duty, the only restriction being without a shirt-held camera. (Ex. 13, p. 90).
15. Claimant was seen at Falcon Physical Therapy on eight occasions. He started physical therapy there on November 15, 2017. At that time, he complained of pain, *stiffness*, and pain in the left cervical region. Physical examination showed decreased range of motion, pain and decreased muscle strength. Pain was 2/10. (Ex. 16, p. 175). Claimant had physical therapy on November 17, 22, 24, 29, and December 1 and 6. Although the physical therapy was helping, Claimant reported having ongoing continuation of his pain and restriction in range of motion after four shifts on the job.
16. Claimant returned to P.A. Homberger on December 20, 2017. He was having continuing pain and *tightness* and tenderness in both the cervical paraspinal muscles and left occipital tenderness and tightness. P.A. Homberger referred the Claimant to Dr. Abercrombie, a chiropractor. P.A. Homberger noted: "He is not currently at MMI and his date of MMI is unknown due to continued symptoms requiring active medical tx [treatments]." (Ex. 13, p. 85).
17. Claimant treated with Alliance Health Partners between January 26, 2018 and September 20, 2018. Dr. Abercrombie's initial examination report note of January 26, 2018 opined that the Claimant had a left sided cervicothoracic strain/sprain complex with chronic articular involvement of the lower cervical facets and upper thoracic facets/costovertebral joints. (Ex. 15, p. 142). Examination revealed loss of cervical range of motion and *tightness* along the left cervicothoracic region. The Claimant had tenderness across the left trapezial ridge and levator scapulae.

18. Dr. Abercrombie sent an updated report on February 10, 2018 noting improvement but need for additional visits. (Ex. 15, p. 136).
19. Claimant returned to see Dr. Abercrombie on April 2, 2018. He had completed the additional visits, and had continued to improve his left sided lower neck and upper back pain with a 70% improvement overall. Nonetheless, Dr. Abercrombie suggested additional chiropractic visits. (Ex. 15, p. 132).
20. Claimant returned to P.A. Homberger on April 27, 2018. At that time, Claimant was feeling better, but still had the constant dull pain/*tightness*. The spot at the base of the skull on the left side was bothering him the most. On physical examination, P.A. Homberger noted ongoing *tightness* and tenderness of the left cervical paraspinals and tenderness of the left occipital area of the scalp. Pain was 2/10. Claimant was still not at MMI. He was to follow up in a month and continue with chiropractic treatment. (Ex. 13, p. 81).
21. Claimant had ongoing chiropractic care with Dr. Abercrombie, and ongoing follow up examinations with P.A. Homberger, which lasted until September 20, 2018. Claimant improved with the chiropractic treatments, but continued to have left-sided neck pain, which was worse upon the end of the workweek. Dr. Abercrombie's examination of Claimant on September 20 noted mild *tightness* across the cervical extensors; specifically splenius services and across the sub-occipital musculature of the splenius capitis. There was minimal joint restriction at C2-C3 to motion palpation, with minimal reproducible pain patterns. Dr. Abercrombie opined that Claimant had full range of motion in all cervical planes. Dr. Abercrombie noted if the Claimant regressed, he would be happy to see him back. Claimant might also be a candidate for supportive ongoing care. (Ex. 15, p. 119).

Claimant placed at MMI

22. Claimant was seen by P.A. Homberger on October 5, 2018. He was placed at MMI without restrictions, without impairment and without medical maintenance care. P.A. Homberger noted that the Claimant had ongoing tenderness and *tightness* in the left occipital area, but did not note any tenderness or tightness in the cervical paraspinals musculature. Pain at this visit was 1/10. (Ex. 13, p. 70).
23. At hearing, Claimant testified that his pain has always been in the same location since the injury. After the October 5 visit, the Claimant testified that he was in a lot of pain and emailed P.A. Homberger to obtain relief. It took a little while for her to get back to him, but P.A. Homberger authorized a one-time visit to Occupational Health.
24. Claimant saw Dr. Nicholas Kurz for a one-time visit on April 5, 2019. Dr. Kurz' agreed with P.A. Homberger's assessment that the Claimant had not sustained any permanent

physical impairment of his neck from the May 29, 2017 injury. Dr. Kurz also concurred with PA Homberger's MMI date of October 5, 2018. At hearing, Dr. Kurz testified that this visit was not for range-of-motion testing but rather for confirmation of P.A. Homberger's opinion. (Ex. 13, p. 64).

25. Thereafter, Employer filed a Final Admission of Liability ("FAL") dated May 21, 2019. (Ex. 3, pp. 3-13, attaching Dr. Kurz' April 5 report). Claimant timely objected to the Final Admission of Liability and requested a DIME evaluation on the issues of MMI and PPD.

DIME Examination and Report

26. The DIME doctor, Dr. Jack L. Rook, examined the Claimant on August 12 2019. His DIME report was issued August 13, 2019. (Ex. 11, pp. 36-51). His Dr. Rook concurred with the ATP's MMI date [October 5, 2018], but then his narrative actually [mis]stated that the Claimant reached MMI on *April 9, 2019*. This April date actually coincides with the date Dr. Kurz himself examined Claimant, but which then concurred with PA Homberger's MMI date of 10/5/2018. {The ALJ finds that Dr. Rook intended to place Claimant at MMI on 10/5/2018 – a date not being disputed by Respondents}.

27. Dr. Rook also found that Claimant was entitled to a whole person physical impairment rating of 13%. He found that Table 53(II)(B) should apply Further, Dr. Rook was of the opinion that the Claimant should be entitled to ongoing medical maintenance care, since Claimant derived considerable benefit from the chiropractic sessions, but his condition began to deteriorate due to the demands of the job once the treatments ended. (Ex. 11, pp. 47-48).

28. Dr. Rook's pertinent clinical diagnosis was

1. Chronic left-sided neck pain:
 - Myofascial pain syndrome involving left-sided suboccipital, paracervical, upper trapezius, levator scapula, and scalene musculature.
 - Likely component of upper cervical facet mediated pain.
 - Negative upper extremity neurological examination.

29. Respondent timely objected to Dr. Rook's DIME report and requested a hearing on overcoming the DIME opinions of Dr. Rook. Claimant then filed a Response to the Application for Hearing, seeking ongoing medical maintenance and a change of physician.

Respondents' Evidence in Support of Overcoming the DIME

30. Respondents' evidence consists of the additional medical report of Dr. Kurz dated October 3, 2019, (Ex. A, pp. 1-4), Dr. Kurz sworn testimony at the hearing, and Dr. Kurz' medical report concerning his examination of the Claimant of April 5, 2019.
31. At hearing, Dr. Kurz testified that he had reviewed both the reports of Dr. Hall (who had performed an IME for Claimant, as noted below) dated May 1, 2019 and Dr. Rook's DIME report of August 12, 2019. He disagreed with Drs. Hall and Rook's determination that the Claimant was entitled to a Table 53(II)(B) physical impairment rating. Dr. Kurz indicated that in his opinion there was no documentation of *objective* evidence on the patient's *MRI* of any facet issues; therefore, the MRI did not support a finding of facet-mediated pain. Specifically, Dr. Kurz identified pain with cervical extension as an indicator of facet-mediated pain, which he felt was lacking in the records to date. Doctor Kurz reasoned that all of the Claimant's complaints were at the occiput, so he did not believe that the Claimant had any facet involvement as a result of the injury sustained.
32. Regarding Dr. Rook's explanation that Claimant's discontinuation of chiropractic treatment resulted in a significant worsening of his symptoms, Dr. Kurz noted that Claimant saw Dr. Abercrombie on September 20, 2018 and reported minimal pain and had full range of motion. Claimant then saw Paula Homberger at the OHC on October 5, 2018 (more than two weeks later) and had basically the exact same presentation. As such, Dr. Kurz testified that the lack of interval change between September 20, 2018, and October 5, 2018, does not support Claimant's assertions to Dr. Rook that if Claimant went two weeks without chiropractic treatment, he suffered a significant increase in his neck pain.
33. Dr. Kurz also testified that he thought that the treatment that Claimant received was in excess of that which would be recognized by the Medical Treatment Guidelines. If he had been involved in the case, he would have considered placing the Claimant at MMI in August of 2017. However, he testified that the Claimant was correctly placed at maximum medical improvement on October 5, 2018:

Question (by Mr. Chambers): "All right, You believe that—did you believe that Mr. Lindvall was correctly placed at max medical improvement on October 5, 2018?"

Answer (by Dr. Kurz): "Yes." (Transcript, p. 24).

34. Dr. Kurz testified that, in his opinion, in interpreting Table 53 of the AMA Guides, the Claimant really did not have a medically documented injury, since the MRI demonstrated no objective injury, just "old stuff." Dr. Kurz reasoned that, since the MRI was normal, there was no objective evidence of an injury. He opined that Claimant's ongoing pain complaints at this time were not causally related to this motor vehicle

accident. Dr. Kurz suggested that an explanation for Claimant's increased pain following his originally being placed at MMI may have more to do with his ergonomic situation in his cruiser, but he further defined this as "ergonomic" pain which he believes does not necessarily rise to a compensable incident.

35. Dr. Kurz further opined further that the Claimant did not qualified for a Table 53(II)(B) rating, as the Claimant did not demonstrate six months of medically documented rigidity and that his pain improved.

36. Further, Dr. Kurz testified that in order to qualify for a Table 53(II)(B) rating, the rigidity must not ever be resolved, *i.e.*, of a permanent nature:

It has to be for a six-month continuous duration. *And we kind of assume that he's stuck with that, it's not going to go away.* And if you're at the definition of MMI and you still have a stiff neck with reduced range of motion and function and you don't have a disc or intervertebral problem, then that's why that [Table 53] II (B) category is there." (Transcript, p. 67) (emphasis added).

Claimant's IME by Dr. Hall

37. Dr. Timothy Hall performed an IME at the request of the Claimant. (Ex. 12). Dr. Hall reviewed the medical records regarding the 2010 injury, and the medical records of the care and treatment given to the Claimant from his May 29, 2017 injury. This included Dr. Kurz' report of April 5, 2019. He also performed a physical examination on the Claimant.

38. Dr. Hall disagreed with Dr. Kurz' position that "his MMI date stands and he is advised to follow up with his PCP privately for these complaints that are unrelated to his previous date of injury." He noted that Dr. Kurz seemed to feel that the Claimant did have a problem and should see someone but that the issues were not related to the compensable on the job injury - even though he has had no new injuries and the complaints seem to be the same.

39. Dr. Hall opined that that while the Claimant was at MMI while receiving the treatment from Dr. Abercrombie prior to October 5, 2018, he had deteriorated without the treatment, and as of the date that he saw him (May 1, 2019), he was no longer at MMI. Dr. Hall thought that the Claimant needed to return to Dr. Abercrombie for treatment and possibly have facet blocks in the upper left cervical region for diagnostic purposes. Dr. Hall gave a provisional physical impairment rating of 9% whole person impairment with 4% for a Table 53 rating and 5% for loss of range of motion. Dr. Hall opined that the Claimant needed ongoing medical care.

Medial Branch Blocks after the IMEs were Conducted

40. Claimant was referred to Dr. Kenneth Finn, MD, by Dr. Abercrombie. At this point, it was through Claimant's private health insurance. On November 26, 2019, the intake report noted that Claimant reported his pain was 1/10 at best, 9/10 at worst, 3/10 at average, and 4/10 *today* [Nov. 26]. The examination showed limited range of motion in all directions, most symptomatic was extension and left side rotation. Dr. Finn concluded that "Patient likely has facetogenic pain in the upper segments." No radiculopathy was noted. (Ex. 10, p. 29). Medial branch blocks were performed on December 3, 2019. (Ex. 10, p. 26).
41. At hearing, Claimant described the relief from those injections as immediate, but the pain had begun to return by the date of the hearing to approximately 3/10.

Testimony of DIME Physician, Dr. Rook

42. Dr. Rook testified that he had sat through the testimony by Dr. Kurz, and had reviewed Dr. Kurz' additional report of October 3, 2019. He had also reviewed the reports of Dr. Finn. Nothing that had been presented to him since his DIME report of August 12, 2019 changed his opinions as contained therein.
43. Regarding the Table 53 rating, Dr. Rook stated that he disagreed with Dr. Kurz' opinion that the Claimant did not sustain a medical injury on May 29, 2017. He also disagreed with Dr. Kurz that Claimant was not entitled to a Table 53 rating. According to Dr. Rook, the medical records demonstrate on an ongoing basis the constant complaints of neck pain and the objective findings by the medical providers of tightness in the neck, the ongoing findings of loss of range of motion, and tenderness in the cervical spine and sub-occipital area.
44. Dr. Rook testified that he performed a physical examination, consistent with the AMA Guides, which demonstrated ongoing muscle *tightness*, muscle spasms, and diminished cervical range of motion. According to Dr. Rook, the Claimant "fulfills every requirement for an impairment rating utilizing the AMA Guides". Dr. Rook noted that even Dr. Kurz' evaluation describes tightness in Claimant's neck muscles, tenderness in his neck muscles, and ongoing complaints of cervical *discomfort*. He conceded that the MRI results [standing alone] did not support a finding of facet-mediated pain.
45. Dr. Rook felt that this is a classic example of "an individual who has six months of medically documented—well documented pain, rigidity, which is recognized by his range of motion loss and ongoing range of motion loss through the medical records"

Claimant's Testimony in Support of Change of Physician

46. At hearing, Claimant testified that he no longer wished to treat with PA Homberger because he felt that it took too long to get the MRI, and he definitely felt that that he would have improved more quickly if he had seen Dr. Abercrombie earlier. Then, Claimant was asked to read his answer to Interrogatory 3 in its entirety.

Q. Please state the physician with whom you no longer wish to treat.

A. I do not want to treat with the City of Colorado Springs Occupational Health Clinic. I do not want to treat with Paula Homberger...PA because of her delay in referring me to Dr. Abercrombie for chiropractic treatment; I do not want to treat with Dr. ...Nicholas Kurz, DO, because Dr. Kurz does not think I need any treatment. I do not trust the providers at the OCC clinic and disagree with their assessments.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Act, Sections 8-40-101, C.R.S. 2007, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S.

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

C. Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the ALJ. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's

testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). In this instance, the ALJ finds Claimant to be sincere and credible at all times pertinent. Claimant has consistently informed all medical providers, both treating and expert witnesses, of the symptoms he was experiencing in an effort to get well and remain at work. Claimant also testified credibly at hearing.

D. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55, P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968). In this instance, the ALJ finds that – as is often the case – the medical practitioners in this case have expressed sincere opinions, based upon sincerely differing medical philosophies. The task of the ALJ here, therefore, is not so much to judge *credibility* per se, but rather *persuasiveness*, attenuated by the burden of proof imposed.

Overcoming a DIME opinion, Generally

E. The finding of a Division Independent Medical Examiner (DIME) may be overcome only by clear and convincing evidence. (CRS 8-42-107(8)(c)). “Clear and convincing” evidence is stronger than a preponderance, is unmistakable, and is free from serious or substantial doubt. *Martinez v. Triangle Sheet Metal, Inc.* (W.C. 4-595-741, ICAO, October 8, 2008) citing *Dilco v. Koltnow*, 613 P. 2d 318 (1980). A mere difference of medical opinions is insufficient. *Medina-Weber v. Denver Public Schools* (W.C. 4-782-625. ICAO May 24, 2010). The question whether a party has overcome the DIME by clear and convincing evidence is one of fact for the ALJ’s determination. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

F. The decisions of a DIME physician are only to be given presumptive effect when provided by the statute. Maximum Medial Improvement is defined at Section 8-40-201(11.5), C.R.S. as: “a point in time when any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition.” When a course of treatment has a reasonable prospect of success and a claimant willingly submits to such treatment, a finding of MMI is premature. See, *Reynolds v. ICAO*, 794 P.2d 1080 (Colo. App. 1990). Here, there is no evidence that the care and treatment that Dr. Finn is presently giving to the Claimant is designed to improve the condition but rather

presently the evidence suggests that such treatment is designed to maintain the Claimant's present functioning and is more in the nature of medical maintenance.

G. Section 8-42-107(8)(c), C.R.S., provides that the DIME physician's finding of medical impairment "may be overcome only by clear and convincing evidence." Under this statute, the question of whether the DIME physician properly applied the *AMA Guides* in determining the impairment rating, and whether the rating was overcome by clear and convincing evidence are questions of fact to be determined by the ALJ. See, *Metro Moving and Storage Co. v. Gussert*, supra. Proof of deviation from the rating protocols provides some evidence from which the ALJ may infer that the DIME physician's rating has been overcome. If the DIME has deviated in the application of the *AMA Guides*, then the ALJ must consider the deviation in the context of all other relevant evidence, and need not find that the rating has been overcome unless the deviation casts substantial doubt on the overall validity of the rating.

Overcoming Dr. Rook's DIME opinion, as Applied

H. Table 53 permits the examiner to rate specific disorders of the cervical, thoracic and lumbar spine if the injured person has an intervertebral disc or other soft-tissue lesion which is not operated on, "with medically documented injury and a minimum of six months of medically documented pain and rigidity with or without muscle spasm, associated with none to minimal degenerative changes on structural tests." In *McLane Western Inc. v. Industrial Claims Appeals Office*, 996 P.2d 263 (Colo. App. 1999), the Colorado Court of Appeals held that the *AMA Guides* do not require that the pain and rigidity occur before MMI in order to award a rating under Table 53.

I. The Division of Workers' Compensation Desk Aid #11 for Impairment Rating Tips provides that the Claimant must have *objective* pathology, and impairment that qualifies for a numerical impairment rating of greater than zero under Table 53. Loss of range of motion is applied to the Impairment Rating only once a Table 53 rating has been established. To summarize, if the medical evidence establishes the presence of a specific diagnosis, objective pathology and six months of medically documented pain and rigidity, the claimant is entitled to a Table 53 rating.

J. Dr. Kurz argues for an objective standard as to "rigidity" under Table 53. He also opines that any rigidity under Table 53 not only be of at least 6 months duration, but it must also be of a *permanent* nature. The ALJ does not agree with this interpretation. Table 53(II)(B) does not require - either implicitly or explicitly - that the six months of medically documented rigidity be *objective*. *Bryant v. Transit Mix Concrete*, W.C. No. 5-058-044 (decided June 5, 2019), found that neither the *AMA Guides* nor Desk Aid #11 state that there must be six months of medically documented rigidity which must be *objective*. Rather, ICAO's interpretation of "objective pathology" cited to in Desk Aid #11, is that such language is referring to the "identification of a problem, injury, disorder, condition, or disease that can be identified by virtue of objective signs or

analysis". In reversing and remanding this very undersigned ALJ, ICAO found in *Bryant*, that the term "objective pathology" is in addition to the "six months of medically documented pain and rigidity." One trip to the woodshed is sufficient for this ALJ, but thank you anyway for the opportunity.

K. In this case, Claimant demonstrated *rigidity*, in the form of *tightness*, beginning in June of 2017 (as observed by his physical therapist), continuing at least through September of 2018 (as observed by Dr. Abercrombie). Call it 16 months, minimum. In fact, the *tightness* was still observed by the DIME physician in August, 2019. The ALJ concludes that Table 53 does not require such *rigidity* to be *permanent*. Pain was documented since his first visit, up through the DIME examination.

L. Dr. Rook found that there was evidence of an *objective* pathology, by diagnosing myofascial pain syndrome, and likely facet-mediated pain, due to soft tissue damage to Claimant's neck. While such diagnosis was not directly confirmed by the MRI, the ALJ finds that substantial evidence in the medical record still supports such an objective diagnosis, despite the lack of imaging in support.

M. No serious challenge has been made to the range-of-motion figures compiled by Dr. Rook, nor how he reached his combined 13% whole person impairment rating once he determined [correctly, as found by the ALJ] that Table 53 (II)(B) should be applied to Claimant. Any differences in range of motion constitute a mere difference in medical opinion, insufficient to overcome the DIME opinion. The ALJ concludes that the Respondent has failed to overcome Dr. Rook's DIME impairment rating by clear and convincing evidence and that the 13% impairment rating determined by Dr. Rook should stand.

Medical Maintenance Benefits, Generally

N. The Court of Appeals has established a two-step procedure for awarding ongoing medical benefits under *Grover v. Industrial Commission*, 759 P. 2d 705 (Colo. 1988). Citing *Grover*, the Court reaffirmed that "before an order for future medical benefits may be entered there must be substantial evidence in the record to support a determination that future medical treatment will be reasonably necessary to relieve the injured worker from the effects of the work related injury or occupational disease." Thus, Claimant does not have to prove the need for a specific medical benefit and respondents remain free to contest the reasonable necessity of any future treatment, he must prove the probable need for some treatment after MMI due to the work injury. If Claimant reaches this threshold, the court stated, as the second step, that the ALJ should enter "a general order, similar to that described in *Grover*", supra.

Medical Maintenance Benefits, as Applied

O. In this claim, based upon the reports of Dr. Hall and Dr. Finn, the report and testimony of Dr. Rook and the Claimant's testimony as to the improvement he has felt with the ongoing treatment by Dr. Abercrombie and Dr. Finn, the ALJ concludes that

the Claimant has introduced *highly persuasive* evidence to substantiate his claim for post MMI maintenance medical benefits. Indeed, all of the doctors who have seen the Claimant since he was placed at MMI have indicated a need for ongoing medical maintenance treatment. The ALJ concludes such opinions and testimony substantially outweigh the opinions of Dr. Kurz and PA Homberger. Claimant has proven, by a preponderance of the evidence, that he is entitled to ongoing medical maintenance benefits.

Change of Physician, Generally

P. A claimant may not change the physician without the insurer's permission or "upon the proper showing to the division." § 8-43-404(5)(a), C.R.S.; *In Re Tovar*, W.C. No. 4-597- 412 (ICAO, July 24, 2008); *Gianetto Oil Co. v. Industrial Claim Appeals Office*, 931 P.2d570 (Colo. App. 1996). Because § 8-43-404(5)(a), C.R.S. does not define "proper showing" the ALJ has discretionary authority to determine whether the circumstances presented warrant a change of physician. *Jones v. T.T.C. Illinois, Inc.*, W.C. No. 4-503- 150 (ICAO, May 5, 2006). The ALJ's decision regarding a change of physician should consider the claimant's need for reasonable and necessary medical treatment while protecting the respondent's interest in being apprised of the course of treatment for which it may ultimately be liable. *Id.* An ALJ is not required to approve a change of physician simply for personal reasons including a claimant's "mere dissatisfaction" in the provider. *In Re Mark*, W.C. No. 4-570-904 (ICAO, June 19, 2006). Nonetheless, the ALJ is not precluded from considering a claimant's subjective perception of his relationship with the physician. *Gutierrez v. Denver Public Schools*, W.C. No. 4-688- 075 (December 18, 2008).

Change of Physician, as Applied

Q. In this case, Claimant is actually not requesting a formal change in physician, away from Dr. Kurz and PA Homberger at Employer's Occupational Health Clinic, and on to a different ATP. Instead, Claimant argues that Dr. Abercrombie, and also Dr. Finn, by virtue of Dr. Abercrombie's referral therefrom, are now de facto Authorized Treating Physicians. The ALJ finds this reasoning persuasive. According to the sincere and best professional judgment of Dr. Kurz and PA Homberger, there is nothing they can personally offer Claimant at this point. The ALJ agrees that there is no further need for their involvement in Claimant's treatment. Claimant needs continued chiropractic treatment, and in his discretion, facet injections. Both of Employer's providers thought Dr. Abercrombie would be a good choice (and Claimant concurs) to continue with treatment, but they felt that causation was lacking, ergo, Claimant should pay privately. The DIME physician (and ALJ) have now concluded otherwise.

R. Claimant testified that he has no faith in the occupational clinic and P.A. Homberger, as his referral to a specialist was significantly delayed. Nor does he have faith in any care and treatment by Dr. Kurz based upon the one-time examination by Dr. Kurz of the Claimant. In this instance, the ALJ does take note of Claimant's subjective perception of his relationship with Employer's Occupational Clinic, who have stated they

have nothing more to offer him. Dr. Abercrombie, therefore, is an authorized treating chiropractor in this Claimant's claim, and Dr. Abercrombie has referred the Claimant for additional treatment with Dr. Finn. As such there is no need for the ALJ to order a change of physician in this matter. The ALJ concludes that the treatment of this Claimant by Dr. Abercrombie and Dr. Finn, which has been provided since MMI, is reasonably necessary and authorized medical treatment for which the Respondent is responsible for the cost of, pursuant to Section 8-42-101.

ORDER

It is therefore Ordered that:

1. The DIME opinion of Dr. Rook has not been overcome. Claimant's Whole Person Impairment Rating is 13%.
2. Claimant is entitled to *Grover* Medical Maintenance Benefits, payable by Employer.
3. Dr. Abercrombie, and his referrals, including Dr. Finn, are Authorized Treating Providers.
4. Respondents are responsible for payment of all treatment rendered by Dr. Abercrombie and his referrals since MMI.
5. Respondents shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.
6. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures

to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: <http://www.colorado.gov/dpa/oac/forms-WC.htm>. In addition, it is recommended that you send a copy of your Petition to Review to the Colorado Springs OAC via email at oac-csp@state.co.us.

DATED: February 14, 2020

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

- I. Whether Claimant established, by a preponderance of the evidence, that her scheduled impairment should be converted to a whole person.
- II. The extent of Claimant's scheduled or whole person impairment.
- III. Whether Claimant has established, by a preponderance of the evidence, that she is entitled to maintenance medical benefits.

STIPULATIONS

- The parties stipulated that Claimant's average weekly wage is \$890.64.

FINDINGS OF FACT

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

1. Claimant worked for Southern Glazer's Wine and Spirits in the warehouse and "pulled" bottles to fill orders, lifted pallets, and lifted cases. She testified that she did this for 5 years.
2. On December 7, 2017, at approximately 8:15 p.m., Claimant reached down to lift an empty pallet with her left hand. The empty pallet weighed more than she expected and while she was lifting it up she felt something pop in her left wrist and she then had the immediate onset of pain and burning in her left hand.
3. On December 8, 2017, Claimant presented to Concentra and was seen by Dr. Karen Larson. At her initial appointment, Claimant reported that she:

[R]eached down to lift an empty pallet which weighed more than she anticipated and hurt the left wrist. She was using the left hand alone. She felt immediate pain then burning in her hand. She was then unable to grip things after that. The pain is at the base of the thumb and over the anterior wrist. Unable to lift liquor bottles after that.

Claimant also complained of throbbing pain that went up to her elbow, as well as some swelling of her hand.

Dr. Larson provided Claimant work restrictions, and prescribed physical therapy, ibuprofen for swelling and pain, and a wrist splint. She also requested Claimant to follow up for recheck before returning to work on Monday night.

4. Claimant continued treating with Dr. Larson, and she became Claimant's primary treating physician for her work injury.
5. On January 5, 2018, Claimant returned to see Dr. Larson. At that time, her assessment of Claimant's condition included i) Left thumb sprain, ii) Left wrist sprain, and iii) tenosynovitis, de Quervain. However, Claimant had continued pain, tenderness, and limited range of motion. Therefore, because Claimant had not improved, she ordered an MRI, required Claimant to continue wearing her splint at all times, and to also use a sling. (*Ex 1, p. 23*)
6. On January 16, 2018, Claimant underwent an MRI. The MRI report indicated the following:
 - i. Constellation of findings consistent with ulnar abutment syndrome resulting in moderate grade partial thickness tear of the TFC.
 - ii. Mild to moderate osteoarthritis of the first carpometacarpal joint.
(*Exhibit 2, p. 60*)
7. On January 19, 2018, Claimant returned to Dr. Larson. Claimant had continued pain and limited grip strength. Dr. Larson also reviewed the MRI report which indicated Claimant also had a tear of her triangular fibrocartilage complex (TFCC). Therefore, she referred Claimant to Dr. Bierbrauer, a hand specialist.
8. On January 25, 2018, Claimant was evaluated by Dr. Bierbrauer. Upon physical examination, Dr. Bierbrauer noted Claimant was tender over the extensor carpi ulnaris tendon and the radial styloid. He further noted that Claimant had a positive Finkelstein's maneuver. He also reviewed the MRI. It was his assessment that the MRI demonstrated degenerative changes of the TFCC consistent with Claimant's age and use with no evidence of an acute traumatic event to the TFCC. However, he also diagnosed Claimant was suffering from Kienbock's disease of the lunate.
9. Dr. Bierbrauer concluded that:

In my judgment, the patient has left wrist Kienbock's disease, although this is likely chronic and not related to her most recent injury. In addition, she has a new onset ulnar and radial-sided wrist pain consistent with both the extensor carpi ulnaris tendonitis and de Quervain's tendonitis. I suggested injections for both of these tendonitis issues and she agrees.
10. On February 8, 2018, Claimant returned to Dr. Bierbrauer and reported no relief from the injections. Claimant still had pain and limited range of motion. Based on Claimant's lack of response to the injections, Dr. Bierbrauer concluded the following:

In my judgment, the patient's chronic left wrist pain. It is seeming more likely that the symptoms are coming from her Kienbock's disease. Unfortunately, given her lack of any significant ulnar positive or negative variance and lack of significant collapse of the lunate, I do not really have any

further surgical options for her. Although core decompression of the radius is possible, this reads like necessary surgery or surgery for surgery sake and there is no direct correlation between core decompression of the radius and lunate improvement with Kienbock's disease. The disease likely has a self-sustaining course either towards improvement or towards worsening regardless of any further surgical intervention at this time given the unusual variance of her DRUJ.

He further concluded that a second opinion might be warranted with someone else who might be able to find something that he cannot. But, in his opinion, he did not think Claimant required, or would benefit from, surgical intervention at this time. He further concluded that job retraining may be helpful since continued physical labor might make it worse. (*Ex. 3, pp. 61-62*)

11. On June 11, 2018, Claimant was evaluated by another hand specialist, Dr. Kulvinder Sachar, for a second opinion. It does not appear that he had Dr. Bierbrauer's report and diagnosis of Kienbock's disease. Based on his evaluation of Claimant and review of her MRI films, Dr. Sachar thought the MRI findings were more consistent with ulnocarpal impaction syndrome. However, Dr. Sachar could not provide a firm diagnosis because Claimant's anatomic abnormalities were not consistent with her clinical complaints. Therefore, based on his inability to provide a firm diagnosis, and Claimant's lack of any response to the prior injection performed by Dr. Bierbrauer, Dr. Kulvinder did not think Claimant was a surgical candidate.
12. On July 19, 2018, in anticipation of being placed at MMI, Claimant underwent a functional capacities evaluation (FCE) at Select Physical Therapy. (*Cl. Ex. 5*) The FCE lasted three hours. Based on Claimant's performance during the FCE, it was concluded that Claimant exhibited consistent performance throughout the evaluation. It was further concluded that Claimant's consistent performance during the FCE, combined with her physiologic responses (heart rate and respiratory rate), movement and muscle recruitment patterns, and both aware and unaware observation, the results of the FCE were considered to be an accurate representation of Claimant's functional abilities. Based on the FCE, it was concluded that Claimant's remaining left handed grip strength was negligible. (*Ex 5, pp. 72-74*) Based on the results of the FCE, the physical therapist reported that Claimant will need modification of her activities of daily living including "dressing, grooming, bathing, hygiene, cooking, laundry, only using right hand for these activities." (*Ex. 5, p. 68*)
13. Consistent with the findings of the FCE, Claimant testified that her activities of daily living, such as dressing, grooming, bathing, hygiene, cooking, and laundry have to be done with her right hand only. She also testified that she has a difficult time zipping clothes, using buttons, tying her shoes, and cutting her food.
14. On July 24, 2018, Dr. Larson placed Claimant at MMI. Based on her evaluation and examination of Claimant, she provided Claimant 43% impairment rating of the left

upper extremity, or 26% whole person.¹ She noted that Dr. Sachar had not recommended a fusion of the left wrist because adding this to the right wrist fusion would “essentially leave her completely disabled.” (*Ex. 1, p. 1*) In assessing Claimant’s impairment, Dr. Larson assigned an impairment rating for both abnormal wrist motion as well as decreased grip strength.

15. Given the number of times Dr. Larson saw and evaluated Claimant, combined with the fact that she had an FCE performed which also documented Claimant’s limited grip strength, and the FCE was found to be valid, Dr. Larson’s assessment of the degree of Claimant’s decreased grip strength, and decision to rate it, is found to be reasonable and supported by the overall medical record. Therefore, the ALJ finds Dr. Larson’s opinion regarding the Claimant’s overall impairment rating to be credible and persuasive.
16. Claimant was being prescribed Tramadol for pain by Dr. Larson. She testified that Dr. Larson told her that she would have to get her pain medication from the VA after she was placed at MMI. Claimant said that there was no difference between her pain levels pre MMI and post MMI. Moreover, Dr. Larson prescribed Claimant Tramadol in her final visit with the Claimant on July 24, 2018. In addition, in the FCE, Claimant’s pain was reported at 9.5 at worst and 6 at best. Claimant also testified that she has had to seek treatment through the VA for her admitted injury. She stated that they have given her medications and have also provided her a new splint, which she was wearing at the time of the hearing. Thus, Claimant is in need of additional medical treatment to relieve her from the effects of her work injury or prevent further deterioration. Therefore, Claimant is in need of maintenance medical treatment.
17. Respondents did not file a Final Admission of Liability for the impairment rating provided by Dr. Larson. Instead they timely requested a Colorado Department of Labor Independent Medical Exam. Dr. Stanley Ginsburg was chosen as the physician.
18. The DIME took place on January 3, 2019 with Dr. Ginsburg. Dr. Ginsburg indicated in his exam that Claimant noted that at rest, there was a throbbing in her wrist, fingers and forearm. (*Ex 7, p. 116*) He also indicated Claimant had a prior work related injury to her right wrist that resulted in a fusion in 1987. Dr. Ginsburg pointed out the FCE that was done on July 18, 2019 demonstrated that she “was unable to use her left hand for any bilateral lifting or unilateral left hand carrying. (*Ex 7. p. 119*) He agreed with the determination that Claimant reached maximum medical improvement. In assessing Claimant’s impairment, he provided Claimant a 19% wrist impairment rating for abnormal range of motion and an additional 4% for impairment to her ulnar nerve, which combined to a 22% upper extremity impairment, or 13% whole person impairment. (*Ex. 7*) However, it appears he had a difficult time fully examining Claimant’s wrist and hand due to severe pain complaints

¹ The parties agreed at hearing that Dr. Larson made an error in her conversion and that the actual whole person conversion of 43% upper extremity should be 23%. However, Claimant, in her proposed order indicates that after further review, the parties have agreed that the original rating of 26% was the correct conversion.

and the fact that Claimant often pulled away while he was trying to perform his examination. Based on his inability to perform a complete examination, he merely noted that Claimant's "Grip seemed equal bilaterally" and did not provide Claimant a rating for her decreased grip strength in the same manner as Dr. Larson.

19. Dr. Ginsburg also indicated that there was no need for future medical treatment, despite Dr. Larson prescribing Claimant Tramadol when placing Claimant at MMI and Claimant's ongoing pain complaints. Moreover, Dr. Ginsburg indicated that Claimant should return to the VA for treatment for her left wrist.
20. Respondents filed a Final Admission of Liability for the upper extremity rating of 22% of Dr. Ginsburg on March 19, 2019. Respondents did not admit for treatment after the date of MMI.
21. Claimant testified that Dr. Ginsburg did not do any testing of her wrist or hand at the time of his exam. She further testified that he did not use any instrument to measure her range of motion. She stated that it was her opinion that Dr. Larson was more thorough and also had known her and examined her for other injuries prior to this claim. She further testified that Dr. Larson did use an instrument to measure range of motion. However, Dr. Ginsburg's impairment rating worksheet was included as part of his DIME report and it does contain range of motion measurements regarding Claimant's left wrist and such measurements are different than those recorded by Dr. Larson. Therefore, it appears Dr. Ginsburg did perform range of motion measurements and did not merely adopt another physician's range of motion measurements.
22. The primary difference between the rating provided by Dr. Larson and the rating provided by Dr. Ginsburg is that Dr. Larson provided Claimant a rating for her decreased grip strength and Dr. Ginsburg decided to rate any decrease in grip strength or hand weakness via an ulnar nerve rating.
23. Claimant timely objected and filed an Application for Hearing.
24. Claimant's testimony, as well as her statements contained in the medical records, are found to be credible regarding her ongoing pain, limitations in performing her activities of daily living, and her restrictions. Thus, the injury to Claimant's left wrist is disabling. And, the resulting disability is more significant due to her preexisting disability involving her right wrist. However, her functional impairment is limited to her left hand and wrist and does not extend beyond the shoulder. Therefore, Claimant's functional impairment is on the schedule.

CONCLUSIONS OF LAW

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

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder has considered, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *CJI*, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Claimant established, by a preponderance of the evidence, that her scheduled impairment should be converted to a whole person.

Section 8-42-107(1)(a), C.R.S. limits medical impairment benefits to those provided in §8-42-107(2), C.R.S. when a claimant's injury is one enumerated in the schedule of impairments. The schedule includes the loss of an "arm at the shoulder" as

well as the loss of an “arm above the hand including the wrist. See §8-42-107(2)(a) and §8-42-107(2)(a.5), C.R.S.

When an injury results in a permanent medical impairment not set forth on a schedule of impairments, an employee is entitled to medical impairment benefits paid as a whole person. See §8-42-107(8)(c), C.R.S. Therefore, the dispositive issue is whether Claimant has sustained a functional impairment to a portion of the body listed on the schedule of impairments. See *Strauch v. PSL Swedish Healthcare*, 917 P.2d 366, 368 (Colo. App. 1996). Whether Claimant has suffered the loss of an arm at the shoulder under §8-42-107(2)(a), or a loss of an arm above the hand including the wrist under §8-42-107(2)(a.5), or a whole person medical impairment compensable under §8-42-107(8)(c), is determined on a case-by-case basis. See *DeLaney v. Industrial Claim Appeals Office*, 30 P.3d 691, 693 (Colo. App. 2000).

The Judge must thus determine the situs of Claimant’s “functional impairment.” *Velasquez v. UPS*, W.C. No. 4-573-459 (ICAO Apr. 13, 2006). The situs of the functional impairment is not necessarily the site of the injury. See *In re Hamrick*, W.C. No. 4-868-996-01 (ICAO, Feb. 1, 2016); *In re Zimdars*, W.C. No. 4-922-066-04 (ICAO, Feb. 4, 2015). Pain and discomfort that limit Claimant’s ability to use a portion of the body is considered functional impairment for purposes of determining whether an injury is off the schedule of impairments. *In re Johnson –Wood*, W.C. No. 4-536-198 (ICAO, June 20, 2005); *Vargas v. Excel Corp.*, W.C. 4-551-161 (ICAO, Apr. 21, 2005). However, the mere presence of pain in a portion of the body beyond the schedule does not require a finding that the pain represents a functional impairment. *Lovett v. Big Lots*, WC 4-657-285 (ICAO, Nov. 16, 2007); *O’Connell v. Don’s Masonry*, W.C. 4-609-719 (ICAO, Dec. 28, 2006).

Moreover, although the opinions and findings of the DIME physician may be relevant to this determination, the ALJ is not required to afford it any special weight. See *Delaney v. Industrial Claim Appeals Office*, 30 P.3d 691 (Colo. App. 2000). It is only after the ALJ determines Claimant sustained whole person impairment that the DIME physician’s rating becomes entitled to presumptive effect under § 8-42-107(8)(c), C.R.S. 2001. See *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998) (DIME provisions do not apply to the rating of scheduled injuries).

In order to determine whether Claimant’s rating is on the schedule or not, the focus is on the location of the functional impairment that was caused by the accident and the resulting injury. As found, Claimant’s functional impairment is limited to her left hand and wrist. The fact that Claimant has difficulties performing activities of daily living, such as dressing, grooming, bathing, hygiene, cooking, laundry, and work activities does not establish Claimant has functional impairment beyond the arm at the shoulder in this case. Moreover, the fact that Claimant has a difficult time zipping clothes, using buttons, tying her shoes, cutting her food and working because of her work injury to her left wrist does not establish Claimant has functional impairment beyond the schedule in this case.

The ALJ is mindful that Claimant’s disability is significant. However, conversion of a scheduled rating is not based on the extent of the disability caused by the work injury, but rather the location of the underlying functional impairment of the anatomical

structures or body systems that were altered by the injury. And, as found in this case, Claimant's functional impairment is limited to her left hand and wrist. Consequently, based on the totality of the evidence, Claimant has failed to establish by a preponderance of the evidence that her wrist injury has resulted in functional impairment that is beyond the schedule and should be converted to a whole person rating.

II. The extent of Claimant's scheduled impairment.

Claimant has the burden of showing the extent of her scheduled impairment by a preponderance of the evidence. *Burciaga v. AMB Janitorial Services, Inc. and Indemnity Care ESIS Inc.*, W.C. No. 4-777-882 (ICAO, Nov. 5, 2010); *Maestas v. American Furniture Warehouse and G.E. Young and Company*, W.C. No. 4-662-369 (ICAO, June 5, 2007).

The increased burden of proof required by the DIME procedures is not applicable to scheduled injuries. Section 8-42-107(8)(a), C.R.S. states that "when an injury results in permanent medical impairment not set forth in the schedule in subsection (2) of this section, the employee shall be limited to medical impairment benefits calculated as provided in this subsection (8)." Therefore, the procedures set forth in §8-42-107(8)(c), C.R.S., which provide that the DIME findings must be overcome by clear and convincing evidence, are applicable only to non-scheduled injuries. The court of appeals has explained that scheduled and non-scheduled impairments are treated differently under the Act for purposes of determining permanent disability benefits. Specifically, the procedures of §8-42-107(8)(c), C.R.S. only apply to non-scheduled impairments. *Delaney v. Industrial Claim Appeals Office*, 30 P.3d 691, 693 (Colo. App. 2000); *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998); *Gagnon v. Westward Dough Operating CO. D/B/A Krispy Kreme* W.C. No. 4-971-646-03 (ICAO, Feb. 6, 2018).

As found, on July 24, 2018, Dr. Larson placed Claimant at MMI. Based on her evaluation and examination of Claimant, she provided Claimant a 43% impairment rating of the left upper extremity, or 26% whole person. In assessing Claimant's impairment, Dr. Larson assigned an impairment rating for both abnormal wrist motion as well as decreased grip strength. Given the number of times Dr. Larson saw and evaluated Claimant, combined with the fact that she had an FCE performed which also documented Claimant's limited grip strength, and the FCE was found to be valid, Dr. Larson's assessment of the degree of Claimant's decreased grip strength, and decision to rate it, is found to be reasonable and persuasive since it is supported by the overall medical record. Dr. Ginsburg, however, seemed to dismiss Claimant's limited grip strength due to his inability to fully evaluate Claimant's left hand and wrist due to severe pain and the fact that Claimant would often pull away during the examination. Therefore, the ALJ credits and finds Dr. Larson's opinion regarding the Claimant's overall impairment rating to be more credible and persuasive when compared to Dr. Ginsburg's.

The ALJ finds and concludes Claimant established by a preponderance of the evidence that she sustained a 43% scheduled impairment to her left upper extremity due to her work injury.

III. Whether Claimant has established, by a preponderance of the evidence, that she is entitled to maintenance medical benefits.

The need for medical treatment may extend beyond the point of MMI where Claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of her condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Hanna v. Print Expeditors Inc.*, 77 P.3d 863, 865 (Colo. App. 2003); *Hobirk v. Colorado Springs School District #11*, W.C. No. 4-835-556-01 (ICAO, Nov. 15, 2012). An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that the claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1999); *Hastings v. Excel Electric*, W. C. No. 4-471-818 (ICAO, May 16, 2002). Claimant must prove entitlement to *Grover* medical benefits by a preponderance of the evidence. *Lerner v. Wal-Mart Stores, Inc.*, 865 P.2d 915 (Colo. App. 1993); *Mitchem v. Donut Haus*, W.C. No. 4-785-078-03 (ICAO, Dec. 28, 2015). An award of *Grover* medical benefits should be general in nature. *Hanna v. Print Expeditors Inc.*, 77 P.3d 863 (Colo. App. 2003); *Anderson v. SOS Staffing Services*, W. C. No. 4-543-730, (ICAO, July 14, 2006).

As found, Claimant was being prescribed Tramadol for pain by Dr. Larson before being placed at MMI. Moreover, on the date she was placed at MMI, Dr. Larson prescribed Claimant Tramadol to continue taking after she was placed at MMI. Moreover, in the FCE, Claimant's pain was reported at 9.5 at worst and 6 at best. Claimant also credibly testified that she has had to seek treatment through the VA for her admitted injury and that they have prescribed her medications and also provided her a new splint, which she was wearing at the time of the hearing. Thus, Claimant is in need of additional medical treatment to relieve her from the effects of her work injury or prevent further deterioration.

Therefore, Claimant established by a preponderance of the evidence that she is in need of future medical treatment to relieve her from the effects of her work injury and to prevent further deterioration of her condition. Thus, Claimant established she is entitled to maintenance medical treatment.

ORDER

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

1. Claimant's injury resulted in a functional impairment that is set forth on the schedule within the meaning of section 8-42-107(2)(a).

2. Claimant's request to convert her scheduled rating to a whole person rating is denied and dismissed.
3. Claimant's injury resulted in a 43% scheduled impairment. Respondents shall pay Claimant medical impairment benefits based upon a 43% scheduled impairment of her left upper extremity.
4. Claimant's request for a general award of maintenance medical treatment is granted.
5. Issues not expressly decided herein are reserved to the parties for future determination.

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

DATED: February 20, 2020.

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- I. Whether Claimant has presented any issues that are not jurisdictionally barred.
- II. Whether Respondents may claim an overpayment in the amount of \$198,620.48.
- III. What terms of repayment, if any, should be ordered.

FINDINGS OF FACT

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

1. Claimant sustained an admitted work related injury on September 10, 2012.
2. On May 31, 2019, respondents filed a final admission of liability following the completion of a Division IME. In that Final Admission of Liability respondents admitted for the following benefits:
 - TTD benefits from 12.19.12 – 11.11.13 in the amount of \$35,663.44.
 - Medical benefits in the amount of \$29,964.27.
 - PPD for an 18% scheduled impairment rating in the amount of \$9,995.73.
 - Disfigurement benefits in the amount of \$1,000.
 - AWW of \$1,141.67.
 - MMI date of 11.12.13 as found by Division IME Physician Stephen Lindenbaum.
 - All other benefits not specifically admitted were noted to be denied.

See, Respondents' Exhibit L.
3. In the May 31, 2019, Final Admission of Liability, Respondents also asserted an overpayment in the amount of \$198,620.48. *See Respondents' Exhibit L.*
4. On July 25, 2019, claimant filed an application for hearing endorsing the following issues:
 - Compensability
 - Medical benefits including authorized provider and reasonable and necessary.
 - AWW

- Disfigurement
- PTD
- Penalties

See, Respondents' Exhibit M.

5. Claimant's July 25, 2019 application for hearing was struck for discovery violations pursuant to a prehearing conference order entered by PALJ John H. Sandberg on August 27, 2019. *See, Respondents' Exhibit O.*
6. Claimant thereafter filed a subsequent application for hearing on September 17, 2019, endorsing the same issues as in the July 25, 2019 application for hearing, but limiting the penalty allegation to the following:

Fraud, supervisor Ron [Redacted], Hector [Redacted] [sic], [Redacted], [Redacted] ie: changing medical records/documents ie; dates and times on x-ray films. I have no proof of this but that's what took place!! [sic] have courtroom testimony, If [sic] we ever get to court, I will explain the ugly, egregious actions of workers comp. doctors injured workers are subject to by this work com. system.

See, Respondents' Exhibit P.

7. This hearing then proceeded on January 21, 2020, at which time Respondents raised a jurisdictional argument, noting that the claim was now closed whereas Claimant had not timely filed his application for hearing as required by C.R.S. As such, Respondents argued that all issues endorsed by Claimant on both the July 25, 2019 application for hearing and the September 17, 2019 application for hearing were closed as a matter of law and that the Office of Administrative Courts and this ALJ did not have jurisdiction to hear the issues Claimant endorsed.
8. Claimant was heard on this issue, and this ALJ advised Claimant that he was proceeding *pro se* and offered Claimant the opportunity to seek counsel, which he declined. Claimant was further advised that this ALJ was required to hold Claimant to the same standards of law and procedure as an attorney even though he was proceeding *pro se*.
9. Claimant was permitted to present argument and addressed various inequities he believed existed in the workers' compensation system.
10. In their October 11, 2019 response to application for hearing, Respondents endorsed the additional issue of an overpayment that had been documented in the May 31, 2019 final admission of liability. *See, Respondents' Exhibit R.* At hearing Respondents noted that they wanted to proceed to address the overpayment issue since the one year statutory limitation was approaching in May of 2020. That overpayment was specifically related to the continuance of TTD payments made to claimant after the Division IME's date of MMI, November 12, 2013. The overpayment totaled \$198,620.48.
11. At hearing claims representative, Debra [Redacted] testified as to the calculation of

the overpayment, the reason for the overpayment, and the authenticity of the payment history records submitted by Respondents at Respondents' Exhibit S. That testimony and the payment history establishes that Claimant was overpaid in TTD benefits by \$198,620.48 after offsets were taken for his admitted PPD award.

12. Claimant testified as to his income and other available resources to repay the overpayment. Claimant testified that at this time he does not have any additional funds to make any repayment and was currently living in his RV and getting food assistance from shelters in order to survive.
13. Claimant testified that he has not worked since the industrial injury, but that he does receive social security benefits, which he estimated to be approximately \$1,100.00 to \$1,200.00 per month.
14. Claimant also testified that his monthly expenses exceed his monthly social security benefits. Claimant estimated some of his monthly expenses are as follows:
 - Mobile home – RV – space is \$500.00 per month during the winter months and \$1,000.00 per month during the summer months. Therefore, the average monthly rental fee to park and live in his RV is \$750.00.
 - Propane for his RV runs between \$120.00 and \$200.00 per month, but yet that cost is dependent upon whether he runs his furnace in the winter, which is currently broken.
 - His monthly gas expenses for his Chevy Tahoe truck average \$400.00 to \$550.00 per month and his insurance is approximately \$100.00 per month.
 - Costs associated with maintaining his truck and RV vary and he makes repairs when necessary and when he has the money. For example, last year he purchased new tires for \$1,200. He also spent \$120.00 for new brake pads and calipers for one wheel, since he could not afford to fix all of them.
15. Claimant's monthly expenses exceed his monthly social security benefits before the cost of food is taken into consideration.
16. Claimant also testified that because his monthly expenses exceed his monthly income, he relies upon food assistance from shelters for food.
17. Claimant also testified that since he has been unable to work since his industrial injury, and that his income is limited to his social security benefits, he has had to sell off certain items of personal property to help make ends meet.
18. The ALJ finds Claimant's testimony regarding his current financial situation at this time to be credible and persuasive regarding his inability to repay the overpayment.
19. Claimant's date of birth is February 15, 1954. Therefore, as of the date of this Order, Claimant is 66-years-old.
20. Based on Claimant's financial situation at this time, Claimant does not have sufficient income or resources to pay back the overpayment. Moreover, Claimant does not have sufficient income or resources at this time from which the ALJ can fashion a reasonable payment plan for Claimant to pay back the overpayment. Lastly, there is no indication Claimant's financial situation is expected to improve in

the near future. Therefore, Claimant lacks the ability to repay the overpayment at this time.

CONCLUSIONS OF LAW

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

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

Issues Raised at Hearing

An uncontested final admission of liability automatically closes a case “as to the issues admitted in the final admission.” C.R.S. 8-43-203(2)(b)(II). Accordingly, the failure to properly contest a final admission of liability closes the claim on all admitted issues. *Dyrkopp v. ICAO*, 30 P.3d 821(Colo. App. 2001).

Courts have treated provisions for objecting to and contesting a final admission as jurisdictional. *Roddam v. Rocky Mountain Recycling*, W.C. No. 4-367-003 (ICAO, Jan. 24, 2005) (citing *Town of Ignacio v. Indus. Claim Appeals Office*, 70 P.3d 513 (Colo. App. 2002); *Dalco Industries, Inc. v. Garcia*, 867 P.2d 156 (Colo. App. 1993).

In *Peregoy v. Indus. Claim Appeals Office*, 87 P.3d 261 (Colo. App. 2004), the Court stated that “we conclude that a claimant has thirty days after the date an employer files an FAL to file an application for hearing...” *Id.* at 264. If the claimant does not do so, the issues admitted in the final admission are closed. *Id.* See also *Berg v. Indus. Claim Appeals Office*, 128 P.3d 270 (Colo. App. No. 04CA1130, August 11, 2005) (case automatically closes unless claimant files an objection to the final admission within thirty days and requests a hearing on any disputed issues that are ripe); *Newbrey v. Valley Excavating, Inc.*, W.C. No. 4535.529 (ICAO, Jan. 18, 2006).

Claimant can be barred from pursuing additional compensation after a final admission of all liability if a timely objection and application for hearing on the issues is not filed. C.R.S. § 8-43-203 (2) (b) (II). *Peregoy v. ICAO*, 87 P.3d 261 (Colo. App. 2004). That statute puts it in these terms: “the claimant may contest this admission if the claimant feels entitled to more compensation.” If the claimant does not do so in a timely manner, “the case will be automatically closed as to the issues admitted.” *Id.*; see, e.g. *Heib v. Devereux Cleo Wallace*, W.C. No. 4-626-898 (ICAO March 15, 2017). “Applying time limits to a claimant’s right to contest closure is rational and advances that purpose.” [emphasis supplied] *Olivas-Soto v. ICAO*, 143 P.3d 1178 (Colo. App. 2006), citing *Peregoy, supra*.

“An issue is ripe for hearing when it is real, immediate, and fit for adjudication.” *Youngs v. Industrial Claim Appeals Office*, 297 P.3d 964, 969 (Colo.App. 2012) (quoting *Olivas-Soto v. Industrial Claim Appeals Office*, 143 P.3d 1178 (Colo.App. 2006). The term “fit for adjudication” refers to a disputed issue concerning which there is no legal impediment to immediate adjudication. See *Maestas v. Wal Mart Stores, Inc.*, W.C. 4-717-132 (Jan. 22, 2009) (quoting *Olivas-Soto v. Genesis Consolidated Services*, W. C. No. 4-518-876) (November 02, 2005), *affd Olivas-Soto v. Industrial Claim Appeals Office, supra*)).” *McMeekin v. Memorial Gardens and Reliance National Indemnity*, W.C. No, 4-384-910 (September 30, 2014).

In *Dyrkopp v. Industrial Claim Appeals Office*, 30 P.3d 821, 822 (Colo. App. 2001), the Court of Appeals held that an admission for PPD benefits constitutes an implicit denial of liability for PTD benefits because both types of benefits “compensate for a claimant's permanent loss of earning capacity.”

Moreover, section 8-43-203 (2) (b) (II) is part of a statutory scheme designed to promote, encourage, and ensure prompt payment of compensation to an injured worker without the necessity of a formal administrative determination in cases not presenting a

legitimate controversy. *Dyrkopp v. Industrial Claim Appeals Office* 30 P.3d 821(Colo. App. 2001); *Cibola Construction v. Industrial Claim Appeals Office*, 971 P.2d 666 (Colo. App. 1998). An order, whether resulting from an admission, an agreement, or a contested hearing constitutes an "award." Thus, after such an award becomes final by the exhaustion of, or the failure to exhaust, review proceedings, no further proceedings to increase or decrease any such benefits beyond those granted by the order are authorized, unless there is an appropriate further order entered directing that those proceedings be reopened. *Brown and Root, Inc. v. Indus. Claim Appeals Office*, 833 P.2d 780, 783 (Colo. App. 1991). The final admissions of liability filed by the respondents were uncontested and the matter was therefore closed." *Feeley v. Century Communications and Sentry Insurance Company*, W.C. No. 4-393-063 (July 6, 2007).

Here, Claimant failed to file his application for hearing until July 25, 2019, 55 days after the final admission of liability was filed. Claimant admitted at hearing that he had failed to timely file the application for hearing.

As for the penalty endorsed by claimant, he did not provide any evidence on this issue that would support a finding of a violation of the Act. "Penalties may be imposed against an employer who '(1) violates any provision of the Act; (2) does any act prohibited by the Act; (3) fails or refuses to perform any duty lawfully mandated within the time prescribed by the director or the Panel; or (4) fails, neglects, or refuses to obey any lawful order of the director or the Panel.'" *Fera v. Indus. Claim Appeals Office of State*, 169 P.3d 231, 234 (Colo. App. 2007), *as modified on denial of reh'g* (June 21, 2007).

Pursuant to the plain language of section 8-43-304(5), C.R.S., "[a] request for penalties shall be filed with the director or administrative law judge within one year after the date that the requesting party first knew or reasonably should have known the facts giving rise to a possible penalty." "Under the plain language of § 8-43-304(5), a request for penalties must be filed within one year of the date a party 'first' knows or reasonably should know 'the facts giving rise to a possible penalty.'" *Spracklin v. Indus. Claim Appeals Office*, 66 P.3d 176, 178 (Colo. App. 2002).

Here, Claimant failed to provide any specific evidence regarding the vague penalty allegation that would support a violation of the Act, or a violation of a duty or order entered by the OAC, the DOWC, the Director or the ICAO Panel. The imaging referred to by claimant, yet not produced, would have occurred over the one year limitation.

Pro se litigants must adhere to the same principles and procedures as those who are qualified to practice law. Further, *pro se* parties must be prepared to accept the consequences of their own tactical and procedural errors. *Manka v. Martin*, 200 Colo. 260, 614 P.2d 875 (1980); *Rosenberg v. Grady*, 843 P.2d 25 (Colo. App. 1992).

Section 8-42-113.5(1)(c), C.R.S. provides that the insurer is authorized to seek an order for repayment of an overpayment, and ALJs are expressly granted authority in § 8-43-207(q), C.R.S., to conduct hearings to "[r]equire repayment of overpayments." In *Simpson v. Industrial Claim Appeals Office*, 219 P.3d 354 (Colo. App. 2009), *rev'd on other grounds*, *Benchmark/Elite, Inc. v. Simpson*, 232 P.3d 777 (Colo. 2010), the Colorado Court of Appeals held that with regard to overpayments, the ALJ has

discretion to fashion a remedy. Further, the ALJ's schedule for recoupment of an overpayment will not be disturbed absent an abuse of discretion. See *Louisiana Pacific Corp. v. Smith*, 881 P.2d 456 (Colo. App. 1994). An abuse of discretion is not shown unless the order is beyond the bounds of reason, as where it is contrary to law or unsupported by the evidence. See *Pizza Hut v. Industrial Claim Appeals Office*, 18 P.3d 867 (Colo. App. 2001).

The Court of Appeals and the ICAO have addressed circumstances of overpayment similar to those in this claim. In *Turner v. Chipolte Mexican Grill*, W.C. No. 4-893-631-07 (February 8, 2018) the claimant was ordered to pay back a \$97,641.12 overpayment that had accrued following a Division IME back date of MMI. The Court of Appeals upheld the ICAO holding in *Turner v. ICAO and Chipolte Mexican Grill*, 18CA0392 (Colo. App. 11.29.18)(not selected for publication).

As was the case in *Turner*, Respondents have established by a preponderance of the evidence in this matter an overpayment for TTD paid after the date of MMI assigned by the Division IME, and as documented in the final admission of liability, in the amount of \$198,620.48. Moreover, since Respondents have established an overpayment, the ALJ must look at fashioning a remedy, such as schedule for recoupment of the overpayment.

However, in this case, the ALJ concludes Claimant established by a preponderance of the evidence that he lacks the financial ability to pay back the overpayment at this time. Moreover, the ALJ concludes that based on Claimant's current financial condition, he also established by a preponderance of the evidence that he lacks the ability to make scheduled payments, in any amount, to pay back the overpayment at this time.

ORDER

IT IS, THEREFORE, ORDERED THAT:

- A. The issues endorsed for hearing by Claimant are dismissed with prejudice for lack of jurisdiction and case closure.
- B. Claimant's allegations related to penalties are dismissed with prejudice based on lack of evidence of a violation, jurisdiction, and case closure.
- C. Respondents' request for an overpayment order is granted. Claimant has been overpaid in the amount of \$198,620.48.
- D. Respondents' request for an order requiring Claimant to repay the overpayment at this time, in some fashion, is denied since Claimant does not have sufficient income or resources at this time to begin paying back the overpayment.
- E. Should Claimant's claim be reopened and he is awarded additional disability benefits, Respondents may seek to recover the overpayment from such benefits.

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

DATED: February 21, 2020.

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-071-467-002**

ISSUES

- Did Claimant prove a basis to amend the admitted average weekly wage (AWW) by a preponderance of the evidence? If so, what is the appropriate AWW?
- Did Claimant prove Respondents should be penalized under § 8-43-304(1) for failing to pay interest on Claimant's PPD award as required by this ALJ's July 18, 2019 Summary Order and § 8-43-410(2)?

FINDINGS OF FACT

1. Claimant suffered an admitted injury on February 3, 2017.
2. Claimant was earning \$22 per hour at the time of his injury. He was paid hourly, every other week. His wages fluctuated based on available work in any week. In the year before the work accident, Claimant's bi-weekly paychecks ranged from a high of \$1,796 and a low of \$946.
3. Respondents calculated the admitted AWW of \$806.75 by averaging Claimant's earnings over the 26 pay periods (52 weeks) before the date of injury.
4. Claimant requests an AWW of \$871.75, based on his earnings in the six weeks before the accident. In the alternative, Claimant requests \$829.12, based on the six weeks before and six weeks after the accident.
5. Claimant failed to prove his AWW is \$871.75 or \$829.12. The admitted AWW of \$806.75 fairly approximates Claimant's earnings at the time of injury and accounts for his injury-related wage loss.
6. Claimant's ATP, Dr. Thomas Centi, placed him at MMI on March 14, 2017 without impairment. Respondents filed a Final Admission of Liability (FAL) on March 22, 2018 based on Dr. Centi's MMI report. Claimant timely objected to the FAL and requested a DIME.
7. Dr. William Watson performed the DIME on September 4, 2018. Dr. Watson determined Claimant reached MMI on March 14, 2017 and was not entitled to an impairment rating. Respondents filed an FAL based on Dr. Watson's DIME report.
8. Claimant applied for a hearing to challenge the DIME's determination regarding impairment. On July 18, 2019, the undersigned ALJ issued a Summary Order finding Claimant overcame the DIME by clear and convincing evidence. The ALJ ordered that "Insurer shall pay Claimant PPD benefits based on an 8% whole person thoracic rating," and "Insurer shall pay Claimant statutory interest of 8% per annum on all benefits not paid when due."

9. On July 26, 2019, Insurer filed an FAL based on the Summary Order. The FAL admitted for an AWW of \$806.75, and \$25,172.42 in PPD benefits from March 14, 2027 (the MMI date) through February 16, 2018. Insurer paid the PPD in a lump sum when it filed the FAL, but specifically denied any interest on the PPD award. Insurer's rationale was set forth in the "Remarks" section as:

Per the attached to Summary Order from ALJ Patrick Spencer, dated 07/18/2019, the injured worker has reached MMI and was awarded an 8% w/p impairment rating. I have also attached the original DIME report from Dr. Watson dated 9-04-2018 that will confirm the MMI date. The Summary Order dated 7-18-2019 also states that the insurer shall pay Claimant statutory interest of 8% per annum on all benefits not paid when due. PPD benefits were not due prior to the 7-18-2019 Summary Order, so no interest admitted or paid pursuant [to] *Dr. Pepper Bottling Co. v. Industrial Commission*, 134 Colo. 238, 301 P.2d 710 (1956) (retroactive compensation due and payable when it is ordered); cited in *Trujillo v. CF&I Steel Corporation*, W.C. 3-516-592 (ICAO March 9, 1987) and *Reed v. City of Colorado Springs*, W.C. No. 4-528-594 (ICAO February 4, 2009).

10. Claimant's PPD benefits were "due" on the date of MMI, and continuing every two weeks through February 16, 2018.

11. Insurer was required to pay the accrued statutory interest no later than Monday, August 19, 2019 (30 days from July 18, 2019 was a Saturday). As of the hearing, Insurer had paid no interest, and no additional evidence was submitted to show they have paid any interest since the hearing. This results in a delay of 187 days through the date of this Order.

12. Claimant proved Insurer should be penalized \$100 per day for violating the July 18, 2019 order to pay interest on the PPD award and for violating § 8-43-410(2). The total penalty is \$18,700 through the date of this order (\$100 x 187 days). The penalty shall continue accruing at the rate of \$100 per day until Insurer pays the interest retroactive to the date of MMI.

CONCLUSIONS OF LAW

A. Average weekly wage

Section 8-42-102(2) provides compensation shall be based on the employee's average weekly earnings "at the time of the injury." The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. But § 8-42-102(3) gives the ALJ wide discretion to "fairly" calculate the employee's AWW in any manner that seems most appropriate under the circumstances. The entire objective of AWW calculation is to arrive at a "fair approximation" of the claimant's actual wage loss and diminished earning capacity because of the industrial injury. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993).

As found, Claimant did not prove a basis to change the admitted AWW of \$806.75. Claimant was an hourly worker whose wages fluctuated based on the work available in any given week. There is no persuasive evidence of a pay raise or other distorting factor that would warrant using only the 6 weeks before the injury as suggested by Claimant. Nor is the ALJ inclined to utilize post-injury wages. This ALJ generally considers the 12 or 16 weeks before the accident to be fairly representative of a claimant's preinjury earnings absent a compelling reason to use a longer or shorter period. But either measure (12 or 16 weeks) results in a lower number than the admitted AWW. Even if we exclude the December 23, 2016 paycheck on the supposition it was distorted by the holidays, the resulting 12-week average would be only slightly different from the admitted AWW. After considering all the evidence presented, the ALJ sees no reason to disturb the admitted AWW of \$806.75.

B. General standards governing penalties

Section 8-43-304(1) provides that an insurer "who violates any provision of [the Workers' Compensation Act], or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or panel, for which no penalty has been specifically provided, or fails, neglects, or refuses to obey any lawful order made by the director," shall be punished by penalties of up to \$1,000 per day.

The assessment of penalties is governed by an objective standard of negligence, and involves a two-step analysis. First, the ALJ must determine whether the insurer or employer violated the Act, a rule, or an order. Second, the ALJ must determine whether the violation was objectively reasonable. *Pioneers Hospital v. Industrial Claim Appeals Office*, 114 P.3d 97 (Colo. App. 2005); *Diversified Veterans Corporate Center v. Hewuse*, 942 P.2d 1312 (Colo. App. 1997); *City Market, Inc. v. Industrial Claim Appeals Office*, 68 P.3d 601 (Colo. App. 2003). An insurer acts unreasonably if it fails to take action that a reasonable insurer would take to comply with the statute, a rule or an order. *Pioneers Hospital, supra*. To be objectively reasonable, an insurer's action (or inaction) must be predicated on "a rational argument based in law or fact." *Diversified Veterans Corporate Center v. Hewuse, supra*. Because the analysis involves an objective standard, the claimant need not show the insurer knew or should have known its actions were unreasonable. *Pueblo School District No. 70 v. Toth*, 924 P.2d 1094 (Colo. App. 1996). All parties are presumed to know the law, and a claimant can establish a *prima facie* showing of unreasonable conduct by proving an insurer violated the statute or a rule of procedure. If the claimant makes a *prima facie* showing, the burden shifts to the respondents to show their conduct was reasonable under the circumstances. *Pioneers Hospital v. Industrial Claim Appeals Office, supra*; *Human Resource Co. v. Industrial Claim Appeals Office*, 984 P.2d 1194 (Colo. App. 1999). To prove a rational basis in law or fact, a party must present admissible evidence, such as sworn testimony or documents; it cannot rest simply on arguments or statements of counsel. *E.g., Kelly v. Kaiser-Hill Company LLC*, W.C. No. 4-332-063 (August 11, 2000)

C. Claimant proved Respondents should be penalized

Claimant argues Respondents should be penalized for violating the July 18, 2018 Summary Order directing Insurer to pay statutory interest on all benefits not paid when due. Nonpayment of interest also implicates § 8-43-410(2), a self-executing provision that requires respondents to “pay interest at the rate of eight percent per annum on all sums not paid upon the date fixed by the award of the director or administrative law judge for the payment thereof.”

As found, Claimant proved Respondents should be penalized because their refusal to pay interest was not objectively reasonable.

The courts long ago decided that past-due benefits were “due” for interest purposes on the date on which the claimant first became entitled to the benefit, not the date of an order after litigation. In *Beatrice Foods Co., Inc. v. Padilla*, 747 P.2d 685 (Colo. App. 1987), the parties had engaged in protracted litigation and appeals regarding whether the claimant could reopen a settlement. Eventually the claimant was awarded past-due TTD benefits with interest retroactive to the date the TTD was originally owed. The respondents appealed the award of interest, but the court affirmed, holding “interest on an award of compensation is a matter of statutory right and applies automatically on the date payment is due.” *Id.* at 687. The court also held that interest must be amortized so “each past due weekly payment accrues interest from the date it was due until the day it was paid.”

Several years later, in *Subsequent Injury Fund v. Industrial Claim Appeals Office*, 899 P.2d 220 (Colo. App. 1994), the court of appeals rejected the argument that interest on a retroactive award should be limited to the date the claimant filed his petition to reopen, as opposed to the date he became disabled. The court noted, “The purpose of § 8-43-410(2) is not to impose a penalty or to award an additional benefit. Instead, the statute is intended to secure to claimants the value of the benefits to which they are entitled. Although here the payment of full benefits was not ordered until after the petition to reopen had been filed, the claimant would not receive the full value of those benefits unless he also received the interest.”

This rule has been applied to TTD, PPD, PTD, and even medical benefits. *Esquibel v. Denver Public Schools*, W.C. No. 4-329-119 (February 11, 1999) (PPD); *Herb v. Mariner Post Acute Network*, W.C. No. 4-496-527 (May 19, 2003) (TTD); *Sallee v. El Paso County School District No. 11*, W.C. No. 3-966-142 (June 13, 1994) (medical bills); *Seeman v. Ouray County*, W.C. No. 3-054-722 (November 16, 1990) (PTD).

The ICAO has repeatedly held that respondents owe interest on PPD benefits retroactive to MMI. There are multiple cases on point, but two decisions are particularly pertinent and persuasive. The facts in *Esquibel v. Denver Public Schools*, W.C. No. 4-329-119 (February 11, 1999) were very similar to Claimant’s case, and also involved PPD benefits awarded by an ALJ after a hearing. The respondents in *Esquibel* had previously paid no PPD benefits because the ATP assigned a zero rating, and the claimant pursued a DIME. The ALJ awarded PPD based on a 9% whole person rating but neglected to

include a clause regarding interest. The claimant argued the ALJ erred by failing to award interest on the PPD benefits “from the date of MMI.” The respondents argued an award of interest was not proper because the ALJ did not “fix the date for the commencement” of PPD benefits. The ICAO agreed with the claimant and held,

Section 8-43-410(2), C.R.S. provides that “an employer shall pay interest at the rate of 8% per annum upon all sums not paid upon the date fixed by the award.” Interest is a statutory right and applies automatically on the date the payment is due. *Beatrice Foods Co., Inc. v. Padilla*, 747 P.2d 685 (Colo. App. 1987). Interest is designed to secure to claimants the value of the benefits to which they are entitled. *Subsequent Injury Fund v. Industrial Claim Appeals Office*, 809 P.2d 1098 (Colo. App. 1991). The date payment is due is the date on which the claimant becomes entitled to the benefits, **not the date of the ALJ’s order**. *Subsequent Injury Fund v. Industrial Claim Appeals Office*, 899 P.2d 220 (Colo. App. 1994); *Fuentez v. Hewlett Packard*, W.C. No. 4-201-920 (December 18, 1998).

Here, the ALJ determined that the claimant reached MMI on May 16, 1994. Consequently, permanent partial disability benefits became due and owing on that date. Section 8-42-107(8)(d), C.R.S.; *Fuentez v. Hewlett Packard*, *supra*. Although the ALJ did not expressly determine a specific date for the commencement of permanent partial disability benefits, that date is determined by operation of law and is implicit in the order. Thus, interest must be awarded on the permanent partial disability benefits commencing May 16, 1994. (Emphasis added).

The ICAO addressed a very similar situation in *Latshaw v. Baker Hughes, Inc.*, W.C. No. 4-842-705-01 (December 17, 2013). In *Latshaw*, the ALJ had ordered the respondents to pay PPD benefits based on an 11% whole person rating plus 8% interest “on compensation benefits not paid when due.” The ICAO rejected the respondents’ appeal regarding the award of interest, using nearly identical language as in *Esquibel*. The Panel also reiterated that PPD benefits “**become due at MMI**, and a, permanent partial disability benefits not paid when due accrued interest at the rate of eight percent per annum.” (Emphasis added).

Numerous other cases affirm benefits are “due” when the claimant first becomes entitled to them, regardless of whether the benefits are ultimately paid voluntarily or under an ALJ order. *E.g.*, *Keel v. Transportation Technology Services*, W.C. No. 4-897-030-02 (April 1, 2014) (“Interest is a statutory right and applies automatically on the date payment is due. The date payment is due is the date on which the claimant becomes entitled to the benefits, and not necessarily the date of the ALJ’s order.”); *see also Herb v. Mariner Post Acute Network*, W.C. No. 4-496-527 (May 19, 2003).

The cases cited by Respondents in the FAL do not support their position. All three cases dealt with timeliness of petitions to reopen, and hinged on interpretation of the phrase “due and payable” in the reopening statute. None involved payment of interest on past-due indemnity benefits. In *Dr. Pepper Bottling Company v. Industrial Commission*,

301 P.2d 710 (Colo. 1956), the court held that the statute of limitations for reopening ran from the date a PPD award was actually paid by the insurer, which, because of litigation, occurred long after the PPD would have paid out had payments commenced on the date of MMI. The court reasoned, *for purposes of the reopening statute*,¹ an award cannot be considered “due and payable,” before any benefits were actually paid to the claimant. *Dr. Pepper* said nothing about interest on an award of past-due PPD, and cannot reasonably be divorced from its context of reopening.

Trujillo v. CF&I Steel Corporation, W.C. No. 3-516-592 (March 9, 1987) addressed the reopening statute of limitations relating to medical benefits. The Panel held that the employer’s voluntary payment for medical treatment constituted an admission that the benefits “became ‘due and payable’ for purposes of the statute of limitations on the date such care was provided. . . . [A]n employer’s voluntary provision of medical care after a case is closed constitutes an admission the claimant was owed such care.” The Panel, in dicta, went on to state that benefits did not become “due and payable” when the claimant asked the employer to provide medical care. The rationale was based on the fact the claim had been closed, so no benefits were due or payable unless the case was reopened. Although *Trujillo* had nothing to do with payment of interest on past-due benefits awarded by an ALJ, it is noteworthy that the Panel considered the benefits “due” on “the date such care was provided,” rather than when claimant asked for it to be covered, or when the employer paid for the care. That supports the general proposition that the “due” date for benefits is not determined by administrative issues or litigation status.

Finally, in *Reed v. City of Colorado Springs*, W.C. No. 4-528-594 (February 4, 2009), the ICAO held that the claimant’s petition to reopen was untimely because it was filed more than six years after the date of injury and more than two years after the last compensation (PPD) became “due or payable.” The Panel noted that the last PPD benefits were due or payable when the PPD award would have paid out under the terms of the FAL (presumably based on the MMI date). The ALJ in *Reed* found the claimant *would have been* entitled to additional PPD benefits based on “conversion,” *except* he had already reached the \$60,000 benefit cap. Thus, no additional PPD was due or payable under the ALJ’s order because the claimant could receive no additional compensation. The Panel did not address whether or when interest would have been payable had the ALJ awarded additional PPD benefits, and the case cannot be fairly read as authority for that issue.

Respondents’ reliance on three cases interpreting an unrelated section of the Act regarding reopening, while ignoring decades of case law directly on point, was not “objectively reasonable.” Respondents’ novel interpretation could have been raised on

¹ The court acknowledged the context of its decision at least three times: “*Certainly under these circumstances, in the absence of an adjudication on any issue of permanent disability, it cannot be said that compensation was due and payable in any amount. Within the meaning of the [reopening] statute, the full sum was due and payable upon the entry of the final order of the commission, and from and after that date the statute of limitations began to run. . . . We hold that a payment of compensation cannot be ‘due and payable’ under the pertinent statute when it has never been considered or ordered by the commission.*” *Id.* at 712 (emphasis added).

appeal of the Summary Order² or in a petition for relief from payment of interest under § 8-43-410(2). But its interpretation does not support the unilateral withholding of interest required by statute and ordered by an ALJ.

Respondents also argue their actions were objectively reasonable because the Summary Order did not explicitly “fix a date upon which such ordered sums became due.” An ALJ’s order need not explicitly “fix” a due date because the due date is determined by statute. Section 8-42-107(8)(d) provides that PPD benefits “shall be paid . . . beginning on the date of maximum medical improvement.” In fact, had the ALJ ordered Claimant’s PPD benefits were originally due on some date *other than MMI*, the order would likely have been reversed on appeal.

The ALJ is not persuaded by Respondents’ argument the Summary Order was “ambiguous” regarding interest. Identical or substantially similar language to the clause in the Summary Order has been routinely included in orders for decades. *E.g., Boring v. King Soopers*, W.C. No. 3-705-514, 3-736-756, 3-758-426 (November 18, 1987). The Order merely recited well-established law that Respondents owe interest on all benefits not paid when due. Claimant would have been entitled to interest even if the Order did not mention it. *E.g., Collett v. Pacesetter Corporation*, W.C. No. 4-414-586 (May 6, 2002) (“interest is a statutory right which automatically applies to an award without any action by the claimant” or the ALJ).

Nor is the ALJ persuaded by Respondents’ reliance on WCRP 5-6(A), which provides that “Benefits awarded by order are due on the date of the order.” This argument is unavailing for several reasons. First, the right to interest on past-due benefits is created by statute, and the Director has no authority to enact rules that contravene the statute. *Monfort Transportation v. Industrial Claim Appeals Office*, 942 P.2d 1358 (Colo. App. 1997). In any event, there is no indication the Division intended to depart from the statute or overrule established case law when enacting Rule 5-6(A). Rather, the first sentence regarding “benefits awarded by order” is simply meant to clarify that insurers or employers must pay all benefits awarded by order *within 30 days of the order*. It does not alter the date those benefits were *originally* “due” for purposes of determining interest owed. Respondents’ proposed interpretation would result in an anomalous situation where a claimant would only receive interest on delayed benefits if paid voluntarily, but never on benefits awarded by an ALJ. That would create a perverse incentive to litigate all benefits to avoid payment of interest. There is no persuasive reason to think the Division intended such a result.

D. Amount of penalties

Although penalties are mandatory when the statutory criteria are met, the ALJ has wide discretion in determining the amount of any penalty. *Crowell v. Industrial Claim Appeals Office*, 298 P.3d 1014 (Colo. App. 2012). Two important purposes of penalties are to punish the violator and deter future misconduct. *May v. Colorado Civil Rights*

² Under CRCP 11(a), arguments must be “warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.”

Commission, 43 P.3d 750 (Colo. App. 2002). The penalty should be sufficient to discourage future violations, but should not be constitutionally excessive or “grossly disproportionate” to the violation found. *Colorado Dept. of Labor & Employment v. Dami*, 442 P.3d 94 (Colo. 2019). When assessing proportionality, the ALJ should “consider whether the gravity of the offense is proportional to the severity of the penalty, considering whether the fine is harsher than fines for comparable offenses in this jurisdiction or than fines for the same offense in other jurisdictions. In considering the severity of the penalty, the ability of the regulated individual or entity to pay is a relevant consideration. And the proportionality analysis should be conducted in reference to the amount of the fine imposed for each offense, not the aggregated total of fines for many offenses.” *Id.* at 103. The ALJ can also consider factors such as the reprehensibility of the conduct involved and the harm to the non-violating party. *Associated Business Products v. Industrial Claim Appeals Office*, 126 P.3d 323 (Colo. App. 2005); *Pueblo School Dist. No. 70 v. Toth*, 924 P.2d 1094 (Colo. App. 1996). Actual prejudice or harm to the claimant is relevant but is not dispositive, particularly where the violation is not explained by the evidence. *Strombitski v. Man Made Pizza, Inc.*, W.C. No. 4-403-661 (July 25, 2005).

The ALJ knows of only one case where penalties were imposed for nonpayment of interest. In *Horton v. Wal-Mart Stores, Inc.*, W.C. No. 4-583-068 (November 5, 2004), the respondents were penalized \$50 per day for failing to timely pay interest on past-due TTD as ordered by an ALJ. The total penalty imposed was \$450 (\$50 x 8 days). In upholding the amount of the penalty, the Panel explained,

[T]he ratio of the amount of the penalty to the amount of interest withheld is roughly 16.5 to 1. While this ratio appears substantial, the daily penalty imposed by the ALJ represents only 10 percent of the maximum daily penalty authorized by § 8-43-304(1). Although the amount of wrongfully withheld interest is small and there is no showing of substantial prejudice to the claimant, the overall impact of the insurer’s conduct could be very significant if it continued delaying interest payments over a long period of time and engaged in such conduct in many cases. Thus, deterrence and punishment considerations support the imposition of the penalty and militates against finding an abuse of discretion. . . . [O]ne of the principal purposes of § 8-43-304(1) is to secure voluntary cooperation with the Act so as to avoid the necessity of litigation.

Moreover, the respondents’ conduct represents disregard of an ALJ’s lawful order to pay interest. Violation of a specific order is an aggravating factor tending to justify a larger penalty than might otherwise be imposed for a late payment.

Applying those factors to Claimant’s case suggests a daily penalty at least as large as that imposed in *Horton*. Insurer is Colorado’s workers’ compensation insurer of last resort,³ and covers more employers than the insurer in *Horton*. A blanket policy by Insurer refusing to pay interest on past-due benefits awarded by ALJs will affect numerous injured

³ Section 8-45-101(2)(f).

workers throughout Colorado. Although Claimant demonstrated no specific harm from the refusal to pay interest, some harm can be presumed based on the time value of money. See *Subsequent Injury Fund v. Industrial Claim Appeals Office*, 899 P.2d 220 (Colo. App. 1994). Claimant has been deprived of several thousand dollars for many months, and Insurer clearly has no intention of voluntarily paying the interest. Forcing Claimant to litigate this issue contravenes the General Assembly's express intent that workers' compensation benefits be delivered quickly and efficiently "without the necessity for any litigation." Moreover, Insurer's refusal to pay interest here is directly contrary to a final order. The workers' compensation system itself is harmed when parties fail to obey lawful orders issued after a full and fair evidentiary hearing. If parties can thumb their noses at ALJ orders with impunity, the integrity of the adjudicative system will be compromised. The ALJ also considers it significant that Respondents avail themselves of other possible remedies, such as appealing the July 18, 2019 order or invoking the statutory procedure to request relief from the obligation to pay interest under § 8-43-410(2).

The law in effect at the time of the *Horton* decision allowed penalties up to \$500 per day. The legislature amended the penalty statute effective August 11, 2010, and doubled the limit to \$1,000 per day. This reflects the General Assembly's intent to increase the level of punishment for those who violate the Act and necessitate litigation. *Associated Business Products v. Industrial Claim Appeals Office*, 126 P.3d 323 (Colo. App. 2005) (discussing 1991 amendment increasing the penalty limit from \$100 to \$500 per day). Accordingly, the ALJ concludes it is appropriate to double the daily penalty imposed in *Horton*, and impose a penalty of \$100 per day for Insurer's failure to pay interest pursuant to the July 18, 2019 Summary Order.

E. Apportionment of penalties

Section 8-43-304(1) provides that penalties shall be apportioned between the aggrieved party and the Colorado Uninsured Employer Fund created in § 8-67-105. The specific apportionment is left to the ALJ's discretion, except the aggrieved party must receive at least 25% of any penalty assessed. As noted previously, many of the factors the ALJ considered in setting the amount of the penalty relate to the need to deter future misconduct, protect injured workers generally, and defend the integrity of the system. In light of those "macro-level" considerations, the ALJ concludes it is appropriate to apportion the penalties 50-50 between Claimant and the Uninsured Employer Fund.

ORDER

It is therefore ordered that:

1. Claimant's request to amend the admitted average weekly wage of \$806.75 is denied and dismissed.
2. Insurer shall pay penalties of \$18,700 from August 19, 2019 through the date of this order. This represents \$100 per day for 187 days. Insurer shall pay fifty percent (50%) of the penalties to Claimant and 50% to the Colorado Uninsured Employer Fund.

3. Insurer shall pay penalties of \$100 per day commencing February 22, 2020 and continuing at the same rate until the unpaid interest on the PPD award retroactive to the date of MMI is paid in full. Insurer shall pay fifty percent (50%) of the penalties to Claimant and 50% to the Colorado uninsured employer fund.

4. Payments for the Colorado Uninsured Employer Fund shall be made payable to the Division of Workers' Compensation and sent to 633 17th Street, 9th Floor, Denver, CO, 80202, Attention: Iliana Gallegos, Revenue Assessment Officer.

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

DATED: February 21, 2020

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-045-590-002**

ISSUES

1. Whether Claimant has produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of Gary Zuehlsdorff, D.O. that he has reached Maximum Medical Improvement (MMI) on August 7, 2018 for his admitted right hip injury.

2. Whether Claimant has presented a preponderance of the evidence that he is entitled to receive Permanent Partial Disability (PPD) benefits for a right knee injury and psychological impairment as a result of his admitted April 30, 2017 right hip injury.

3. Whether Claimant has established by a preponderance of the evidence that he is entitled to receive reasonable, necessary and related medical maintenance benefits designed to relieve the effects of his April 30, 2017 industrial injury or prevent further deterioration of his condition pursuant to *Grover v. Industrial Comm'n.*, 759 P.2d 705 (Colo. 1988).

4. Whether Claimant has proven by a preponderance of evidence that his admitted 18% scheduled right hip rating should be converted to a 10% whole person impairment.

FINDINGS OF FACT

1. Claimant works for Employer in various facilities performing cleanup and snow removal duties. On April 30, 2017 Claimant sustained an admitted work-related injury during the course and scope of his employment. He was specifically shoveling snow when he slipped on ice and fell on his right hip.

2. Claimant was transported by ambulance immediately after the injury on April 30, 2017. Paramedic records note Claimant was walking on the sidewalk when he slipped and fell. He landed on his right leg. Claimant was admitted to St. Anthony's Hospital on April 30, 2017. Records note Claimant was shoveling snow at Red Rocks when he slipped and fell. Right hip and right pelvis x-rays showed a comminuted and angulated proximal metaphyseal fracture with probable interchanteric component. Patrick Joseph McNair, M.D. evaluated Claimant and recommended surgery to repair the fracture.

3. Claimant was hospitalized from April 30, 2017 to May 5, 2017. On May 1, 2017 Dr. McNair performed surgery in the form of an open reduction and internal fixation for Claimant's right femur fracture. After discharge on May 5, 2017 Claimant was transferred to in-patient rehab and remained there until May 11, 2017.

4. X-rays from June 21, 2017 showed the hardware was in place with evidence of callous formation. Dr. McNair determined that Claimant's fracture was well-aligned,

stable, and fixated with the plate and screws in appropriate position. Claimant had early callus formation but not union of the fracture. Claimant reported minimal pain and was non-weight bearing with the assistance of a wheelchair. Dr. McNair noted essentially full range of motion of the hip and knee but there was quad and gastric atrophy. He recommended that Claimant could progress to 50% weight bearing.

5. Claimant again visited Dr. McNair on August 9, 2017. Claimant complained of pain in his right knee and lower back after long days. X-rays revealed that the femoral shaft and peritrochanteric femur fracture were healed. Dr. McNair noted that Claimant was doing remarkably well and ready to begin physical therapy. He remarked that Claimant's right knee pain was coming from a weak quad.

6. On September 19, 2017 Claimant told Authorized Treating Physician (ATP) Kathryn G. Bird, D.O. that he got stiff and tight with sharp pain in his right knee. Claimant's right hip was also sore. Dr. Bird instructed Claimant to continue his physical therapy. She decreased Claimant's restrictions to walking no longer than 20 minutes at a time.

7. On October 4, 2017 Dr. McNair remarked that Claimant was weight bearing without assistive devices for ambulation. Claimant reported a sharp pinching pain on the lateral aspect of his right hip while climbing stairs. Dr. McNair noted persistent quad atrophy that had improved. X-rays reflected a solidly united fracture. Dr. McNair again determined that Claimant's knee pain was related to quad atrophy and would improve with his quad strengthening through therapy. Dr. McNair commented that the hip pinching was due to the hardware and should improve with time. However, in the future Claimant could consider plate removal that would require another six months of recovery.

8. On November 9, 2017 Dr. Bird noted that Claimant reported improvement but continued to limp and experienced pain. He was performing his regular job duties despite restrictions. Dr. Bird commented that Claimant might be released at his next visit after he again visited Dr. McNair. Dr. Bird released Claimant to full duty employment.

9. Dr. Bird examined Claimant again on January 31, 2018. Claimant reported continuing pain, a weak thigh and a limp. Claimant complained that he was not progressing with his therapy at Panther Therapy and his therapy sessions were only 35 minutes. Based on Claimant's complaints, Dr. Bird recommended a series of more aggressive therapy sessions at Concentra. She delayed a determination of Maximum Medical Improvement (MMI) to complete additional therapy. Claimant remained at full duty employment.

10. On February 14, 2018 Claimant commented that his right knee had become more painful. Dr. McNair noted full range of motion of the knee, stable to provocative testing, no lateral joint line tenderness and some medial joint line tenderness. Claimant's hip was tender but had full range of motion and excellent strength. Dr. McNair remarked that Claimant's challenge continued to be strength and fatiguing that created persistent patellofemoral pain. He remarked that Claimant's injury would take two years of recovery or until April 2019 with aggressive therapy.

11. On March 12, 2018 Dr. McNair noted that Claimant's fracture had healed and his remaining symptoms were soft tissue related. Dr. McNair recommended a diagnostic ultrasound to determine if Claimant was having mechanical irritation over the IT band from his plate and whether he should consider hardware removal or injections. Dr. McNair referred Claimant to Scott J. Primack, D.O. for an ultrasound and possible injections.

12. Dr. Primack evaluated Claimant on April 27, 2018. He noted discomfort at the anterior compartment and lateral aspect of the right hip with some knee soreness. He recommended and performed a sonographic analysis for both hips. Based on the analysis Dr. Primack recommended consideration of regenerative medicine in the form of Plasma Rich Protein (PRP) injections. He remarked that the injections would create better muscle contraction at that level of the gluteal musculature.

13. On May 2, 2018 Claimant visited Dr. Bird for an evaluation. Dr. Bird noted that Claimant was quite upset and depressed about his continued pain. Claimant remarked that he had been told he would not be allowed to do more therapy. Dr. Bird explained that they would continue to do therapy as long as he was making functional gains. She recommended anti-depressant medication and visiting a psychologist to develop coping mechanisms. Dr. Bird provided prescriptions for transportation, sertraline and more lidocaine patches.

14. Claimant underwent a right knee MRI on May 18, 2018. The MRI revealed the following: very subtle findings in the medial meniscal body raising suspicion of a possible meniscal tear; additional horizontal peripheral tear at the junction of the body and posterior horn without extension to the meniscal articular surface; focal mild bone marrow edema along the periphery of the medial femoral condyle; and no cruciate or collateral ligament injury.

15. On May 25, 2018 Claimant underwent right hip PRP injections with Dr. Primack. On June 15, 2018 Dr. Primack noted that Claimant had completed a significant amount of rehabilitation. He performed a repeat ultrasound and noted improvement with less fluid. Dr. Primack determined that Claimant was experiencing significant sonographic improvement despite the apparent lack of clinical progress.

16. On July 11, 2018 Dr. Bird noted that Claimant had last visited Dr. Primack three weeks to one month earlier. Based on Dr. Primack's PRP rehab sheet, Claimant was prepared to begin eccentric strengthening exercises for the next six weeks. Dr. Bird referred Claimant to physical therapy based on the post PRP protocol to learn home exercises. Dr. Bird released Claimant to full duty employment.

17. On July 31, 2018 Claimant completed his 34th and final therapy session with Concentra since January 2018. Claimant had "reached 95% of his goals at this visit." He was able to squat with good form, ambulate at work for 30 to 40 minutes, single right leg stand and had begin hopping. Claimant could lift and carry 20 pounds from floor to waist for 30 feet and go up and down stairs. Therapist Peck noted that Claimant was able to return to full work with regular participation in essential job functions.

18. On August 7, 2018 Claimant returned to Dr. Bird for an examination. Dr. Bird concluded that Claimant had reached MMI for his April 30, 2017 work injury. She explained that Claimant returned to functional status but continued to experience pain. Dr. Bird commented that, if Claimant's pain continued, he could again visit Dr. Primack or consider Dr. McNair's other options of a steroid injection or hardware removal. She assigned an 18% scheduled impairment rating for Claimant's right hip. However, Dr. Bird did not comment on the situs of Claimant's functional impairment. Dr. Bird recommended maintenance treatment in the form of visiting Dr. Primack and Dr. McNair for possible injections or hardware removal. She released Claimant to full duty with no permanent restrictions.

19. On October 18, 2018 Respondents filed a Final Admission of Liability (FAL) consistent with Dr. Bird's MMI and impairment determinations.

20. On December 11, 2018 Claimant returned to Dr. McNair for an evaluation. X-rays revealed that Claimant's fracture was fully healed with no evidence of hardware failure. Dr. McNair noted that Claimant had undergone extensive physical therapy. He further remarked that Claimant would always have a right leg that was painful. Dr. McNair recommended three possible treatment options. The first option was to see Dr. Primack again about possible injection therapy and consideration of more physical therapy. The second option was to visit Dr. Ellman for a consultation to check for any type of labral injury to the hip. The third option was plate removal, but Dr. McNair cautioned that it would be six months or longer before the screw holes were solid and stable.

21. On July 5, 2019 Claimant underwent a Division Independent Medical Examination (DIME) with Gary Zuehlsdorff, D.O. Dr. Zuehlsdorff diagnosed Claimant with the following: (1) right lateral hip pain with anterior thigh pain that was most likely consistent with retained hardware irritation; (2) right knee pain syndrome consistent with patellofemoral syndrome from primary gait abnormality secondary chronic hip pain; (3) probable adjustment disorder with anxiety; and (4) diffuse lumbar mechanical back pain likely secondary to gait abnormality.

22. Dr. Zuehlsdorff agreed with Dr. Bird that Claimant had reached MMI on August 7, 2018. He specifically commented, "I would concur and hold to the date of MMI, at least at this time, as given originally by Dr. Bird of 08/07/2018." Dr. Zuehlsdorff later detailed:

As I stated above, I would hold to Dr. Bird's date of MMI; however, if he goes onward to another surgery, MMI would have to be rescinded at that time until he hit MMI post the second surgery. However, I would hold to MMI at this time concurrent with the original date of 08/07/2018, given the above.

Dr. Zuehlsdorff further discussed a possible second surgery for hardware removal.

23. Dr. Zuehlsdorff assigned Claimant a 24% lower extremity impairment for his right hip. The impairment converts to 10% whole person rating. Dr. Zuehlsdorff did not address the situs of Claimant's right hip functional impairment. He also did not provide

impairment ratings for Claimant's knee, lumbar spine or psychological issues. Dr. Zuehlsdorff specifically stated "[w]ith regard to the knee, I see no impairable entity or diagnosis at this time...[w]ith regard to the back, again, I see no impairable entity here."

24. Dr. Zuehlsdorff recommended medical maintenance treatment. The recommendations included a hip joint MRI and psychological care with consideration of psychotropic medication and counseling. Dr. Zuehlsdorff also suggested additional therapy to treat Claimant's knee pain, lumbar symptoms and gait abnormality. He discussed that Claimant would most likely require a second surgery for hardware removal in the future.

25. Respondents filed a FAL on June 26, 2019 consistent with Dr. Zuehlsdorff's August 7, 2018 MMI determination and 24% lower extremity impairment rating. The FAL also acknowledged maintenance treatment based on Dr. Zuehlsdorff's DIME report.

26. On September 20, 2019 Claimant visited Sander Orent, M.D. for an independent medical examination. Claimant reported continued pain in the hip, back, knee and anterior thigh at the location of the implanted hardware designed to stabilize the femur. On physical examination, Dr. Orent noted tenderness in Claimant's knee and thigh, with restricted range of motion in the lumbar region. Dr. Orent explained that Claimant's treatment was incomplete and he had not reached MMI. Dr. Orent recommended a second orthopedic opinion regarding removal of the hardware or pain management. He recommended an injection for the right hip and treatment for the right knee. Dr. Orent also suggested psychological treatment. He thus explained that Dr. Zuehlsdorff erroneously failed to provide an impairment rating for Claimant's right knee and psychological symptoms. He did not discuss the situs of functional impairment for Claimant's hip injury.

27. From August 2018 until January 2020 Claimant did not obtain maintenance medical treatment at Concentra. Claimant visited Dr. Bird at Concentra in January 2020 to discuss recommended psychological treatment. Dr. Bird mentioned placing a referral for Claimant to visit a psychologist.

28. Claimant testified at the hearing in this matter. He explained that he continues to have a significant limp. Claimant remarked that he still has significant problems with stairs and cannot return to many of his prior activities. He commented that, although Dr. Bird released him to full duty with no restrictions, he is unable to perform his job duties. Claimant noted Employer has prohibited him from shoveling snow.

29. Claimant has failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Zuehlsdorff that he reached MMI on August 7, 2018 for his admitted right hip injury. Initially, Claimant suffered an admitted right hip injury when he slipped on ice and fell on his right hip while shoveling snow for Employer on April 30, 2017. Claimant subsequently underwent surgery with Dr. McNair for his right femur fracture. During follow-up treatment Claimant reported pain in his right knee and lower back. Dr. McNair attributed Claimant's right knee pain to a weak quad. By February 14, 2018 Dr. McNair noted full range of motion of the knee, stable to provocative testing, no

lateral joint line tenderness and some medial joint line tenderness. Claimant's hip was tender but had full range of motion and excellent strength. Claimant underwent 34 physical therapy sessions and received right hip PRP injections. On August 7, 2018 Dr. Bird concluded that Claimant had reached MMI for his April 30, 2017 admitted right hip injury. She explained that Claimant had been able to return to a functional status but continued to experience pain. Dr. Bird assigned an 18% scheduled impairment rating for Claimant's right hip.

30. On July 5, 2019 Claimant underwent a DIME with Dr. Zuehlsdorff. Dr. Zuehlsdorff diagnosed Claimant with the following: (1) right lateral hip pain with anterior thigh pain; (2) right knee pain syndrome from primary gait abnormality secondary to constant and chronic hip pain; (3) probable adjustment disorder with anxiety; and (4) diffuse lumbar mechanical back pain likely secondary to gait abnormality. Dr. Zuehlsdorff agreed with Dr. Bird that Claimant had reached MMI on August 7, 2018. He assigned Claimant a 24% lower extremity impairment rating for his right hip. Dr. Zuehlsdorff did not provide impairment ratings for Claimant's knee, lumbar spine or psychological issues. He specifically stated "[w]ith regard to the knee, I see no impairable entity or diagnosis at this time...[w]ith regard to the back, again, I see no impairable entity here."

31. In contrast, Dr. Orent explained that Claimant's treatment was incomplete and he had not reached MMI. Dr. Orent recommended a second orthopedic opinion regarding removal of the hardware or pain management. He proposed a right hip injection and right knee care. Dr. Orent also suggested psychological treatment. He thus explained that Dr. Zuehlsdorff erroneously failed to provide an impairment rating for Claimant's right knee and psychological symptoms. Despite Dr. Orent's opinion, Claimant has failed to demonstrate that Dr. Zuehlsdorff improperly applied the *AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised)* (*AMA Guides*) or otherwise erred in concluding that Claimant reached MMI on August 7, 2018. Dr. Orent's determination is simply a difference of medical opinion regarding the extent of Claimant's impairment. Notably, Dr. Bird also persuasively explained that Claimant reached MMI on August 7, 2018. Moreover, Dr. McNair determined that Claimant would take approximately two years or by approximately April 2019 to recover from his work injury. Accordingly, Claimant has failed to produce unmistakable evidence free from serious or substantial doubt that Dr. Zuehlsdorff's August 7, 2018 MMI determination is incorrect.

32. Claimant has failed to present a preponderance of the evidence that he is entitled to receive Permanent Partial Disability (PPD) benefits for a right knee injury and psychological impairment as a result of his admitted April 30, 2017 right hip injury. During follow-up treatment after right femur surgery Claimant reported pain in his right knee and lower back. Dr. McNair attributed Claimant's right knee pain to a weak quad. By February 14, 2018 Dr. McNair noted full range of motion of the knee, stable to provocative testing, no lateral joint line tenderness and some medial joint line tenderness. When Dr. Bird determined that Claimant had reached MMI on August 7, 2018 she explained that he had been able to return to functional status but continued to experience pain. She assigned an 18% scheduled rating for Claimant's right hip but no other impairment. Dr. Zuehlsdorff assigned Claimant a 24% lower extremity impairment for his right hip. He did not provide impairment ratings for Claimant's knee, lumbar spine or psychological issues. Dr.

Zuehlsdorff specifically stated “[w]ith regard to the knee, I see no impairable entity or diagnosis at this time...[w]ith regard to the back, again, I see no impairable entity here.”

33. In contrast, Dr. Orent explained that Claimant warranted an impairment rating for his right knee and psychological symptoms. On physical examination, Dr. Orent noted tenderness in Claimant’s knee and thigh, with restricted range of motion in the lumbar region due to leg discomfort. He recommended additional right knee and psychological treatment. However, the bulk of the persuasive medical evidence reflects that ratings for Claimant’s right knee and psychological symptoms are not warranted. Accordingly, Claimant is not entitled to an additional impairment rating for his right knee and psychological symptoms.

34. Claimant has established that it is more probably true than not that he is entitled to receive reasonable, necessary and related medical maintenance benefits designed to relieve the effects of his April 30, 2017 industrial injury or prevent further deterioration of his condition. Dr. Zuehlsdorff recommended medical maintenance treatment including a hip joint MRI, psychological care with consideration of psychotropic medication and counseling. Dr. Zuehlsdorff also suggested additional therapy to treat Claimant’s knee pain, lumbar symptoms and gait abnormality. He discussed that Claimant would most likely require a second surgery for hardware removal in the future. Dr. Orent recommended a second orthopedic opinion regarding removal of the hardware or pain management. He proposed an injection for the right hip and treatment for the right knee. Dr. Orent also suggested psychological treatment. The treatment recommended by Dr. Orent is virtually identical to the maintenance care proposed by Dr. Zuehlsdorff. The only distinction is that Dr. Zuehlsdorff recommended a right hip joint MRI and Dr. Orent suggested a right hip injection. All of the care recommended by Dr. Orent can be completed as maintenance treatment. Accordingly, Claimant has established that it is more probably true than not that he is entitled to receive reasonable, necessary and related medical maintenance benefits as outlined in the June 26, 2019 FAL.

35. Claimant has failed to prove that it is more probably true than not that his admitted 24% scheduled hip rating should be converted to 10% whole person impairment. Dr. Bird assigned an 18% scheduled rating and Dr. Zuehlsdorff assigned Claimant a 24% lower extremity impairment for his right hip. None of the medical providers in the claim specifically addressed the situs of functional impairment. However, Dr. Bird remarked that Claimant was able to return to a functional status but continued to experience pain. Although Claimant experienced pain to parts of the body beyond the schedule, he has not established that his symptoms constituted functional impairment. Accordingly, Claimant suffered an 18% scheduled right hip impairment as a result of his April 30, 2017 admitted industrial injury.

CONCLUSIONS OF LAW

1. The purpose of the “Workers’ Compensation Act of Colorado” (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1),

C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. See *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Overcoming the DIME

4. In ascertaining a DIME physician's opinion, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office*, 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician's determination regarding MMI and permanent impairment consists of his initial report and any subsequent opinions. *In Re Dazzio*, W.C. No. 4-660-149 (ICAO, June 30, 2008); see *Andrade v. Industrial Claim Appeals Office*, 121 P.3d 328 (Colo. App. 2005).

5. A DIME physician is required to rate a claimant's impairment in accordance with the *AMA Guides*. §8-42-107(8)(c), C.R.S.; *Wilson v. Industrial Claim Appeals Office*, 81 P.3d 1117, 1118 (Colo. App. 2003). However, deviations from the *AMA Guides* do not mandate that the DIME physician's impairment rating was incorrect. *In Re Gurrola*, W.C. No. 4-631-447 (ICAO, Nov. 13, 2006). Instead, the ALJ may consider a technical deviation from the *AMA Guides* in determining the weight to be accorded the DIME physician's findings. *Id.* Whether the DIME physician properly applied the *AMA Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In Re Goffinett*, W.C. No. 4-677-750 (ICAO, Apr. 16, 2008).

6. A DIME physician's opinions concerning MMI and impairment carry presumptive weight pursuant to §8-42-107(8)(b)(III), C.R.S.; see *Yeutter v. Industrial Claim Appeals Office*, No. 18CA0498 (Apr. 11, 2019) 2019 COA 53. The statute provides that "[t]he finding regarding [MMI] and permanent medical impairment of an independent medical examiner in a dispute arising under subparagraph (II) of this paragraph (b) may be overcome only by clear and convincing evidence." *Id.* Subparagraph (II) is limited to

parties' disputes over "a determination by an authorized treating physician on the question of whether the injured worker has or has not reached [MMI]." §8-42-107(8)(b)(II). "Nowhere in the statute is a DIME's opinion as to the cause of a claimant's injury similarly imbued with presumptive weight." See *Yeutter*, 2019 COA 53 ¶ 18. Accordingly, a DIME physician's opinion carries presumptive weight only with respect to MMI and impairment. *Id.* at ¶ 21.

7. "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc.*, W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.*, W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); see *Shultz v. Anheuser Busch, Inc.*, W.C. No. 4-380-560 (ICAO, Nov. 17, 2000).

8. As found, Claimant has failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Zuehlsdorff that he reached MMI on August 7, 2018 for his admitted right hip injury. Initially, Claimant suffered an admitted right hip injury when he slipped on ice and fell on his right hip while shoveling snow for Employer on April 30, 2017. Claimant subsequently underwent surgery with Dr. McNair for his right femur fracture. During follow-up treatment Claimant reported pain in his right knee and lower back. Dr. McNair attributed Claimant's right knee pain to a weak quad. By February 14, 2018 Dr. McNair noted full range of motion of the knee, stable to provocative testing, no lateral joint line tenderness and some medial joint line tenderness. Claimant's hip was tender but had full range of motion and excellent strength. Claimant underwent 34 physical therapy sessions and received right hip PRP injections. On August 7, 2018 Dr. Bird concluded that Claimant had reached MMI for his April 30, 2017 admitted right hip injury. She explained that Claimant had been able to return to a functional status but continued to experience pain. Dr. Bird assigned an 18% scheduled impairment rating for Claimant's right hip.

9. As found, on July 5, 2019 Claimant underwent a DIME with Dr. Zuehlsdorff. Dr. Zuehlsdorff diagnosed Claimant with the following: (1) right lateral hip pain with anterior thigh pain; (2) right knee pain syndrome from primary gait abnormality secondary to constant and chronic hip pain; (3) probable adjustment disorder with anxiety; and (4) diffuse lumbar mechanical back pain likely secondary to gait abnormality. Dr. Zuehlsdorff agreed with Dr. Bird that Claimant had reached MMI on August 7, 2018. He assigned Claimant a 24% lower extremity impairment rating for his right hip. Dr. Zuehlsdorff did not provide impairment ratings for Claimant's knee, lumbar spine or psychological issues. He specifically stated "[w]ith regard to the knee, I see no impairable entity or diagnosis at this time...[w]ith regard to the back, again, I see no impairable entity here."

10. As found, in contrast, Dr. Orent explained that Claimant's treatment was incomplete and he had not reached MMI. Dr. Orent recommended a second orthopedic

opinion regarding removal of the hardware or pain management. He proposed a right hip injection and right knee care. Dr. Orent also suggested psychological treatment. He thus explained that Dr. Zuehlsdorff erroneously failed to provide an impairment rating for Claimant's right knee and psychological symptoms. Despite Dr. Orent's opinion, Claimant has failed to demonstrate that Dr. Zuehlsdorff improperly applied the *AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised)* (*AMA Guides*) or otherwise erred in concluding that Claimant reached MMI on August 7, 2018. Dr. Orent's determination is simply a difference of medical opinion regarding the extent of Claimant's impairment. Notably, Dr. Bird also persuasively explained that Claimant reached MMI on August 7, 2018. Moreover, Dr. McNair determined that Claimant would take approximately two years or by approximately April 2019 to recover from his work injury. Accordingly, Claimant has failed to produce unmistakable evidence free from serious or substantial doubt that Dr. Zuehlsdorff's August 7, 2018 MMI determination is incorrect.

Right Knee and Psychological Impairment

11. PPD benefits do not require a showing of actual wage loss but are instead based on the potential loss of future earning capacity. *Duran v. Industrial Claim Appeals Office*, 883 P.2d 477 (Colo.1994); *see also Hussion v. Indus. Claim Appeals Office*, 991 P.2d 346 (Colo. App.1999). The Workers' Compensation system is premised on the assumption that the future earning capacity of a partially disabled worker will be less than that of a non-disabled worker. *Business Ins. Co. v. BFI Waste Sys. of N. Amer., Inc.* 23 P.3d 1261, 1265 (Colo. App. 2001). The increased burden of proof required by the DIME procedures is not applicable to scheduled injuries. Section 8-42-107(8)(a), C.R.S. states that "when an injury results in permanent medical impairment not set forth in the schedule in subsection (2) of this section, the employee shall be limited to medical impairment benefits calculated as provided in this subsection (8)." Therefore, with regard to an extremity impairment, the claimant bears the burden to prove a scheduled rating by a preponderance of the evidence. *Delaney v. Indus. Claim Appeals Office*, 30 P.3d 691, 693 (Colo. App. 2000); *Burciaga v. AMB Janitorial Serv, Inc.*, W.C. No. 4-777-882 (ICAO, Nov. 5, 2010).

12. As found, Claimant has failed to present a preponderance of the evidence that he is entitled to receive Permanent Partial Disability (PPD) benefits for a right knee injury and psychological impairment as a result of his admitted April 30, 2017 right hip injury. During follow-up treatment after right femur surgery Claimant reported pain in his right knee and lower back. Dr. McNair attributed Claimant's right knee pain to a weak quad. By February 14, 2018 Dr. McNair noted full range of motion of the knee, stable to provocative testing, no lateral joint line tenderness and some medial joint line tenderness. When Dr. Bird determined that Claimant had reached MMI on August 7, 2018 she explained that he had been able to return to functional status but continued to experience pain. She assigned an 18% scheduled rating for Claimant's right hip but no other impairment. Dr. Zuehlsdorff assigned Claimant a 24% lower extremity impairment for his right hip. He did not provide impairment ratings for Claimant's knee, lumbar spine or psychological issues. Dr. Zuehlsdorff specifically stated "[w]ith regard to the knee, I see no impairable entity or diagnosis at this time...[w]ith regard to the back, again, I see no impairable entity here."

13. As found, In contrast, Dr. Orent explained that Claimant warranted an impairment rating for his right knee and psychological symptoms. On physical examination, Dr. Orent noted tenderness in Claimant's knee and thigh, with restricted range of motion in the lumbar region due to leg discomfort. He recommended additional right knee and psychological treatment. However, the bulk of the persuasive medical evidence reflects that ratings for Claimant's right knee and psychological symptoms are not warranted. Accordingly, Claimant is not entitled to an additional impairment rating for his right knee and psychological symptoms.

Medical Maintenance Benefits

14. To prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover v. Industrial Comm'n.*, 759 P.2d 705, 710-13 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609, 611 (Colo. App. 1995). Once a claimant establishes the probable need for future medical treatment he "is entitled to a general award of future medical benefits, subject to the employer's right to contest compensability, reasonableness, or necessity." *Hanna v. Print Expeditors, Inc.*, 77 P.3d 863, 866 (Colo. App. 2003); see *Karathanasis v. Chilis Grill & Bar*, W.C. No. 4-461-989 (ICAP, Aug. 8, 2003). Whether a claimant has presented substantial evidence justifying an award of *Grover* medical benefits is one of fact for determination by the Judge. *Holly Nursing Care Center v. Industrial Claim Appeals Office*, 919 P.2d 701, 704 (Colo. App. 1999).

15. As found, Claimant has established by a preponderance of the evidence that he is entitled to receive reasonable, necessary and related medical maintenance benefits designed to relieve the effects of his April 30, 2017 industrial injury or prevent further deterioration of his condition. Dr. Zuehlsdorff recommended medical maintenance treatment including a hip joint MRI, psychological care with consideration of psychotropic medication and counseling. Dr. Zuehlsdorff also suggested additional therapy to treat Claimant's knee pain, lumbar symptoms and gait abnormality. He discussed that Claimant would most likely require a second surgery for hardware removal in the future. Dr. Orent recommended a second orthopedic opinion regarding removal of the hardware or pain management. He proposed an injection for the right hip and treatment for the right knee. Dr. Orent also suggested psychological treatment. The treatment recommended by Dr. Orent is virtually identical to the maintenance care proposed by Dr. Zuehlsdorff. The only distinction is that Dr. Zuehlsdorff recommended a right hip joint MRI and Dr. Orent suggested a right hip injection. All of the care recommended by Dr. Orent can be completed as maintenance treatment. Accordingly, Claimant has established that it is more probably true than not that he is entitled to receive reasonable, necessary and related medical maintenance benefits as outlined in the June 26, 2019 FAL.

Conversion of Hip Rating

16. Section 8-42-107(1)(a), C.R.S. limits medical impairment benefits to those provided in §8-42-107(2), C.R.S. when a claimant's injury is one enumerated in the schedule of impairments. The Judge must thus determine the situs of a claimant's "functional impairment." *Velasquez v. UPS*, W.C. No. 4-573-459 (ICAO Apr. 13, 2006). The situs of the functional impairment is not necessarily the site of the injury. See *In re Hamrick*, W.C. No. 4-868-996-01 (ICAO, Feb. 1, 2016); *In re Zimdars*, W.C. No. 4-922-066-04 (ICAO, Feb. 4, 2015). Pain and discomfort that limit a claimant's ability to use a portion of the body is considered functional impairment for purposes of determining whether an injury is off the schedule of impairments. *In re Johnson –Wood*, W.C. No. 4-536-198 (ICAO, June 20, 2005); *Vargas v. Excel Corp.*, W.C. 4-551-161 (ICAO, Apr. 21, 2005). However, the mere presence of pain in a portion of the body beyond the schedule does not require a finding that the pain represents a functional impairment. *Lovett v. Big Lots*, WC 4-657-285 (ICAO, Nov. 16, 2007); *O'Connell v. Don's Masonry*, W.C. 4-609-719 (ICAO, Dec. 28, 2006).

17. Under § 8-42-107(2)(w), C.R.S. the "loss of the leg at the hip joint" is a scheduled impairment. However, impairment to the "lower extremity" is not listed on the schedule. Consequently, a physician's "lower extremity" impairment rating is not conclusive of whether a claimant sustained a scheduled injury. The issue requires a determination whether the claimant suffered functional impairment beyond the leg at the hip. *Webb v. Circuit City Stores, Inc.*, W.C. No. 4-467-005 (ICAO, Aug. 16, 2002). The claimant bears the burden to prove by a preponderance of evidence that the situs of the functional impairment is not on the schedule. *Strauch v. PSL Swedish Healthcare Sys.*, 917 P.2d 366 (Colo. App. 1996).

18. As found, Claimant has failed to prove by a preponderance of the evidence that his admitted 24% scheduled hip rating should be converted to 10% whole person impairment. Dr. Bird assigned an 18% scheduled rating and Dr. Zuehlsdorff assigned Claimant a 24% lower extremity impairment for his right hip. None of the medical providers in the claim specifically addressed the situs of functional impairment. However, Dr. Bird remarked that Claimant was able to return to a functional status but continued to experience pain. Although Claimant experienced pain to parts of the body beyond the schedule, he has not established that his symptoms constituted functional impairment. Accordingly, Claimant suffered an 18% scheduled right hip impairment as a result of his April 30, 2017 admitted industrial injury.

ORDER

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

1. Claimant reached MMI on August 7, 2018 for his April 30, 2017 admitted industrial injury.

2. Claimant is not entitled to receive PPD benefits for a right knee injury and psychological symptoms for his admitted April 30, 2017 industrial injury.

3. Claimant shall receive reasonable, necessary and related medical maintenance benefits as outlined in the June 26, 2019 FAL.

4. Claimant suffered an 18% scheduled right hip impairment as a result of his April 30, 2017 admitted industrial injury.

5. Any issues not resolved in this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at <http://www.colorado.gov/dpa/oac/forms-WC.htm>.*

DATED: February 27, 2020.

DIGITAL SIGNATURE:


Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-101-519-002**

ISSUES

- Did Claimant prove she suffered a compensable injury on January 24, 2019?
- If Claimant proved a compensable injury, did she prove entitlement to reasonably necessary medical benefits, including reimbursement for a September 18, 2019 orthopedic evaluation with Dr. Craig Davis?
- Did Claimant prove entitlement to temporary partial disability (TPD) benefits from February 19, 2019 through March 20, 2019?
- Did Claimant prove entitlement to temporary total disability (TTD) benefits commencing March 21, 2019?
- The parties stipulated to an average weekly wage (AWW) of \$410.10.

FINDINGS OF FACT

1. Claimant works as an assistant manager at the Family Dollar store in Rocky Ford. She has worked there for six years. Her duties included opening and closing the store, making deposits, stocking product, and unloading trucks.

2. On January 24, 2019, Claimant was stocking Coffee-Mate on a high shelf using a rolling ladder. She was coming down from the ladder and accidentally stepped on a case of coffee left on the floor. She tried to maneuver her foot around the coffee but her ankle gave out when she stepped to the floor, causing her to fall onto her right side and buttocks. She instinctively put her right arm out to brace her fall. Claimant remained on the floor for a few moments, and when she rolled over to get up, she smacked her right knee on the floor. Claimant's knee and ankle hurt, but she felt no pain in her right shoulder or neck immediately after the fall.

3. Claimant texted her manager to report the incident. The manager texted back and asked if Claimant was okay. Claimant replied, "I'm fine." She then contacted the district manager, who advised her to call Employer's 1-800 number to report the incident. There was ultimately a delay in filing the report because it turned out Claimant's supervisor had to report the accident rather than Claimant.

4. Claimant worked the next couple of days and her neck and right shoulder started hurting badly. She forced the issue with her manager and eventually received a referral to Rocky Ford Family Health Center.

5. Claimant had seen Dr. Michael Sells, a chiropractor, twice before the accident for right upper back and neck pain. On January 5, 2019, she reported "Dull pain: 8/10" on an "intermittent to frequent" basis, aggravated by lifting and decreased with

NSAIDs and massage. Dr. Sells documented, "Patient reports (R) sided neck and upper back pain for 3 weeks due to heavy lifting. Patient reports using massage and NSAIDs for palliative relief, and reports lifting increases pain." Physical examination showed "fixation" at multiple spinal levels from the neck to the sacrum. There was no indication of muscle spasm. Cervical range of motion was "normal" in all planes. Claimant "responded well" to chiropractic manipulation.

6. Claimant was improved by her next appointment with Dr. Sells on January 18, 2019. Her pain had decreased to 6/10. Physical exam findings were essentially the same as at the previous visit, and Dr. Sells again indicated Claimant "responded well" to manipulation.

7. Claimant's next chiropractic appointment was January 25, the day after the accident. She told Dr. Sells she had "fall[en] off a ladder work last night." The remainder of the report is essentially identical to the report from January 18.

8. Claimant had her first visit with Rocky Ford Family Health on January 29, 2019. She saw NP-C Heather Elliott, who has served as the primary ATP since then. Claimant was no longer having any ankle pain, but reported pain in her right knee, neck, and right shoulder. Physical examination showed tenderness and muscle spasm in the right trapezius, and reduced cervical range of motion because of pain and guarding. Right shoulder range of motion was full without pain. Nurse Elliott diagnosed neck and trapezius strains with muscle spasms, and a right knee contusion. She prescribed muscle relaxers and recommended NSAIDs, ice, and stretching. She imposed work restrictions of no lifting over 15 pounds, no repetitive lifting over 5 pounds, limited use of the right arm "to comfort" and 10-minute rest breaks every hour.

9. Claimant did not mention the pre-injury neck pain or chiropractic treatment to Nurse Elliott. She testified the neck pain before the accident was primarily "soreness" and was "a lot different" than what she experienced after the accident, so she did not think it was pertinent.

10. Claimant followed up with Nurse Elliott on February 5, 2019 and reported no improvement in the right shoulder and neck pain. Claimant described "excessive swelling on neck area that tends to get worse with activity." The swelling improved with ice and heat, but "when she goes back to work the swelling comes back." Claimant was trying to stay within her the work restrictions, but sometimes had to handle heavy items at checkout. She also described "popping" in the neck when turning her head. Physical examination again showed right trapezius spasm and guarding, and reduced cervical range of motion. The right anterior shoulder was tender, and right shoulder ROM was reduced. X-rays of Claimant's neck showed mild degenerative changes but no acute pathology. Nurse Elliott referred Claimant to physical therapy and maintained her work restrictions.

11. Nurse Elliott's February 12 report documented Employer was not following the restrictions. Claimant was having difficulty reaching behind her and reaching out at shoulder level. She was having right elbow pain "due to compensating for injured muscles

in the right shoulder/neck.” Physical exam findings were unchanged, with muscle spasm, guarding, and reduced range of motion. Nurse Elliott put Claimant in a sling and completely restricted any work with the right arm. She encouraged Claimant to speak with HR about enforcing her restrictions, but noted, “If you are unable to accommodate these restrictions, she will need to be allowed off of work.” Nurse Elliott instructed Claimant to start PT “as soon as it is approved.”

12. Claimant’s next appointment with Nurse Elliott was February 19, 2019. Her symptoms had not improved, and she was developing soreness on her left side because of compensating for the immobilized right arm. Claimant was still having “excessive swelling” around her right shoulder and neck. Nurse Elliott noted PT still had not been approved, even though “the order has been in since 2/5/19 and we have contacted Sedgwick multiple times to follow up on approval.” Nurse Elliott opined, “She is having new pains related to having to modify her movement at work to accomplish the tasks she is given at work. She is sometimes working more than 8 hours and this is having a negative effect on her healing process. I am restricting her to 4 hours of work per day until she starts to show improvement with physical therapy after it is approved.”

13. On February 28, 2019, Claimant’s symptoms were no better. She was still having popping in her neck with range of motion. Physical therapy had “finally” been approved and was scheduled to start the next week.

14. At the initial PT appointment on March 6, the therapist documented “swelling along bilateral upper traps (base of neck) and reduced strength with right shoulder flexion and abduction.” On March 8, the therapist noted, “Pt is noticeably swollen and bilat[eral] shoulders, R>L.” The March 11, 2019 report showed, “Swelling has increased over the course of several days. Pt’s job duties exacerbate muscle damage. Active inflammation is evident with swelling.” The last note from March 20, 2019 documented, “hydrotherapy is exacerbating her cervical and bilateral shoulder swelling symptoms. Her pain remains for the rest of the day following treatment sessions and continues to be exacerbated by work duties.”

15. Claimant followed up with Nurse Elliott on March 21, 2019 and explained PT was not helping. Her pain was worse and interfering with her sleep. Claimant still had “significant swelling” around her neck. She was not taking the muscle relaxer during the day because it was too sedating. Nurse Elliott ordered a cervical MRI and took Claimant off work. She explained, “Physical therapy and conservative management are not improving function or pain, she is actually worsening. I am taking her out of work, even with the reduced hours there is not adequate adjustment of her tasks to allow her to heal.”

16. Claimant underwent cervical and right shoulder MRIs on April 25, 2019. The cervical MRI showed mild to moderate multilevel degenerative changes with no acute findings. The shoulder MRI showed a Type 2 SLAP tear and mild inflammation of the subacromial-subdeltoid bursa.

17. After reviewing the MRI reports, Nurse Elliott referred Claimant to Dr. David Weinstein for a right shoulder surgical evaluation. She kept Claimant off work “until cleared by ortho.”

18. Respondents did not authorize the evaluation with Dr. Weinstein. Instead, they scheduled an IME with Dr. Wallace Larson.

19. Claimant saw Dr. Larson on June 20, 2019. His reported exam findings were entirely benign with no “objective” evidence of neck or right shoulder pathology. Dr. Larson opined the SLAP tear is probably an incidental finding because Claimant has no symptoms typically associated with SLAP tears. Even if the SLAP tear were symptomatic, Dr. Larson believes it is pre-existing and not caused by the work accident. He opined Claimant suffered a mild ankle sprain but no neck or shoulder injury. He thought Claimant’s reported symptoms were out of proportion to the accident, and there is “no objective medical evidence of any specific anatomic injury.” Dr. Larson concluded Claimant was at MMI and required no further treatment. He saw no “objective” basis for any work restrictions.

20. Claimant returned to Nurse Elliott on August 1, 2019 to review Dr. Larson’s report. Nurse Elliott wrote,

[S]he was able to carry out all of her job functions without pain for 6 years prior to this injury. She would regularly [lift] 36lb of dog food, cases of water to re-stock shelves. At the time of the injury, and up to present, she is no longer able to lift without pain, so her injury was clearly caused by the fall she sustained at work. . . . I am not an orthopedic specialist, so I made a referral for the appropriate specialist to evaluate and treat this patient when her injury was not responsive to conservative treatment with activity restriction, medication, and physical therapy. I feel that this patient was denied treatment by the appropriate provider when the referral to Dr. Weinstein was denied by Sedgwick.

21. She added, “This patient has had a muscle strain and/or spasm at the neck level since the time of injury, and it is independent of the SLAP tear of the shoulder. This is also an injury that did not respond as I would have expected with reduction of activity, medication and physical therapy, which is additionally why I have referred her to an orthopedic specialist for evaluation and treatment.” Nurse Elliott referred Claimant to Dr. Craig Davis “for a second opinion on the causality of your injury and her recommendations for treatment.”

22. Claimant followed up with Nurse Elliott on September 3, 2019. Insurer had not approved the appointment with Dr. Davis, so she gave Claimant the contact information so she could schedule it herself. Claimant was struggling financially because she was out of work and not receiving disability benefits. There was a new manager at her store and Claimant wanted to try working again. Nurse Elliott stated, “I advised we try and send her back to work with restrictions now that there is a new manager and hopefully

they will comply with restrictions at this time.” Nurse Elliott spoke with the new manager by phone and received assurances they would abide by Claimant’s restrictions.

23. Claimant contacted the new store manager but was not offered modified duty. Claimant has remained off work through the date of the hearing.

24. Claimant saw Dr. Davis on September 18, 2019. Her most bothersome symptoms were pain in the right side of her neck, the right trapezius, and the right parascapular area. She also complained of persistent swelling in the supraclavicular area “which she says is much larger than it ever was prior to her injury.” She was not having much pain in the right shoulder itself. Claimant’s right paraspinal and trapezial areas were tender to palpation, but shoulder range of motion was full with excellent strength. Impingement signs were negative. Dr. Davis did not think Claimant needed surgery. He opined,

This patient has a neck strain related to her accident at work. I think her current myofascial symptoms in the neck and right trapezial area are a direct result of her work-related injury. She has significant prominence of the soft tissues in the supraclavicular area on both sides of her neck. Some of this appears to be physiologic in nature but it’s possible the right side is more prominent just due to muscle spasm underneath or behind it related to her neck strain. Again, I think this is a direct result of her work-related injury.

25. Dr. Davis recommended a cervical MRI and referral to a physiatrist “depending on the findings of the MRI.”¹ Dr. Davis was willing to treat Claimant if she wanted, but thought it made more sense to see someone in Colorado Springs, closer to where she lives.

26. Dr. Larson testified for Respondents in a deposition on November 19, 2019. He conceded Claimant “might” have suffered minor shoulder and neck strains from the accident, but opined she had fully recovered, with no objective evidence of ongoing pathology. He reiterated the SLAP tear is probably an incidental finding and warrants no treatment. He opined the supraclavicular “prominence” described by Dr. Davis is “probably just her anatomy . . . most likely adipose tissue.”

27. Despite some minor inconsistencies, Claimant’s testimony was generally credible and supported by the persuasive evidence of record.

28. Dr. Davis and Nurse Elliott’s opinions are more persuasive than the contrary opinions expressed by Dr. Larson.

29. Claimant proved she suffered a compensable injury on January 24, 2019.

¹ Dr. Davis did not know Claimant had already had a cervical MRI in April 2019. Regardless, the ALJ considers it unlikely the MRI would have altered Dr. Davis’ opinion because it confirms his assessment of a primarily myofascial, soft-tissue injury.

30. The evaluations and treatment Claimant received under the direction of Nurse Elliott since January 29, 2019 were reasonably necessary to cure and relieve the effects of her compensable injury. The evaluation with Dr. Davis was reasonably necessary and related to the injury.

31. Claimant suffered a partial wage loss because of her injury commencing February 19, 2019 when Nurse Elliott restricted her work hours. Respondents owe Claimant \$625.61 in TPD benefits, calculated as follows:

| Pay period end: | Wages: | TPD owed: |
|------------------------|---------------|------------------|
| 3/23/2019 | \$295.25 | \$349.97 |
| 3/9/2019 | \$536.03 | \$189.45 |
| 2/23/2019 | \$690.92 | \$86.19 |
| Total TPD: | | \$625.61 |

32. Claimant proved she suffered a total wage loss commencing March 21, 2019 when she was taken off work. Although she was released work with restrictions in September 2019, Employer never offered modified work.

CONCLUSIONS OF LAW

A. Compensability

To receive compensation or medical benefits, a claimant must prove she is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo. App. 2001). The claimant must prove that an injury directly and proximately caused the condition for which she seeks benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). An injury need not be dramatic or serious to support a finding of compensability. Even a “minor strain” or a “temporary exacerbation” of a pre-existing condition can be a sufficient basis for a compensable claim if it was caused by a claimant’s work activities and caused her to seek medical treatment. *E.g.*, *Garcia v. Express Personnel*, W.C. No. 4-587-458 (August 24, 2004); *Conry v. City of Aurora*, W.C. No. 4-195-130 (April 17, 1996).

As found, Claimant proved by a preponderance of the evidence she suffered a compensable injury on January 24, 2019 when she fell to the floor. Although Claimant received chiropractic treatment for neck and upper back pain shortly before the accident, the evidence shows at a minimum she aggravated a pre-existing condition, and more probably, suffered new neck and shoulder strains because of the fall. While the reported pre-injury symptoms were similar, there were new clinical findings after the work accident including reduced cervical range of motion, muscle spasm, and swelling. The chiropractic records do not mention right shoulder pain, which has been a significant component of her pain complaints since the accident. Furthermore, Claimant worked a relatively demanding job before the accident without limitation. Admittedly, Claimant failed to

mention the pre-injury neck pain to Nurse Elliott at the outset, but the evidence supports her testimony the post-accident symptoms were different and worse than before. In light of the other evidence in the record, the ALJ is willing to give Claimant the benefit of the doubt she did not purposefully hide the history to manipulate the course of her claim.

The ALJ credits Dr. Davis and Nurse Elliott's opinions that Claimant at least suffered neck and right shoulder strains because of the work accident and reasonably required conservative treatment. The etiology and clinical significance of the SLAP tear is unclear, and Dr. Larson may be right that the tear is merely an incidental finding. But Claimant has not asked the ALJ to award surgery or other treatment specifically directed to the SLAP tear, so that question can be left for another day.

B. Medical benefits

Respondents are liable for medical treatment reasonably needed to cure or relieve the effects of an industrial injury. Section 8-42-101. Compensable medical treatment includes evaluations or diagnostic procedures to investigate the existence, nature, or extent of an industrial injury, or suggest a course of treatment. *Garcia v. Express Personnel*, W.C. No. 4-587-458 (August 24, 2000); *Walker v. Life Care Centers of America*, W.C. No. 4-953-561-02 (March 30, 2017); *Jacobson v. American Industrial Service/Steiner Corp.*, W.C. No. 4-487-349 (April 24, 2007). Respondents must reimburse a claimant directly for any compensable medical treatment they pay from their own pocket. Section 8-42-101(6)(a), (b); WCRP 16-10(F).

As found, the evaluations and treatment Claimant received under Nurse Elliott's direction since January 29, 2019 were reasonably necessary to cure and relieve the effects of her compensable injury. The ALJ also concludes the referral to Dr. Davis was reasonably necessary to assess her condition and explore potential treatment options. Claimant paid for the evaluation with Dr. Davis, and is entitled to reimbursement.

C. Temporary partial disability benefits

A claimant is entitled to TPD benefits if an injury proximately causes them to earn less than their pre-injury wage. Section 8-42-106. As found, Claimant suffered a partial wage loss because of her injury. Based on the stipulated AWW of \$410.10, Respondents owe Claimant \$625.61 for TPD benefits from February 19 through March 20, 2019.

D. Temporary total disability benefits

A claimant is entitled to TTD benefits if the injury caused a disability, the disability caused the claimant to leave work, the claimant missed more than three regular working days, and suffered an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The claimant must establish a causal connection between a work-related injury and the wage loss to obtain TTD benefits. *Id.*

As found, Claimant proved entitlement to TTD benefits commencing March 21, 2019 when she was taken off work. The decision to take Claimant off work was appropriate because Employer was not following her restriction and she was not

improving. Although she was released back to work with restrictions in September 2019, Employer offered no modified work.

ORDER

It is therefore ordered that:

1. Claimant's claim for an injury on January 24, 2019 is compensable.
2. Insurer shall cover all reasonably necessary medical treatment from authorized providers to cure or relieve the effects of Claimant's injury.
3. Insurer shall reimburse Claimant for the September 18, 2019 evaluation with Dr. Craig Davis.
4. Claimant's average weekly wage is \$410.10, per the parties' stipulation.
5. Insurer shall pay Claimant TPD benefits from February 19, 2019 through March 20, 2019 in the total amount of \$625.61.
6. Insurer shall pay Claimant TTD benefits at the weekly rate of \$273.40, commencing March 21, 2019 and continuing until terminated according to law.
7. Insurer shall pay Claimant statutory interest of 8% per annum on all temporary disability benefits that were not paid when due.
8. All issues not decided herein are reserved for future determination.

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

DATED: February 24, 2020

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

- I. Whether Claimant established by a preponderance of the evidence she suffered compensable injury to her right knee and low back arising out of and in the course of her employment on September 11, 2018.
- II. If compensable, whether Claimant established by a preponderance of the evidence entitlement to medical benefits for her right knee and/or low back, including right knee surgery recommended by William Cooney, M.D.
- III. If compensable, whether Claimant established by a preponderance of the evidence that she is entitled to a change of medical providers.
- IV. If compensable, whether Claimant established by a preponderance of the evidence entitlement to temporary total disability (TTD) benefits from September 12, 2018 to December 17, 2018.
- V. If Claimant proved entitlement to TTD benefits, whether Respondents established by a preponderance of the evidence that Employer's modified employment offer terminated Claimant's right to TTD after October 1, 2018.
- VI. If compensable, whether Respondents provided by a preponderance of the evidence Claimant's December 21, 2018 accident in a store parking lot was an efficient intervening injury severing claimant's right to disability and medical benefits.

STIPULATIONS

The parties stipulated that Claimant's average weekly wage (AWW) is \$801.04.

FINDINGS OF FACT

1. Claimant is a 51-year-old woman. Claimant alleges she sustained an industrial injury to her right knee and low back while working for Employer on September 11, 2018.

Prior Medical History

2. Claimant has a history of prior right knee issues and treatment. On April 21, 2017, Claimant sought treatment with William P. Cooney, M.D., reporting right knee swelling, popping and pain after climbing rocks in Mexico, slipping, and twisting her right knee. On examination, Dr. Cooney noted moderate effusion and some lateral joint line tenderness. Dr. Cooney assessed Claimant with right knee pain and effusion and a

possible diagnosis of lateral meniscus tear. He aspirated the right knee and administered a cortisone injection. Dr. Cooney noted if the injection did not provide relief he would proceed with an MRI to look for a lateral meniscus tear. Claimant was to schedule a right knee MRI in the event her condition did not improve.

3. Claimant did not seek further evaluation or treatment of her right knee until the alleged work injury. Claimant testified she experienced relief from the injection administered by Dr. Cooney in April 2017 and did not have any additional right knee issues until the alleged work injury. Claimant testified that between seeing Dr. Cooney in April 2017 and the date of the alleged work injury she was able to continue working and exercising.

4. Claimant testified she experienced low back muscle strains at work in February 2013 and January 2017. The incidents did not result in any missed time from work. Claimant testified she did not have any low back issues leading up to the alleged work injury.

Employment Issues and Demotion

5. Claimant began her employment with Employer in 2011 as a patient care attendant. She was subsequently promoted for floor nurse and, in July 2016, charge nurse. As charge nurse Claimant was responsible for managing the daily operational needs for a med-surg oncology unit. Claimant also served on two leadership committees.

6. Prior to her promotion to charge nurse Claimant received accolades from Employer. Approximately one year after her promotion to charge nurse, Claimant began receiving verbal and written correction actions for her work performance and behavior. In August 2017, Claimant received a verbal coaching for indicating that she had verified chemotherapy calculations but actually failing to do so. On July 23, 2018, Claimant was coached for “cornering” associates, making them feel bullied, intimating the manager supported her behavior, and lack of follow-through on commitments to staff. On August 8, 2018, Claimant received a written Corrective Action Form for “inappropriate service behaviors,” including displaying a lack of integrity related to lying during a conference with a manager and a co-worker.

7. Leslie K[Redacted], Director of the department, requested that the human resources department conduct an investigation of the department and of Claimant. Abigail H[Redacted] and Jonathon X[Redacted] conducted the investigation. Mr. X[Redacted] testified the investigation included interviewing over 30 members of the unit, including Claimant and Claimant’s supervisor. Mr. X[Redacted] testified that the investigation confirmed issues with Claimant’s work performance and involvement in bullying.

8. Claimant received a written Final Corrective Action during a meeting with Ms. H[Redacted] and Ms. K[Redacted] on August 31, 2018. The Corrective Action noted

Claimant received the disciplinary action for a demonstrated pattern of lying, bullying, threatening staff and lack of willingness to be a resource to staff. Claimant was demoted from the charge nurse position to a floor nurse, resulting in a reduction in pay and removal from the shared governance committee. Claimant was required to attend bullying training with other members of the department on September 11, 2018. During the August 31, 2018 meeting Claimant became weepy and distraught and requested time to consider whether she would accept the demotion.

9. On September 4, 2018, Claimant spoke with Mr. X[Redacted], Ms. H[Redacted], and Ms. K[Redacted] by phone. Dr. X[Redacted] testified Claimant sounded upset, emotional, weepy, distraught, and indecisive about her future. Mr. X[Redacted] testified Claimant asked several times if Employer would rip up her final warning. She also asked if she could transfer departments, and was informed that was not an option. Claimant requested and received additional time to process how she wished to proceed.

10. Claimant ultimately returned to work as a floor nurse on September 10, 2018. That morning, she briefly met with Mr. X[Redacted], Ms. K[Redacted] and her supervisor, Keith N[Redacted], to discuss Employer's expectations of Claimant as a floor nurse moving forward. Mr. X[Redacted] observed Claimant looking upset. Claimant worked her entire shift that day.

Alleged Work Injury September 11, 2018

11. Claimant worked her normal shift on September 11, 2018 beginning at 7:00 a.m. Claimant, along with other members of the unit, attended anti-bullying training from 9:30 a.m. to 11:00 a.m.

12. Claimant alleges she sustained a work injury at approximately 12:12 p.m. on September 11, 2018. Claimant alleges she spent more than an hour on her knees attempting to unclog the catheter of a patient who was seated in a chair. Claimant testified she called Dr. D[Redacted] and Eric W[Redacted], a nurse, for assistance. Claimant testified she left the room to retrieve a urology cart and as she was pushing the cart back into the room, slipped on saline solution on the floor. Claimant testified she grabbed the handle of the ante room door and the cart to prevent herself from falling. Claimant stated that as she did so, she twisted her lower body and right knee.

13. Claimant acknowledged that Dr. D[Redacted] and Mr. W[Redacted] were in the room at the time but neither observed the alleged incident. Claimant testified she did not experience any right knee or low back pain immediately after the alleged incident. Claimant proceeded to perform her regular job duties and finish her shift at 7:00 p.m. Claimant testified she began feeling generally "unwell" after the alleged incident, including experiencing some nausea. Claimant testified she attributed the feeling to stress and having not yet eaten lunch. She informed Mr. N[Redacted] she was not feeling great, she had waited too long to eat, she had too much caffeine, she felt nauseous, and she had vomited. Claimant did not inform Mr. N[Redacted] of the alleged incident, any pain in back or knee pain, or any alleged work injury. Claimant did not

report the alleged incident to anyone that day. Claimant testified that upon completion of her shift she went home, took a bath, took some over-the-counter pain medication and went to sleep.

14. Claimant testified she subsequently woke up in significant pain. At 7:10 a.m. on September 12, 2018 Claimant emailed Mr. N[Redacted]. She stated that the day prior she slipped on urine during attempts to irrigate a catheter and later awoke with back and knee pain. She noted her belief that the combination of slipping and being hunched over on her knees for more than an hour took a toll. Claimant reported to Mr. N[Redacted] she had requested an appointment to see her personal physician. She also apologized for being “so emotional” the day prior, noting she had not been sleeping well and had a very difficult few weeks. Mr. N[Redacted] replied via email and advised Claimant to contact the Occupational Health Department if she was claiming a work injury. Claimant did so.

15. On September 12, 2018, Claimant signed a document provided to her by Employer specifying Dr. Woo at SCL Health as the primary care physician at Employer’s on-site health facility. The document does not list other designated providers. The document states, in relevant part,

Designated Medical Providers: Under the Colorado Worker’s Compensation Act, employers may select specific physicians to treat work related injuries. William Woo, M.D. in SCL Health Associate Occupational Health Services is the designated **primary** care physician for the LMC, GSMC and SJH worker’s compensation program. Other designated **specialist** medical providers are listed in the Associate Occupational Health Services office. These physicians have been carefully chosen because of their expertise in treating people who have been injured on the job (emphasis not added).

16. Employer completed a First Report of Injury or Illness on September 14, 2018, noting a date of injury of September 11, 2018.

17. Claimant first presented to Dr. Woo on September 17, 2018 with complaints of right knee, right shoulder and back pain. Claimant reported slipping on fluid and bracing herself on the wall using her right side. Claimant reported that she did not fall, but twisted her body. Claimant reported experiencing pain in her right low back, right lateral knee and right shoulder several hours later. Claimant admitted prior episodes of tweaking her low back, but the medical record contains no mention of prior right knee issues. Dr. Woo noted Claimant was anxious and tearful, which she related to lack of sleep and personal stress. On examination of the back, Dr. Woo noted minimal back extension, guarded and slow right/left side bending, and tight right paralumbar muscles and tenderness at the right SI. On examination of the right knee Dr. Woo noted “excellent” range of motion for extension and flexion, seemingly stable ligaments, no laxity with LCL testing, mild tenderness with palpation over the lateral knee, and pain at the lateral knee with McMurray’s testing. Dr. Woo assessed Claimant with a work-

related right shoulder strain, right knee strain, and right lumbar strain with possible SI involvement. He prescribed Claimant Dapro and physical therapy and assigned work restrictions of 20 pounds lifting/pushing/pulling, no bending and twisting at the waist, and alternating sitting and standing as needed.

18. On September 25, 2018, Employer sent Claimant a Temporary Alternate Work Assignment via certified mail. Dr. Woo reviewed and signed off on the assignment as complying with Claimant's work restrictions. The offer of modified employment entailed performing secretarial duties for 12-hour shifts for a total of 36 hours per week at \$33.38 per hour. Prior to the alleged work injury Claimant worked 12-hour shifts and was earning \$33.38 per hour as a floor nurse. The modified duty position was set to begin on October 1, 2018. Claimant received and declined Employer's offer of modified work. Claimant testified she declined the offer because she did not feel she could sit through a 12-hour shift.

19. On September 27, 2018, Mark A. Levstik, D.O. evaluated Claimant for recurrent depressive disorder and completion of FMLA documentation. Claimant admitted to work stress and difficulty sleeping. Claimant went on a leave of absence under FMLA retroactive September 15, 2018 to October 31, 2018.

20. On October 5, 2018, Claimant completed an Employee Report for Insurer. Regarding the alleged injury, Claimant reported spending 30 minutes on her knees attempting to irrigate a catheter, then slipping on urine while retrieving a cart. Claimant stated she did not fall on the floor. In response to the question "Have you returned to work?" Claimant wrote, "No, but not due to WC injury." Claimant testified she did not indicate her time off was due to the alleged injury because she was emotional and upset and was not in a rush to return to work because she wanted to heal. Claimant testified she was aware she would not be able to pursue a leave of absence under FMLA if she noted that the leave of absence was due to a work injury. Claimant testified she wanted time to heal "mentally and spiritually."

21. Dr. Woo reexamined Claimant on October 8, 2018. Claimant continued to report right low back and right lateral knee pain. On examination, Dr. Woo noted tenderness to palpation at the right lumbosacral junction and right SI area, tenderness to palpation at lateral right knee, good extension and flexion, and some laxity of the right ACL. He continued Claimant's restrictions.

22. Respondents filed a Notice of Contest on October 9, 2018.

23. Claimant began physical therapy on October 15, 2018. At a follow-up examination with Dr. Woo on October 25, 2018, Claimant reported 50% improvement with some remaining pain in the low back and significant improvement in the right knee. By November 15, 2018, Claimant was reporting to Dr. Woo 75% overall improvement. On November 29, 2018, Claimant reported to Dr. Woo experiencing momentary locking of her right knee earlier that week. Claimant continued conservative treatment.

24. Claimant requested a transfer to a different department. Claimant returned to work on modified duty on December 18, 2018.

25. At reexamination on December 17, 2018, Dr. Woo noted Claimant felt 85-90% improved. Claimant reported experiencing some swelling when her knee that resolved after diminishing her activities. She reported occasional popping of the right knee but no pain. Dr. Woo noted Claimant was not currently inhibited from doing any activities and had been exercising and lost seven pounds. He continued Claimant on work restrictions and recommended she complete her remaining four sessions of physical therapy. Claimant testified at hearing that she did not recall telling Dr. Woo she had improved 85-90%.

December 21, 2018 Incident

26. On December 21, 2018, Claimant was doing some personal shopping and fell in the parking lot of a store. Claimant testified her right knee locked, causing her to fall on her right knee. Claimant contacted the occupational nurse and was scheduled to see Dr. Woo a week earlier than the previously scheduled follow-up.

27. Dr. Woo examined Claimant on December 27, 2018. Claimant reported that her right knee locked or gave out as she was walking in a parking lot, aggravating her right low back symptoms. She reported experiencing some initial swelling of her right knee. On examination Dr. Woo noted some tenderness at the right low back area. With fairly good low back range of motion. The right knee had no appreciable swelling, but some knee joint cystic prominence at the anterolateral knee with full flexion. He further noted some tenderness with LCL stressing, but no overt laxity and no locking or pivot shift with McMurray's testing. Dr. Woo referred Claimant for an MRI of the right knee and continued Claimant on restrictions and physical therapy.

28. Claimant underwent a right knee MRI on January 2, 2019. The radiologist's impression was: 1. Suspected lateral meniscus tear with dissecting laminating component allowing for lateral joint line meniscal cysts. 2. No acute ligamentous disruption. 3. Mild arthritic type chondromalacia especially at the patellofemoral interval.

29. Claimant returned to Dr. Woo for a follow-up evaluation on January 14, 2019, reporting locking and giving out of the right knee and some continued low back pain. Dr. Woo noted the right knee MRI demonstrated a laminar-type of tear of the lateral meniscus. He referred Claimant for a lumbar MRI and a physiatrist evaluation for the low back, and an orthopedic evaluation for the right knee.

30. On January 16, 2019, Claimant underwent a lumbar spine MRI. The radiologist's impression was: 1. Multilevel lumbar degenerative changes including moderate spinal narrowing including both lateral recesses as well as moderate right neural foraminal narrowing at L4-5. 2. Posterior left transverse annular fissure of the L5-S1 disc potentially contributing to central low back pain.

31. On January 21, 2019, Claimant saw Dr. Cooney per Dr. Woo's referral. Regarding the mechanism of injury, Dr. Cooney noted, "Back in September 2018 patient spent an hour and (*sic*) a deep crouch and on her knees while taking care of a patient. As she was getting up she slipped on the floor which was wet and twisted her right leg." On examination, Dr. Cooney noted swelling laterally as well as joint line tenderness laterally and reproducible mechanical symptoms laterally. He noted the right knee MRI demonstrated a complex lateral meniscus tear with associated parameniscal cyst and early patellofemoral chondral change. He opined consideration of a knee arthroscopy with presumed partial meniscectomy and parameniscal cyst decompression was warranted. He referred Claimant to Dr. Gerlach for a spine consultation.

32. On January 30, 2019, Claimant presented to Nicholas K. Olsen, M.D. per referral of Dr. Woo. Claimant reported injuring her lumbar spine after spending an hour on her knee flushing a clotted catheter and in the process slipping on a wet floor. He noted the lumbar spine MRI demonstrated grade 1 spondylolisthesis at L4-5 with right greater than left foraminal stenosis and annular fissure at L5-S1. He opined that, based on his clinical examination, the more likely pain generator was the annular fissure at L5-S1. He noted the grade 1 spondylolisthesis was likely chronic and longstanding. Dr. Olsen recommended flexion/extension films, aquatic therapy, and a possible epidural steroid injection in the future.

33. On February 25, 2019 Dr. Cooney issued a letter stating his opinion that Claimant sustained a new work-related injury on September 11, 2018 because Claimant was "essentially symptom-free" since his April 2017 evaluation of her up until the alleged work injury.

34. On April 18, 2019, Claimant saw Matthew R. Gerlach, M.D. per the referral of Dr. Cooney. Claimant reported feeling pain in her right leg while lifting a patient at work on September 11, 2018, then that same day slipping on a wet floor and twisting her right leg, immediately feeling severe right leg pain. Dr. Gerlach noted MRI findings of L4-5 spondylolisthesis, hypertrophic facet degeneration, and severe lateral recess stenosis. He opined that Claimant's radiating right leg pain followed an L5 nerve root pattern and correlated with the L4-5 spinal stenosis and spondylolisthesis. He recommended conservative treatment and consideration of surgery at L4-5 in the event conservative treatment failed.

35. On July 8 2019, Kathleen D'Angelo, M.D. conducted an Independent Medical Examination (IME) at the request of Respondents. Dr. D'Angelo took a detailed history from Claimant, performed a thorough record review, and examined Claimant. Regarding the mechanism of injury, Claimant reported slipping on a wet floor, twisting, and catching herself on a cart. Dr. D'Angelo opined that, at most, Claimant suffered an aggravation of underlying right knee osteoarthritis, which by medical definition should have been short-lived and temporary. Dr. D'Angelo opined that the lateral meniscus tear demonstrated on MRI was chronic and degenerative. Dr. D'Angelo explained that traumatic meniscus tears generally occur with other associated ligamentous tears and are generally are vertical tears. She noted that degenerative meniscal lesions are

common, strongly associated with the presence of osteoarthritis in the knee, and present in a significant percentage of patients 50 years old and older. Dr. D'Angelo noted Dr. Cooney previously diagnosed Claimant with a lateral meniscus tear and, in April 2017 Claimant had similar knee complaints as she had at the time of the IME. She explained that the proper treatment for a degenerative tear is activity, which is why Claimant functioned well after the aspiration and injection. Dr. D'Angelo opined that surgery for Claimant's degenerative lateral tear was not reasonable and necessary, as studies demonstrate there is no benefit from surgical intervention for degenerative meniscus tears.

36. Dr. D'Angelo further opined that Claimant's lumbar MRI showed nothing but degenerative findings which predated and were incidental to her alleged work injury. Dr. D'Angelo cited medical literature to explain that the MRI finding of degeneration was the result of normal aging and not associated with pain, and that the facet joint arthropathy (OA of the facet joint) is a common finding linked to low back pain, progressing with age, and commonly seen in the general population without an unusual injury or trauma. Finally, she noted that annular fissures occur in early stages of spinal degeneration and are not indicative of a traumatic injury. Dr. D'Angelo stated that in her medical opinion Claimant's lumbar spine pain was not causally related to her alleged work injury.

37. On August 15, 2019, Dr. Woo issued a letter to Respondents' counsel stating he agreed with Dr. D'Angelo's assessment that Claimant has a chronic lateral meniscus tear. Dr. Woo explained that the MRI findings indicate chronic changes, specifically, the parameniscal cysts on the anterolateral joint line. He also agreed that Claimant's right knee condition was at MMI at the time of her MRI, and no medical care or restrictions for the right knee were related to the alleged work injury. Dr. Woo noted he agreed the lumbar MRI findings revealed only chronic degenerative changes, but stated he could not conclude solely from the MRI that Claimant's lumbar condition as a whole was unrelated to the alleged work injury.

38. On August 21, 2019, Dr. Woo issued a second letter to Respondents' counsel stating that, if Claimant had been receiving care for a low back condition prior to the work incident, this would suggest elements of symptomatic low back degenerative changes with intermittent or persistent episodes of symptoms. Could be a pre-existing condition, but again reiterated the work-relatedness would be based on the facts of what precipitated the need for treatment for low back pain.

39. Dr. Cooney testified at pre-hearing evidentiary deposition. Dr. Cooney testified as an expert in orthopedic surgery, specializing in knees and shoulders. Dr. Cooney is not Level II accredited. Dr. Cooney continued to opine Claimant sustained an acute lateral meniscus tear as a result of the September 11, 2018 incident. He clarified that when he examined Claimant in April 2017 he did not actually suspect Claimant sustained a lateral meniscus tear. He explained that lateral meniscus tear was listed as a possible diagnosis for insurance companies in the event Claimant were to schedule an MRI in the future. Dr. Cooney testified that if Claimant had a meniscus tear at the time, neither the aspiration nor the injection would have provided relief. He testified that

if Claimant was suffering from a more significant condition at the time he would have expected Claimant to return to him for treatment sooner. Dr. Cooney testified that the MRI revealed a lateral meniscus tear with a parameniscal cyst and some early patellofemoral arthritis. He explained that the parameniscal cyst would suggest the tear did not happen within a week or two of his January 2019 evaluation of Claimant; however, Dr. Cooney was unaware of how long it generally takes such cysts to develop.

40. Dr. Cooney testified that traumatic tears can occur without an ACL injury and do not have to take any particular shape or configuration. He explained that the normal cartilage on the lateral side of Claimant's knee supports a conclusion the tear is traumatic. Dr. Cooney testified the MRI demonstrated early osteoarthritis that did not have any implication in causing a degenerative meniscus tear. He disagreed with Dr. D'Angelo that Claimant's symptoms are more related to ongoing arthritis versus a meniscus tear. Dr. Cooney opined that, given the mechanism of injury, MRI results, and persistent symptoms, it is reasonable for Claimant to undergo a right knee arthroscopy.

41. On cross-examination, Dr. Cooney testified his opinion was based on the MRIs, his reports, and the report of Dr. D'Angelo. He testified he did not review any of Claimant's other medical reports or the medical studies cited by Dr. D'Angelo. Dr. Cooney testified he was unaware Claimant provided a different mechanism of injury to him than she did to other providers. He testified, however, that twisting of the knee would be a common cause of a meniscus tear. Dr. Cooney further testified that if Claimant sustained a traumatic meniscus tear on September 11, 2018 she would have pain and possible some mechanical symptoms. He explained it would not be unusual to have full pain-free range of motion a few days later. Dr. Cooney testified he was unaware Claimant had reported significant improvement by December 17, 2018, and she had an incident involving her knee on December 21, 2018. Despite being made aware of such information at hearing, Dr. Cooney did not change his opinion regarding the relatedness of Claimant's condition or need for treatment.

42. Dr. D'Angelo testified by post-hearing evidentiary deposition. Dr. D'Angelo testified as a Level II accredited expert in internal medicine and occupational medicine. After the July 8, 2019 IME, Dr. D'Angelo reviewed additional records, including records regarding Claimant's employment issues, Dr. Gerlach's report, Dr. Woo's August 15, 2019 and August 21, 2019 reports, and Dr. Cooney's deposition testimony. Dr. D'Angelo continued to opine Claimant's right knee diagnosis is a degenerative lateral meniscus tear that predated the alleged work injury. Dr. D'Angelo explained that if Claimant truly sustained an acute lateral meniscus tear during her shift on September 11, 2018, she would have become acutely symptomatic and could not have done the activities she told Dr. D'Angelo she completed prior to the end of her shift. Dr. D'Angelo concluded that Claimant had a degenerative tear by mechanism, structure, and findings on the MRI. Dr. D'Angelo explained that the MRI revealed multiple cysts, which are commonly seen with degenerative tears, as well as degenerative changes in all three compartments of the knee.

43. Dr. D'Angelo discussed Claimant's well-documented improvement between the date of the alleged injury and December 17, 2018, noting that Claimant's condition on December 17, 2018 was classic for resolution of an exacerbation of a degenerative tear. With respect to the December 21, 2018 incident, Dr. D'Angelo opined Claimant's fall in the parking lot was not related to the alleged work injury. She reiterated her opinion that right knee surgery is not reasonable, necessary or related.

44. Regarding Claimant's low back condition, Dr. D'Angelo testified that all of the findings identified on the lumbar MRI are degenerative. She continued to opine Claimant's low back issues are degenerative in nature and unrelated to Claimant's alleged work injury. Dr. D'Angelo opined Claimant did not sustain any work injury on September 11, 2018.

45. Claimant testified at hearing she was not upset regarding her demotion in August 2018 and that the employment issues are unrelated to her reporting of a work injury. She testified that she continues to experience pain and a locking sensation in her right knee, as well as low back pain when sitting for extended periods of time. Claimant testified she no longer rides bikes or exercises as she did prior to the alleged work injury. Claimant is currently working for Employer in an on-call basis. Claimant is requesting a change in authorized treating physicians. She testified she is dissatisfied with Dr. Woo's treatment and feels he does not listen to her concerns or adequately assess her. She further testified Dr. Woo prescribed her a NSAID that caused her problems. Claimant requests a change of physician to Dr. Caroline Gellrick, who she has researched online.

46. The ALJ finds the opinions of Drs. D'Angelo and Woo more credible and persuasive than the opinions of Dr. Cooney

47. The ALJ finds the testimony of Mr. X[Redacted] more credible and persuasive than Claimant's testimony.

48. Claimant failed to prove by a preponderance of the evidence she sustained a compensable industrial injury to her right knee and low back on September 11, 2018. The preponderant credible and persuasive evidence establishes Claimant's right knee and low back conditions are pre-existing and were not caused, aggravated or accelerated by the alleged September 11, 2018 work incident.

49. Evidence and inferences contrary to these findings were not credible and persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the

necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Compensability

The claimant was required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.*, 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a

pre-existing condition that is unrelated to the employment. See *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center*, WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.*, WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000).

As found, Claimant failed to prove by a preponderance of the evidence she sustained a compensable work injury during the course and scope of her employment for Employer. Claimant alleges she slipped and twisted her low back and right knee on September 11, 2018. The record clearly demonstrates Claimant was in the midst of employment issues with her Employer at the time of the alleged injury. Claimant had returned to work just one day prior to the alleged injury after taking time off due to being distraught over a recent demotion. Claimant's testimony that she was not upset over the demotion is not credible, as Mr. X[Redacted] credibly testified to his observation of Claimant's behavior, and both the medical records and Claimant's September 12, 2018 email to Mr. N[Redacted] refer to Claimant being emotional and stressed. Claimant admitted to taking a leave of absence under FMLA after sustaining the alleged work injury because she was emotional and upset and wanted time to heal mentally and spiritually. This further calls into question Claimant's motives and her credibility as to an alleged work injury.

In addition to the employment issues, the credible and persuasive medical evidence does not establish Claimant more than likely sustained acute injuries to her right knee and low back. Claimant acknowledges she did not feel any right knee or low back pain until hours after the alleged work injury and she was able to continue performing her normal work duties for several hours. Claimant notified Mr. N[Redacted] she was generally not feeling well, but made no mention to him of the alleged slipping incident or any issues with her right knee or low back. Dr. D'Angelo credibly explained that, had Claimant actually sustained an acute meniscus tear, she more than likely would have been acutely symptomatic and unable to continue performing at least some of her regular job duties. Dr. D'Angelo conducted a comprehensive review of Claimant's medical records and employment records in issuing a causation analysis. She credibly opined Claimant did not sustain a work injury on September 11, 2018, explaining that Claimant's lumbar and knee MRIs demonstrate only chronic, degenerative changes. Dr. D'Angelo credibly explained Claimant's presentation and response to treatment further support her conclusion that Claimant's symptoms and need for treatment are the result of pre-existing, degenerative changes that are unrelated to any alleged work incident. The totality of the credible and persuasive evidence does not establish Claimant more than likely sustained a compensable work injury that caused disability or the need for treatment.

As Claimant failed to meet her burden to prove she sustained a compensable industrial injury, the remaining issues of medical benefits, TTD, intervening injury, and change of physician are moot.

ORDER

1. Claimant failed to prove by a preponderance of the evidence she sustained a compensable industrial injury on September 11, 2018. Claimant's claim for benefits is denied and dismissed.
2. All matters not determined herein are reserved for future determination.

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

DATED: February 25, 2020



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-119-027-002**

ISSUES

- Did Claimant prove by a preponderance of the evidence that Colorado has jurisdiction over his workers' compensation claim?
- Did Claimant prove entitlement to reasonably necessary medical treatment to cure and relieve the effects of his injuries?

STIPULATIONS

Respondents stipulated Claimant was in the course and scope of employment with Employer at the time of the accident in Georgia on June 25, 2019, and that the accident arose out of Claimant's employment.

FINDINGS OF FACT

1. Claimant is an over-the-road truck driver. He lives in Colorado Springs, Colorado.

2. Employer is a trucking company based in Union, Missouri. Employer has no operations in Colorado.

3. On April 15, 2019, Claimant received an e-mail from Nicholas R[Redacted] in Employer's recruiting department, thanking Claimant for his interest in the company, and providing a link to Employer's online job application. Later that day, Claimant completed the application, via his cell phone, from his home in Colorado Springs.

4. No persuasive evidence was presented to show Employer contacted Claimant regarding prospective employment. Nor is there any persuasive evidence Employer actively recruits employees from Colorado or has any other Colorado-resident employees other than Claimant. Based on the evidence presented, the ALJ infers Claimant made the first contact, and the e-mail from Mr. R[Redacted] was in response to that initial contact from Claimant.

5. On the morning of April 16, 2019, Employer reviewed Claimant's driving record through the MVR Express system. The ALJ infers Employer was satisfied with the report, because a few hours later, Employer's Representative Karen Y[Redacted] sent Claimant a welcome e-mail packet. The e-mail started with "Welcome to the Climate Express Family!!!!!!!!!! We appreciate what you [sic] and value your employment with us. Have a safe trip in and see you soon!!!" [Exclamations in original].

6. Before starting work for Employer, Claimant had to attend an orientation at Employer's facility in Union, Missouri. The orientation included a driving test, a drug test, and paperwork. The welcome e-mail described Claimant lodging arrangements (at

Employer's expense) during the orientation. Employer also provided a company car for Claimant's use during the orientation. The e-mail confirmed, "You should be in your truck and on the road the 2nd day or the morning of the 3rd. Once orientation is complete, you will be assigned a truck and routed through your house as soon as possible."

7. Ms. Y[Redacted] enclosed another two-page document with more details regarding the orientation process and daily schedule. At the top of the first page, the document stated, "Congratulations You Made it! Welcome to the Climate Express Team!" The document ended with "**Congratulations!!! You are now part of the team!!! We look forward to working with you.**" [Bold in original].

8. Employer provided Claimant a one-way bus ticket for travel from Colorado Springs to St. Louis, Missouri.

9. Claimant believed he was hired and "got the job" when he read the welcome e-mail packet. Claimant believed he was Employer's employee when he left Colorado because they had sent him the bus ticket, a hotel voucher, and the "letter of congratulations." Claimant knew he had to pass the driving test and drug test before he could start driving for Employer, but he thought he had been hired before he left Colorado. Claimant testified he would not have travelled to Missouri for orientation if he did not think he had been hired.

10. Claimant departed Colorado Springs on April 17 and arrived in St. Louis on April 18, 2019. He went to Employer's facility after arriving in Missouri to start the orientation process. He completed multiple documents on April 18, including a "New Hire Acceptance Sheet," a direct deposit form, and a W-4 withholding form. Employer arranged for Claimant to give a urine sample that same day, which he passed. On Friday, April 19, Claimant passed a written test and the driving test.

11. Claimant returned to Employer's facility on Monday, April 22, 2019 to complete additional paperwork, including the Employment Eligibility Verification Form I-9. He was assigned a truck and began driving that same day. Employer made various notations in Claimant's employment file that his "date of hire" was April 22, 2019.

12. Claimant was involved in motor vehicle accident on June 25, 2019 while making deliveries in Georgia. He suffered injuries that required medical treatment and caused him to miss work.

13. Claimant has an active workers' compensation claim in Missouri for the June 25, 2019 accident. MEM, Employer's workers' compensation insurer in Missouri, has paid temporary disability benefits and covered medical treatment.

14. On October 3, 2019, Claimant filed a Worker's Claim for Compensation form with the Colorado Division of Workers' Compensation, seeking benefits for his injuries under Colorado law. Respondents denied the claim on the basis Colorado lacks jurisdiction over Claimant's injuries.

15. Claimant failed to prove Employer purposefully availed itself of the privilege of conducting business in Colorado or had any significant contacts with Colorado other than Claimant living here when he applied for work. Accordingly, Colorado does not have personal jurisdiction over Employer.

CONCLUSIONS OF LAW

Colorado's "extraterritorial" jurisdiction over injuries occurring in another state is governed by § 8-41-204, which provides,

If an employee who has been hired or is regularly employed in this state receives personal injuries in an accident or an occupational disease arising out of and in the course of such employment outside of the state, the employee, or such employee's dependents in case of death, shall be entitled to compensation according to the law of this state. This provision shall apply only to those injuries received by the employee within six months after leaving this state, unless, prior to the expiration of such six month period, the employer has filed with the division noticed that the employer has elected to extend such coverage for a greater period of time.

Claimant asserts Colorado jurisdiction under the theory he was hired in Colorado and the injury occurred within six months after he left the state. Whether an employee was "hired . . . in this state" is a contract question generally governed by the same rules as other contracts. *Denver Truck Exchange v. Ferryman*, 407 P.2d 805 (Colo. 1957). The essential elements of a contract are competent parties, subject matter, legal consideration, mutuality of agreement, and mutuality of obligation. *Id.* The place of contracting is generally determined by the parties' intention and is usually the place where the offer is accepted, or the last act necessary to the meeting of the minds or to complete the contract is performed. The ultimate criterion of the place where the contract is deemed to have been made is the place where the last act necessary to complete it was done. *Id.* Nevertheless, in the context of workers' compensation claims, overly technical application of the "contract of hire" requirement is not appropriate. The general rule announced in *Denver Truck Exchange* has been tempered so that a contract of hire may be deemed formed, even though not every formality attending commercial contractual arrangements is observed, as long as the fundamental elements of contract formation are present. *Moorhead Machinery & Boiler Co. v. Del Valle*, 934 P.2d 861 (Colo. App. 1996).

Claimant argues the facts of his case are "remarkably similar" to the facts in *Miner v. Youngquist Brothers Oil & Gas, Inc.*, W.C. No. 4-951-385-01 (June 19, 2015) and *Huffman v. Multiple Concrete*, W.C. No. 4-876-455-03 (February 20, 2013). Colorado jurisdiction was found in those cases, and Claimant naturally reasons the same result should obtain in his case.

The ALJ agrees the evidence shows Claimant was "hired . . . in this state," as was found in the *Huffman* and *Miner* cases. But that is not the end of the analysis. Claimant's argument overlooks a critical development since those cases were decided, namely, the Supreme Court's decision in *Youngquist Brothers Oil & Gas, Inc. v. Miner*, 390 P.3d 389

(Colo. 2017). *Youngquist* held that even where the requirements of § 8-41-204 are met, the exercise of jurisdiction over a particular employer must comport with substantive due process based on the employer's contact with Colorado. The court held,

Specific jurisdiction is properly exercised where the injuries triggering litigation arise out of and are related to activities that are significant and purposefully directed by the defendant at residents of the forum. To determine whether the defendant has sufficient minimum contacts, we consider (1) whether the defendant purposefully availed himself of the privilege of conducting business in the forum state, and (2), whether the litigation arises out of the defendant's forum-related contacts. The "purposeful availment" requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of random or fortuitous contacts or the unilateral activity of [a third-party]. Single or occasional acts related to the forum may not be sufficient to establish jurisdiction if the nature and quality and the circumstances of their commission create only an attenuated affiliation with the forum. [Internal quotations and citations omitted].

In Claimant's case, there is no persuasive evidence Employer "purposefully availed" itself of the privilege of doing business in Colorado or had sufficient "minimum contacts" to subject itself to Colorado jurisdiction. Employer is not based in Colorado and there is no persuasive evidence it conducts any business in this state. Employer's only contact with Colorado is the happenstance that Claimant lived here when he applied for work. Employer did not actively recruit Claimant or any other Colorado citizen. *Youngquist* instructs it is not enough for an employee unilaterally to reach out to a non-resident employer and seek employment. Rather, the employer must reach into Colorado to seek the employee, or otherwise conduct business here. Otherwise, Colorado lacks subject matter jurisdiction, notwithstanding that the employee was hired in Colorado.

The facts in Claimant's case are not appreciably different from those in *Youngquist*, which the Supreme Court found were insufficient to support personal jurisdiction over the employer. Accordingly, Claimant's claim must also be denied for lack of jurisdiction.

ORDER

It is therefore ordered that:

1. Claimant's claim for Colorado workers' compensation benefits is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to

the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: <http://www.colorado.gov/dpa/oac/forms-WC.htm>.

DATED: February 25, 2020

s/ Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that the cervical facet injections as recommended by Dr. Stanton, are reasonable, necessary, and related to the original work injury of October 14, 2016?

II. Has Claimant shown, by a preponderance of the evidence, that the right shoulder surgery as recommended by Dr. Weinstein, is reasonable, necessary, and related to the original work injury of October 14, 2016?

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

1. On October 14, 2016, Claimant was working for Employer. Claimant testified that he was walking down a small hill, then slipped on a patch of grass. Claimant testified that his feet went out from under him and he fell backwards, hitting his low back. He also braced himself with his left arm. Claimant testified that his head snapped to the left and behind him. Claimant immediately reported the injury to his employer.

2. Claimant initially treated at Penrose St. Francis Hospital the same day. (Ex. H) Claimant reported to ER personnel that he had low back pain after a fall to his back. Claimant complained of pain radiating down his right leg along with left shoulder pain with numbness in his left upper extremity. *Id.* Claimant did not report or complain of any neck pain. Examination revealed a supple neck with no midline tenderness. *Id.* at 69.

3. On October 17, 2016, Claimant was evaluated by Dr. Baptist at Colorado Springs Health Partners. (Ex. I, p. 73). Claimant complained of pain in his low back, left shoulder, and arm with numbness. Claimant again denied neck pain. Dr. Baptist noted that the neck was supple and appearance was normal. *Id.* at 75. There was no tenderness and full range of motion of the cervical spine.

4. Claimant's first report of neck pain occurred on October 20, 2016 when he was treated by Dr. Baptist. (Ex. I, p. 77). Claimant reported that his neck was hurting, and his left upper extremity symptoms were more constant. Dr. Baptist noted left paraspinal and upper trapezius tenderness and spasm. Claimant was referred for a cervical MRI.

5. Claimant underwent an MRI of the cervical spine on October 25, 2016. (Ex. N). The MRI showed a small disc protrusion posterolaterally on the left at C6-7, with probable impingement of the left C7 nerve. Also noted were a right sided uncinat spurting at C4-5 with moderate lateral recess stenosis, and mild right foraminal stenosis with crowding of the right C6 nerve. On November 3, 2016, Dr. Baptist noted that the cervical MRI findings did not really explain Claimant's left upper extremity symptoms; however, Claimant was referred to a neurosurgeon for a surgical opinion. (Ex. I, p. 80). He was also referred to physical therapy.

6. Claimant attended 20 physical therapy sessions between November 8, 2016 and January 27, 2017 with Total Function Physical Therapy. The initial assessment included neck, left shoulder, and back pain, with possible signs of cervical radiculopathy in his upper left arm, and decreased range of motion in his neck and shoulder. Conservative treatment followed, including manual therapy, cervical distraction, and right-sided C4-7 lateral glides.

7. On December 8, 2016, Claimant returned to Dr. Baptist. At that time, Claimant's chief complaints included a pain sensation on the neck going down the left arm. Claimant was released to work for modified duty. Restrictions included no lifting, carrying, pushing, or pulling over 5 pounds and no use of the left arm.

8. On December 19, 2016, Claimant presented to Dr. Weinstein at the Colorado Center of Orthopedic Excellence for an evaluation of his left shoulder. Claimant discussed his injury on October 14, 2016 when he fell on his back and braced onto his left arm. Claimant reported pain in his anterior, posterior, and lateral aspect of the shoulder as well as into the lateral neck. Claimant stated his pain was notable with sleeping on the left side as well as shoulder level activities.

9. Physical examination revealed tenderness over the trapezius bilaterally, more notable on the left than the right. ROM showed a decreased ROM in the cervical spine in all planes. Dr. Weinstein stated, "most of his symptoms are related to adhesive capsulitis of his shoulder and general inflammation as well as a myofascial component with radiculopathy from his neck. Dr. Weinstein suggested a surgical intervention in the form of a left shoulder arthroscopy. (Ex. 4, pp. 372-373). On a return visit on February 1, 2017, Claimant agreed to undergo the procedure, but it was denied by Respondents at this time.

10. On March 9, 2017, Claimant returned to Dr. Weinstein for a follow-up for his left shoulder injury. Physical examination showed mild tenderness over the left trapezius and a slightly positive Spurling's test. Dr. Weinstein administered a cortisol injection for the left shoulder because the surgery had not been authorized. (Ex 4, pp. 376-377).

11. Over the next three years, Claimant's reported neck symptoms varied. On December 30, 2016, Claimant reported that the numbness and weakness in his arms was gone, but his pain continued. (Ex. I, p. 91). On February 3, 2017, Claimant was treated by Dr. Baptist and reported that his neck still hurt, but he did not have any radiculopathy. (Ex. I, p. 95). Dr. Baptist noted that Claimant was moving his neck better. *Id.*

12. On March 3, 2017, Claimant followed up with Dr. Baptist and reported ongoing pain in his left shoulder and low back, but did not mention any neck pain. (Ex. I, p. 99). On April 5, 2017, Claimant was examined by Dr. Hammers. (Ex. 4, p. 342). Dr. Hammers noted no cervical midline tenders and full range of motion. *Id.* Claimant did have mild tenderness over the left trapezius. On April 7, 2017, Claimant was evaluated by Dr. Baptist. (Ex. I, p. 104). Claimant did not report any neck pain and Dr. Baptist noted that the neck was supple and appearance was normal with full movement and no apparent pain.

13. At this same visit with Dr. Baptist on April 7, 2017, the following was noted in Claimant's file by Dr. Baptist:

I have told the patient that he must not obtain narcotics from any other provider while I'm caring for him. I checked the PDMP today, as I checked previously, and there are several scripts written and filled by his PCP which didn't appear before this to my knowledge, and also not in clinical summary except as ordered by his PCP 2/27. Patient at first stated he did not take the hydrocodone prescribed at 60/month by other providers but later admitted to this. In reviewing PDMP, over the year prior to this case he was provided multiple scripts by multiple providers, ostensibly for chronic pain in elbow. *Id.* at 104.

14. From April 4, 2017 through July 7, 2017 Claimant returned to PT for 23 visits based on a referral from Dr. Weinstein. Chief complaints consisted of shoulder, back and neck pain. Treatment diagnosis included cervicalgia. Claimant reported that his condition had worsened since he stopped PT in late January 2017. Initial subjective complaints showed his left shoulder ROM was extremely limited and that he was unable to do most activities of daily living with his left arm. Claimant also reported that his neck feels 'misaligned'. Claimant now reported headaches that began after his fall on October 14, 2016.

15. On April 5, 2017, Claimant presented to Dr. Ronald Hammers for an evaluation of his cervical spine. Claimant reported a few months of pain with neck movement but denied any radiculopathy. Claimant did report headaches. Dr. Hammers recommended conservative care.

16. Also On April 5, 2017, in an effort to bring Claimant back to work, Respondents provided Claimant with a modified job offer of light duty working for ARC Thrift Store. (Ex. O). Claimant worked a single shift of eight hours for ARC Thrift Store on April 19, 2017. *Id* at 200. Claimant's duties while working for ARC were to assist with sorting, cleaning, and tagging clothing, linens, shoes, books, electronics, and small household appliances weighing no more than five pounds. At hearing, Claimant testified that he stayed within his work restrictions at that time, by lifting electronic items weighing no more than 5 pounds.

17. Claimant testified that he began feeling right shoulder pain while working at the ARC on April 19, 2017. Claimant testified that he told his supervisor at ARC that his shoulder was starting to hurt, and he took a morning break. Claimant testified that he felt a 'pop' in the right shoulder after lunch and he could not work any further. *Claimant did not report this pop in his right shoulder to any of his treating or examining medical providers.* Claimant did not immediately report the right shoulder injury to Employer.

18. Dr. Weinstein is an orthopedic surgeon specializing in shoulder and elbow surgery. Dr. Weinstein treated Claimant for his left shoulder injury, and his reported right shoulder injury. Dr. Weinstein testified at his deposition that he did not know Claimant's prior history, and did not have any documentation about the right shoulder injury prior to his treatment of Claimant. Dr. Weinstein opined that it would be hard to tear a rotator cuff by working one day lifting items that weighed five pounds or less.

19. Around the time that Claimant was working for ARC, he was attending regular physical therapy sessions with Total Function Physical Therapy. (Ex. K). On April 20, 2017, [one day after the reported right shoulder injury], Claimant attended physical therapy and reported that he was in a lot of pain after volunteering at ARC; however, he did not mention a right shoulder *injury* or feeling a *pop* in his right shoulder while working for ARC. *Id* at 163. Claimant followed up with physical therapy on April 25, 2017. *Id* at 161. Physical Therapist Reed noted significant tightness and tenderness to palpation of the left greater than right cervical musculature. In addition, PT Reed noted that pressure to the left upper trapezius distally and proximally elicited a headache. There was no discussion of right *shoulder pain* or tenderness.

20. On April 28, 2017, Claimant followed up with Dr. Baptist. (Ex. I, p. 108). Claimant complained of neck, back, and left shoulder pain, rated at 8/10. *Id.* Dr. Baptist noted that there were no other new complaints. *Id.* On May 1, 2017, Claimant was evaluated by Dr. Weinstein. Claimant complained of pain in the area of his trapezius but no cervical pain. *Id.* Dr. Weinstein noted no midline cervical tenderness and full range of motion. There was no mention of right *shoulder pain*.

21. On May 1, 2017, Claimant returned to Dr. Weinstein for evaluation of his left shoulder. Physical examination showed mild tenderness over the left trapezius and

continued tenderness and pain over the anterior subacromial space, bicipital groove, and acromioclavicular joint. Left shoulder surgery was recommended. Claimant again stated he wished to proceed with surgery.

22. On May 23, 2017, Claimant had a left shoulder arthroscopic subacromial decompression with rotator cuff repair of the subscapularis tendon, arthroscopic biceps tenodesis and arthroscopic distal clavicle resection. (Ex. 4, p. 380).

23. On June 27, 2017, Claimant returned to Dr. Weinstein for a post-surgical visit. Physical examination revealed a slight decrease in ROM in all cervical planes. Dr. Weinstein stated Claimant is doing well six weeks out from surgery. Dr. Weinstein also instructed Claimant to avoid use of the left upper extremity except to write or type and discontinuation of the sling on July 4, 2017.

24. On June 28, 2017, Claimant returned to Dr. Hammers for a follow up on his cervical radiculopathy. Claimant reported some neck pain that radiates towards the right ear. Dr. Hammers noted that Claimant had a history of neck pain but he did not see any severe neurologic compression requiring surgery. Dr. Hammers recommended a repeat MRI to assess continued back pain. No additional care or testing was recommended for the cervical spine. (Ex. 4, pp. 348-349).

25. On August 9, 2017, Claimant returned to Dr. Weinstein. Claimant was approximately 10 weeks out from surgery and was improving. Claimant also reported increased pain in the right shoulder that was described as an ache in the anterolateral aspect. Dr. Weinstein conducted a cursory examination of the right shoulder in addition to the left shoulder. Dr. Weinstein stated Claimant's physical examination is consistent with general inflammation of the [right] rotator cuff and that his parasthesias of his hand may be related to peripheral mononeuropathias. Dr. Weinstein's impression included right shoulder rotator cuff tendinitis and hand parasthesias. (Ex. 4, pp. 384-386).

26. On August 31, 2017, Claimant reported to PT based on a new referral from Dr. Weinstein. Initial subjective complaints included pain in the right shoulder. He stated he tried a recumbent bike and it hurt the right shoulder and back when he went over a little bump. Claimant tolerated strengthening exercises on this day. However, due to right shoulder pain, all the exercises had to be single arm. (Ex. 2, p. 279).

27. On a return visit to Dr. Weinstein on October 6, 2017, Claimant was noted to be making progress on his left shoulder recovery, but right shoulder symptoms pointed towards a possible rotator cuff issues. (Ex. 4, pp. 387-388).

28. On November 10, 2017, Claimant returned to Dr. Hammers with reports of increasing neck stiffness for the past six months. Claimant reported pain that

radiates from his neck towards his right ear. In addition, Claimant reported feeling 'heat' at the back of his neck and he mentioned an additional right shoulder injury from working at the ARC thrift store. He also described pain in the right upper extremity that radiates down to the hand.

29. Dr. Hammers noted that the physical examination was limited by the recent right shoulder injury and pain. Dr. Hammers ordered an additional MRI cervical without contrast and cervical dynamic x-rays. The MRI report dated November 10, 2017 revealed cervical spondylosis with borderline central spinal canal stenosis at C3-C4 and C4-C5 as well as multilevel foraminal stenosis bilaterally, most pronounced on the left at C6-C7. (Ex. 3, pp. 357-361).

30. On November 16, 2017, Claimant presented to Dr. Baptist with a *new* workers compensation injury. Claimant stated he injured his right arm and hand while working at the ARC on April 19, 2017. Specifically, Claimant was lifting heavy objects of a trash bin with his right arm only when he felt sudden pain in his right shoulder extending into the median distal right hand. He asserted he initially thought the right shoulder injury would get better, but it didn't. Physical examination revealed very limited range of motion in the right shoulder in all planes and tenderness around the humeral head. Claimant filled out a pain diagram indicating pain in the front right shoulder extending into the right trapezius down into the right arm, pain along the entire cervical spine, and pain in the lower back. Dr. Baptist referred Claimant to hand surgery. Claimant was also referred for an MRI of the right shoulder. (Ex. 1, pp. 74-79).

31. On December 18, 2017, Claimant reported to Dr. Karl Larsen on referral from Dr. Baptist for evaluation of his right hand. Dr. Larsen noted that Claimant was functionally one-handed on the right side during his recovery from his left shoulder surgery. Dr. Larsen also noted that Claimant was sent to a warehousing area where he was *doing a lot of* box emptying one-handed. During this work, he developed significant throbbing pain throughout the right wrist and hand with some subjective tingling in the digits.

32. Dr. Larsen's impression stated he had carpal tunnel syndrome related to his use of his right arm only. Specifically, Dr. Larsen stated, "ordinarily, I would not consider just use of one extremity during recovery on the other [arm] a major cause of injury but in this case, the way it is presented ... *he was essentially on employment doing a lot of heavy repetitive gripping* and lifting activities. I think [this] has aggravated his right hand to where it now needs treatment. (Ex. 4, pp. 389-391)(emphasis added). At no point in Dr. Larsen's report does it indicate the Claimant told him that worked at this position for *one day*.

33. On a follow-up visit to Dr. Baptist on December 21, 2017, Claimant now reported not only right shoulder pain extending into the trapezius, but also pain in right hand, lower back pain, and along the *entire* cervical spine. Pain now reported at 8/10. (Ex. 1, pp. 82-85).

34. On February 28, 2018, Claimant reported to Dr. Baptist for symptoms related to his back. Physical examination revealed stiffness in the neck. Claimant was referred to PT for his cervical and lumbar radiculopathy. (Ex. 1, pp. 91-97).

35. From March 13, 2018 to April 30, 2018, Claimant returned to PT after receiving a new referral from Dr. Baptist. Claimant's primary complaints included pain in the right shoulder and neck. Claimant's neck pain stopped him from looking up or to the left because his neck felt "stuck." Claimant reported neck pain and headaches when leaning forward to shave. He gets headaches when he turns his head to the left. Claimant also reported pain in the right shoulder, which increased when he raised his arms. Physical examination revealed pain with cervical extension and left rotation. Dr. Baptist diagnosed claimant with "persistent neck and back pain ... and decreased cervical ROM." Treatment modalities included manual therapy, therapeutic exercises, neuromuscular rehabilitation and patient education. (Ex. 2, pp. 281-286).

36. On March 23, 2018, Claimant reported that he had a bulge and tenderness on the ride side of the neck that wouldn't go away. On March 29, 2018, Claimant again reported neck pain. Manual therapy on this date included left rotation at T1 3 mobilization with left cervical rotation, soft tissue mobilization of the right scalenus, upper trapezius, bilateral suboccipitals. Claimant continued to report pain to the right shoulder and neck on his April 2, 2018 visit to PT. Manual therapy included left cervical rotation. Claimant also reported right shoulder pain.

37. On May 11, 2018, Claimant returned to Dr. Baptist for a follow-up for his cervical myofascial strain and lumbar radiculopathy. Claimant reported ongoing neck pain. Dr. Baptist noted the neck pain "has not been attended to over the last few months because *the patient told me ... that his neck was back to baseline* and he was having no more pain than usual. That is apparently not the case." Physical examination of the neck showed "fairly normal" range of motion although Claimant was in pain and there was apparent endpoint pain. Dr. Baptist referred Claimant to a neck specialist for a surgical consult. (Ex. 1, pp. 99-101)(emphasis added).

38. On May 31, 2018, Claimant presented to Dr. Paul Stanton with complaints of ongoing posterior cervical pain since his October 14, 2016 fall. Claimant stated the lateral aspect of the right side of his cervical spine was most bothersome. He rated his neck pain as moderate to severe. Claimant stated overhead activity, lifting, and repetitive motion exacerbate his pain while stretching, resting and using a TENS

unit seem to help. Claimant now reported his neck pain at an 8/10. Claimant also reported his neck pain interfered with personal care, lifting, sleeping, social life, and his sex life. He described the pain to the posterior aspect of his cervical spine as a burning sensation with a chronic ache to his bilateral shoulders.

39. Physical examination showed tenderness to palpation over the cervical spinal and paraspinal muscles along with decreased cervical flexion and extension secondary to pain. Dr. Stanton impressions included degenerative disc disease of the cervical spine from C3 to C5, bilateral foraminal stenosis most severe on the left side at C6-C7, and ongoing cervical pain from the 10/14/16 fall at work. Dr. Stanton recommended facet blocks versus radiofrequency ablations in the cervical spine to alleviate Claimant's symptoms.

40. On August 21, 2018, Claimant underwent an x-ray of the right shoulder. It showed small osteophytes at the inferior glenohumeral joint and mild osteoarthritis. (Ex. N, p. 188). On November 6, 2018, Claimant underwent an MRI of the right shoulder, which showed moderate tendinitis involving the infraspinous and supraspinatus tendons, a possible labral tear, mild impingement syndrome, and a small amount of fluid in the subacromial subdeltoid bursa. The MRI scan also noted a crescentic depression involving the anterior articular surface of the right humeral head, which could be a congenital variation or a Hill Sachs deformity from an old anterior shoulder dislocation.

41. On August 23, 2018, Claimant reported to Dr. Baptist for a follow-up on his lumbar and cervical radiculopathy. Dr. Baptist stated that "the right shoulder is another separate case which I'm not addressing today." Claimant's pain diagram showed pain to the right shoulder extending into the right trapezius, pain along the entire cervical spine, and pain in the lower back. Pain was rated at a 7/10. Dr. Baptist noted that Claimant still had some discomfort in his neck and he saw a surgeon who opined that he needed injections but those were not approved. (Ex. 1, pp. 116-120).

42. On November 15, 2018, Claimant reported to Dr. Baptist for the right shoulder only. Dr. Baptist reviewed the MRI of the right shoulder taken on November 6, 2018, which showed tendinitis, and tendinosis of the rotator cuff in addition to a possible labral tear. Dr. Baptist opined that this was consistent with his symptoms of lack of range of motion and popping and instability in the shoulder. Dr. Baptist noted Claimant had an advanced frozen shoulder with limited range of motion. Dr. Baptist referred Claimant to PT to improve his passive range of motion and to orthopedics to attend to a potential labral tear.

43. Physical examination showed extremely limited range of motion with abduction to only 80 degrees and extremely limited external and internal rotation as well as possible adhesive capsulitis. Claimant's pain diagram showed pain to the

right shoulder extending into the right trapezius and pain along the entire cervical spine. Pain was now reported at an 8/10. (Ex. 1, pp. 121-123).

44. On August 23, 2018, Claimant reported to Dr. Baptist for a follow-up on his lumbar and cervical radiculopathy. Dr. Baptist stated that "the right shoulder is another separate case which I'm not addressing today." Claimant's pain diagram showed pain to the right shoulder extending into the right trapezius, pain along the entire cervical spine, and pain in the lower back. Pain was now rated at a 7/10. Dr. Baptist noted that Claimant still had some discomfort in his neck and he saw a surgeon who opined that he needed injections but those were not approved. (Ex. 1, pp. 116-120).

45. On November 15, 2018, Claimant returned to Dr. Baptist for the right shoulder only. Dr. Baptist reviewed the MRI of the right shoulder taken on November 6, 2018, which showed tendinitis, and tendinosis of the rotator cuff in addition to a possible labral tear. Dr. Baptist opined that this was consistent with his symptoms of lack of range of motion and popping and instability in the shoulder. Dr. Baptist noted Claimant had an advanced frozen shoulder with limited range of motion. Dr. Baptist referred Claimant to PT to improve his passive range of motion and to orthopedics to attend to a potential labral tear.

46. Physical examination showed extremely limited range of motion with abduction to only 80 degrees and extremely limited external and internal rotation as well as possible adhesive capsulitis. Claimant's pain diagram showed pain to the right shoulder extending into the right trapezius and pain along the entire cervical spine. Pain was now reported at an 8/10. (Ex. 1, pp. 121-123).

47. Claimant followed up with Dr. Baptist on January 25, 2019. (Ex. 1, p. 115). Claimant reported that all his symptoms from his legs were gone and his back was doing much better. *Id.* Claimant also reported that his left shoulder was doing quite well, and his neck pain was nonradicular at that point. *Id.*

48. Physical examination revealed neck stiffness and tenderness in the right upper side. Claimant's pain diagram indicated pain in the right neck and right trapezius and was rated at an 8/10. (Ex. 1, pp. 127-129).

49. On March 5, 2019, Claimant filed a Worker's Claim for Compensation alleging an injury to his right shoulder, which reportedly occurred on April 19, 2017. (Ex. 9, p. 443). Claimant reported that he injured his right shoulder by repeated lifting and using the right arm. *Id.* Claimant did not report that he experienced a 'pop' or any acute injury.

50. On March 25, 2019, Claimant returned to Dr. Weinstein for an orthopedic consult for his right shoulder pain. Claimant claimed this was related to an April 19, 2017 work incident at the ARC thrift store. Claimant stated he was engaged in

repetitive activity and noticed shoulder pain. Claimant's subjective complaints included a constant ache on the anterior aspect of his right shoulder and the axilla region. Exacerbating factors included reaching across his body to grab a seatbelt. Claimant also reported right shoulder pain wakes him during sleep and that he experiences pain with overhead activity. The location of the pain was on the anterior, posterior, and lateral aspect of the right shoulder radiating into the paracervical region and upper arm. Exacerbating factors were any use of his right arm.

51. Physical examination revealed tenderness over the anterior subacromial space and tenderness over the bicipital groove. Claimant had tenderness to palpation of his right paracervical region, right axillary region and right anterior chest wall muscles. Claimant also had a positive impingement sign. An MRI scan of the right shoulder performed on November 6, 2018 was also reviewed. The MRI showed evidence of a partial thickness rotator cuff tear in addition to the tendinitis and tendinopathy.

52. Dr. Weinstein's impressions included: Right rotator cuff tendinitis with partial rotator cuff tear; Right biceps tendinitis; and Right mild upper extremity myofascial inflammation. Dr. Weinstein's treatment plan indicated "although the patient does have a component of myofascial inflammation, the majority of the patient's symptoms are arising from inflammation of the right rotator cuff with partial tearing as well as inflammation of the right biceps." Dr. Weinstein also indicated that Claimant was treating appropriately to date. Options were extensively reviewed including the possibility of a right shoulder arthroscopic subacromial decompression with debridement versus repair of the rotator cuff and possible biceps tenodesis. Claimant wished to give one further attempt at nonoperative measures. Claimant was given a cortisol injection in his right shoulder and told to continue with PT. (Ex. 4, p. 389).

53. On May 13, 2019, Claimant returned to Dr. Weinstein for a follow-up on his right shoulder. Claimant reported his pain had returned to its previous level. Claimant described his pain as a constant low-grade ache radiating down his right biceps. Any shoulder level and overhead activity exacerbated his symptoms and he reported difficulty sleeping at night due to his right shoulder pain. Physical examination revealed tenderness over the biceps with a positive Speed's test and a positive impingement sign. Dr. Weinstein discussed the etiology of Claimant's injury and stated repetitive activity is one common mechanism of injury for this type of injury. Claimant's options, including surgery, were discussed. (Ex. 5, pp. 400-401).

54. Claimant underwent three Respondent-sponsored IMEs with Dr. Goldman. They occurred on June 22, 2017, January 8, 2019, and August 26, 2019. (Ex. E, G, P). Dr. Goldman has been licensed to practice medicine in the state of Colorado since 1985.

He is board certified in physical medicine and rehabilitation and independent medical examinations. Dr. Goldman is also Level II accredited by the Department of Labor and Division of Workers' Compensation.

55. The first IME with Dr. Goldman occurred on June 22, 2017, approximately two months after the alleged right shoulder injury at the ARC. Dr. Goldman noted that Claimant's chief complaint, self-evaluation questionnaire, and pain drawing alleged total body pain with the *exception of the right upper extremity*. (Ex. P). At hearing, Dr. Goldman testified that he was fully unaware of the ARC injury when he originally evaluated Claimant on June 22, 2017. Dr. Goldman opined that based on the history and records, if there was a right shoulder injury from April 2017, it would have been obvious when Claimant was evaluated in June 2017. (Ex. G, p. 59).

56. Dr. Goldman testified that the reported mechanism of injury would not cause a huge whiplash injury to Claimant's neck, and there was no discrete cervical spine injury. At the 6/22/ 2017 IME, Dr. Goldman reviewed the cervical MRI report, and noted that the findings were primarily *degenerative* in nature, and they did not clearly correlate with Claimant's injury or symptoms. (Ex. P). Dr. Goldman testified that his examination of Claimant's cervical spine was not completely reliable, and a little confusing and magnified at times. Dr. Goldman testified that Claimant's neck symptoms were likely from the left shoulder that travelled up through the left trapezius, and were not specific to the cervical spine itself.

57. On August 31, 2017, Claimant was treated at Total Function Physical Therapy. (Ex. 2). Claimant reported that he tried to ride his recumbent road bike, and hurt his right shoulder and back when he went over a bump. *Id* at 210. This is the first mention of the right shoulder in all of Claimant's medical records. At hearing, Claimant testified that he rode the recumbent bike down the street and went over a drainage dip. Claimant testified that he had to get off because the bump hurt his back, shoulder, and neck.

58. Dr. Goldman noted in his January 8, 2018 IME report that recumbent road bikes can place increased mechanical strain on the shoulder, and require more rotator cuff integrity and stabilization. Dr. Goldman noted that recumbent road bikes were heavy and cumbersome. Dr. Goldman opined that Claimant's underlying non-work-related pre-existing conditions and the cycling incident provide a medically probable reason for the right upper extremity complaints contrasted with the April 19, 2017 incident. (Ex. G, p. 64). Dr. Goldman testified that when determining causation, it is best to rely on prospective medical records because individual memories can be faulty.

59. Dr. Goldman testified that the history provided by Claimant did not make sense, since he personally examined Claimant in June 2017, and Claimant was not having any issues with the right shoulder at that time. Claimant reported that he was working for

ARC and lifting and sorting various items out of crates when he developed right shoulder and upper extremity pain throughout the day. (Ex. G, p. 54). Claimant did not report to him that he experienced a pop in his right shoulder.

60. Dr. Goldman opined that it was highly unlikely that Claimant's right upper extremity complaints were due to the April 19, 2017 incident at ARC. Dr. Goldman noted that there may have been a temporary exacerbation of symptoms on that day, but the records and Claimant's presentation at the IME in June 2017 strongly argue against a medically probable work-related injury that would result in the physical findings and symptoms reported more recently. Dr. Goldman noted that Claimant's right shoulder had regressed beyond expectation in a dramatic and non-physiologic fashion. *Id* at 64. Dr. Goldman opined that the findings did not correlate well with the diagnosis, nor did they make sense with the mechanism of injury reported.

61. At hearing, Claimant testified that he had a prior injury for which he was previously taking Percocet and Vicodin for several years. After the injury on October 14, 2016, Claimant continued receiving prescriptions for Percocet and Vicodin from Dr. Baptist. On April 7, 2017, Dr. Baptist noted that Claimant admitted to inappropriate narcotic use and obtaining multiple prescriptions for narcotics from multiple physicians. Dr. Baptist advised Claimant to seek immediate in-hospital treatment for narcotic addiction. Dr. Baptist opined that Claimant must obtain immediate expertise or there could be dire physical and mental deterioration and threat to his life.

62. Despite Dr. Baptist's strong warning, Claimant testified that he was able to wean himself off narcotics after one week. Dr. Goldman opined that weaning off narcotics in a week was possible, but would have caused withdrawal symptoms. Dr. Goldman testified that the recommended weaning schedule is to reduce the medication by 10% per week. Claimant testified that he recently went to the emergency room twice to obtain Vicodin because his symptoms were increasing, and Dr. Baptist refused to prescribe any narcotics.

63. Claimant underwent a third IME with Dr. Goldman on August 26, 2019. (Ex. E). Dr. Goldman noted that the timing of Claimant's recent symptomatic escalation and request for opioids was concerning. He opined it was consistent with "administrative case closure anxiety" which was frequently seen in patients nearing MMI. (Ex. E, p. 27). Dr. Goldman testified that Claimant's neck symptoms and testing was consistent with referred pain from the shoulder injury. Dr. Goldman testified that performing cervical injections would not be reasonable or necessary, since there was no sufficient physiological or objective correlating medical evidence to support more aggressive treatment of the cervical spine.

64. Dr. Goldman testified that Claimant had significant somatization or response bias that would make interpreting any diagnostic injections difficult. Dr. Goldman opined that

Claimant's pain pattern calls into question how efficacious all the treatment had been and whether additional injections and surgery would be reasonable. He opined that cervical facet injections were not a good idea. Dr. Goldman also noted that the MRI findings of the right shoulder were consistent with degenerative joint disease, a prior injury, and potential congenital abnormalities that would predispose Claimant to a gradual reinjury with activities of daily living or especially a recumbent cycling attempt. (Ex. E, p. 32).

65. Dr. Stanton testified via deposition on December 19, 2019. He is a fellowship trained orthopedic spine surgeon that is treating Claimant's cervical spine. Dr. Stanton is not level II accredited and has not received training with the Division of Workers' Compensation for causation analyses. Dr. Stanton testified that he did not have a detailed description of Claimant's fall to base his opinion on. Dr. Stanton also testified that he had not reviewed Claimant's entire history. Dr. Stanton agreed that if Claimant had a rotator cuff tear, there might be some myofascial pain into the neck. He further acknowledged that based upon what he had seen in the [cervical] imaging studies and the MRI report, that "there was a preexisting injury" [to Claimant's neck]. Doctor Stanton further testified that Claimant's mechanism of injury, his subjective complaints, and the objective reports show that his cervical injuries are, in part, probably related to his fall with an outstretched arm. Dr. Stanton further testified that conservative care, including facet block injections, were reasonable based on Claimant's presentation.

66. On November 18, 2019 Dr. Weinstein testified by deposition as an expert in orthopedic surgery. Dr. Weinstein testified that that it was more likely than not that Claimant's right shoulder inflammation was connected to his left post-shoulder injury, assuming no previous significant complaints. He indicated that it is common to see injury to an arm when the opposite arm is in post-surgical recovery and that he observes this "frequently". Dr. Weinstein opined that the mechanism of injury for Claimant's right shoulder was related to overuse and compensation. He stated his opinion was based upon Claimant's restricted use of the left shoulder and because he was doing physical activity with one hand.

67. Dr. Weinstein further testified that his right shoulder injury was related to both his recovery and his work at the Arc thrift store. Dr. Weinstein stated he did not believe the Claimant's right shoulder injury was connected to the August 2017 incident with a recumbent bike because it was a very minor trauma and because his right shoulder was bothering him before that incident. Dr. Weinstein also stated that asymptomatic rotator cuffs are common in older people and that it is possible for someone to have an asymptomatic rotator cuff tear become symptomatic due to use. Dr. Weinstein testified this happens when small tears over time grow until there is an activity that exacerbates it.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. §8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. §8-43-201, C.R.S.

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

C. Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). In this instance, the ALJ finds that while Claimant may not have *willfully* misled his treatment providers, his track record as a medical historian is checkered. However, it is understandable that Claimant's memory, with the passage of time, is not as persuasive as medical records which were kept contemporaneously with his reported symptoms. Secondly, while Claimant might do his best to describe his symptoms, he cannot be expected to offer persuasive opinions on issues of causation. Such opinions are best sought from medical professionals, as will be noted further.

D. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55, P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968). In this instance, as is frequently the case, sincere and well-informed medical opinions differ. Such opinions will be analyzed in the context of *persuasiveness*, as opposed to *credibility* per se, with further attention to their respective training in determining *causation*, in addition to what might be reasonable and necessary.

E. Further, courts are to be "mindful that the Workmen's Compensation Act is to be liberally construed to effectuate its humanitarian purpose of assisting injured workers." *James v. Irrigation Motor and Pump Co.*, 503 P.2d 1025 (Colo. 1972).

Medical Benefits, Generally

F. Once Claimant has established the compensable nature of his/her work injury, he is entitled to a general award of medical benefits and respondents are liable to provide all reasonable, necessary, and related medical care to cure and relieve the effects of the work injury. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). However, a claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of his need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 622 (197); *Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970); Section 8-41-301(1)(c), C.R.S. Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of employment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). Stated differently, occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability was caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those which flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball, supra*.

G. Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc.*, W.C. No. 4-117-758 (!CAO April 7, 2003). The question of whether a particular medical treatment is reasonably necessary to cure and relieve a claimant from the effects of the injury is a question of fact. *City & County of Denver v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984).

Cervical Injections as recommended by Dr. Stanton

H. Dr. Goldman is a Level II accredited physician by the Division of Workers' Compensation (DOWC). He has specialized knowledge and training by the DOWC to perform causation analyses. Dr. Goldman had the ability to review and analyze Claimant's complete medical file before forming an opinion on whether Claimant's alleged neck injury or right shoulder injury were causally related to the October 14, 2016 work incident. By being able to review the complete record, Dr. Goldman had more than simply Claimant's reports of the injury and symptoms. When dealing with an alleged injury that may have occurred several months prior to the reporting of the injury, it is beneficial to have a clear picture of what happened at the time of the alleged injury. Claimant's authorized treating physicians were focused, and rightly so, on treating Claimant's *symptoms*, but did not have access to the full record and did not have a complete picture to base a *causation* analysis on.

I. Claimant's testimony and reported symptoms surrounding his neck give one pause. First, Claimant alleged that he injured his neck when he slipped and fell on October 14, 2016. However, there is no mention of a neck injury or neck pain in the emergency room records or the initial evaluation by Dr. Baptist on October 17, 2016. In fact, Claimant's neck was examined during both evaluations and it appeared supple with no tenderness and full range of motion. The first mention of neck pain was when Claimant followed up with Dr. Baptist on October 20, 2016. Despite the clearly documented lack of cervical symptoms during Claimant's initial treatment, he testified at hearing that he experienced neck pain from the date of injury. Claimant reported that he had left shoulder pain and numbness down his left upper extremity but no cervical spine symptoms. Claimant did not report any whiplash type injury or pain in his neck related to the fall. Claimant's cervical spine was supple and non-tender with full range of motion. Claimant was next treated by his ATP, Dr. Baptist, three days later on October 17, 2016. Claimant reported to Dr. Baptist that he slipped walking down a grassy slope and injured his left shoulder and low back. Claimant did not report a whiplash type injury, and he specifically denied neck pain. Dr. Baptist noted that the neck was non-tender and Claimant had full range of motion of the cervical spine. In addition, Dr. Goldman persuasively testified that the reported mechanism of injury would not cause a huge whiplash injury to the neck. Since there was no reported whiplash injury or neck pain at the time of the injury, a cervical injury is less likely, he opined.

J. Claimant's reported neck symptoms waxed and waned, and at times Claimant reported that they had completely resolved. By December, 30, 2016, Claimant no longer complained of radicular symptoms into his arms. By March 2017, Claimant no longer reported any neck symptoms and his ATPs reported full range of motion. On May 10, 2018, Dr. Baptist noted that Claimant had, in the past, reported that his neck was back to baseline. Given the documentation, Dr. Goldman noted that there was a lack of discrete, consistent, and persistent focal neck symptoms that you would expect to occur six to seven months after an alleged injury.

K. In addition, Dr. Goldman persuasively opined that diagnostic testing showed primarily diffuse and degenerative [nontraumatic] changes that do not correlate with the symptoms presentation nor physical examination of the cervical spine. Dr. Goldman noted that his examination findings were primarily nonphysiologic and did not correlate with the MRI findings. Similarly, after reviewing the MRI scan, Dr. Baptist noted that the pathology did not really explain Claimant's reported radicular symptoms. Likewise, Dr. Hammers treated Claimant for his neck pain, and noted that there was not a structural cause for Claimant's neck symptoms.

L. Dr. Goldman opined that there was no cervical injury. Claimant's neck symptoms appeared to be more referred pain pattern involving the left shoulder and trapezii as well as supportive musculature. Dr. Goldman testified that his examination of Claimant showed that Claimant was most tender in the trapezius region and it was very common for pain to radiate from a rotator cuff injury into the neck. Dr. Stanton testified that he agreed that if Claimant had a rotator cuff tear, there might be some myofascial pain up to the neck, but not necessarily an injury to the spine. There was no cervical pathology that correlated with Claimant's symptoms.

M. Claimant's presentation during his evaluations with Dr. Goldman led Dr. Goldman to conclude that Claimant's symptomatology was exaggerated and unexplainable. On June 22, 2017, Dr. Goldman attempted to evaluate Claimant's cervical spine; however, Claimant had an extreme reaction to gentle palpation. Claimant cried out and was tearful to the gentle palpation to the point that Dr. Goldman noted that the response was very unusual and may be unconscious somatization and a fear avoiding coping strategy.

N. Claimant also has a history of drug-seeking behavior, which raises additional concerns. On April 7, 2017, Claimant admitted, after apparent prodding, to inappropriate narcotic use to Dr. Baptist. Dr. Baptist checked the PDMP system and found that Claimant was obtaining several prescriptions for narcotics from multiple medical providers. Claimant initially denied seeking drugs from multiple providers, but later admitted to this after being presented with the PDMP report. Dr. Baptist recommended in-hospital treatment for narcotic addiction. This did not occur.

O. Instead, Claimant testified at the hearing that he was able to wean himself off all narcotics in one week by cutting the prescription in half. Dr. Goldman credibly testified that the recommended weaning protocol is 10% per week, which can take 10 weeks or more. It is unlikely, and the ALJ so finds, that Claimant was able to wean himself from all narcotics within a week given his history of misuse. Claimant also testified that he recently was treated at the emergency room for increased pain and to obtain opioid medications because Dr. Baptist refused to provide him with any additional narcotic medications. This shows that Claimant may not have given up his drug-seeking tendencies, which is inconsistent with his reports to his providers and his hearing testimony.

P. Dr. Goldman opined that cervical injections were not reasonable or necessary because there was not sufficient physiological and objective correlating medical evidence to support more aggressive treatment of the neck in the context of this claim. Dr. Goldman testified that injections would not be appropriate because of the possible somatization or response bias that would make interpreting the diagnostic and therapeutic effect of any injections difficult. Dr. Goldman testified that he frequently sees this type of chronic pain management where the treating providers are “chasing the pain” and when one injury gets better another gets worse. Dr. Goldman persuasively testified that this pain pattern calls into question how efficacious all of the treatment to date has been and whether additional injections or surgery is reasonable. The ALJ finds and concludes that the injections as proposed by Dr. Stanton are not reasonable and necessary to treat Claimant’s symptoms, and further finds that Claimant has not shown, by a preponderance of the evidence, that his cervical symptoms, as reported, are related to his original work injury.

Right Shoulder Symptomology and proposed Rotator Cuff Surgery

Q. Claimant testified that he injured his right shoulder on April 19, 2017 while working for ARC. Claimant testified and insisted that he felt a ‘pop’ in his right shoulder while repetitively lifting various household appliances with his right arm. However, Claimant never mentioned feeling a pop in his right shoulder to any of his treating or examining physicians. Claimant also testified that he reported the injury to Dr. Baptist on April 28, 2017; however, Dr. Baptist does not note any new injury or symptoms. Dr. Baptist specifically noted “no other new complaints.” Claimant underwent his first IME with Dr. Goldman two months after the alleged right shoulder injury; however, he did not mention any new alleged injury and *the right upper extremity was the only body part that Claimant did not complain about* during this evaluation.

R. When Dr. Goldman evaluated Claimant on January 8, 2018 specifically for the right shoulder, Claimant did not report that he experienced a ‘pop’ in his shoulder while working for ARC on April 19, 2017. Instead, he simply reported that he began experiencing pain from *overuse* of his right arm. Dr. Goldman noted that Claimant could not give a cogent explanation for the documented historical discrepancies with the alleged right shoulder injury. Claimant also filed a Worker’s Claim for Compensation and alleged an injury from overuse of his right arm. During this January 8, 2018 IME, Dr. Goldman noted that the change in Claimant’s right shoulder symptoms from the prior examination was problematic and not explainable compared to the history documented in Claimant’s medical records. Dr. Goldman noted that Claimant had regressed beyond expectation in a dramatic and non-physiologic fashion and the findings did not correlate with the diagnosis or the mechanism of injury. Claimant’s presentation, the inconsistent reporting, and reported symptoms render his theory of injury problematic.

S. The alleged mechanism of injury is not likely to cause a rotator cuff injury. Claimant’s job description for the modified job offer at ARC indicated that he would be assisting with sorting, cleaning, and tagging clothing, linens, shoes, books, electronics,

and small household appliances weighing no more than five pounds. Claimant admitted at the hearing that he was not lifting heavy electronics such as TVs or microwaves. Instead, Claimant was lifting small household items such as hair dryers and toasters. Claimant also admitted that he only worked at ARC for one day. Dr. Weinstein testified that it would be hard to tear a rotator cuff working for one day lifting items weighting five pounds or less. Dr. Weinstein further stated that it would be hard to get a significant partial tear from this activity, but some partial tearing and inflammation may occur.

T. Though Claimant did not report the right shoulder injury to his medical providers in April 2017, he did report right shoulder pain after an incident on his recumbent bike in August 2017. Claimant testified that he was cleared by his physicians to try to ride his recumbent bike in August 2017. Claimant took his bike out and rode a very short distance before he went over a drainage bump in the road which caused pain in his low back and right shoulder. This incident was significant enough that Claimant reported it to his physical therapist on August 21, 2017. This was apparently the very first mention of right shoulder pain in all of Claimant's medical records. Dr. Goldman noted that the MRI findings for the right shoulder were consistent with degenerative joint disease, a prior injury, and a potential congenital abnormality that would predispose him to gradual re-injury even with activities of daily living and certainly with recumbent cycling as attempted by Claimant. The ALJ finds that while the right rotator cuff surgery might indeed be reasonable and necessary, Claimant has not shown, by a preponderance of the evidence, that his right shoulder symptoms are causally related to his original work injury.

ORDER

It is therefore Ordered that:

1. Claimant's request for cervical spine injections as recommended by Dr. Stanton is denied and dismissed.
2. Claimant's request for right shoulder surgery as recommended by Dr. Weinstein is denied and dismissed.
3. All matters not determined herein are reserved for future determination.

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

In addition, it is recommended that you send a copy of your Petition to Review to the Colorado Springs OAC via email at oac-csp@state.co.us.

DATED: February 25, 2020

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

- I. Have Respondents, by clear and convincing evidence, overcome the DIME opinion on the issue of MMI?
- II. Has Claimant shown, by a preponderance of the evidence, that the Medial Branch Blocks as recommended by the DIME physician, are reasonable, necessary, and related to his work injury.
- III. Has Claimant shown, by a preponderance of the evidence, that he is entitled to Temporary Total Disability ("TTD") Payments?

STIPULATIONS

The parties agreed to hold in abeyance the issues of Average Weekly Wage and Change of Physician.

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

1. Claimant was employed as a truck driver. He was initially injured in February, 2018 while loading "super sandwich bales" comprised of compressed plastic recycling material onto his truck. He was required to secure the bales with straps prior to transporting them. He crawled on top of the bales in order to do this, but slipped in the process and fell over the side of the flatbed, catching himself by the strap with his left arm. (Ex. G, p. 123). Claimant pulled himself up with his left arm but had the onset of left shoulder pain and left low back pain. *Id.*

2. There was no first report of injury filed at this time. Claimant reported the injury to Employer but was able to continue working. His back pain worsened, and he ultimately sought medical treatment on May 25, 2018. At hearing, Claimant testified that he did not seek any medical care until late May of 2018, when he claimed an exacerbation of pain into his left lower extremity and back after driving a distance and then strapping down a load of super sandwich bales. Claimant's Workers' Compensation Claim ("WCC") reflects a reported date of injury as May 24, 2018.

3. Claimant was seen at the UC Health emergency room by Angela Randall, NP, on May 25, 2018. She noted he "...presents with chronic back pain exacerbated 6 months ago with the start of a new job. Patient felt that his L leg was numb getting out of his truck yesterday after a 2.5 hour drive. Pain worst to his L lower back. Denies incontinence, paresthesia. Patient recently moved here from Germany and does not have a PCP." (Ex. 2, p. 85). Lumbar x-rays revealed "no acute findings." *Id.* at 88. On

exam Ms. Randall noted left trapezius and paraspinal lumbar tenderness. She diagnosed “chronic lower back pain.” *Id* at 85, 87.

4. Claimant continued treating at UC Health. On June 28, 2018 Jessica Fisher, D.O. recommended MRI’s of the thoracic and lumbar spine. (*Id.* at 67). Those tests were performed on July 18, 2018. (Ex. 7, pp. 248, 249). The results of those MRIs were deemed “unremarkable”. *Id.* It was noted by UC Health staff that, when discussing the MRI findings, Claimant became “very upset raising his voice with me being very accusatory toward our clinic and myself because we have not cured him” and that “if he was in Germany he would have been completely better within a matter of days.” (Ex. 2, p. 63). Claimant reported no improvement with physical therapy.

5. Claimant ultimately came under the care of Elizabeth Bisgard, M.D., at UC Health. She saw him on August 5, 2018 and noted that while the MRI’s “...were normal without evidence of disc herniation or any pathology...Tim continue[s] to experience significant pain and dysesthesia. He had been given Robaxin and naproxen but neither provided relief. Despite being off work he failed to make any progress and in fact he reports that he is progressively worsening. He was brought to Castle Rock clinic today for second opinion...” (Ex. 2, p. 53). Dr. Bisgard diagnosed “diffuse myofascial pain syndrome, ulnar neuritis, left, and anxiety and depression.” She recommended pool therapy, biofeedback, and use of Cymbalta, and she imposed work restrictions.

6. On September 21, 2018 Dr. Bisgard noted pool therapy and biofeedback were beneficial. (Ex. 2, p. 41). She reported, “...On his pain diagram he continues to mark midthoracic hot burning pain which is waxing and waning. He also has his midline low back pain which he described as numbness and hot burning. He is requested [sic] a cane for ambulation as he feels that putting pressure on his left foot when he is walking is causing more pain. He is trying to get out more and walk but is having difficulty due to his increased pain.” *Id* at 42. Dr. Bisgard referred Claimant for a physiatry evaluation with Dr. Sparr or Dr. Leggett at Accelerated Recovery Specialists. (*Id.* at 43, 45).

7. On October 12, 2018 Dr. Bisgard recommended more pool therapy, and on or about October 24, 2018 she referred Claimant to psychologist Dr. Anthony Ricci for “LBP /w underlying [psych].” (Ex. 2, pp. 37-38)

8. Claimant saw Dwight Leggett, M.D., on October 25, 2018. He noted, “...Mr. Hickcox states that his primary area of complaint revolves around his low back issues. The majority of his pain is found over the left great than right region, starting just above the belt line. From here, and travels downward into the buttocks and lateral hip. This pain is described as constant, achy and occasionally stabbing in nature. From here, it transitions into the sensation of ‘tingling’ that travels down the posterior aspect of the thigh, ending in to the lateral aspect of the foot...” (Ex. 3, p. 112).

9. Dr. Leggett discussed treatment options, which included facet injections (“...highest structural pain generation seems to be coming from the left L4-L5 and L5-S1 facet joints”), trigger point injections (“...there is a large amount of myofascial irritation

identified into the left parascapular region and left low back region”), use of gabapentin, and possible SI joint injections. *Id* at 115.

10. On November 7, 2018, Dr. Ricci performed a psychological evaluation. Dr. Ricci opined that, to within a reasonable degree of psychological certainty, Claimant was manifesting issues of adjustment to disability with anxiety and depression. Dr. Ricci noted that the results of the EMG recommended by Dr. Leggett would “go a long way to clarifying the left-sided weakness, and particularly left lower extremity giveway considerations.” (Ex. C, p. 51).

11. Allison Fall, M.D., examined Claimant at Respondents’ request on November 7, 2018. Dr. Fall reported, “...In order to reach MMI, I would recommend left L4-5 and L5-S1 facet intraarticular injections. If this alleviates his pain, then I would recommend more aggressive physical therapy with progression to land therapy two times a week for four weeks ...For the scapular area, four session of massage could be trialed. Left upper extremity electrodiagnostic testing would also be medically reasonable, necessary, and related...” No surgery was anticipated by Dr. Fall at this time. (Ex. A, p. 7).

12. Dr. Bisgard wrote to Respondents’ counsel on November 18, 2018, indicating she agreed with Dr. Fall’s treatment recommendations. (Ex. 2, p. 34).

13. On December 21, 2018, Dr. Bisgard noted that if electrodiagnostic testing was negative, “...there is likely not much else to offer.” She noted that “...If Dr. Leggett recommends facet injections or trigger point injections, he will need to document not only pre and post injection pain levels but functional assessment as well.” *Id* at 32.

14. Michael Sparr, M.D., met with Claimant on January 17, 2019 and noted, “...Sacroiliac provocative tests are quite positive on the left side including Patrick’s maneuver, sacroiliac shear and compression test and are mildly positive on the right. Sensation today is not particularly diminished. He walks with a markedly antalgic gait pattern, does not demonstrate an obvious foot drop.” (Ex. 3, p. 103). Dr. Sparr performed EMG/NCV testing of the lower extremities and there was “no electrodiagnostic evidence whatsoever of lumbosacral radiculopathy left or right-sided,” that would account for Claimant’s lower extremity symptoms. He noted Claimant would follow-up with Dr. Leggett. *Id* at 104.

15. Dr. Leggett saw Claimant on February 28, 2019 and reported, “...At this point, highest pain generation from a structural standpoint seems to be involving the lumbar facet joints. I believe that it would be medically reasonable justifiable to move forward with a medial branch block targeting these regions. If this procedure is beneficial from a diagnostic standpoint, consideration could be made for moving forward with radiofrequency ablation.” (Ex. 3, p. 100).

16. Dr. Leggett noted that the study showed no lumbar radiculopathy, distal compression neuropathy, peripheral neuropathy, or any other issues which would be associated to the work-related claim or specific lumbosacral injury. Claimant reported

ongoing left leg pain of 8/10 and was unable to tolerate facet loading at L4- L5 or L5-S1 or sacroiliac joint manipulation due to complaints of pain and tenderness. Dr. Leggett confirmed his plan for “Bilateral L4/5 and L5/S1 medial branch blocks with functional testing before and after mbb...”

17. Dr. Steven Scheper administered the injections on April 4, 2019. (Ex. 3, p. 94). Afterwards he reported, “The patient reported pre-injection 7/10 pain. At 15 minutes after the procedure the patient was reporting standing and walking slightly better. Standing flexion was painful at about 20° and standing extension at only about 10° was still painful with 5/10 pain.” *Id* at 95. There is nothing else in the reports to indicate that Dr. Scheper otherwise addressed “functional testing before and after” the injections as had been recommended by Dr. Leggett and Dr. Bisgard.

18. On April 10, 2019, Dr. Bisgard reported, “...He recently underwent bilateral facet injections at the L4 5 and L5 S1 level. Dr. Scheper, who did the injections, noted Tim’s visual analog scale only changed by 2 points and had no functional improvement; to him, indicating a non-diagnostic response.” (Ex. 2, p. 28). Dr. Bisgard stated she planned to proceed with an impairment rating.

19. On April 16, 2019, Dr. Bisgard issued a response to Respondents’ April 12, 2019 correspondence regarding whether Claimant was at MMI. (Ex. C, p.19). Dr. Bisgard opined that Claimant was not at MMI, pending the scheduling of an evaluation for MMI and impairment status based on objective findings. *Id*.

20. Dr. Leggett met with Claimant for a post-injection follow-up on April 23, 2019 and noted, “...*Today, he states that he is unsure if he gave appropriate responses after the injection.* He reports that after the injection, he felt ‘scared,’ and reported that his pain was a ‘5/10’ somewhat randomly. He did note that after the injection, he didn’t seem to be as sensitive to bumps in the road while driving home...” (Ex. 3, p. 91)(emphasis added). Dr. Leggett continued, “...*He indicates that he was confused with how to rate this pain afterward.* He also indicates that he did not feel the ‘bumps in the road’ where [were] as pain provoking after the injection. However, this does not give us a substantial diagnostic result. It does not appear that he had a clear reduction in pain, but only a mild decrease in reaction to potentially pain producing stimuli.” (*Id.* at 93)(emphasis added). Dr. Leggett concluded, “...He continued to be quite persistent with his frustration due to his injury. He indicated that he may need to return to Germany to explore other treatment options if his pain persists. I again reiterated the findings of our diagnostic testing, and the above recommendations of increasing activity.” *Id* at 93.

21. Dr. Ricci noted on April 24, 2019 that Claimant presented on April 9, 2019 with slightly improved ambulation and that his anxiety and despondence were mildly reduced. (Ex. 5, p. 193). Dr. Ricci noted that Claimant reported having two-to-three hours of relief from injections, after which time pain returned.

22. Dr. Bisgard placed Claimant at MMI on April 24, 2018, concluding, “...I am hopeful with time he will experience some relief. But at this point there is really nothing

further to do under his work injury..." She opined that Claimant had a 2% whole person rating for mental impairment with no impairment for the back or other physical injuries. Dr. Bisgard opined that the facet injections were nondiagnostic, and that other diagnostic imaging was normal. (Ex. B, p. 9). She also opined that, based on the negative diagnostic studies and nonphysiologic examination, Claimant did not qualify for a Table 53 impairment rating [and therefore, range of motion loss] under the *AMA Guidelines 3rd ed. Id* at 16.

23. Dr. Bisgard did note significant psychological overlay and therefore indicated a mental rating was appropriate. She opined that there was no anatomic or physiologic reason impeding Claimant from resuming full duty work and normal activities. Dr. Bisgard did not recommend maintenance care except six months of Cymbalta refills, and maintenance visits with Dr. Ricci. (Ex. B, p. 17). She released Claimant with no permanent work restrictions.

24. Respondents filed a FAL consistent with Dr. Bisgard's opinions on May 3, 2019. (Ex. 8). Claimant objected to the FAL and requested a DIME.

25. Dr. John Tyler performed the DIME on September 16, 2019. He addressed the medial branch block injections and the events that transpired afterwards. Dr. Tyler reported:

Mr. Hickcox today states that in the report from Dr. Leggett [4/23/19] there is 'a misunderstanding' in what he was trying to explain. It is important to note that Mr. Hickcox was raised in Germany and has a heavy German accent and did not understand some common words that I utilized during conversations with him on today's date and I can understand why there may have been some verbal miscommunication being given. What Mr. Hickcox informs me today is that immediately after the injections he felt 'drunk.' He believes that his *pain symptomatology was diminished by '80%'* and gave a quick answer of '5/5-10' as the level of his pain after the injection, but *actually states it was down close to a '2/10' where it was a '7/10' before the procedure.* He [Claimant] states that indeed he was able to ambulate without a significant level of pain in his low back and he states that typically whenever he was in a car that was going over any kind of rough ground or a dip in the road, he would feel that pain shoot up into his mid back. On the ride home, he reported that he tolerated the drive without any severe pain in his low back or any exacerbation of his upper back pain. He also states that where Dr. Leggett is reporting that his mid back was worse after the injection, he meant to state that he noticed his mid back pain 'more' because his low back was no longer hurting him to the same level. Dr. Leggett in his report of April 24 [sic, April 23] does state that the patient indeed was apparently feeling that he was misunderstood in his responses and Dr. Leggett (who did not do the procedure itself) believed that his responses were not accurate enough to be definitive as a "therapeutic diagnostic medial branch block result." (Ex. 1, pp. 6, 7)(emphasis added).

26. On examination, Dr. Tyler found

...a significant pelvic obliquity at this time. There is at least a 2 cm elevation of the left posterior superior iliac spine over the right. This is secondary to localized spasm and active trigger point formation easily palpated within the left quadratus lumborum and iliocostalis lumborum. There are also diffuse and *fairly large active trigger points* found within the gluteus medius and gluteus minimus muscles in the left buttocks as well as in the tensor fasciae latae and right-greater-than-left piriformis muscles. There is a positive piriformis sign seen, with the patient lying supine, on the right. There is shortening with fascial restrictions found in the IT band on the left. There is significant spasm in the left psoas major muscle which is inducing an *anterior torsion of the right pelvis*. There is tenderness to the point of insertion of the right iliolumbar ligament along the medial ilium. *There is positive facet loading pain in the lower lumbar spine at approximately L4-5 and/or L5-S1 on the left greater than on the right...*" (Ex. 1, p. 8)(emphasis added).

Dr. Tyler's diagnoses included L4-5 and L5-S1 lumbar facet syndrome, pelvic obliquity, fibromyositis/myofascial pain syndrome, right piriformis syndrome, right iliolumbar ligament strain, and left psoas major spasm. *Id* at 9.

27. Dr. Tyler concluded Claimant has not reached MMI:

I do not feel that this patient is at a point of maximum medical improvement at this time. I do not believe this patient is "falsifying or exaggerating" his pain symptomology, but I do believe he is quite fixated on the level of his pain and its secondary consequences on his level of activity, capacity to be a loving husband and father, and his fears and worries about the future capacity of him caring for his family. These overriding emotional and psychological features do exacerbate his level of limitations, but *I do believe that he does have facet driven pain symptomatology.* I understand the confusion that may have occurred not only with Dr. Scheper immediately after the injections, but even in follow-up with Dr. Leggett at the time of his re-evaluation 2-3 weeks after the procedure. Based on my clinical examination today as well as what he now describes to me as the response he had and his hope to be able to undergo a procedure that may to some degree that *even a '50% improvement' would mean a world of difference to this gentleman and to his capacity to care for his family at this time.* I am going to recommend, as I trust both Dr. Leggett and Dr. Scheper not only as excellent physicians, but as excellent interventionalists, to see this patient again and give him 1 further trial of medial branch blocks. If there is significant diminishment of pain, this patient should be able to undergo radiofrequency rhizotomies to the L4-5 and L5-S1 levels bilaterally. Tim states he understands that this may not actually improve his level of pain long term, but actually may worsen it to some degree. He states that the

quality of life that he has now makes that potential risk an acceptable outcome as he cannot continue to function at the level he is with his current pain state. I am not recommending this approach just to appease Mr. Hickcox, but do believe that because of language barriers that were noted on our visit today, there was just simple misunderstanding of the level of improvement to be reported. *I do believe that he is an excellent candidate for a repeat trial and possible rhizotomies to be performed.* I will defer the final decision as to whether to proceed forward with rhizotomy obviously to Dr. Scheper or Dr. Leggett, but would *recommend that the same physician who performs the medial branch blocks also be the one that has the follow-up with the patient for clarification as to his response to the diagnostic injections.*" (Ex. 1, p. 9)(emphasis added).

28. Dr. Tyler addressed work restrictions; "...This patient is incapable or working even in a sedentary position at this time based on his level of spinal and muscle pathology. If he were to work at all, he would be limited to no more than 4 hours in a day and at a position that would allow him to shift from sit-to-stand and stand-to-sit almost continuously and no lifting capacities beyond 5 pounds occasionally..." (Ex. 1, p. 11).

29. Dr. Tyler also indicated a 15% whole person impairment rating of the lumbar spine. This rating included a 5% whole person impairment for "ongoing pain in the lumbar spine with mild clinical findings" pursuant to Table 53(II)(B) of the *AMA Guidelines, 3rd ed., rev.*, combined with an 11% rating for measured loss of range of motion. (Ex. G, p. 129).

30. On December 4, 2019, Dr. Fall performed a medical record review and addendum IME after review of Dr. Tyler's opinion. Dr. Fall opined that, "Even if there were difficulty in communication due to language, there is no indication that he does not understand the concept of numbers for rating pain . . . The procedure note indicated that, post procedure, he had a 5/10 pain level which was a nondiagnostic response." Dr. Fall agreed with the ATP that Claimant was at MMI in light of a nondiagnostic response to injections, unremarkable imaging through x-rays, MRI, and (diagnostic) EMG, and "obvious pain behaviors and psychosocial issues playing a role" which Dr. Tyler acknowledged but did not ultimately reflect in the conclusions of his report. (Ex. A, p. 2) Dr. Fall opined that, in agreement with Dr. Bisgard, there was a clear error in the DIME report of Dr. Tyler in issuing a Table 53-based impairment rating for the lumbar spine due to non-physiologic examination and negative studies (lack of objective basis for findings).

31. Claimant testified at hearing. He stated that following the medial branch block injections, "I felt very foggy. I didn't know where was up and down, kind of – and I felt under pressure a little bit because I couldn't really give an answer to the questions that he had right away to me." Claimant testified Dr. Scheper asked questions about his pain level, and in response, "...I first said, I don't know yet. I can't tell. I'm very unsure – uncertain, I mean. And then he kept asking. He said, I – I -you know, I need an answer. And I said then a five out of ten because it's just in the middle. And I don't

know what else to say, because I - yeah. I couldn't determine what was going on with my body at this point, yeah."

32. Claimant testified he "absolutely" obtained pain relief from the injections; "...I first experienced it in the car. I didn't feel all the bumps anymore. And I got better out of the car. I was walking way better with less pain. My mid-back or upper back was way more - it hurt way more than lower back at that point, and - yeah." Claimant testified the injections "...made my low back pain go almost away, I would say, but my mid-back, I would feel more than - more than the lower back." He testified that during the period of time he experienced pain relief, he was doing "...the same things as before, but a little bit more. I was walking around. I took my kids for a walk. And yeah, I was doing physically a little bit more. Yes, I was walking around without pain as of - I was way better..."

33. Claimant testified he told Dr. Bisgard that he "felt relieved, that I felt way better than before" after the injections, but that the beneficial effect "wore out" after 4-6 days."

34. Claimant also testified he was given a pain diary after the injections, he completed it, but nobody asked him for it. Claimant testified he wants to have the repeat injections recommended by Dr. Tyler "because I am very certain that they helped..." Claimant testified he has been physically unable to perform any work since May 24, 2018. Claimant testified he was born in Arizona, but moved to Germany with his mother when his parents divorced. He was "two years old or so" at the time. He grew up in Germany and came back to the U.S. in 2013. He went to college in Arizona and learned English. Prior to that, his English was "very bad."

35. Dr. Fall testified at hearing as an expert in the field of physical medicine and rehabilitation. It was her opinion that Claimant did not have a "diagnostic response" to the medial branch block injections. Dr. Fall testified that such injections are supposed to be performed "...on two separate days, two separate occasions, and both need to have diagnostic positive responses." In this case, Claimant underwent medial branch blocks ("MBB") on only one occasion [April 4, 2019]. Dr. Fall addressed Claimant's testimony that he experienced pain relief for 4-6 days following the injections, and she called this non-diagnostic, "...Because the medicine that blocks the nerve only lasts several hours, so it wasn't having any effect for those days - those additional days." She attributed Claimant's 4-6 days' worth of pain relief to a likely "placebo effect."

36. Dr. Fall opined Dr. Tyler "clearly erred" in determining Claimant is not at MMI "...because there was not a diagnostic response" to the injections. Dr. Fall further opined Dr. Tyler erred in issuing an advisory impairment rating because "...there's been no, you know, Table 53 diagnosis." Dr. Fall confirmed she saw Claimant only one time, on November 7, 2018 at the request of Respondents. Dr. Fall testified that this was not merely a difference of opinion between two doctors, but rather an error in assessing the diagnosis and calling for a repeat block.

37. Dr. Fall further testified that Dr. Tyler's report was in error because of his assignment of an impairment rating based on Table 53 of the *AMA Guidelines, 3rd ed., rev.* She stated that, in order for there to be a ratable impairment, there must be objective findings to support a diagnosis caused by a work-related injury. Dr. Fall testified that she agreed with Dr. Bisgard that there was no Table 53 diagnosis, because there was no consistent, objectively verifiable presentation causing permanent problems documented in the medical records. Dr. Fall testified that the structural examination findings performed by Dr. Tyler inconsistent with any of the other documentation by the providers in the record.

38. Dr. Tyler testified at hearing as an expert in the field of physical medicine and rehabilitation with "forty-nine plus years" of experience in the field. Dr. Tyler testified MBB's are a diagnostic tool to assess for the potential of the facet joints in the posterior elements of the bony structure of the spine as an inducer of pain. He explained the diagnostic purpose; "...they're to rule in the probability that a component of a patient's pain, symptomology coming from that area of the body, is being caused by irritability within a joint that is known as a facet joint." Dr. Tyler explained what it means to have a "diagnostic response" to MBB's; "Diagnostic response is typically greater than fifty to sixty percent diminishment of pain, short term, after application of an anesthetic to the post universal rami branches, which are small branches that come from above and below the joint, that innervate the joint for sensation."

39. Dr. Tyler was asked whether Claimant had a "diagnostic response" to the injections; "My opinion is that the understanding that was to be given by the gentleman - and I think we can all agree that Mr. Hickcox doesn't understand the spoken English language as well as most of us present do. And that there was a inconclusive non-diagnostic or diagnostic response to the injections. And I spout like that in my report" {The ALJ is unsure how to interpret this commentary}.

40. Dr. Tyler testified that the results of the medial branch block were inaccurately interpreted and that he believed it was critical in this instance that the blocks should have been performed and evaluated by the same clinician because "it doesn't necessarily always have to be that way, but if you have somebody who understands and speaks the English language to the degree that all parties but Mr. Hickcox [does], then it's not absolutely - absolutely necessary." Dr. Tyler testified in effect that the method by which American clinicians use to document pain on a "zero to ten" scale was outdated. A more accurate method of documentation would be to ascertain baseline pain and then determine a patient's degree of improvement after a procedure by documenting pain relief as a percentage value from the baseline (e.g. 30% diminished). Dr. Tyler opined that the difference between German and American cultures was responsible for differing accounts in the nature of the reported pain. Tr. 68-72.

41. Dr. Tyler explained why he determined Claimant has not reached MMI:

The basis is that this patient's pain symptomology, based upon clinical examination - not only for myself, but from other providers who

have seen him - therapy related to an induction of pain or a primary inducer of pain from the facet joints in the lower lumbar spine. It's not the only component that is causing this pain, and I outline that in my report as well, but is the probable underlying primary cause of pain.

I think that the interpretation as this being a nondiagnostic result is fallacy, and I say that with all due respect to Dr. Fall; but the reality is, is I believe that this gentleman is being a hundred percent upfront and honest with us. I don't question that he has emotional aspects to his pain - that's outlined in my report as well - but I think it is inappropriate from a medical standpoint to base this patient's potential for significant long-term improvement, quality of life, and mobile function based on what I perceive to be a misunderstanding between the providers that performed the injection and did the follow up from that injection.

And like I stated in my report, I have great respect for both Dr. Scheper and Dr. Leggett; they're both very qualified physicians. But because of the language difficulties that are obviously present and were notified or-or seen from today's testimony, I think they shortchanged this gentleman without giving him the opportunity to have him repeat it. And all parties that are pursuing-or performing the injections not only be the ones to perform the injection and get the information from the patient immediately afterwards, but also to be the clinician who follows up with the patient to get a more clearer understanding of the benefit, or lack thereof, from it.

As I stated in my report, I am not recommending that this patient proceed forward with any type of rhizotomy, and will defer entirely to the judgment of either Dr. Scheper or Dr. Leggett in that response. But I think it is critical of us to presume we know the answers are accurate, and based on our understanding, based upon the capacity of this patient to clearly outline-as what will form or a lack thereof-so I can see from the reports, as well as from my evaluation into the (inaudible)." (Transcript, pp. 58-60).

42. Dr. Tyler testified concerning the significance of the fact that the physician who administered the injections, Dr. Scheper, was not the one who reviewed the effects with Claimant, Dr. Leggett; "In this case, I think it was critical. And the reason why I say that, it doesn't necessarily always have to be that way, but if you have somebody who understands and speaks the English language to the degree that all parties but Mr. Hickcox in this room I presume do, then it's not absolutely--absolutely necessary. But in this case, I would strongly recommend, if you want to get a truly accurate and diagnostic assessment as to the benefit, or lack thereof, from the diagnostic medial branch blocks, then it should be performed for both the procedure and the follow up by the same clinician."

43. Dr. Tyler testified at length about his findings on physical examination of Claimant. He concluded; "So the mechanical aspect that I've described to you with the pelvic obliquity and the muscle spasms are a secondary problem that were brought on because of the, I believe, on the irritability of the facet joints to the left greater than right, L4 or 5 and L5 S1 levels. Because I had not performed the procedures or have an opportunity to clarify with this patient to make sure that he truly understood what I was asking, because of the language difficulties, I can't form positive--state that this testing was either positive or negative....And thus, *I asked for a repeat of those procedures to be performed...*" (emphasis added).

44. Dr. Tyler was asked why Claimant should have a repeat of the MBB's; "Because I believe his perception of level of improvement was such that the potential for life-changing--and I'm not talking about short-term, but life-changing--improvement and quality of life I think is being taken away from this gentleman based upon a misinterpretation of what he was trying to describe through his vocabulary versus what was being perceived by the clinicians at that time." Dr. Tyler added that; "...*Without those facets being calmed down, I don't think there's anything that's going to long term change his level of pain and his quality of life.* And I think that is a shame." (emphasis added).

45. Dr. Tyler addressed Dr. Fall's testimony that the relief provided by MBB's lasts only several hours; "Sure. And if indeed the facet joints were the only inducer of pain, then I could agree with her that you would not expect for any significant improvement to be going on days later. But that's not the case in this patient, is it? This patient has a significant component of myofascial or muscular spasticity and such going on as well. And if you've been living with a certain level of pain that is interfering with your level of function and quality of life, as much as this pain state seems to be for this patient, and you get the primary generator of pain to calm down, you will also then, secondarily, get some of the other surrounding areas to relax enough so that you will see a longer term improvement in pain than just a few hours."

46. Dr. Tyler testified regarding the propriety of the Table 53 impairment rating he issued; "Only level of the spasticity going on in the muscles with the lumbar spine -- I won't list them all, I did that in my report--causing the obliquity to be present. That's all a hundred percent objective, and it correlates well with a large part of his pain symptomology that he's been describing from day one. And that twelve other doctors aren't qualified to assess for that or did not assess for that doesn't take away that the pathology I found is directly related to the injuries that this man suffered."

47. Dr. Tyler confirmed he is recommending repeat MBB's because there was no clear diagnostic or non-diagnostic response after the first trial; "That is correct...and again, I am not stating that one side or the other is incorrect in their perception of what the results of the first one were. I just believe the results have been muddied to a large degree because of what I've described above or in this testimony as well. And it would be of great benefit if either Dr. Leggett or Dr. Scheper could have a clearer verbal exchange with this patient so that both parties understand exactly what the other one is trying to say. Just like you all noticed when Mr. Hickcox was testifying earlier, he--to us,

what were simple (inaudible) terms that we use commonly, he didn't understand. And that's where I think a lot of the problems come up. And to analyze this gentleman strictly based on that, I think is an injustice.”

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (“Act”) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S.

B. In accordance with §8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). Irrespective of the standard of proof involved, it is solely for the trier of fact to determine the persuasive effect of the evidence and whether the burden of proof has been satisfied. *Mehlbrand v. Hall*, 213 P.2d 605 (Colo. 1950). An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office*, 240 P.3d 429 (Colo. App. 2010). Substantial evidence is that “quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence.” *Metro Moving & Storage Co. v. Gussert, supra*. It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

C. Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential*

Insurance Co. v. Cline, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

D. In this instance, the ALJ finds Claimant to be sincere and credible. While he is sufficiently conversant in English to make himself understood, Claimant does not appear to be *bilingual* in the classic sense- nor does he purport to be. There are different legal and cultural expectations for the provision of medical services than Claimant was accustomed to. Throw in the bewilderment of a first-time diagnostic procedure overlaying a history of pain, and you have the recipe for potential miscommunication. This is especially so when there is a different physician administered the injections from the one asking the questions. Quite understandably, from the standpoint of Drs. Leggett and Scheper, they needed tangible, quantitative answers to satisfy certain criteria for repeat injections. Just a little more time with this patient could have yielded what they needed.

E. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55, P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968). Frequently, well-trained physicians reach sincerely held, differing medical opinions based upon similar data. Such is the case here. Thus, the ALJ must determine who is more *persuasive*, rather than who is more per se *credible*, being mindful of the burden of proof herein.

F. Further, courts are to be "mindful that the Workmen's Compensation Act is to be liberally construed to effectuate its humanitarian purpose of assisting injured workers." *James v. Irrigation Motor and Pump Co.*, 503 P.2d 1025 (Colo. 1972).

Overcoming the DIME Opinion on MMI, Generally

G. The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, *supra*; *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998). The MMI determination requires the DIME physician to assess, as a matter of diagnosis, whether the various components of a claimant's medical condition are casually related to the injury. *Martinez v. ICAO*, No. 06CA2673 (Colo. App. July 26, 2007). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). In other words, to overcome a DIME physician's opinion regarding the cause of a particular component of a claimant's overall medical impairment, MMI or the degree of whole person impairment, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must

be “unmistakable and free from serious or substantial doubt.” *Adams v. Sealy, Inc.*, W.C. No. 4-476-254 (ICAP, Oct. 4, 2001).

H. This enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appeals Office*, *supra*. Where the evidence is subject to conflicting inferences a mere difference of opinion between qualified medical experts does not necessarily rise to the level of clear and convincing evidence. Rather, it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Oates v. Vortex Industries*, WC 4-712-812 (ICAO November 21, 2008).

I. As a matter of diagnosis, the assessment of permanent medical impairment inherently requires the DIME physician to identify and evaluate all losses that result from the injury. *Mosley v. Industrial Claim Appeals Office*, 78 P.3d 1150 (Colo. App. 2003). Consequently, a DIME physician’s finding that a causal relationship does or does not exist between an injury and a particular impairment must be overcome by clear and convincing evidence. *Cordova v. Industrial Claim Appeals Office*, *supra*; *Qual-Med, Inc. v. Industrial Claim Appeals Office*, *supra*.

Overcoming the DIME Opinion, as Applied

J. Dr. Tyler persuasively testified Claimant is not at MMI because he requires a repeat of the MBB injections. He explained the nature of MBB injections, their diagnostic purpose, and the anatomy and the pain symptoms they are designed to address. He testified, again persuasively, regarding the language and communication barriers that exist between Claimant and some of his treating physicians. Especially as they concern Dr. Scheper and Dr. Leggett, those problems led Dr. Tyler to reasonably conclude there had not actually been a “non-diagnostic response” to the first set of injections. To the contrary, Dr. Tyler’s more detailed questioning, and Claimant’s responses at hearing, would lead one to believe such responses were, in fact, diagnostic. Accordingly, Claimant requires a second set of MBB’s so that this issue can be resolved. Until this issue is resolved, Claimant is not at MMI.

K. Dr. Fall’s sincerely expressed opinions were different of those issued by Dr. Tyler. She testified that Claimant stated that the blocks provided up to six days of pain relief to the low back. Dr. Fall testified that this would not be a diagnostic response, based on the above criteria. It would, instead, represent a placebo effect. Dr. Fall noted that diagnostic imaging from an x-ray, MRI, and EMG testing showed no notable abnormalities and that there was no objective basis for any additional medial branch block for further assessment based on the nondiagnostic response to the initial injection. Dr. Fall testified that Dr. Bisgard was correct in her assessment of MMI, based on the nondiagnostic response and exhaustion of treatment.

L. In this instance, the ALJ concludes that Dr. Fall’s medical opinions do not rise to the level of “clear and convincing evidence” that demonstrates that it is “highly

probable” that Dr. Tyler’s opinion concerning MMI is incorrect. Rather, they constitute a [sincerely held] difference of opinion between physicians regarding whether Claimant has reached MMI. Respondents have not proved by clear and convincing evidence that Dr. Tyler was incorrect in determining Claimant is not at MMI. Because Claimant is not at MMI, it is premature to address in this Order the advisory impairment rating issued by Dr. Tyler.

Medical Benefits

M. Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). Claimant must prove entitlement to benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The ALJ concludes, based primarily upon Dr. Tyler’s report and testimony, that Claimant has proven, by a preponderance of the evidence, that the repeat MBB’s are reasonable and necessary to cure or relieve the effects of Claimant’s compensable work injury. Depending upon the response thereto, the administration of a rhizotomy would be in the discretion of Claimant’s assigned ATPs.

Temporary Total Disability Benefits

N. Despite the DIME opinion, and the ALJ’s Conclusions in support, Claimant has conceded this point. TTD benefits cease when the injured worker reaches MMI, or when the attending physician issues a written release to return to regular employment. Section 8-42-105(3)(a)(c), C.R.S. Here, attending physician Dr. Bisgard placed Claimant at MMI on April 24, 2018, and released him to regular employment with no permanent work restrictions. Dr. Tyler opined Claimant was capable of only sedentary work at 4 hours per day.

O. However, nothing in Section 8-42-107.2, C.R.S. treats the opinion of the DIME physician as binding with respect to the claimant’s ability to perform regular employment. See *Bestway Concrete v. Industrial Claim Appeals Office*, 984 P.2d 680, 685 (Colo. App. 1999) (DIME provisions apply to determinations of maximum medical improvement, but Act creates no specific procedure to review attending physician’s release to regular employment). Further, the Court of Appeals has determined that §8-42-105(3)(c) mandates termination of TTD benefits if the attending physician gives the employee a written release to return to regular employment. The courts have determined that an ALJ may not [despite the temptation herein] disregard the attending physician’s opinion that a claimant is released to return to regular employment. *Imperial Headware, Inc. v. Industrial Claim Appeals Office* 15 P.3d 295 (Colo. App. 2000); *Burns v. Robinson Dairy, Inc.*, 911 P.2d 661 (Colo. App. 1995). Thus, because Dr. Bisgard

released Claimant to regular employment on April 24, 2018 he is not entitled to TTD benefits thereafter, barring a possible worsening of his condition.

ORDER

It is therefore Ordered that:

1. Respondents have not overcome the DIME opinion on MMI. Claimant is not at MMI.
2. Respondents shall pay for the repeat Medial Branch Blocks as recommended by the DIME physician.
3. Claimant's request for TTD benefits is denied and dismissed.
4. Respondents shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.
5. All matters not determined herein are reserved for future determination.

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

DATED: February 28, 2020

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-117-876-001**

ISSUES

- Did Claimant prove she suffered a compensable occupational disease on September 4, 2019?
- If Claimant proved a compensable injury, did she prove entitlement to reasonably necessary medical treatment, including a wrist brace dispensed by PA-C Cox at the ROMP Clinic?

FINDINGS OF FACT

1. Claimant works for Employer as a child welfare caseworker. She started the job in November 2015.

2. Claimant's job entails a mix of office work and fieldwork. Some days she spends most of her time doing office tasks. Other days she is primarily in the field, visiting and working with children and transporting them to appointments or medical treatment. Some days are a combination of both. Claimant frequently writes reports, both by hand and on the computer. She uses a keyboard and mouse when working on the computer. In January 2019, Claimant started covering the receptionist position 5-6 hours per week.

3. In August 2019, Claimant started having pain in her right arm and hand. The pain was intermittent at first but became more intense and constant over the next several weeks. On September 4, 2019, the pain became so severe she could not grip a marker while writing on a whiteboard. She went back to her office and started typing, which made the pain worse, so she typed her reports with her left hand. At that point, she decided she had to report the injury.

4. Claimant completed an injury report on September 5, 2019. She described the injury as "pain when typing and moving/gripping computer mouse, taking notes with pen/pencil, pressing the gear shifter and moving the lever, gripping steering wheel, and turning a key to start/shut off vehicle and open office door." Claimant attributed the symptoms to data entry using a keyboard and mouse, writing notes and reports, and gripping objects such as pens and the steering wheel of her car.

5. At hearing, she described an additional aggravating factor while working at the reception station. The reception station had a "split" keyboard, which differed from the traditional flat keyboard at Claimant's regular workstation. The split keyboard aggravated her right arm so badly she typed everything with only her left hand.

6. Employer referred Claimant to the ROMP Clinic in Alamosa. She saw PA-C Howard Cox at her first appointment was on September 9, 2019. Claimant told the intake nurse her pain was from "repetitive movements like typing and writing/taking notes. PT describes pain as an ache and states when she uses her mouse, pain goes up into

arm.” Mr. Cox noted Claimant’s symptoms were associated with “8+ hours per day of typing, keyboard, and mouse use.” Grip strength was diminished and she had focal tenderness of the distal flexor tendons of the right forearm. Mr. Cox diagnosed an acute right forearm strain. He gave Claimant a wrist splint and referred her to physical therapy. Mr. Cox opined the objective findings were consistent with the history and/or a work-related mechanism of injury.

7. Sarah Nowotny performed a physical demands analysis (PDA) for Respondents on September 27, 2019. She interviewed Claimant and observed her performing office tasks. The evaluation at the office took approximately two hours. From that sampling of work tasks, Ms. Nowotny “extrapolated” the exact number of minutes and hours Claimant spends each day performing various tasks such as typing, mousing, and writing. She calculated 1-2 hours per day of keyboard use, 1-2 hours per day of mousing, and 2-4 hours per day of writing. Ms. Nowotny concluded Claimant’s job does not expose her to any primary or secondary risk factor outlined in the Cumulative Trauma Disorder Medical Treatment Guidelines (CTD MTGs).

8. Claimant returned to the ROMP Clinic on October 9, 2019, and saw Dr. Susan Geiger. She reported 6/10 pain at rest and 9/10 pain with activity. Her pain level typically increased as the day progressed. She was having pain in her right bicep but “the pain is only there when she is using her mouse or typing a lot.” She had swelling in her hand. Dr. Geiger reviewed the PDA with Claimant and opined “several factors [were] probably contributing to her discomfort,”

They have been short 1 coworker since March which has increased her hours over the last several months. She was observed she states from 940 – 11 AM by [Ms. Nowotny]. Some days she works and 8-hour workday and other days she works for 15 hours. She does do front desk work or she answers phones and logs in clients on a computer. She states since her right wrist and hand have been bothering her she sometimes does that utilizing 1 finger and typing with her left hand. The keyboard that is at the front desk is a split keyboard which she states actually aggravates her wrist and hand symptoms which is why she types with one finger on her left hand. . . . She states after work sometimes she also has to work on her phone and she holds the phone in her left hand and either clicks on a form or does typing with her right hand on the phone. She states that when she is on call she has to do that for 1-week stretch and at times then is working 12 days in a row without a break. She states that she rarely has a lunch break and rarely takes her 15-minute breaks because of their workload. She states ice helps a little bit when she utilizes it at the end of the workday. Looking at the pictures [from the PDA] . . . it is noted that her wrist support for the area in her keyboard actually stretches across and is under her wrist when she is using the mouse. We did discuss removing that portion to see if that does make a difference and is a better ergonomic fit.

9. Dr. Geiger diagnosed a forearm strain and right wrist tenosynovitis, and cited the following ICD-10 diagnostic codes:

ICD-10

856.911D - Strain of unsp musc/fasc/tend at forearm lv, right arm
M65.841 – Other synovitis and tenosynovitis, right hand

ICD-9

841.9 - Sprain & Strain unspecified site elbow & forearm
727.05 – Other tenosynovitis of hand and wrist

Dr. Geiger referred Claimant to occupational therapy, and recommended she continue wearing the wrist brace, apply ice several times daily, and take regular rest breaks during the day.

10. Employer terminated Claimant on October 17, 2019 for reasons not discussed at the hearing.

11. Claimant followed up with Dr. Geiger on November 4, 2019. Her hand and wrist pain were improved since being office work. She had not started PT because Respondents were contesting the claim.

12. Claimant had another appointment with Dr. Geiger on December 3, 2019. She again reported less pain since she had not been working. Her pain level was down to 4-5/10 at rest and 7-8/10 with activity. The swelling in her fingers had also improved. She was completing applications looking for a new job. She told Dr. Geiger her pain increased after 45-60 minutes of typing job applications. Routine household activities such as vacuuming were also bothering her arm. The right palm and right biceps were tender to palpation.

13. Claimant saw Dr. Nicholas Olsen for an IME at Respondents' request on December 9, 2019. Claimant told Dr. Olson she typically worked 55 per week, and every third week she was on call 24/7 for the entire week. Claimant said she typed reports and entered data into the computer at least four hours per day. Four days per month were reserved solely for data entry, which required eight hours of typing. Claimant was experiencing 4/10 pain at the IME, but it had been as high as 8/10 and the previous two weeks. Claimant indicated typing, writing, gripping, and grasping increased her pain. She primarily walks, hikes, and reads for recreation, with no avocational activities involving significant use of the upper extremities. The physical examination was largely benign, with no evidence of nerve compression or irritation. Finkelstein's test was negative, with no indication of de Quervain's syndrome. There was "generalized tenderness" to palpation of the right wrist and palm. Grip strength was decreased in the right hand, and all other strength measures were normal. Dr. Olsen opined Claimant's "diffuse" subjective complaints of palm and wrist pain supported no specific diagnosis. He opined Claimant has none of the upper extremity diagnoses referenced in the CTD MTG causation tables, and thus cannot qualify for a work-related CTD.

14. Dr. Olsen reviewed the PDA after the appointment, which he noted did not support Claimant's statement she performed typing at least four hours each day. He opined her job involves no primary or secondary risk factors under the CTD MTGs

causation matrix. This reinforced his opinion Claimant's arm problems are not work-related.

15. Dr. Olson expanded on his opinions in his deposition on January 15, 2020. He opined the diagnosis of "forearm strain" provided by Mr. Cox is not "a specific diagnosis that would qualify for application of the cumulative trauma disorder guidelines." He gave a similar opinion regarding the diagnoses provided by Dr. Geiger, stating, "she doesn't give a diagnosis that would qualify for application of the cumulative trauma disorder guidelines." He testified, "the medical treatment guidelines state that if one is going to apply the cumulative trauma disorder guidelines, you must have one of those diagnoses listed."

16. Dr. Geiger and Mr. Cox's causation opinions are more credible and persuasive than Dr. Olson's opinions.

17. Claimant proved she suffered a compensable occupational disease consisting of soft tissue strains affecting her right upper extremity. The injury resulted directly from Claimant's work activities and not from any hazard to which she is exposed outside her job.

18. The treatment provided by the ROMP clinic was reasonably necessary to evaluate and treat Claimant's compensable injury, including the wrist brace Mr. Cox dispensed at her first appointment.

CONCLUSIONS OF LAW

A. Compensability

To receive compensation or medical benefits, a claimant must prove she is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo. App. 2001). The claimant must prove entitlement to benefits by a preponderance of the evidence. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case are not interpreted liberally, in favor of either claimant or respondents. Section 8-43-201.

The Act imposes additional requirements for liability of an occupational disease beyond the "arising out of" and "course and scope" requirements. A compensable occupational disease must meet each element of the four-part test mandated by § 8-40-201(14), which defines an occupational disease as:

[A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard

to which the worker would have been equally exposed outside of the employment.

The equal exposure element effectuates the “peculiar risk” test and requires that the injurious hazards associated with the employment be more prevalent in the workplace than in everyday life or other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). The claimant “must be exposed by his or her employment to the risk causing the disease in a measurably greater degree and in a substantially different manner than are persons in employment generally.” *Id.* at 824. The hazard of employment need not be the sole cause of the disease, but must cause, intensify, or aggravate the condition “to some reasonable degree.” *Id.*

The mere fact an employee experiences symptoms while working does not compel an inference the work caused the condition. *Scully v. Hooters of Colorado Springs*, W.C. No. 4-745-712 (ICAO, October 27, 2008). There is no presumption that a condition which manifests at work arose out of the employment. Rather, the Claimant must prove a direct causal relationship between the employment and the injury. Section 8-43-201; *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989).

The Division has adopted Medical Treatment Guidelines (MTGs) to advance the statutory mandate to assure quick and efficient delivery of medical benefits to injured workers at a reasonable cost to employers. WCRP 17, Exhibit 5 addresses Cumulative Trauma Conditions (CTD MTGs), and was most recently updated in December 2016. Under § 8-42-101(3)(b) and WCRP 17-2(A), medical providers must use the MTGs when furnishing medical treatment. The ALJ may consider the MTGs as an evidentiary tool but is not bound by the MTGs when determining if requested medical treatment is reasonably necessary or injury-related. Section 8-43-201(3); *Logiudice v. Siemens Westinghouse*, W.C. No. 4-665-873 (January 25, 2011).

As found, Claimant proved she suffered a compensable occupational disease consisting of soft tissue strains affecting her right upper extremity. Mr. Cox and Dr. Geiger diagnosed soft-tissue strains, which are legitimate diagnoses as evidenced by their corresponding ICD-9 and ICD-10 codes. In fact, the CTD MTG explicitly recognizes “strains” as an “example[] of appropriate diagnoses.” See § (D)(3). The injury resulted directly from her work activities and not from any hazard to which Claimant is exposed outside her job.

Respondents’ reliance on the CTD MTG causation algorithm in this case is misplaced because, as Dr. Olson explained, Claimant has none of the diagnoses listed in the CTD causation tables. Accordingly, the causation tables are not particularly helpful in determining the cause of Claimant’s soft-tissue upper extremity strains.¹ The MTG CTD causation matrix provides a quick reference to available empirical data regarding the listed CTDs. It does not definitively limit the universe of potentially work-related conditions. The ALJ knows of no authority to support Dr. Olson’s opinion that only those

¹ Section (3)(a) of the CTD MTG concedes, “there are few studies which address less common musculoskeletal diagnoses” other than those listed in the causation tables. It makes little sense, therefore, to characterize application of the tables to unlisted diagnoses as “evidence-based.”

diagnoses listed in the CTD causation tables are eligible for coverage in a workers' compensation claim. The ALJ is not persuaded the Division intended to foreclose compensation for non-listed medical conditions if the claimant otherwise satisfies the statutory requirements for a compensable occupational disease. Indeed, such a rule would be contrary to the Act and void. *E.g.*, *Reyes v. JBS USA LLC*, W.C. No. 4-968-907-04 (December 4, 2017) (notwithstanding the MTGs, "determination of the compensable nature of an injury remains controlled by the Workers' Compensation Act and by relevant caselaw").

Multiple factors persuade the ALJ that Claimant's upper extremity strains were caused by her work. The symptoms began at work and were associated with specific work-related activities such as typing, using the mouse, and writing. Claimant's symptoms were worse at the end of her workday and workweek, but better when she was away from work. The persistent and worsening symptoms interfered with her ability to perform specific job-related tasks, prompting her to report and injury and request treatment. Claimant's symptoms improved relatively quickly after she was terminated in October 2019, which further supports a causal relationship to the work. The symptoms later recurred and worsened when she performed similar activities such as typing and mousing while filling out job applications. Finally, there is no persuasive evidence of any other potentially injurious activity, pathology, or potentially causal factor besides Claimant's work. Nor is there persuasive evidence she was at least equally exposed to the injurious activities outside of work.

B. Medical benefits

Respondents are liable for medical treatment reasonably needed to cure or relieve the effects of an industrial injury. Section 8-42-101. Compensable medical treatment includes evaluations or diagnostic procedures to investigate the existence, nature, or extent of an industrial injury, or suggest a course of treatment. *Garcia v. Express Personnel*, W.C. No. 4-587-458 (August 24, 2000); *Walker v. Life Care Centers of America*, W.C. No. 4-953-561-02 (March 30, 2017); *Jacobson v. American Industrial Service/Steiner Corp.*, W.C. No. 4-487-349 (April 24, 2007).

As found, the evaluations and treatment Claimant received through the ROMP Clinic, including the wrist brace dispensed by Mr. Cox, was reasonably necessary to cure and relieve the effects of her injury

ORDER

It is therefore ordered that:

1. Claimant's claim is compensable.
2. Insurer shall cover all treatment from authorized providers reasonably needed to cure and relieve the effects of Claimant's injury, including the wrist splint dispensed by the ROMP Clinic.
3. All issues not decided herein are reserved for future determination.

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

DATED: March 2, 2020

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

Whether the claimant has demonstrated, by a preponderance of the evidence that his average weekly wage is an amount other than the AWW of \$982.50, admitted by the respondents.

FINDINGS OF FACT

1. Prior to his employment with the employer, the claimant owned Four Corners Locating (FCL). During his self-employment, the claimant worked as a utility locator. The claimant testified that he paid himself \$1,200.00 per week. The claimant further testified that this was based on an hourly rate of \$30 per hour and work of 40 hours per week. The claimant clarified that while the owner of FCL he was paid that \$1,200.00 per week regardless of the number of hours he actually worked.

2. On May 15, 2019, the claimant sold FCL to the employer. Thereafter, the employer established the subsidiary, Jaco Locating Services. The claimant testified that due to his extensive experience and knowledge, he was hired by the employer to assist with the initial startup and management of the employer's locating company. The claimant worked as a locator for the employer.

3. The claimant's employment with the employer began on June 1, 2019. The claimant's first actual day of work for the employer was June 16, 2019.

4. The claimant testified that he understood that the employer would pay him \$30.00 per hour. The claimant also understood that he would be a full-time employee. Therefore, the claimant believed he would be working 40 hours each week.

5. On July 29, 2019, the claimant was injured at work. Specifically, the claimant was electrocuted while attempting to connect a locating box to an electrical panel.

6. On September 6, 2019, the respondents filed a General Admission of Liability regarding the claimant's July 29, 2019 injury. In that GAL, the respondents admitted for an average weekly wage (AWW) of \$982.50.

7. Payroll records admitted at hearing demonstrate that the claimant was paid as follows:

- a. For the pay period June 16 through June 22, 2019, the claimant reported 38.5 hours worked and was paid \$1,155.00;
- b. For the pay period June 23 through June 29, 2019, the claimant reported 40 hours worked and was paid \$1,200.00;

- c. For the pay period June 30 through July 6, 2019, the claimant reported hours 28 worked and was paid \$840.00;
- d. For the pay period July 7 through July 13, 2019, the claimant reported hours 40 hours worked and was paid \$1,200.00;
- e. For the pay period July 14 through July 20, 2019, the claimant reported hours 16 hours worked and was paid \$480; and
- f. For the pay period July 21 through July 27, 2019, the claimant reported hours 34 hours worked and was paid \$1,020.00.

8. The ALJ calculates that for the six-week period of June 16, 2019 through July 27, 2019, the claimant was paid a total of \$5,895.00. When this amount is divided by six weeks, it is equal to \$982.50. This is the AWW admitted by the respondents in the September 6, 2019 GAL.¹

9. The claimant asserts that his average weekly wage should be calculated at 40 hours per week, regardless of the actual number of hours he reported to the employer. Therefore, the claimant asserts that his AWW should be \$1,200.00 per week; (40 hours per week at \$30.00 per hour)². In support of this assertion, the claimant testified that he understood that when the employer purchased FLC, they would operate their business in the same manner the claimant had run FLC. As the ALJ understands the claimant's testimony, this "same manner" would include the claimant being paid a salary of \$1,200.00 per week. The ALJ is not persuaded by the claimant's testimony or his assertions.

10. The claimant's supervisor with the employer, Curt M[Redacted] testified at hearing. Mr. M[Redacted] testified that the claimant was hired to work a full time position and was paid \$30.00 per hour. Mr. M[Redacted] confirmed that the claimant was paid for the hours he worked. Those hours and the claimant's paychecks were calculated based upon timesheets prepared by the claimant. Mr. M[Redacted] also testified that there were weeks that the claimant worked less than 40 hours. For those weeks, the claimant was paid \$30.00 per hour for the hours he reported. Mr. M[Redacted] further testified that the claimant did not assert that he was owed \$1,200.00 per week, regardless of the number of hours the claimant worked.

11. Will D[Redacted] is a locator with the employer. He testified that prior the claimant's injury, the claimant was his supervisor. Mr. D[Redacted] also testified that he contacted the claimant with questions he had about his job assignments.

¹ The ALJ notes that the parties agree that the claimant's first day of employment was June 1, 2019. However, the claimant was on a two-week vacation immediately thereafter. That is the reason that his first day of work is indicated as June 16, 2016. The ALJ notes that if this eight-week period were considered in calculating the claimant's AWW, it would result in an AWW of \$736.88; (\$5,895.00 divided by eight weeks of employment).

² The ALJ calculates that the amount asserted by the claimant is \$217.50 more than the admitted AWW of \$982.50.

12. James B[Redacted] is the President of the employer. He testified that he purchased the assets of Four Corners Locating. Mr. B[Redacted] also testified that he did not discuss a salary with the claimant. Mr. B[Redacted] understood that the claimant was to be paid \$30.00 per hour for the hours the claimant worked. Mr. B[Redacted] also testified that he did not guarantee the claimant as set weekly salary. The claimant did not indicate to Mr. B[Redacted] that he was displeased with his pay.

13. Brian H[Redacted] is the employer's Head of Operations. He testified that he was present when the claimant met with Mr. B[Redacted] to discuss the sale of FCL. Mr. H[Redacted] also testified that the claimant was not told he would receive a set salary.

14. The ALJ credits the payroll records and the testimony of Mr. M[Redacted] and Mr. B[Redacted] over the contrary testimony of the claimant. The ALJ finds that the claimant has failed to demonstrate that it is more likely than not that his AWW should be calculated to be \$1,200.00 per week. On the contrary, the payroll records reflect that the claimant was an hourly employee, and paid \$30.00 per hour. The claimant's hours varied, resulting in the AWW proposed by the respondent of \$982.50. This is further supported by the testimony of Mr. M[Redacted] and Mr. B[Redacted].

15. The claimant has made much of the content of a form completed by his spouse regarding enrollment in an employer provided vision plan. (See the claimant's exhibit 22 at page 116). The ALJ is not persuaded that the content of this document is supportive of the claimant's arguments. On the contrary, the handwritten information included only reinforces the respondents' position that the claimant was an hourly employee and paid \$30.00 per hour.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2018).

4. The ALJ must determine an employee's AWW by calculating the monetary rate at which services are paid the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995).

5. Section 8-42-102(2), C.R.S. requires the ALJ to base claimant's AWW on his earnings at the time of the injury. Under some circumstances, the ALJ may determine the claimant's TTD rate based upon her AWW on a date other than the date of the injury. *Campbell v. IBM Corporation*, 867 P.2d 77 (Colo. App. 1993). Section 8-42-102(3), C.R.S. grants the ALJ discretionary authority to alter that formula if for any reason it will not fairly determine claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective of calculating AWW is to arrive at a fair approximation of claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO, May 7, 2007).

6. As found, the claimant has failed to demonstrate by a preponderance of the records that his AWW should be calculated as an amount other than the admitted AWW of \$982.50.

ORDER

It is therefore ordered that the claimant's AWW is \$982.50, as admitted by the respondents.

Dated this 3rd day of March 2020.



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-113-544-001**

ISSUE

Whether Claimant has demonstrated by a preponderance of the evidence that she suffered compensable injuries during the course and scope of employment with Employer on June 24, 2019.

FINDINGS OF FACT

1. Claimant works for Employer as a Delivery Driver. Her job duties include delivering sandwiches as well as stocking and cleaning Employer's store.

2. On June 24, 2019 Claimant was involved in a motor vehicle accident while delivering sandwiches for Employer. Another driver rear-ended her vehicle.

3. Claimant has suffered numerous injuries in previous motor vehicle accidents. In 2008 she was involved in a rear-end collision and injured her lower back. In 2010 Claimant broke her hip, tailbone, sternum and ribs on the left side.

4. Immediately after the June 24, 2019 collision Claimant contacted the police and reported back pain, but declined transfer to a hospital via ambulance. Claimant's Supervisor Tyler B[Redacted] arrived at the scene and drove Claimant back to Employer's store.

5. Claimant testified that after she returned to the store, she worked for half an hour before going home due to pain. She explained that she went to Urgent Care the night of the accident. Claimant remarked that she reported back, hip, neck and shoulder pain. However, the emergency room record only documents localized complaints of low back pain, with some tingling to her fingers and toes but no numbness or weakness. Claimant denied loss of consciousness, headache or neck pain. She also did not mention any shoulder or hip pain. Edward Walter Cetaruk, M.D. diagnosed Claimant with a back strain and prescribed medications. He noted that Claimant's pain was "due to soft tissue injury of the muscles in connective tissue of her spine and back."

6. Claimant missed one day of work after the motor vehicle accident but returned to employment on June 26, 2019. She explained that she struggled with work activities, including an inability to scoop ice out of a machine, carry a bucket, use a pole to grab chip boxes and roll a floor mat. Claimant commented that she developed symptoms in her right shoulder, neck and hip while working.

7. Employer's General Manager Tyler B[Redacted] testified that he went to the scene of the accident on June 24, 2019 and gave Claimant a ride back to the store. After taking a day off, Claimant returned to work and performed her regular job duties. Mr. B[Redacted] remarked that Claimant did not request work accommodations as a result of any injuries and he did not notice any difference in her job performance. In fact, Claimant

was a hard worker who often sprinted to her car, both before and after the motor vehicle accident, in order to make sandwich deliveries.

8. On July 2, 2019 Claimant visited Kartik K. Patel, M.D. for an evaluation. She reported pain in her lower right SI joint and tingling in her fingers. Imaging of the lumbar and thoracic spines was negative. Dr. Patel did not document any hip or neck symptoms.

9. Claimant explained that on July 10, 2019 she twisted to the left at work and experienced a stabbing pain on the left side of her spine down her leg. She specified that the July 10, 2019 incident caused a new, shooting pain that radiated through the bottom of her foot.

10. Claimant ceased working for Employer on July 12, 2019. She visited multiple medical providers over the ensuing months. Claimant underwent physical therapy and diagnostic imaging.

11. On August 7, 2019 Claimant visited Michael Shen, M.D. for an examination. Claimant did not provide any history of the July 10, 2019 event and related her symptoms to the June 24, 2019 motor vehicle accident. Dr. Shen determined that Claimant's lumbar MRI was essentially normal with the exception of some age appropriate findings. He remarked that Claimant was mechanically stable and neurologically intact. Dr. Shen did not note any indications for surgery and expressed concerns about pain out of proportion to his physical examination.

12. On August 14, 2019 Claimant visited Christopher D'Ambrosia, M.D. for an evaluation. Dr. D'Ambrosia determined that Claimant's pain was "significantly out of proportion relative to her diagnostic imaging studies." He noted she experienced severe pain with even the slightest touch and was unable to complete any physical therapy because of her severe pain.

13. On September 23, 2019 Claimant visited Nathan D. Faulkner, M.D. She reported severe pain in her buttock, groin and lateral hip that was unchanged since June 24, 2019. Dr. Faulkner determined that Claimant's pain was "way out of proportion to exam" because she exhibited symptoms with even light pressure. He noted that it would be very atypical for a labral tear to cause the amount of pain in the area Claimant described.

14. On December 19, 2019 Claimant visited John S. Hughes, M.D. for an independent medical examination. Dr. Hughes recounted that Claimant suffered a motor vehicle accident on June 24, 2019. He explained that at her June 24, 2019 emergency room visit Claimant reported lower back pain. Claimant reported current symptoms of lower back, left hip and right shoulder pain. Dr. Hughes concluded that Claimant had received reasonable, necessary and related medical treatment for her June 24, 2019 injuries. He reasoned that Claimant had not reached Maximum Medical Improvement (MMI).

15. On December 19, 2019 Claimant also underwent an independent medical examination with Robert L. Messenbaugh, M.D. He initially determined that Claimant

likely sustained some level of injury to her left hip, lower back, neck and left shoulder. However, he noted that he was unable to provide a clearer opinion given the extremely limited medical records he had received. Dr. Messenbaugh subsequently obtained additional records from UCHHealth, Health Images, Usama Ghazi, D.O., Advanced Orthopedic & Sports Medicine, Colorado Orthopedic Consultants and Hughes Medical Consulting.

16. On January 16, 2020 Dr. Messenbaugh issued an Addendum Report. He amended his opinion to explain that Claimant sustained a lower back strain on June 24, 2019, but did not injure her cervical spine, right shoulder or left hip.

17. Dr. Messenbaugh testified at the hearing in this matter. He maintained that Claimant's only suffered a lower back strain in the June 24, 2019 motor vehicle accident. Dr. Messenbaugh reasoned, that during her initial emergency room visit on June 24, 2019, Claimant only mentioned lower back pain and did not note left hip, right shoulder or cervical spine pain. He explained that sciatica from an acute event would begin within 24-48 hours. Claimant's sciatica symptoms would not delay for three weeks and explode into a form of excruciating pain in which she could not bear weight or walk. Moreover, neck or cervical symptoms from whiplash would also begin immediately.

18. Dr. Messenbaugh detailed that the objective examination findings did not support a severe debilitating injury from Claimant's motor vehicle accident. The initial pain was limited to Claimant's lower back. The radiating pain and hip symptoms arose after the July 10, 2019 incident.

19. Dr. Messenbaugh summarized that an individual cannot have labrum tears and rotator cuff tears without reporting them because the conditions involve the painful tearing of tissues. The pain is immediate and does not begin at a later time. Dr. Messenbaugh noted that debilitating pain in which an individual cannot stand or walk due to a traumatic event is usually promptly reported. He reasoned that, if the motor vehicle accident caused Claimant's inability to walk, the condition would have been evident within the three week time span after the accident while Claimant was working. Finally, Dr. Messenbaugh concluded that Claimant's right shoulder symptoms were unrelated to her motor vehicle accident because there was no mechanism for a right shoulder injury. Claimant's seat belt was over her left shoulder during the June 24, 2019 accident.

20. Claimant has demonstrated that it is more probably true than not that she suffered a compensable injury in the form of a back strain during the course and scope of her employment with Employer on June 24, 2019. However, based on the persuasive medical records, Claimant did not suffer injuries to her cervical spine, left hip or right shoulder during the motor vehicle accident of June 24, 2019. Because the medical records simply reflect a lack of causation, an absence of objective evidence and exaggerated pain symptoms, they do not support cervical spine, left hip or right shoulder injuries.

21. The emergency room record from June 24, 2019 only documents localized complaints of lower back pain with some tingling to her fingers and toes, but no numbness or weakness. Claimant denied the loss of consciousness, headache or neck pain. She also did not mention any shoulder or hip pain. Dr. Cetaruk diagnosed Claimant with a

back strain and prescribed medications. Although Claimant explained that she subsequently struggled to perform her work activities, Mr. B[Redacted] credibly remarked that Claimant did not request work accommodations and he did not notice any difference in her job performance. In a July 2, 2019 evaluation with Dr. Patel Claimant only reported pain in her lower right SI joint and tingling in her fingers. Imaging of the lumbar and thoracic spines was negative. Dr. Patel did not document any hip or neck symptoms.

22. Claimant commented that on July 10, 2019 she twisted to the left at work and experienced a stabbing pain on the left side of her spine down her leg. She ceased working for Employer on July 10, 2019. Numerous medical providers subsequently noted that Claimant exhibited pain out of proportion relative to physical examination findings and diagnostic imaging studies.

23. Dr. Messenbaugh maintained that Claimant's injury as a result of the June 24, 2019 motor vehicle accident was limited to a lower back strain. He reasoned that during her initial emergency room visit on June 24, 2019 Claimant only mentioned lower back pain and did not note left hip, right shoulder or cervical spine pain. He explained that sciatica from an acute event would begin within 24-48 hours. Claimant's sciatica symptoms would not delay for three weeks and explode into a form of excruciating pain in which she could not bear weight or walk. Dr. Messenbaugh summarized that an individual cannot have labrum and rotator cuff tears without reporting them because the conditions involve the painful tearing of tissues. The pain is immediate and does not begin at a later time. Dr. Messenbaugh reasoned that, if the motor vehicle accident caused Claimant's inability to walk, the condition would have been evident within the three week period after the accident when she was working. Finally, Dr. Messenbaugh concluded that Claimant's right shoulder symptoms were unrelated to her work accident because there was no mechanism for a right shoulder injury.

24. Dr. Hughes explained that at her June 24, 2019 emergency room visit Claimant reported lower back pain as a result of the June 24, 2019 accident. Claimant reported current symptoms of lower back, left hip and right shoulder pain. Dr. Hughes thus concluded that Claimant had received reasonable, necessary and related medical treatment for her June 24, 2019 injuries. However, the persuasive medical records and opinions demonstrate the lack of a causal connection between Claimant's June 24, 2019 motor vehicle accident and left hip, right shoulder and cervical spine symptoms. Moreover, because the record is replete with pain out of proportion to physical examination findings and diagnostic imaging studies, Claimant's connection of symptoms to the June 24, 2019 accident is questionable. It is thus speculative to attribute Claimant's myriad symptoms to her work-related motor vehicle accident. Accordingly, Claimant suffered a work-related injury only in the form of a back strain during the course and scope of her employment with Employer on June 24, 2019.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1),

C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. See *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson*, W.C. No. 4-589-645 (ICAP, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.*, 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner*, 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts*, W.C. No. 4-606-563 (ICAO, Aug. 18, 2005).

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. See *Cotts v. Exempla, Inc.*, W.C. No. 4-606-563 (ICAO, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. See *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAO, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs*, W.C. No. 4-745-712 (ICAO, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job

function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that “correlation is not causation,” and merely because a coincidental correlation exists between the claimant’s work and his symptoms does not mean there is a causal connection between the claimant’s injury and work activities.

7. As found, Claimant has demonstrated by a preponderance of the evidence that she suffered a compensable injury in the form of a back strain during the course and scope of her employment with Employer on June 24, 2019. However, based on the persuasive medical records, Claimant did not suffer injuries to her cervical spine, left hip or right shoulder during the motor vehicle accident of June 24, 2019. Because the medical records simply reflect a lack of causation, an absence of objective evidence and exaggerated pain symptoms, they do not support cervical spine, left hip or right shoulder injuries.

8. As found, the emergency room record from June 24, 2019 only documents localized complaints of lower back pain with some tingling to her fingers and toes, but no numbness or weakness. Claimant denied the loss of consciousness, headache or neck pain. She also did not mention any shoulder or hip pain. Dr. Cetaruk diagnosed Claimant with a back strain and prescribed medications. Although Claimant explained that she subsequently struggled to perform her work activities, Mr. B[Redacted] credibly remarked that Claimant did not request work accommodations and he did not notice any difference in her job performance. In a July 2, 2019 evaluation with Dr. Patel Claimant only reported pain in her lower right SI joint and tingling in her fingers. Imaging of the lumbar and thoracic spines was negative. Dr. Patel did not document any hip or neck symptoms.

9. As found, Claimant commented that on July 10, 2019 she twisted to the left at work and experienced a stabbing pain on the left side of her spine down her leg. She ceased working for Employer on July 10, 2019. Numerous medical providers subsequently noted that Claimant exhibited pain out of proportion relative to physical examination findings and diagnostic imaging studies.

10. As found, Dr. Messenbaugh maintained that Claimant’s injury as a result of the June 24, 2019 motor vehicle accident was limited to a lower back strain. He reasoned that during her initial emergency room visit on June 24, 2019 Claimant only mentioned lower back pain and did not note left hip, right shoulder or cervical spine pain. He explained that sciatica from an acute event would begin within 24-48 hours. Claimant’s sciatica symptoms would not delay for three weeks and explode into a form of excruciating pain in which she could not bear weight or walk. Dr. Messenbaugh summarized that an individual cannot have labrum and rotator cuff tears without reporting them because the conditions involve the painful tearing of tissues. The pain is immediate and does not begin at a later time. Dr. Messenbaugh reasoned that, if the motor vehicle accident caused Claimant’s inability to walk, the condition would have been evident within the three week period after the accident when she was working. Finally, Dr. Messenbaugh concluded that Claimant’s right shoulder symptoms were unrelated to her work accident because there was no mechanism for a right shoulder injury.

11. As found, Dr. Hughes explained that at her June 24, 2019 emergency room visit Claimant reported lower back pain as a result of the June 24, 2019 accident. Claimant reported current symptoms of lower back, left hip and right shoulder pain. Dr.

Hughes thus concluded that Claimant had received reasonable, necessary and related medical treatment for her June 24, 2019 injuries. However, the persuasive medical records and opinions demonstrate the lack of a causal connection between Claimant's June 24, 2019 motor vehicle accident and left hip, right shoulder and cervical spine symptoms. Moreover, because the record is replete with pain out of proportion to physical examination findings and diagnostic imaging studies, Claimant's connection of symptoms to the June 24, 2019 accident is questionable. It is thus speculative to attribute Claimant's myriad symptoms to her work-related motor vehicle accident. Accordingly, Claimant suffered a work-related injury only in the form of a back strain during the course and scope of her employment with Employer on June 24, 2019.

ORDER

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

1. Claimant suffered a compensable back strain during the course and scope of her employment with Employer on June 24, 2019.
2. Any issues not resolved in this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at <http://www.colorado.gov/dpa/oac/forms-WC.htm>.*

DATED: March 3, 2020.

DIGITAL SIGNATURE:


Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

Whether the claimant has overcome, by clear and convincing evidence, the findings of the Division-sponsored independent medical examination (DIME) physician regarding maximum medical improvement (MMI), causation, and the need for additional medical treatment.

If the claimant fails to overcome the opinion of the DIME physician, whether the claimant has demonstrated, by a preponderance of the evidence, that she is entitled to permanent partial disability (PPD) benefits related to her right foot and ankle.

If the claimant fails to overcome the opinion of the DIME physician, whether the claimant has demonstrated, by a preponderance of the evidence, that she is entitled to reasonable and necessary medical treatment to maintain maximum medical improvement (MMI).

If the claimant fails to overcome the opinion of the DIME physician, whether the claimant sustained a serious permanent disfigurement to areas of her body normally exposed to public view, resulting in additional compensation.

At hearing, the claimant withdrew the endorsed issue of an overpayment. That issue is reserved, without prejudice.

FINDINGS OF FACT

1. On August 27, 2015, the claimant suffered an injury to her left ankle when she fell down some stairs while vacuuming in a client's home. The respondents have admitted liability for the August 27, 2015 left ankle injury.

2. The claimant's initial treatment of her left ankle included use of a boot, physical therapy, and injections. Ultimately, the claimant was seen by Dr. Christopher Copeland for a surgical consultation.

3. On February 26, 2016, Dr. Copeland requested authorization for a left ankle arthroscopy with debridement, anterior decompression, and Brostrom repair.

4. On April 4, 2016, the claimant attended an independent medical examination (IME) with Dr. Eric Lindberg. In connection with the IME, Dr. Lindberg reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In his IME report, Dr. Lindberg opined that the surgery recommended by Dr. Copeland was reasonable and related to the claimant's August 27, 2015 injury.

5. The surgery was approved by the respondents. On May 4, 2016, Dr. Copeland performed the recommended left ankle surgery. Specifically, that procedure included left ankle arthroscopy with extensive debridement, open excision of the distal tibia, and a lateral ligament Brostrom repair.

6. On June 28, 2017, the claimant underwent a second left ankle surgery, again performed by Dr. Copeland. On that date, Dr. Copeland performed a left ankle peroneal brevis tendon repair, tenolysis of the peroneal longus tendon, and a hypertrophic scar revision.

7. On February 27, 2018, the claimant was seen for an IME with Dr. Scott Resig. As with the claimant's prior IME, Dr. Resig reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In his March 1, 2018 report, Dr. Resig opined that the claimant was not a candidate for PRP injections. However, he did note that the claimant could benefit from additional surgery to her left ankle, which could include a sural nerve resection. In addition, Dr. Resig recommended that the claimant undergo electromyography (EMG) testing before additional surgery was pursued.

8. On August 29, 2018, Dr. Copeland performed a third surgery on the claimant's left ankle. That surgery included peroneal tendon tenolysis, sural nerve neurolysis, and further revision of the scar.

9. The claimant testified that she also injured her right ankle because she lost her balance on her left foot. The claimant further testified that she was at her home preparing food when she turned to step on to her left foot. However, she felt unsteady and placed all of body weight onto her right foot. As this shift occurred, the claimant twisted her right ankle. The records indicate that this incident occurred on January 17, 2019.

10. On June 4, 2019, the claimant attended an IME with Dr. Jeffrey Raschbacher. Prior to issuing his IME report, Dr. Raschbacher reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. Dr. Raschbacher opined that the claimant's August 27, 2015 fall resulted in a "very mild sprain" of the claimant's left ankle. Dr. Raschbacher opined that the claimant had reached maximum medical improvement (MMI) as of the date of his exam, June 4, 2019. Dr. Raschbacher also opined that the claimant's left ankle did not exhibit instability. Based upon that finding, Dr. Raschbacher further noted that alleged instability of the claimant's left ankle is not a likely mechanism of injury for the claimant's right ankle. Dr. Raschbacher further noted that if the claimant did in fact injure her right ankle, it was a strain or sprain. Dr. Raschbacher further clarified that he was not certain that a right ankle injury occurred. As a result, he recommended no further treatment for the claimant's right ankle.

11. On June 7, 2019, the claimant was seen by Dr. Waqqar Khan-Farooqi for a surgical consultation. Dr. Khan-Farooqi diagnosed sural nerve entrapment in the claimant's left ankle. On that date, Dr. Kahn-Farooqi recommended two surgical options. Those recommended surgeries were either a sural neurectomy or decompression and vein wrapping. Dr. Khan-Farooqi clarified that decompression and vein wrapping would be performed by another physician (Dr. Pitcher).

12. On June 27, 2019, the parties went to hearing before ALJ Keith Mottram on the issue of whether the claimant's right ankle injury was compensable.

13. On July 9, 2019, the respondents requested a 24-month Division-sponsored independent medical examination (DIME).

14. Closing arguments for the June 27, 2019 hearing were heard on July 9, 2019. In an order issued July 24, 2019, ALJ Mottram found that the claimant's right ankle injury was compensable, because the "chain of causation" connected that new injury to the August 27, 2015 left ankle injury. In addition, ALJ Mottram ordered the respondents to pay for recommended treatment of the claimant's right ankle that included a magnetic resonance image (MRI) and physical therapy.

15. On August 2, 2019, the parties agreed to Dr. John Hughes as the DIME physician.

16. On August 22, 2019, the claimant returned to Dr. Khan-Farooqi who assessed entrapment neuropathy. Dr. Khan-Farooqi noted that the claimant's left ankle condition included "incisional neuromas involving the sural nerve". He also noted that such neuromas are "recalcitrant to further surgery". Dr. Khan-Farooqi recommended the claimant wear rocker bottom shoes.

17. The claimant attended the DIME with Dr. Hughes on September 26, 2019. In addition to completing a physical exam, Dr. Hughes reviewed the claimant's medical records and obtained a history from the claimant. In his DIME report, Dr. Hughes listed the claimant's diagnoses as a work related left ankle sprain/strain occurring on August 27, 2015; left ankle arthritis; left sural neuropathy. Dr. Hughes opposed any surgery to the claimant's left ankle, and recommended no maintenance medical treatment. With regard to permanent impairment, Dr. Hughes determined a 19% left lower extremity impairment rating. In addition, Dr. Hughes noted his agreement with Dr. Raschbacher that the claimant reached MMI on June 4, 2019.

18. With regard to the claimant's right ankle, Dr. Hughes opined that the claimant suffered a sprain strain. Additionally, he opined that the claimant's right ankle injury was not work related and identified it as a "subsequent injury". In addition, Dr. Hughes opined that the ongoing right ankle symptoms reported by the claimant would support a finding that the claimant has an underlying arthritic condition that may predispose her to lack of improvement with surgical intervention.

19. In compliance with ALJ Mottram's July 24, 2019 order, the claimant underwent a right ankle MRI on October 9, 2019. That MRI showed high-grade chondral fissuring in the anterior tibial plafond; mild to moderate subchondral bone marrow edema; small anterior marginal osteophytes; and mild hypertrophic scarring of the anterior talofibular ligament.

20. On October 17, 2019, the respondents filed a Final Admission of Liability (FAL) admitting for the MMI date of June 4, 2019 and scheduled impairment of 19 percent for the claimant's left lower extremity, as determined by Dr. Hughes.

21. The claimant testified that she wishes to pursue one of the surgical options for her left ankle, as proposed by Dr. Khan-Farooqi. With regard to her right ankle, the claimant testified that her current symptoms include swelling and pain. The claimant testified that she needs additional treatment to both her left and right ankles.

22. For purposes of a possible disfigurement award, the ALJ made the following findings regarding the appearance of the claimant's left ankle. On the outside of the claimant's left ankle, there is a well-healed surgical scar that measures approximately 8 cm long and is 0.5 cm at its widest point. In addition, there is a well-healed arthroscopic scar that is 0.5 cm in diameter. On the claimant's left Achilles, there is a circular area of discoloration that measures 0.75 cm in diameter. The ALJ also observed swelling on the claimant's left ankle to the point that visualizing the ankle bone is not distinct. The claimant testified that swelling of her left ankle is constant.

23. The ALJ credits the medical records and the opinions of Drs. Hughes and Raschbacher. Therefore, the ALJ finds that the claimant has failed to overcome the opinions of Dr. Hughes that the claimant reached MMI on June 4, 2018, that her right foot and ankle symptoms are not related to the admitted work injury, and that she does not require post-MMI medical treatment. Contrary medical opinions and the claimant's testimony are not sufficient to demonstrate that it is highly probable that Dr. Hughes's opinions are incorrect.

24. With regard to maintenance medical care necessary to maintain the claimant at MMI, the ALJ credits the opinion of Dr. Hughes. The ALJ finds that the claimant has failed to demonstrate that it is more likely than not that she is entitled to post-MMI medical treatment. As noted by Dr. Hughes, the claimant has undergone a number of treatment modalities (including three surgeries) since her 2015 work injury, but her left ankle symptoms have not improved.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering

all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *CJI*, Civil 3:16 (2015).

4. Section 8-42-107(8)(b)(III) and (c), C.R.S. provides that the DIME physician's finding of MMI and permanent medical impairment is binding unless overcome by clear and convincing evidence. Clear and convincing evidence is highly probable and free from substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it is highly probable that the DIME physician is incorrect. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). A fact or proposition has been proved by clear and convincing evidence if, considering all of the evidence, the trier-of-fact finds it to be highly probable and free from substantial doubt. *Metro Moving & Storage, supra*. A mere difference of opinion between physicians fails to constitute error. See *Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-356 (March 22, 2000). The ALJ may consider a variety of factors in determining whether a DIME physician erred in his opinions including whether the DIME appropriately utilized the Medical Treatment Guidelines and the AMA Guides in his opinions.

5. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; see *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). The need for medical treatment may extend beyond the point of maximum medical improvement where claimant requires periodic maintenance care to prevent further deterioration of his physical condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1999); *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995). Section 8-42-101, C.R.S., thus authorizes the ALJ to enter an order for future treatment if supported by substantial evidence of the need for such treatment. *Grover v. Industrial Commission, supra*.

6. As found, the claimant has failed to prove by clear and convincing evidence that Dr. Hughes's opinions regarding MMI, causation of right ankle symptoms, and post-MMI care were incorrect. The claimant has failed to establish anything other than a difference of opinion between medical providers. As found, the medical records and the opinions of Drs. Hughes and Raschbacher are credible and persuasive.

7. As found, the claimant has failed to demonstrate by a preponderance of the evidence that she is entitled to post-MMI treatment. As found, the medical records and the opinion of Dr. Hughes are credible and persuasive.

8. Section 8-42-108 (1), C.R.S. provides that a claimant may be entitled to additional compensation if, as a result of the work injury, she has sustained a serious permanent disfigurement to areas of the body normally exposed to public view.

9. As found, the claimant has a visible disfigurement on her left ankle consisting of scarring and swelling as described above.

ORDER

It is therefore ordered:

1. The claimant has failed to overcome the DIME physician's opinion on the issues of MMI, causation, and the need for additional medical treatment.

2. The claimant's claim for post-MMI medical treatment is denied and dismissed.

3. The insurer shall pay the claimant \$750.00 for disfigurement. The insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

4. All matters not determined here are reserved for future determination.

Dated this 4th day of March 2020.



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

- Did Claimant prove by a preponderance of the evidence an arthroscopic surgery recommended by Dr. Mark Failing is reasonably necessary to cure and relieve the effects of her admitted injury?

FINDINGS OF FACT

1. Claimant works for Employer as a server. At the time of the accident, Claimant had a second job as a Zumba instructor.

2. Claimant suffered an admitted right knee injury on February 22, 2019. She was moving a heavy pallet of food and did not realize the back wheels were locked. She planted her right leg and pushed, but the pallet did not move. She immediately felt sharp, burning pain in the medial aspect of the right knee.

3. Employer referred Claimant to Concentra Medical Centers. She saw Dr. Scott Richardson at her first appointment on March 4, 2019. She described right knee pain when walking, occasional catching, occasional clicking, and a feeling of instability. On examination, she was tender to palpation around the medial knee. McMurray test was positive on the medial side but negative on the lateral side. She had pain when stressing the medial collateral ligament, but no laxity. She walked with an antalgic gait. Dr. Richardson diagnosed a right knee "sprain" and an MCL "sprain or strain." He gave Claimant a hinged knee brace and referred her to therapy. He imposed work restrictions of no lifting, pushing, or pulling over 20 pounds, and at least 50% of each shift must be done in a seated position.

4. Claimant returned to Concentra on March 8 and saw PA-C Nathan Adams. Her symptoms were essentially unchanged, although Mr. Adams thought her medial knee pain was consistent with pes anserine bursitis. There is no indication he performed a McMurray test. The note stated Claimant "denies increased clicking or popping over her pre-injury baseline." The source of that statement is unclear, but the ALJ infers Mr. Adams misunderstood the history because there is no persuasive evidence Claimant had any preinjury right knee problems.

5. Claimant attended three PT sessions over two weeks in March 2019. At each session, the therapist documented a positive medial McMurray testing.

6. At her follow-up appointment with Dr. Richardson on March 22, 2019, Claimant described "deep ache and sharp pains in the right knee . . . without improvement." She reported clicking, popping, and increased pain with weightbearing. She also reported right knee swelling after walking. McMurray test was positive on the medial side, negative on the lateral side. Stressing the MCL produced pain by no laxity.

Dr. Richardson recommended she stop PT and ordered an MRI of the right knee for “possible medial meniscus tear.”

7. A right knee MRI was performed on April 1, 2019. The radiologist appreciated (1) a possible tear of the posterior horn of the medial meniscus with an overlying parameniscal cyst, (2) a low-grade partial-thickness tear of the medial collateral ligament, and (3) significant patellofemoral chondromalacia.

8. After reviewing the MRI report, Dr. Richardson referred Claimant to Dr. Mark Failinger for a surgical evaluation.

9. Dr. Failinger evaluated Claimant on April 18, 2019. Dr. Failinger reviewed the MRI and saw “moderate chondromalacia in the central portion of the patella and smaller chance of medial meniscus tear with small posteromedial possible parameniscal cyst.” He opined, “It is certainly not clear that there is a medial meniscus tear given the MRI findings.” He administered a cortisone injection and opined, “possibly the scope would be the next step.”

10. Claimant received no benefit from the steroid injection.

11. She returned to Dr. Failinger on May 2, 2019. She was no better and wanted to try surgery. McMurray test was equivocal; it produced pain but no obvious click. Dr. Failinger recommended arthroscopic surgery to “look for a meniscus tear as noted on the MRI reading and also clean up her chondromalacia.”

12. Dr. Jon Erickson performed a Rule 16 review for Insurer on May 20, 2019. Dr. Erickson questioned the veracity of Claimant’s reported symptoms because he was under the mistaken impression she was still working as a Zumba instructor. There is no persuasive evidence Dr. Erickson reviewed the MRI images, and the ALJ infers he only reviewed the radiologist’s report. Dr. Erickson concluded, “[the] chondromalacia patella is clearly preexisting and was not worsened or aggravated by her injury on 2/22/2019. There is no clear convincing evidence of a medial meniscal tear on her MRI. I would, therefore, recommend a denial of Dr. Failinger’s request for surgery, as there is no clear indication of an injury-related knee abnormality.”

13. Claimant followed up with Dr. Failinger on May 23, 2019 to discuss appealing the denial of surgery. Dr. Failinger noted, “she would like to try to get rid of the catching and locking more than anything.” Examination showed moderate crepitus, pain with patellofemoral compression, and focal medial joint line pain. McMurray’s produced pain, but no obvious click. Dr. Failinger requested Insurer reconsider the surgery denial, noting Claimant was asymptomatic before the work injury, had persistent and bothersome pain, catching, and locking, and had not responded to conservative treatment.

14. Dr. Erickson reviewed Dr. Failinger’s appeal on June 7, 2019, and again recommended denial of the surgery. He saw no appreciable change Claimant’s situation or the available clinical information to warrant changing his opinion. He again cited his erroneous impression Claimant still doing Zumba, which he thought was probably the reason she was not getting better.

15. Claimant saw Dr. James Lindberg for an IME at Respondents' request on July 23, 2019. She described ongoing symptoms, including swelling, locking, and feeling like her knee "wants to give out." She was working light-duty and having difficulty standing on both feet. She explained she had not been teaching Zumba since the injury and has an assistant who runs the classes. Dr. Lindberg reviewed surveillance video that shows Claimant participating in a Zumba exhibition at a sporting event. He observed, "She did not fully participate and did take a seat during the middle portion of the performance. Also shows her in the gym, but not doing much, presumably at a Zumba class." On examination, she demonstrated an antalgic gait favoring the right knee. There was bilateral patellofemoral crepitus. McMurray test was "equivocal," with pain but no audible click. She was most tender over the medial femoral condyle at the origin of the medial collateral ligament. Dr. Lindberg diagnosed "a mild medial collateral ligament sprain that appears to be recalcitrant to treatment." He opined there is no indication for surgery. He reviewed the MRI and saw degeneration of the posterior horn of the medial meniscus but no tear. He saw a "questionably related" cyst posterior to the medial meniscus, but doubted it was causing any symptoms. He concluded, "Her major problem appears to be a slow healing medial collateral ligament sprain." Dr. Lindberg recommended additional conservative care directed to the MCL, including physical therapy, ultrasound, phonophoresis, and anti-inflammatories. If those modalities did not work, he recommended a cortisone injection specifically directed to the MCL. He opined, "[the] most important thing is time and anti-inflammatories."

16. Claimant returned to Dr. Richardson on July 29, 2019 and told him Dr. Lindberg had recommended against surgery. Her symptoms were unchanged and Dr. Richardson again noted a positive McMurray test. He referred Claimant to Dr. Michael Hewitt for a second opinion regarding surgery.

17. Dr. Hewitt evaluated Claimant on August 12, 2019. His physical examination showed medial joint line tenderness and a positive McMurray test. He reviewed the MRI and saw a nondisplaced tear of the posterior horn of the medial meniscus and a parameniscal cyst. He also noted grade 3 chondromalacia of the central patella with subchondral edema. He believed her "clinical examination and MRI [are] consistent with a meniscal tear." Dr. Hewitt concluded,

The patient has undergone extensive conservative management over the past six months without improvement. Given her young age, excellent health and focal clinical examination, as well as MRI findings, she is medically appropriate for a knee arthroscopy and partial medial meniscectomy. I would highly recommend approval of the surgery to allow the patient to return to full activities including work without restriction.

18. On August 19, 2019, Dr. Failinger requested authorization for viscosupplementation injections as an alternative to surgery. Insurer denied the injections based on a report from Dr. Lindberg.

19. On September 27, 2019, Dr. Hewitt issued a supplemental report after reviewing Dr. Lindberg's IME. He disagreed with Dr. Lindberg's opinions, and stated,

I have examined the patient; she has a focal clinical examination to the medial joint line as well as a positive McMurray's test. She has undergone extensive conservative management. After 8 months of appropriate conservative management, I do not feel suggesting further conservative management is medically reasonable. Dr. Lindberg understands an MRI does not have 100% accuracy in diagnosing a medial meniscal tear. The patient does have an associated cyst often associated with a tear.

With persistent medial-sided complaints, an acute work-related injury and nonresponse to appropriate conservative management, I would reiterate [the] knee arthroscopy proposed by Dr. Failinger [is] both medically reasonable and appropriate.

20. Respondents had another radiologist, Dr. Elizabeth Carpenter, read Claimant's MRI in December 2019. She opined, "Degenerative changes [are] present within the medial meniscus posterior horn and root however no discrete tear is identified, the meniscus is not extruded, and no parameniscal cyst is present. A subacute mild proximal MCL sprain is present and patellofemoral chondromalacia is nonacute in etiology."

21. Dr. Lindberg testified at hearing consistent with his report. He disagreed with Dr. Hewitt's opinions Claimant has a meniscal tear or a parameniscal cyst. He believes she has a popliteal cyst, unrelated to the meniscus. He reiterated his opinion Claimant's problem is a slow-healing MCL strain, and the proposed surgery will not help.

22. Claimant's testimony she minimally participated in Zumba since the accident is credible. There is no persuasive evidence Zumba-related activities aggravated or contributed to any of Claimant's ongoing symptoms.

23. Dr. Hewitt's analysis and opinions are credible and persuasive.

24. Claimant proved the surgery proposed by Dr. Failinger is reasonably necessary to cure and relieve the effects of her work injury.

CONCLUSIONS OF LAW

The respondents are liable for medical treatment reasonably necessary to cure or relieve the effects of an industrial injury. Section 8-42-101. Even if the respondents admit liability, they retain the right to dispute the reasonable necessity or relatedness of any particular treatment, and the mere occurrence of a compensable injury does not compel the ALJ to approve all requested treatment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997); *McIntyre v. KI, LLC*, W.C. No. 4-805-040 (July 2, 2010). The claimant must prove that an injury directly and proximately caused the condition for which he seeks treatment, and that the treatment is reasonably necessary. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). A claimant is entitled to injury-related treatment that has a "reasonable prospect of success." *Reynolds v. Industrial*

Claim Appeals Office, 794 P.2d 1080, 1082 (Colo. App. 1990); *Dziewior v. Michigan Genral Corp.*, 672 P.2d 1026 (Colo. App. 1983).

The mere existence of a preexisting condition does not disqualify a claim for compensation or medical benefits where an industrial injury aggravates, accelerates, or combines with a preexisting condition to produce the need for treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). To prove an aggravation, a claimant need not show an injury objectively caused any identifiable structural change to their underlying anatomy. Rather, a purely symptomatic aggravation is sufficient for an award of medical benefits if it caused the claimant to need treatment she would not otherwise have required. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Cambria v. Flatiron Construction*, W.C. No. 5-066-531-002 (May 7, 2019).

As found, Claimant proved the surgery proposed by Dr. Failinger is reasonably necessary to cure and relieve the effects of her work injury. Reasonable physicians can disagree about whether the MRI shows a meniscal tear. The initial interpreting radiologist and Dr. Failinger saw a possible tear. Dr. Hewitt was confident he saw a tear. Dr. Lindberg and Dr. Carpenter saw no tear. The ALJ concludes the existence or nonexistence of a meniscal tear cannot be definitively determined from the MRI. Nevertheless, the MRI establishes a reasonable possibility Claimant has a tear. Likewise, clinical examinations, although somewhat variable among providers, show a reasonable likelihood of a tear. Claimant has complained of medial knee pain with catching and clicking since the outset of her claim. Multiple providers repeatedly documented a positive McMurray test on the medial side, including Dr. Richardson, the physical therapist, and Dr. Hewitt. Claimant undoubtedly still has pain from the MCL injury, and probably some pain from the underlying chondromalacia. But that does not rule out the probability of symptoms related to the meniscus. The notion that Claimant will respond favorably to more “time” is not persuasive. She is already more than a year out from the work accident with no significant improvement despite conservative treatment and relative rest. The patellar chondromalacia was present before the work accident, but it was asymptomatic and non-disabling. To the extent some of Claimant’s symptoms are attributable to the chondromalacia, it was probably aggravated by the work accident. After reviewing all the evidence, the ALJ is inclined to credit the opinions and recommendations of the authorized providers over the IMEs and agree that the proposed surgery has a reasonable probability of improving Claimant’s condition.

ORDER

It is therefore ordered that:

1. Insurer shall cover the arthroscopic surgery recommended by Dr. Failinger.
2. All issues not decided herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or

service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: <http://www.colorado.gov/dpa/oac/forms-WC.htm>. **In addition, it is requested that you send a courtesy copy of your Petition to Review to the Colorado Springs OAC office via email at oac-csp@state.co.us**

DATED: March 4, 2020

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-797-901-004**

ISSUE

- I. Whether Respondents must pay bills for a limited number of prescriptions filled by the IWP. Specifically, the issue is whether Respondents owe the bills for the following prescriptions:

| | | | |
|---------|--|------------------|----------|
| 8/13/19 | | Gabapentin 300MG | \$243.53 |
| 8/13/19 | | Tramadol | \$153.92 |
| 8/13/19 | | Testosterone | \$48.38 |
| 8/13/19 | | BD Needles | \$4.16 |
| 8/13/19 | | BD Syringe | \$4.21 |
| 8/13/19 | | Ibuprofen | \$76.23 |
| 8/13/19 | | Fluoxetine | \$80.39 |
| 8/13/19 | | Desvenlafaxine | \$348.04 |
| | | TOTAL | \$958.86 |

Stated more generally, can Insurer refuse payment to a previously authorized pharmacy (IWP) for these prescription medicines when Claimant elects - for whatever reason - not to use a different pharmacy as instructed by Insurer in an effort to control costs?

STIPULATIONS

The parties agree that the facts in this case are essentially undisputed, and that the ALJ consider only the undisputed facts when issuing an Order. The facts, as agreed by the parties stipulation approved February 13, 2020, are recited here:

- The prescriptions at issue were received by the claimant from the authorized treating provider, Dr. Timothy Hall. Dr. Hall has been claimant's authorized treating physician since at least 2010.
- The prescriptions were filled by the IWP, a pharmacy licensed in Colorado, and the corresponding bills are in line with the Colorado fee schedule. IWP has filled the prescriptions since November of 2012.
- Claimant is currently receiving his medications from IWP at his home through the mail.
- Respondents had previously denied the payment of the pharmacy bills which resulted in the IWP seeking penalties and the payment of the bills in dispute. A stipulation was ultimately entered by the parties and

approved by an ALJ which resolved those issues. However, there was no agreement in the stipulation as to how this issue would be handled in the future.

- To pursue this issue moving forward, respondents disputed the limited bills on August 13, 2019 but have paid all the other bills. Specifically, Respondents have voluntarily paid the pharmacy bills before and after the bills from August 13, 2019 which are in dispute. The reason respondents did this was to have this issue decided by an ALJ without discontinuance of the medications to the claimant or IWP not receiving further significant payments in the interim while the issue was litigated.
- The nature of this dispute involves a CorVel pharmacy payment card. Specifically, Respondents sent a CorVel pharmacy payment card to the claimant in the past on numerous occasions between 2013 and 2018. The claimant was specifically instructed in writing on numerous occasions during this time frame to use the CorVel pharmacy payment card when filling the prescriptions provided by Dr. Hall.
- The claimant was also instructed in writing on numerous occasions (including in March of 2018) that respondents would not pay for the ongoing prescriptions provided by Dr. Hall and filled at IWP if the CorVel pharmacy payment card was not used.
- The CorVel pharmacy payment card can be used at most pharmacies (including national chains such as Walgreens, CVS, Safeway, Sam's Club and many smaller pharmacies) and/or the claimant can have the prescriptions delivered by mail to his home for convenience. Use of the CorVel pharmacy card does not change the prescriptions or medications provided by Dr. Hall (or the choice of delivery by mail). Specifically, the claimant would obtain the precise same prescriptions and medications if the CorVel pharmacy payment card was used or not.
- The CorVel pharmacy payment card provides a further discount on the payment of the medications. As a result, the CorVel pharmacy payment card is intended by respondents as a cost savings payment measure for the prescriptions.
- The claimant has failed to use the CorVel pharmacy payment card and IWP is still filling the prescriptions. As a result, this dispute has been presented to the ALJ for consideration.

PRELIMINARY EVIDENTIARY RULINGS

I. Respondents object to IWP Exhibit 2, which is ALJ Martin Stuber's Findings of Fact, Conclusions of Law, and Order issued on April 30, 2013 under WC 4-797-901-08. This Order addressed, among other issues, Claimant's claim for prescription medications as prescribed by his ATP. Said prescriptions were then ordered to be paid for by Respondents herein. This Order does not address which pharmacy may-or shall-provide Claimant's medications. Exhibit 2 in this case merely provides contextual background for how the parties at issue today arrived at this point of dispute. *For that limited purpose, the ALJ will take administrative notice of the contents of Exhibit 2, pursuant to C.R.E. 201(b)(2).* The ALJ finds that Exhibit 2 is a matter contained within the OAC's own files and records, and is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

II. Respondents object to IWP Exhibit 3, which is a letter dated December 23, 2011, from the Director of the Division of Workers Compensation to attorney David Skaggs. It outlines the position of the Division that "injured workers *have the choice* of having their prescriptions filled by any licensed pharmacy, or by the worker's treating physician if so offered." (emphasis added).

The ALJ makes note of the following:

1. The ALJ assumes that Exhibit 3 is a complete and accurate copy of this letter, unedited, and presented in good faith. It is unknown how this Exhibit was obtained.

2. This position stated by the Division appears to address the same issue before this ALJ; however, there may well be far more to the story of this 2011 letter.

3. The Director of the Division in 2011, Paul Tauriello, remains in that capacity to date. *The ALJ will administratively notice that fact.*

4. Nonetheless, it is unclear from the available record if that remains the official position of the Division. Assuming, arguendo, that it remains the position of the Division, the ALJ remains free to interpret all applicable Statutes, Rules, and Regulations differently.

5. This letter involved different parties, and was issued in response to a specific inquiry on behalf of one of those parties. The ALJ cannot identify where, or if, this letter has ever been *published*, to more definitively and permanently outline the Division's current position. There is no mechanism for *updating* the contents of a hard copy letter that has been posted.

There are certain instances where the ALJ can take administrative notice of certain records of the Division. For example, in *Habteghrgis v. Denver Marriott Hotel*,

WC no. 4-528-385 (ICAO 2006), the ALJ was tasked with determining if the statute of limitations had been met. The ALJ took administrative notice of the records of the Division insofar as they showed that claimant therein had *attempted*, pro se, to file a (defective) notice claiming compensation. However, in *Habteghrgis*, as in other similar cases, the ALJ noticed portions the Division's *official file*, and it involved the *same parties in interest*. Neither fit the facts here. For that reason, the ALJ will not take *administrative notice* of Exhibit 3.

IWP argues that Exhibit 3 meets the criteria for the hearsay exception as a Public Record under C.R.E. 803(8), as a ".....statement...of a public office or agency, setting forth (A) the activities of the office or agency." Reading the Rule 803(8) in its entirety, the ALJ does not take that broad of an interpretation. A single letter, written in response to a discrete inquiry, on an unrelated matter, does not rise to the level of "activities" of the Division. For that reason, the ALJ will not consider IWP Exhibit 3, and will base his decision independent of that as apparently expressed by the Director in 2011.

CONCLUSIONS OF LAW

Based upon the foregoing Stipulated Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina*, 860 P. 2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark*, 197 Colo. 306, 592 P. 2d 792 (1979); *People v. M.A.*, 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.*, W.C. No. 4-483-341 [Industrial Claim Appeals Office (ICAO), March 20, 2002]. Also see *Ortiz v. Principi*, 274 F.3d 1361 (D.C. Cir. 2001). The purpose of statutory construction is to effect the legislative intent. Because the best indicator of legislative intent is the language of the statute, words and phrases in a statute should be given their plain and ordinary meanings. *Weld County School District RE-12 v. Beemer*, 955 P.2d 550 (Colo. 1998). In this instance, the burden, by a preponderance of the evidence, is upon Respondents to demonstrate that they do not owe these bills.

B. The principles governing the interpretation of administrative regulations are the same as those concerning statutes. *Gerrity Oil and Gas Corp. v. Magness*, 923 P.2d 261 (Colo. App. 1995), *aff'd. in part, rev'd. in part on other grounds*, 946 P.2d 913 (Colo. 1997). In construing a statute or Rule the Court must refrain from reading nonexistent provisions into it. *Heinicke v. Industrial Claim Appeals Office* 197 P.3d 220 (Colo. App. 2008)

C. The Workers' Compensation Act and the Workers' Compensation Rules of Procedure are silent on whether a claimant can be *required* to use a cost containment measure, however, Rule 18-6(C)(2)(c) states the following:

All prescriptions shall be filled with bio-equivalent generic drugs unless the physician indicates "Dispense As Written" (DAW) on the prescription. In addition to the Rule 16 requirements, providers prescribing a brand name with a DAW indication shall provide a written medical justification explaining the reasonableness and necessity of the brand name over the generic equivalent.

This Rule calls for cheaper generic drugs to be provided in place of brand name drugs unless there is a medical justification for the more expensive brand name. The apparent intent of this Rule is to ensure prescription medications are provided to injured workers in a way that provides the intended medical benefit but is also provides reasonable cost containment.

D. While Respondents argue – and not without justification –that the same logic *should* apply to the facts of this case, they are unable to cite a Statute or Rule in support. The Administrative Courts, not being courts of equity, are simply not in a position to impose a new requirement upon the parties where one does not otherwise exist.

E. One might well argue that Claimant is simply being unreasonable. By simply using the CorVel card, he can obtain the exact benefit, including the benefit of free delivery, all the while helping contain costs - which might eventually trickle down to assist other workers. Certainly, no good reason has been supplied for Claimant's apparent intransigence. In fact, intransigence for its own sake might be his entire motivation. However, Respondents are not in a position to change that, any more than they can seek the substitution of an ATP for simply ordering treatment they don't agree with. They must pursue their remedies as authorized by law.

F. Such is the case here. The ALJ cannot conclude that it is not reasonably medically necessary to continue to allow Claimant to use the pharmacy of his choice. Respondents may seek a change via the statutory or rulemaking process, which might indeed serve valid public policy purposes. But as of the date of this Order, the ALJ cannot identify a legal mechanism to provide the relief as sought by Respondents, however reasonable their arguments might be.

ORDER

It is therefore Ordered that:

1. Respondents shall pay IWP for the prescriptions at issue, written 8/13/19.
2. Respondents shall pay interest to IWP at the rate of 8% per annum on all amounts of compensation not paid when due.
3. All matters not determined herein are reserved for future determination.

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

DATED: March 4, 2020

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

- Whether the claimant has demonstrated, by a preponderance of the evidence, that the left lower extremity hardware removal surgery, as recommended by Dr. Ronald Hugate, is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted September 8, 2018 work injury.
- Whether the claimant has demonstrated, by a preponderance of the evidence, that inpatient treatment she received at Mind Springs Health/West Springs Hospital in July 2019 constitutes reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted September 8, 2018 work injury.
- Whether the claimant has demonstrated, by a preponderance of the evidence, that treatment the claimant received from Mind Springs Health and West Springs Hospital is authorized.

FINDINGS OF FACT

1. On September 8, 2018, the claimant was working for the employer as a semi-truck driver in El Paso, Texas. On that date, the claimant was using the sleeper portion of the semi-truck cab. The claimant suffered an injury to her left leg when she fell while climbing down from the top bunk of the sleeper area.
2. The claimant immediately obtained medical treatment at The Hospitals of Providence Transmountain Campus. At that time, x-rays were taken of the claimant's left femur and left knee. The x-rays showed a comminuted intraarticular fracture of the left tibial epiphysis that extended through both tibial plates. In addition, there was posterior displacement of the lateral tibial plateau.
3. On September 10, 2018, Dr. Jason Vourazeris performed an open reduction internal fixation (ORIF) of the bicondylar tibial plateau fracture.
4. Following her discharge from the hospital in El Paso, Texas, the claimant returned to her home in Colorado. At that time, Dr. Theodore Sofish became the claimant's authorized treating physician (ATP). The claimant was first seen by Dr. Sofish on October 4, 2018. On that date, Dr. Sofish referred the claimant for an orthopedic consultation.
5. On October 8, 2018, the claimant was seen by orthopedic surgeon Dr. Kennan Vance. At that time, Dr. Vance recommended physical therapy and a t-scope brace.

6. On October 18, 2018, the claimant returned to Dr. Sofish and reported pain in the surgical scar area, left foot pain, and left lower leg spasm. Thereafter, the claimant reported left foot hypersensitivity and discoloration. On December 5, 2018, Dr. Sofish observed “some reddish/purplish molting” on the claimant’s left foot. Similarly, on December 26, 2018 Dr. Sofish recorded the appearance of color change and coolness.

7. On November 1, 2018, the claimant returned to Dr. Vance and reported pain over the proximal tibia. Dr. Vance noted that if the claimant’s pain continued he would consider removing the surgical hardware. However, he would not do so until at least one year from surgery.

8. On November 5, 2018, the claimant was seen by pain specialist Dr. William James. On that date, Dr. James noted his concern that the claimant had developed complex regional pain syndrome (CRPS). Dr. James’ treatment recommendations included lumbar sympathetic blocks, spinal stimulation, and/or ketamine treatments. Thereafter, the claimant continued to treat with Dr. James. On both November 26, 2018; and January 22, 2019; Dr. James noted color and temperature changes to the claimant’s left foot.

9. On December 13, 2018, the claimant was seen by Dr. Vance. At that time, the claimant continued to complain of pain in her left knee. Dr. Vance recommended that the claimant pursue pool therapy. In the medical record of that date, Dr. Vance opined that the claimant did not have CRPS.

10. On January 8, 2019, the claimant attended an IME with Dr. Lawrence Lesnak. In connection with the IME, Dr. Lesnak reviewed the claimant’s medical records, obtained a history from the claimant, and completed a physical examination. In his report, Dr. Lesnak summarized medical records that addressed treatment for anxiety and depression as early as 2014, and treatment for posttraumatic stress disorder (PTSD) in 2017.¹ In light of these prior records, Dr. Lesnak opined that prior to her September 8, 2018 work injury, the claimant had “moderate to severe chronic major depression, a chronic anxiety disorder, and chronic symptoms related to [PTSD].” Dr. Lesnak further opined that the claimant’s preexisting psychological diagnoses are the cause of her current symptoms.

11. With regard to the diagnosis of CRPS, Dr. Lesnak opined that the claimant has not met the criteria for a diagnosis of CRPS. In support of this opinion, Dr. Lesnak noted that the claimant might have left superficial peroneal neuritis or neuropathy, which would exhibit similar symptoms to CRPS. Dr. Lesnak further noted that the Colorado Medical Treatment Guidelines (MTG) require a number of criteria including subjective complaints, at least two reproducible objective findings on exam, and diagnostic testing. It is the opinion of Dr. Lesnak that the claimant does not meet

¹ Neither party provided those earlier medical records as evidence at hearing. As a result, the ALJ has only Dr. Lesnak’s summary of those records for her review.

the MTG criteria. In that same report, Dr. Lesnak anticipated that the claimant would be at maximum medical improvement (MMI) by March 2019 (six months after surgery).

12. On January 24, 2019, the claimant returned to Dr. Vance. On that date, the claimant wore a “cast shoe” and reported to Dr. Vance that the shoe was for her CRPS symptoms. The claimant raised the issue of removing the hardware in her left knee. Dr. Vance advised that he would not consider hardware removal until at least one year after the initial surgery. In addition, he recommended against any such surgery if the claimant does have CRPS.

13. Subsequently, Dr. Sofish referred the claimant clinical psychologist, Dr. Dale Bowen for counseling. On February 11, 2019, the claimant was seen by Bowen. On that date, Dr. Bowen noted that the claimant has a history of depressive disorder. At that time, Dr. Bowen diagnosed the claimant with adjustment disorder with mixed anxiety and depressed mood. He noted that the claimant was experiencing anxiety and depression due to the “adjustment to her injury and change in lifestyle”. Dr. Bowen recommended 10 to 12 additional therapy sessions. Treatment with Dr. Bowen was approved and the claimant continued to treat with him until September 19, 2019.

14. On February 12, 2019, Dr. Tashof Bernton performed testing for CRPS. Dr. Bernton opined that the results of the thermogram testing met diagnostic criteria for CRPS. In addition, Dr. Bernton determined that the autonomic testing was positive for a CRPS diagnosis.

15. On February 15, 2019, the claimant attended a psychiatric independent medical examination (IME) with psychiatrist Dr. Stephen Moe. In connection with the psychiatric IME, Dr. Moe reviewed the claimant’s medical records, obtained a history from the claimant, and conducted a psychiatric interview of the claimant. Dr. Moe was asked to opine regarding the relatedness of the claimant’s psychological diagnosis, if any, to her pain complaints and CRPS symptoms. In addressing this issue, Dr. Moe opined that that claimant meets the criteria for Somatic Symptom Disorder (SSD). In support of his opinion, Dr. Moe noted that the claimant appears to be “rather comfortable with the injured role”; has “unrealistic expectations about her condition”; and is “extremely resistant to efforts to increase her functionality”.

16. In addition, Dr. Moe also opined that the claimant was not a candidate for a spinal cord stimulator. Although he found no psychiatric contraindications, Dr. Moe expressed concern related to the claimant’s moderate to severe depression and anxiety symptoms. Specifically, Dr. Moe noted that the claimant’s psychological symptoms would reduce the likelihood that the SCS trial would be successful.

17. On February 19, 2019, the claimant was seen by neurosurgeon Dr. Robert Repogle. At that time, Dr. Repogle opined that the claimant’s left leg symptoms were not attributable to a small, herniated disc at the L5-S1 level. Dr. Repogle recommended electromyography (EMG) testing to determine whether the claimant’s symptoms were related to peripheral neuropathy or lumbosacral radiculopathy.

18. On February 26, 2019, the claimant was seen by Dr. Mitchell Burnbaum for EMG testing. Based upon this testing, Dr. Burnbaum noted that that claimant had significant denervation in the anterior tibialis, but not in the posterior tibialis. He opined that the claimant had a peroneal nerve injury. Dr. Burnbaum noted that it would be reasonable to explore the peroneal nerve in the claimant's left knee.

19. On April 22, 2019, the claimant was seen by Dr. Jeffrey Pitcher. On exam, Dr. Pitcher noted decreased sensation in the claimant's left lower extremity. In addition, he noted some color change on the dorsum of the claimant's left foot. Dr. Pitcher opined that removing the hardware in the claimant's left leg could address the issue of potential nerve entrapment or compression. However, Dr. Pitcher also noted that surgery would increase the likelihood of nerve damage.

20. On May 28, 2019, Dr. Lesnak was asked to review additional medical records. In his report of that date, Dr. Lesnak reiterated his opinion that the claimant does not have CRPS. Therefore, it is his opinion that any treatment of CRPS would not be reasonable or necessary treatment for the claimant. Dr. Lesnak further reiterated that test results for peripheral neuropathies and CRPS can be similar.

21. The claimant testified that on July 2, 2019, she became suicidal. As a result, she sought guidance from a local crisis line. It was staff from that crisis line that referred the claimant to Mind Springs Health for treatment.

22. On July 2, 2019, the claimant was admitted to West Springs Hospital² for inpatient psychiatric treatment. The claimant was discharged from the hospital on July 9, 2019. However, the claimant was readmitted to West Springs Hospital on July 14, 2019 for additional inpatient treatment. The claimant was discharged on July 23, 2019.

23. The claimant testified that she improved during her first stay at West Springs Hospital. However, her suicidal ideation returned and she sought the readmission July 14, 2019.

24. The claimant has requested authorization for the treatment she has received from Minds Springs Health/West Springs Hospital. The claimant asserts that this treatment was obtained on an emergent basis.

25. On September 4, 2019, Dr. Sofish referred the claimant for a second opinion regarding the removal of the hardware in the claimant's left knee.

26. On September 19, 2019, the claimant was seen by Dr. Bowen. On that date, they discussed the claimant's psychiatric hospitalizations at Mind Springs Health/West Springs Hospital. In the medical record of that date, Dr. Bowen noted that he and the claimant had agreed that she would continue to receive mental health treatment through Mind Springs. Dr. Bowen also noted that the claimant could return to his care on an as needed basis.

² West Springs Hospital is the psychotic hospital that is affiliated with Mind Springs Health.

27. On September 26, 2019, the claimant was seen by Dr. Ronald Hugate for a second opinion. Dr. Hugate noted that the EMG testing showed issues related to the peroneal nerve. On exam, Dr. Hugate observed decreased sensation in the claimant's left peroneal nerve distribution. Dr. Hugate opined that the claimant is too young to undergo a total knee replacement. At that time, he recommended and administered an injection to the claimant's left knee. In addition, Dr. Hugate recommended the claimant undergo surgery to include: 1) hardware removal; 2) neuroplasty and neurolysis of the peroneal nerve; and 3) knee arthroscopy.

28. September 30, 2019, the claimant returned to Dr. Sofish. On that date, Dr. Sofish noted that he had not observed color or temperature changes in the claimant's left foot "since much earlier in the case". Dr. Sofish opined that if the claimant obtained psychiatric clearance for surgery, he would not be opposed to the hardware removal.

29. On October 1, 2019, Dr. Bowen formalized a referral to Mind Springs Health for psychiatric treatment.

30. On October 4, 2019, Dr. Lesnak issued an addendum to his prior reports after review of additional medical records. In that report, Dr. Lesnak opined that the claimant does not need surgical intervention. In support of this opinion, Dr. Lesnak noted that Dr. Hugate stated that the claimant's symptoms were "global". Dr. Lesnak also pointed to Dr. Moe's opinion that the claimant was not a good candidate for any interventional treatment. Again, Dr. Lesnak stated his opinion that the claimant has not met the diagnostic criteria for CRPS. Dr. Lesnak also opined that the claimant had reached MMI. Dr. Lesnak's testimony by deposition was consistent with his reports.

31. Dr. Lesnak testified that based upon his exam of the claimant, it is his opinion that the claimant may have left superficial peroneal neuritis or neuropathy. In his testimony, Dr. Lesnak agreed that the thermogram and QSART testing (as performed by Dr. Bernton) showed abnormalities. However, these same abnormalities could be indicative of a peripheral nerve problem. Dr. Lesnak also testified that the recommended surgical treatment is neither reasonable nor necessary. Dr. Lesnak opined that surgery would not help the claimant's peroneal neuritis or neuropathy, particularly given the time that has elapsed since the claimant's injury. Furthermore, it is the opinion of Dr. Lesnak that the claimant is not a good candidate for any surgery given her psychological diagnoses.

32. On October 8, 2019, the respondents notified the claimant that authorization was denied for the recommended hardware removal and peroneal nerve release surgery.

33. On October 15, 2019, the respondents notified the claimant that authorization was denied for the treatment the claimant received at Mind Springs Health.

34. On November 20, 2019, the claimant attended a second psychiatric IME with Dr. Moe. As with the February 2019 IME, Dr. Moe reviewed the claimant's medical records, obtained a history from the claimant, and conducted a psychiatric interview of the claimant. Dr. Moe was asked to opine as to whether the claimant had reached psychiatric MMI. Dr. Moe opined that the claimant would not reach psychiatric MMI until she is at MMI for her physical injuries. Dr. Moe opined that the claimant's hospitalization and treatment with Mind Springs Health/West Springs Hospital was triggered by "new-onset suicidal ideation driven by overwhelming panic" which "implicates treatment that was needed on an emergent basis." Dr. Moe specifically opined that the claimant's anxiety and depression symptoms were caused by the September 8, 2018 work injury.

35. The claimant testified that she wants to have the hardware removal surgery. The claimant noted that her CRPS symptoms are different from the pain and discomfort in her left knee. The claimant testified that she continues to have stabbing pain and numbness in her left foot. In addition, the claimant experiences discoloration in her left foot and it becomes cold. The claimant also testified that she has pain in her left knee that is a sharp constant pressure.

36. The ALJ credits the claimant's testimony and the opinions of Drs. Hugate, Sofish, and Pitcher over the conflicting opinions of Dr. Lesnak and finds that the claimant has successfully demonstrated that it is more likely than not that the hardware removal, neuroplasty, and arthroscopic surgery recommended by Dr. Hugate is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted injury.

37. The ALJ credits the medical records, the claimant's testimony and the opinions of Drs. Moe and Bowen and finds that the claimant has demonstrated that it is more likely than not that the treatment she received at Mind Springs Health/West Springs Hospital in July 2019 was emergent. As noted by Dr. Lesnak in his initial IME report, the claimant has a long history of anxiety and depression. The ALJ concludes that the claimant's September 8, 2018 work injury, related surgery, and ongoing difficulty with physical symptoms aggravated and combined with the claimant's preexisting anxiety and depression. This resulted in the suicidal ideation the claimant experienced on July 2, 2019. Seeking immediate treatment when contemplating suicide is emergent. Thereafter, when the claimant begin to have those same suicidal thoughts on July 14, 2019, it was reasonable for her to seek that same emergent care from Mind Springs Health/West Springs Hospital.

38. With regard to a chain of authorization, the ALJ notes that the claimant's ATP, Dr. Sofish referred the claimant to Dr. Bowen. Later, Dr. Bowen referred the claimant to Mind Springs. The ALJ finds that the initial treatment with Mind Springs Health/West Springs Hospital was emergent. Following Dr. Bowen's referral, Mind Springs Health/West Springs Hospital was within the normal chain of referrals, and therefore authorized.

CONCLUSIONS OF LAW

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

2. The ALJ’s factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness’s testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *CJI*, Civil 3:16 (2018).

4. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

5. Section 8-43-404(5)(a), C.R.S. grants employers the initial authority to select the claimant’s authorized treating physician (ATP). However, in a medical emergency a claimant need not seek authorization from her employer or insurer before seeking medical treatment from an unauthorized medical provider. *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777, 781 (Colo. App. 1990). A medical emergency affords an injured worker the right to obtain immediate treatment without the delay of notifying the employer to obtain a referral or approval. *In Re Gant*, W.C. No. 4-586-030 (ICAP, Sept. 17, 2004). Because there is no precise legal test for determining the existence of a medical emergency, the issue is dependent on the particular facts and circumstances of the claim. *In re Timko*, W.C. No. 3-969-031 (ICAP, June 29, 2005). Once the emergency is over the employer retains the right to designate the first “non-emergency” physician. *Bunch v. Indus. Claim Appeals Office of State of Colorado*, 148 P.3d 381, 384 (Colo. App. 2006); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

6. As found, the claimant has demonstrated by a preponderance of the evidence that the hardware removal, neuroplasty, and arthroscopic surgery recommended by Dr. Hugate is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the September 8, 2018 injury. As found, the medical records, the claimant's testimony, and the opinions of Drs. Hugate, Sofish, and Pitcher are credible and persuasive.

7. As found, the claimant has demonstrated by a preponderance of the evidence that treatment at Mind Springs Health/West Springs Hospital was reasonable, necessary, and emergent treatment. As found, the claimant's September 8, 2018 work injury, related surgery, and ongoing difficulty with physical symptoms aggravated and combined with the claimant's preexisting anxiety and depression. This resulted in the suicidal ideation the claimant experienced on July 2, 2019, necessitating treatment. As found, the claimant's testimony and the opinions of Drs. Moe and Bowen are credible and persuasive.

8. As found, the claimant has demonstrated by a preponderance of the evidence that Mind Springs Health/West Springs Hospital is authorized to treat the claimant in this claim. As found, Mind Springs Health/West Springs Hospital is authorized by both written referral from Dr. Bowen and by the claimant's emergent need for inpatient treatment on July 2 and 14, 2019.

ORDER

It is therefore ordered:

1. The respondents shall pay for the hardware removal, neuroplasty, and arthroscopic surgery as recommended by Dr. Hugate.
2. The respondents shall pay for the treatment the claimant received from Mind Springs Health/West Springs Hospital beginning in July 2019.
3. Mind Springs Health/West Springs Hospital is an authorized provider in this claim.

Dated this 5th day of March 2020.



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that he suffered compensable injuries in the form of an umbilical hernia and hand and foot pain during the course and scope of employment with Employer on January 17, 2018.

2. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive reasonable, necessary and causally related medical benefits to cure or relieve the effects of his industrial injuries.

FINDINGS OF FACT

1. Claimant worked for Employer as a window tint and clear bra technician. He performed his job duties while standing and occasionally kneeling.

2. Claimant explained that he installed clear bras on the hoods of vehicles toward the front grill, but they occasionally extended toward the front bumper of the vehicles. The purpose of clear bras is to protect vehicles from the elements encountered during normal operation. Claimant was responsible for thoroughly cleaning the area of the vehicle upon which the bra would be applied, moving the clear bra material from its storage location to the vehicle and affixing the clear bra to the front the vehicle's hood. In applying the clear bra film, Claimant was required to stretch it across the hood and bumper of the vehicle.

3. In performing his job duties as a window tint technician, Claimant thoroughly cleaned the desired window of a vehicle. He then affixed and pressed the tinting film onto the window.

4. Claimant testified that, at some time prior to reporting an industrial injury, he experienced stomach pain. He assumed kidney stones caused the pain because he had previously suffered from the condition. Claimant continued performing his regular job duties and attempted to mitigate the pain.

5. On January 18, 2018 Claimant visited primary care provider Clinica Colorado for a follow-up appointment. He also sought to refill medications for hypertension, hyperthyroidism, obesity and stress. The medical record reflects that Claimant had "no complaints." However, treating provider Vanessa Vergarda, FNP, BC documented the existence of an umbilical hernia.

6. Claimant testified that he reported a pulled stomach muscle to his supervisor Dan W[Redacted]

on January 19, 2018. He explained that he was unaware of a specific work activity that caused the pain or a specific date on which the symptoms began.

7. On January 19, 2018 Claimant completed a Workers' Compensation Incident Report. He listed "stomach" as the injured body part. Claimant did not note any injuries to his hands or feet.

8. Claimant explained that immediately following the creation of the Incident Report, Employer provided him with a list of physicians. Employer directed him to choose a provider to treat his injury. However, Claimant chose not to select a physician from the list.

9. Claimant continued to work for Employer until he voluntarily resigned his position in November 2018. Following his resignation, Claimant texted supervisor Dan W[Redacted] and sought treatment for his hernia.

10. On March 31, 2019 Claimant filed a Worker's Claim for Compensation. He listed hernia and hand pain as his injuries. Claimant specified that his injuries occurred on January 17, 2018. He attributed his symptoms to stretching clear bra film onto vehicles under cold conditions.

11. On August 21, 2019 Claimant visited Concentra Medical Centers for an examination. Claimant commented that he had "noticed a small bump" on his abdomen a few months prior to reporting his injury. He reiterated that he did not recall a specific date on which the bump appeared. Claimant also mentioned pain in his hands and feet. He explained that he spent the majority of workdays on his feet and the bay he used was cold during the winter. Claimant also remarked that the pain in his hands and feet had worsened since he resigned his position with Employer. Treating provider Chelsea Rasis, PA-C concluded that Claimant had reached Maximum Medical Improvement (MMI) and released him without impairment to full duty employment.

12. On November 20, 2019 Ericson Tentori, D.O. performed a records review of Claimant's claim. Dr. Tentori explained that hernias develop when there is a loss of abdominal wall integrity. A hernia will develop when intra-abdominal pressure exceeds abdominal wall pressure. He noted that obesity is a risk factor for the development of hernias because the condition increases intra-abdominal pressure. Dr. Tentori commented that Claimant's umbilical hernia was an incidental finding at a January 18, 2018 visit with his personal care physician. He concluded that the hernia was more likely than not caused by Claimant's obesity because there was a lack of a specific injury or event at work. Dr. Tentori thus summarized that "it is my medically probable opinion that [Claimant's] umbilical hernia is not to be considered work-related."

13. In addressing Claimant's hand and foot symptoms, Dr. Tentori explained that the pain was likely caused by degenerative arthritis as a result of the aging process. Claimant also did not mention a specific mechanism of injury that caused his hand and foot symptoms. Dr. Tentori specified that Claimant's increasing hand and foot pain since leaving Employer in November 2018 supported his determination that the hand and foot pain was related to the aging process. He thus concluded that Claimant's bilateral hand and foot pain was not likely work related.

14. Dr. Tentori testified at the hearing in this matter. He maintained that Claimant's umbilical hernia as well as hand and foot symptoms were not caused by his work activities for Employer. He reiterated that the lack of a specific inciting event or mechanism of injury suggested it was unlikely Claimant suffered compensable injuries while working for Employer. Dr. Tentori attributed Claimant's hernia to obesity. He determined that the hand and foot symptoms were related to osteoarthritis as revealed on x-rays.

15. Claimant has failed to demonstrate that it is more probably true than not that he suffered compensable injuries in the form of an umbilical hernia and hand and foot pain during the course and scope of employment with Employer on January 17, 2018. Initially, Claimant asserts that he developed an umbilical hernia as well as hand and foot pain while performing his job duties for Employer. He specifically contends that stretching clear bra film across the hoods of vehicles caused him to develop a hernia. Furthermore, Claimant contends that working under cold conditions in Employer's facility caused hand and foot pain. However, based on the medical records and persuasive opinion of Dr. Tentori, Claimant's symptoms were not likely caused by his job duties for Employer.

16. On January 18, 2018 Claimant's primary care provider documented the existence of an umbilical hernia. On the following day Claimant reported a pulled stomach muscle to his supervisor. He explained that he was unaware of a specific work activity that caused his pain or a date on which the symptoms began. Claimant refused to select a medical provider and continued to work for Employer until he voluntarily resigned his position in November 2018. Following his resignation, Claimant contacted Employer and sought treatment for his hernia. At an August 21, 2019 visit to Concentra the treating provider concluded that Claimant had reached MMI, suffered no impairment and could return to full duty work.

17. Dr. Tentori persuasively explained that Claimant's umbilical hernia as well as hand and foot symptoms were not caused by his work activities for Employer. He remarked that the lack of a specific inciting event or mechanism of injury suggested it was unlikely Claimant suffered compensable injuries while working for Employer. Dr. Tentori attributed Claimant's hernia to obesity. He determined that the hand and foot symptoms were related to osteoarthritis as revealed on x-rays. Furthermore, Claimant's increasing hand and foot pain since leaving Employer in November 2018 supported Dr. Tentori's determination that the hand and foot pain was related to the aging process. He thus concluded that Claimant's umbilical hernia as well as bilateral hand and foot pain were not likely work related. Based on the medical records and persuasive opinion of Dr. Tentori, Claimant's Workers' Compensation claim is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A

preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. See *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *CJI*, Civil 3:16 (2007).

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson*, W.C. No. 4-589-645 (ICAO, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.*, 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner*, 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). However, when a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *In re Cotts*, W.C. No. 4-606-563 (ICAO, Aug. 18, 2005).

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. See *Cotts v. Exempla, Inc.*, W.C. No. 4-606-563 (ICAO, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. See *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAO, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs*, W.C. No. 4-745-712 (ICAO, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job

function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that “correlation is not causation,” and merely because a coincidental correlation exists between the claimant’s work and his symptoms does not mean there is a causal connection between the claimant’s injury and work activities.

7. As found, Claimant has failed to demonstrate by a preponderance of the evidence that he suffered compensable injuries in the form of an umbilical hernia and hand and foot pain during the course and scope of employment with Employer on January 17, 2018. Initially, Claimant asserts that he developed an umbilical hernia as well as hand and foot pain while performing his job duties for Employer. He specifically contends that stretching clear bra film across the hoods of vehicles caused him to develop a hernia. Furthermore, Claimant contends that working under cold conditions in Employer’s facility caused hand a foot pain. However, based on the medical records and persuasive opinion of Dr. Tentori, Claimant’s symptoms were not likely caused by his job duties for Employer.

8. As found, on January 18, 2018 Claimant’s primary care provider documented the existence of an umbilical hernia. On the following day Claimant reported a pulled stomach muscle to his supervisor. He explained that he was unaware of a specific work activity that caused his pain or a date on which the symptoms began. Claimant refused to select a medical provider and continued to work for Employer until he voluntarily resigned his position in November 2018. Following his resignation, Claimant contacted Employer and sought treatment for his hernia. At an August 21, 2019 visit to Concentra the treating provider concluded that Claimant had reached MMI, suffered no impairment and could return to full duty work.

9. As found, Dr. Tentori persuasively explained that Claimant’s umbilical hernia as well as hand and foot symptoms were not caused by his work activities for Employer. He remarked that the lack of a specific inciting event or mechanism of injury suggested it was unlikely Claimant suffered compensable injuries while working for Employer. Dr. Tentori attributed Claimant’s hernia to obesity. He determined that the hand and foot symptoms were related to osteoarthritis as revealed on x-rays. Furthermore, Claimant’s increasing hand and foot pain since leaving Employer in November 2018 supported Dr. Tentori’s determination that the hand and foot pain was related to the aging process. He thus concluded that Claimant’s umbilical hernia as well as bilateral hand and foot pain were not likely work related. Based on the medical records and persuasive opinion of Dr. Tentori, Claimant’s Workers’ Compensation claim is denied and dismissed.

ORDER

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

Claimant’s Workers’ Compensation claim is denied and dismissed.

If you are a party dissatisfied with the Judge’s order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street,

4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at <http://www.colorado.gov/dpa/oac/forms-WC.htm>.*

DATED: March 5, 2020.

DIGITAL SIGNATURE:


Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

➤ Whether respondent has established by a preponderance of the evidence that claimant has returned to work and is therefore no longer entitled to temporary total disability (“TTD”) benefits?

STATEMENT OF FACTS

1. Claimant sustained a compensable injury in the course and scope of his employment with employer on August 22, 2018. Claimant sought medical treatment following his work injury including surgery to repair his ankle and two surgeries on his right shoulder. Claimant has been under work restrictions since his work injury.

2. At the time of claimant’s injury, claimant had concurrent employment with Employer 2 as a driving instructor. Claimant’s wages from his employment with Employer 2 were taken into account in the admitted average weekly wage. Respondents admitted to temporary total disability (“TTD”) benefits beginning August 23, 2018 at an average weekly wage (“AWW”) rate of \$1,050.00 (increased from an initial amount of \$837.00 in the August 30, 2018 general admission of liability (“GAL”).

3. Claimant has not returned to work for employer.

4. Respondents obtained surveillance of claimant showing up at Employer 2 in a work shirt with Employer 2’s logo on it and performing duties consistent with being a driving instructor. These duties included getting into a vehicle with a teenage driver and giving instruction to the teenage driver while the driver operated the vehicle around the local area.

5. Respondents filed a Petition to Modify, Suspend or Terminate Benefits on October 2, 2019. Claimant filed an Objection to the Petition on October 8, 2019 and the hearing in this matter was set on Respondents’ Application for Hearing.

6. Mr. L[Redacted], owner of Employer 2, testified at hearing that he had hired claimant as a driving instructor in 2017 to work as a driving instructor. Mr. L[Redacted] testified claimant performed duties that included performing motorcycle training and some driving instruction. Mr. L[Redacted] testified that claimant would help around the office by getting tires changed on the cars.

7. Mr. L[Redacted] testified that claimant had been employed in a part-time capacity, and while still an employee, he had not paid claimant since claimant’s work injury. Mr. L[Redacted] testified that claimant was “still on the books” as an employee but had not been paid, including any cash payments. Mr. L[Redacted] testified that claimant provides motorcycle testing in order for claimant to keep his certification current. Mr. L[Redacted] testified that if claimant does not complete the required

number of exams to maintain his motorcycle certification, claimant would lose the certification.

8. Claimant testified at hearing that he works for Employer 2 on a volunteer capacity since his injury. Claimant testified he has administered motorcycle tests, but has not been compensated for his work. Claimant testified he administered the motorcycle tests in order to maintain his certification. Claimant testified he performs “behind the wheel” instruction for two to three hours at a time. Claimant testified he is not compensated for this work. Claimant testified that the actions he performed on the video obtained by respondents did not result in claimant receiving payment from Employer 2. Claimant testified he performed other tasks for Employer 2 including getting tires or oil changed on the cars and cleaning the cars owned by Employer 2. Claimant further denied any work agreement with Employer 2 for future payment.

9. Notably, Mr. L[Redacted] testified that non-employees are not allowed to drive the cars owned by Employer 2. Mr. L[Redacted] testified that only employees are added to the insurance policy for the company owned vehicles.

10. Respondents argue that claimant has returned to work for Employer 2, as he is capable of performing the tasks he performed prior to the work injury and is performing those same tasks, even if he is not accepting payment for the work he is performing.

11. Claimant argues that because he is not receiving monetary compensation for his work, he is a volunteer and not an employee, and he should continue to receive the full amount of his wage loss benefit. The ALJ finds that respondents have established that claimant has returned to work for Employer 2.

12. In this case, it is undisputed that claimant was working with Employer 2 at the time of his injury and his AWW was adjusted to take into consideration the concurrent employment. After his injury, claimant was initially off of work from both his primary employment and his concurrent employment. Claimant has since been able to return to his concurrent employment and is performing the same job duties he performed prior to his work injury, including motorcycle exams and driving instruction, along with taking the cars for oil changes, cleaning and obtaining new tires.

13. Because claimant has returned to work for Employer 2, claimant may not independently classify himself as a “volunteer” in an attempt to continue to receive a higher disability payment by refusing to collect a paycheck from Employer 2¹.

¹ The ALJ would note that Employer 2 gets a tremendous windfall under this arrangement. Employer 2 is able to continue to charge clients the same rate he would for having a driving instructor or motorcycle exam, but avoids having to pay the labor costs associated with having an employee perform these tasks. However, this windfall is not without victims, as respondents have continued to have to pay claimant disability benefits at a higher rate while claimant performs the same work he performed for Employer 2 prior to his work injury. This becomes patently unfair to respondents to bear the continued cost of disability benefits where claimant has not only demonstrated the ability to return to work, but has for all intents and purposes, actually returned to work for Employer 2. This is not the intent of the Act.

14. The ALJ finds and concludes pursuant to the testimony at hearing that claimant is not only capable of performing the work duties he performed for Employer 2 prior to his work injury, but claimant has also returned to work performing those duties. Because claimant has returned to work, claimant's right to temporary total disability benefits terminates. The ALJ therefore finds that respondents have established that it is more probable than not that claimant has returned to work in regular or modified employment for Employer 2.

15. Respondents, however, remain responsible for paying claimant temporary partial disability ("TPD") benefits based on claimant's earnings with employer. Claimant has not returned to work for employer, and respondents must continue to pay benefits for claimant's wage loss in that regard.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2017).

3. Section 8-42-105(3), C.R.S. states in pertinent part:

Temporary total disability benefits shall continue until the first occurrence of any one of the following:

(b) The employee returns to regular or modified employment

4. In this case, respondents have established that claimant returned to regular or modified employment for Employer 2. While claimant maintains that by virtue of the fact that he did not accept a paycheck from Employer 2 made him a volunteer

and not an employee is immaterial to a finding that claimant has returned to regular or modified employment as claimant continues to perform the same job duties he was performing for Employer 2 prior to his work injury.

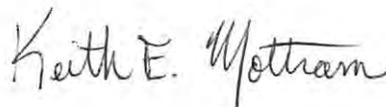
5. As found, claimant's work that he is currently performing for Employer 2 represents the same job duties he performed for Employer 2 prior to the injury. As found, the mere fact that claimant has not accepted payment from Employer 2 for the work he is performing does not negate the fact that claimant has returned to work for Employer 2 performing the same job duties claimant performed prior to his work injury.

ORDER

It is therefore ordered:

1. Respondents are allowed to modify claimant's disability benefits to no longer include the wages from the concurrent employer effective October 2, 2019, the date of the Petition to Modify.

Dated: March 6, 2020



Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

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

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-034-884-001**

ISSUES

- Did Respondent prove it properly admitted for PPD benefits based on a 20% rating after apportionment?
- Which benefit "cap" under § 8-42-107.5 applies to this claim?

FINDINGS OF FACT

1. Claimant works for Employer as a police officer. His claim involves an admitted injury to his cervical spine on July 11, 2016.

2. Claimant had a prior work-related neck injury in October 2007, also while working for Employer. That claim was admitted and assigned W.C. No. 4-814-207. Dr. Miguel Castrejon was Claimant's ATP on the 2007 claim. Dr. Castrejon put Claimant at MMI on December 18, 2009, with a 6% whole person impairment rating for his cervical spine. Respondent admitted and paid \$28,930.94 in PPD benefits based on the 6% rating.

3. Dr. Nicholas Kurz is the ATP on Claimant's current (2016) claim. Dr. Kurz placed Claimant at MMI on April 9, 2019, with a 25% whole person cervical spine rating.

4. On May 1, 2019, Respondent admitted liability for the 25% rating. Respondent invoked the lower benefit "cap" under § 8-42-107.5, which limits Claimant to a combined total of \$86,697.04¹ in temporary disability and permanent partial disability benefits. Because Claimant had already received \$55,933.57 in temporary disability benefits, his PPD award was capped at \$30,763.47.

5. Claimant timely objected to the FAL and requested a DIME. Dr. John Tyler was chosen as the DIME physician. In a report dated August 28, 2019, Dr. Tyler assigned a 26% whole person impairment rating. Dr. Tyler knew of the 2007 injury, but did not have Dr. Castrejon's December 18, 2009 rating report. Dr. Tyler opined apportionment was warranted, but he did not perform the apportionment "because I do not have the necessary information of the previous impairment rating."

6. Respondent timely applied for a hearing on September 25, 2019 after receiving Dr. Tyler's DIME report.

7. Respondent does not dispute the overall 26% rating calculated by Dr. Tyler, but believes the rating should be apportioned to 20% under § 8-42-104(5)(a).

8. After the hearing, Respondent filed a new FAL dated January 27, 2020. Respondent subtracted the 6% impairment rating from Claimant's 2007 claim from Dr.

¹ The applicable benefit caps for Claimant's date of injury are \$86,697.04 and \$173,391.90.

Tyler's 26% rating and admitted for PPD based on a net 20% rating after apportionment. Respondent again invoked the \$86,697.04 benefit cap, resulting in a PPD award of \$30,763.47. Respondent attached a copy of Dr. Castrejon's prior rating and the corresponding FAL from the 2007 claim.

9. The parties had agreed at hearing Respondent's counsel would submit the most recent FAL to the ALJ for consideration when determining the appropriate rating and PPD award. The ALJ has incorporated the January 27, 2020 FAL into the record as Respondent's Exhibit F.

10. Respondent proved Claimant's current 26% rating must be apportioned to account for the prior 6% rating. Respondent proved it properly admitted for a PPD award of \$30,763.47 based on a 20% whole person impairment after apportionment.

CONCLUSIONS OF LAW

Section 8-42-104(5) ("the apportionment statute") provides,

In cases of permanent medical impairment, the employee's award or settlement shall be reduced:

(a) When an employee has suffered more than one permanent medical impairment to the same body part and has received an award or settlement under the "Workers' Compensation Act of Colorado" or a similar act from another state. The permanent medical impairment rating applicable to the previous injury to the same body part, established by award or settlement, shall be deducted from the permanent medical impairment rating for the subsequent injury to the same body part.

Section 8-42-107.5 provides,

No claimant whose impairment rating is twenty-five percent or less may receive more than [\$86,697.04] from combined temporary disability payments and permanent partial disability payments. No claimant whose impairment rating is greater than twenty-five percent shall receive more than [\$173,391.90] from combined temporary disability payments and permanent partial disability payments.²

Neither party disputes the overall 26% rating calculated by Dr. Tyler. Claimant concedes apportionment is required under § 8-42-104(5)(a) because he received an "award or settlement" for his prior 6% rating from the 2007 injury. The dispute here is over which indemnity cap under § 8-42-107.5 applies when calculating Claimant's PPD award. Respondent believes the applicable cap is determined by the net rating after apportionment. Claimant believes the higher cap applies because his overall rating is 26% before apportionment. He argues the PPD award should be calculated based on the 26%

² For ease of reference, the ALJ has inserted the maximum benefit limits applicable to Claimant's date of injury.

rating under the higher cap, and then the prior 6% rating essentially becomes a “credit” against the resulting award.³

Neither Claimant nor Respondent cited any caselaw directly on point, and the ALJ found none. Accordingly, this appears to be an issue of first impression. Statutes should be construed to further the legislative intent. The best indicator of legislative intent is the language of the statute. Where the statutory language is clear and unambiguous, the court need not resort to other rules of statutory construction. *Snyder Oil Co. v. Embree*, 862 P.2d 259 (Colo. 1993).

Based on the plain language of the apportionment statute, the ALJ agrees with Respondent’s argument. The apportionment statute lays out the specific process by which apportionment is applied, and states the “*impairment rating*” from the prior claim “shall be deducted from the . . . *impairment rating* for the subsequent injury.” (Emphasis added). Thus, apportionment under § 8-42-104(5)(a) is part of the process used to determine the claimant’s compensable rating. It reduces the rating ultimately used to calculate the PPD award. Once the claimant’s rating is established, the value of that rating is determined by other sections of the Act. One of those sections is § 8-42-107.5, which limits the benefits that would otherwise be payable for the rating based on the statutory formula.

It necessarily follows Respondent properly admitted for a 20% rating after apportionment in the January 27, 2020 FAL. The admitted PPD award of \$30,763.47 is accurate given the applicable benefit cap under § 8-42-107.5.

ORDER

It is therefore ordered that:

1. Respondent’s request to approve the January 27, 2020 FAL regarding PPD is granted. Claimant’s claim for additional PPD benefits beyond the \$30,763.47 admitted in the January 27, 2020 FAL is denied and dismissed.
2. All issues not decided herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver,

³ The difference in value between these two approaches is considerable. A PPD award using Claimant’s proposed methodology under the higher cap is worth an additional \$55,116.91 over the admitted PPD:

| | |
|--------------------------|---------------------|
| Higher cap: | \$173,391.90 |
| Less TTD/TPD paid: | <u>-\$55,933.57</u> |
| = Value of 26% rating: | \$117,458.33 |
| Less value of 6% rating: | <u>-\$31,577.95</u> |
| = Net PPD award: | \$85,880.38 |
| Less admitted PPD: | <u>-\$30,763.47</u> |
| = Difference: | \$55,116.91 |

CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: <http://www.colorado.gov/dpa/oac/forms-WC.htm>. **In addition, please send a courtesy copy of your Petition to Review to the Colorado Springs OAC office via email at oac-csp@state.co.us**

DATED: March 6, 2020

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

- Did Claimant prove by a preponderance of the evidence an arthroscopic right shoulder surgery recommended by Dr. John Pak is reasonably necessary and related to his admitted work injury?

FINDINGS OF FACT

1. Claimant works for Employer as a pediatric home care nurse. He injured in a multi-vehicle accident on I-25 during a snowstorm on January 18, 2019. His vehicle was subjected to multiple impacts, and he was briefly knocked unconscious.

2. Claimant went to the Penrose hospital emergency department after the accident. He complained of a headache, neck and back pain, and right shoulder pain. He could not lift his right arm up to hold a phone to his ear because of the shoulder pain. He was tender to palpation over the right AC joint and had limited shoulder range of motion. A right shoulder x-ray showed no fracture or significant arthritic changes. There was an 11.5mm gap at the right AC joint, consistent with an AC joint separation. Claimant was given a right arm sling and advised to follow up with an orthopedist.

3. Employer referred Claimant to CCOM for authorized treatment, and his initial visit took place on January 23, 2019. He saw NP Valerie Joyce, who diagnosed a shoulder strain and AC joint dislocation. NP Joyce referred ordered an MRI of the right shoulder and referred Claimant to therapy. She also prescribed medications.

4. Claimant had a history of shoulder problems many years before the work accident. He underwent right shoulder surgery in approximately 2009 while he was in the Army. Claimant credibly testified he recovered well after the surgery, with minimal residual symptoms, and no functional limitations. There is no persuasive evidence he received or required any treatment for the right shoulder for many years before January 2019.

5. The right shoulder MRI was performed on January 30, 2019. It showed: (1) supraspinatus tendinosis, without tendon tear, (2) mild glenohumeral chondromalacia, with a near full-thickness cartilage defect at the inferior glenoid rim, (3) postoperative changes from the 2009 subacromial decompression and distal clavicle resection, with no residual impingement, and (4) the long head of the biceps tendon was absent, and presumably retracted into the upper arm.

6. Dr. Thomas Centi took over as Claimant's primary ATP on February 12, 2019. Claimant was slowly improving with therapy. Dr. Centi recommended Claimant continue with therapy and medications.

7. Claimant attended regular PT sessions in February, March, and April 2019. He also began seeing a chiropractor in April. His back and neck symptoms steadily improved but the shoulder did not significantly improve.

8. On April 30, 2019, Dr. Centi referred Claimant to Dr. John Pak for an orthopedic evaluation of the right shoulder because he was no longer progressing.

9. Claimant had his first visit to Dr. Pak's office on May 21, 2019. He saw Dr. Pak's Nurse Practitioner, Trisha Finnegan. She noted Claimant's shoulder had not improved much since the accident despite approximately 11 weeks of therapy. Claimant described swelling and 3-5/10 aching pain around the shoulder, including around the AC joint. He also reported popping and grinding. Claimant was having difficulty moving his right arm, which was interfering his ability to participate in activities. On examination, he was "quite painful" around the AC joint. He had a positive impingement sign and crepitus about the AC region with movement of the shoulder. NP Finnegan administered a subacromial cortisone injection and an AC joint intra-articular cortisone injection. She recommended Claimant continue therapy and return in three weeks to assess his progress and response to the injections.

10. Claimant followed up with NP Finnegan on June 11, 2019. The injections had helped, but only for one week. His examination was unchanged, with "exquisite pain about the acromioclavicular joint with positive findings of impingement." NP Finnegan planned to discuss the case with Dr. Pak and asked Claimant to return in a week to discuss surgical intervention.

11. Claimant saw Dr. Pak on June 18, 2019. Physical examination showed tenderness around the AC joint and acromion, positive impingement sign, AC joint crepitus with motion, and painful range of motion. Dr. Pak reviewed the MRI and noted increased uptake in the AC joint and bursal impingement, which were not discussed in the radiologist's report. Although it is not clear from his report, Dr. Pak credibly testified he personally reviews all MRIs regarding his patients. Dr. Pak recommended "diagnostic arthroscopy with debridement and chondroplasty [and] subacromial decompression and probably extension of the distal clavicle excision."

12. In his deposition, Dr. Pak elaborated on he proposed surgery, explaining,

Diagnostic arthroscopy means that sometimes you do actually have to look at the area where there's abnormal signal on the MRI or any abnormality to see whether it really corresponds with the MRI finding. As good as MRI is . . . number one, it's not very good at looking at bone anatomy. CT scan and x-ray is actually better for that. And number two, such as cartilage injury, and also soft tissue injury and labral injury, it's not very accurate or sensitive. It can miss up to 20 percent of pathology.

13. Dr. Pak testified the surgery is not directed at any "age-related" findings, and the two primary issues he plans to look at are the chondral defect and the distal clavicle area. He opined the specificity of Claimant's symptoms, coupled with temporary

relief from the injection, “tells me that there are some things going on in those specific areas.”

14. Dr. O’Brien performed a Rule 16 record review for Respondents on June 25, 2019 regarding surgery request. He opined Claimant suffered only “minor” strains,” which “resolved” within two weeks of the accident. He opined “minor injuries . . . heal uneventfully and expeditiously without sequelae . . . 100 percent of the time.” Dr. O’Brien opined Claimant’s ongoing symptomology is “nonorganic” and “generated by secondary gain issues inherent in his personal injury claim.” He concluded surgery is not reasonable because Claimant has no identifiable pathology.

15. Dr. O’Brien saw Claimant for an IME on October 28, 2019. He opined, “neither the supplemental medical record documentation nor my Independent Medical Evaluation in any way alter my opinions.” He stated “there was not a single pathoanatomic abnormality on that MRI scan that could be considered a surgical indication.” Dr. O’Brien opined Claimant exhibited “nonorganic physical findings” and “significant pain magnification.” He stated, “the presence of the Workers’ Compensation claim is the reason that [Claimant] has nonorganic pain. He needs to have pain in order to continue adjudicating his claim.” Dr. O’Brien believes Claimant’s “feigned” symptoms should not be validated by the provision of any further treatment, including surgery.

16. Dr. O’Brien testified in a post-hearing deposition consistent with his reports.

17. Claimant testified credibly at hearing regarding multiple issues. He would have preferred to use Tricare after the accident because “it’s easier,” and he has no copays or deductibles. He only pursued a claim because Employer (correctly) insisted the accident and injuries had to be reported and handled through the workers’ compensation system. Claimant explained, “I didn’t even want to do this,” and having a claim against Employer upsets him because he loves his job and the organization. He credibly testified his current right shoulder symptoms are much different from anything he experienced before the accident. He credibly described significant limitations on his ability to participate in vocational and avocational activities since the accident because of ongoing right shoulder symptoms. Claimant has continued working despite pain and restrictions because he does not want to let his patients down or burden his coworkers.

18. Dr. Pak’s opinions are credible and more persuasive than the contrary opinions offered by Dr. O’Brien.

19. Claimant proved by a preponderance of the evidence the surgery proposed by Dr. Pak is recently necessary to cure and relieve the effects of his injury.

CONCLUSIONS OF LAW

The respondents are liable for medical treatment reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101. The mere occurrence of a compensable injury does not compel the ALJ to approve all requested treatment. Even if the respondents admit liability for an accident, they retain the right to dispute the reasonable necessity or relatedness of any particular treatment. *Snyder v. City of Aurora*,

942 P.2d 1337 (Colo. App. 1997). Where the respondents dispute the claimant's entitlement to medical benefits, the claimant must prove the treatment is reasonably necessary and causally related to the industrial accident. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). The claimant must prove entitlement to medical benefits by a preponderance of the evidence. *Page v. Clark*, 592 P.2d 792 (Colo. 1979).

As found, Claimant proved that the surgery proposed by Dr. Pak is reasonable necessary and related to his admitted injury. Claimant was a very credible witness. Although he had surgery on his right shoulder in 2009, he recovered well with no significant ongoing symptoms and no need for treatment for many years before the work accident. Dr. Pak's opinions regarding the indications for surgery are credible and persuasive. Dr. O'Brien's opinions are not persuasive, particularly his allegation Claimant is exaggerating or "feigning" his ongoing symptoms and limitations for secondary gain.

ORDER

It is therefore ordered that:

1. Insurer shall cover the arthroscopic right shoulder surgery recommended by Dr. Pak.
2. All issues not decided herein are reserved for future determination.

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

DATED: March 9, 2020

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-100-792-001**

ISSUES

- I. Has Claimant shown, by a preponderance of the evidence, that she suffered a compensable injury on February 18, 2019?
- II. Has Claimant shown, by a preponderance of the evidence, that she is entitled to Temporary Total Disability ("TTD") payments from the date of injury, and ongoing?
- III. Has Claimant shown, by a preponderance of the evidence, that she is entitled to all reasonable, necessary, and related medical treatment for compensable injuries to her left leg?
- IV. Has Claimant shown, by a preponderance of the evidence, that the right of selection of her Authorized Treating Physician ("ATP") has passed to her?

STIPULATIONS

The parties stipulated that Claimant's Average Weekly Wage ("AWW") is \$538.64.

The parties further stipulated that no UC Health medical records have been identified beyond February 28, 2019; therefore the ALJ will not, as of this Order, order further medical treatment from UC Health beyond that date. Assuming other such records come into possession of the parties, payment for services rendered will be addressed separately from this Order.

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

1. Claimant is a 76 year old who worked as a housekeeper for Employer. Claimant was hired as an employee of Healthcare Services Group in 2011, and worked at the Terrace Gardens facility. To Claimant's knowledge, Terrace Gardens owns this facility.

2. On February 18, 2019 while reporting to work at the Terrace Gardens facility, Claimant slipped on an icy sidewalk adjacent to the building and landed on her knees, seriously injuring her left leg. Healthcare Services Group provided housekeeping, laundry, maintenance, and food service to Terrace Gardens (Ex. H), which is the facility where Claimant has worked for 34 years.

3. At hearing, Claimant testified that her son dropped her off for work that day, since Claimant does not drive. She was approaching the entrance door, which she

uses to clock in for work. The work time clock is just within this door. She was within “5 to 10 feet” of this door when she fell. Claimant acknowledged that there were other doors to the building, but stated that this same entrance is the one that the employees use, and she was instructed by “Cleo” M[Redacted], [Claimant’s supervisor], to use this entrance. Claimant’s 7:00 a.m. shift was just about to begin when she fell.

4. After the incident Claimant’s son helped her up, and she presented straight to the emergency department at UC Health with a left distal femur fracture. She was admitted to the trauma unit after an orthopedic consultation and eventually taken to the OR for a repair of the fracture on February 20, 2019. According to available records, the hospitalist who oversaw Claimant’s treatment was Caley M. Copeland, MD. (Ex B, p. 52). Claimant was discharged from the hospital on February 28, 2019 and then transferred to Life Care Centers for rehabilitation.

5. Claimant was admitted to Life Care Center of Colorado Springs on February 28, 2019 with a primary diagnosis of “unspecified fracture of lower end of left femur”. Other conditions included “left artificial knee joint, muscle weakness, unsteadiness on feet, cognitive communication deficit, hypertension, type 2 diabetes without complications, anemia, vitamin D deficiency, disorder of the teeth, and age related osteoporosis. Claimant was admitted for in-patient care at this rehab facility from February 28, 2019 through April 5, 2019.

6. Claimant testified that her doctors placed restrictions on her activities. These restrictions including limitations on standing, walking and lifting. Claimant testified that she was still on restrictions as of the time of the hearing. Claimant testified she had not worked since her injury on February 18, 2020.

7. Claimant received various forms of therapy including physical therapy, occupational therapy, and speech therapy to address various issues. Exercises focused on strength, mobility, function, balance, safety, and active range of motion.

8. On March 15, 2019, Employer filed a Notice of Contest, alleging that Claimant’s injury was not work-related.

9. On November 19, 2019, Dr. Marc Steinmetz conducted an independent medical examination of Claimant. Dr. Steinmetz reviewed the records to date, took a history from claimant and conducted a medical examination. Dr. Steinmetz noted that claimant had suffered a slip and fall on ice that resulted in a severe fracture of the left lower femur necessitating a left total knee replacement with a subsequent developed deep vein thrombosis (“DVT”) of the left leg. Dr. Steinmetz considered the fracture, the knee replacement and the DVT related to the fall, and that the treatment for this would be reasonable and necessary (Ex. 6, pp. 118-119). He did not address whether the fall itself was work-related as he considered that a non-medical and legal issue.

10. He required additional records to address the reasonable necessity of the all of the treatment claimant had received. He believed Claimant was at MMI for the leg injury, with a 32% lower extremity rating and recommended sedentary work restrictions.

He did not believe Claimant's hand symptoms were work-related, and did not believe Claimant required any maintenance treatment for the injury.

11. After reviewing the supplemental records from the Life Care Rehab Center, Dr. Steinmetz reiterated his prior opinion regarding the conditions that he considered related to the February 18, 2019 fall and stated that only Claimant's lower extremity symptoms were related.

12. Dr. Steinmetz opined that Claimant's restrictions would likely be sedentary, "with a 10 pound lifting limit and occasional walking and standing and mostly sitting and no climbing." (Ex. 6, p. 119).

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

1. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40101, C.R.S. 2007, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

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

3. Assessing the weight, credibility and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). Moreover, the weight and credibility to be

assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55, P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting all, part or none of the testimony of an expert witness. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

4. In this instance, the only witness who testified at hearing is Claimant. The ALJ finds Claimant to have testified sincerely, credibly, and sufficiently thoroughly regarding the circumstances of her fall and subsequent treatment.

Compensability

5. To qualify for recovery under the Workers' Compensation Act of Colorado, a claimant must be performing services arising out of and in the course of her employment at the time of her injury. See § 8-41-301(1)(b) C.R.S. 2007. For an injury to occur "in the course of" employment, the claimant must demonstrate that the injury occurred within the time and place limits of her employment and during an activity that had some connection with her work-related functions. See *Gregory v. Special Counsel, and Travelers Indemnity Co.*, W.C. 4-713-707 (2008); *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arise out of" requirement is narrower than the "in the course of" requirement. See *id.* For an injury to arise out of employment, the claimant must show a causal connection between the employment and injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. See *id.* at 64-1-42; *Industrial Comm'n v. Enyeart*, 81 Colo. 521, 524-25, 256 P. 314, 315 (1927) (denying recovery to claimant who was injured when his steering gave out while he was driving across a bridge on his employer's property on his way home from work). The claimant must prove these statutory requirements by a preponderance of the evidence. See *City of Boulder v. Streeb*, 706 P.2d 786, 789 (Colo. 1985).

6. In general, a claimant who is injured while going to or coming from work does not qualify for benefits because such travel is not considered to be performance of services arising out of and in the course of employment. See *Industrial Comm'n v. Lavach*, 165 Colo. 433, 437-38, 439 P.2d 359, 361 (1968); *Berry's Coffee Shop, Inc. v. Palomba*, 161 Colo. 369, 373, 423 P.2d 2, 4-5 (1967); *Varsity Contractors v. Baca*, 709 P.2d 55 (Colo. App. 1985). This principle is known as the "going to and from work" rule. See *Berry's Coffee Shop, Inc.*, 161 Colo. At 373, 432 P.2d at 4-5.

7. In *Madden v. Mountain W. Fabricators*, the court identified several factors for determining whether special circumstances applied for awarding benefits. These variables included: (1) whether the travel occurred during working hours, (2) whether the travel occurred on or off the employer's premises, (3) whether the travel was contemplated by the employment contract, and (4) whether the obligations or conditions of employment created a "zone of special danger" out of which the injury arose. No single factor is determinative.

Compensability, as Applied

8. In this instance, however, Claimant was not merely travelling to work. *She had arrived on the premises where she was required to be as a term of her employment* by Employer. Using this icy sidewalk to enter and clock in was not optional. Her supervisor told her to use this entrance. Claimant was mere steps away from clocking in, and beginning her shift inside Terrace Gardens, as she has done on Employer's behalf for years. As such, Claimant's case is much more like a parking lot injury than an injury while still commuting to work, either by car, or while walking prior to arriving on the work premises.

9. If *special circumstances* demonstrate a causal connection between the circumstances under which the work is performed and the "off premises" injury, the resulting injury arises out of and in the course of the employment. Special circumstances may be found if the employer provides a parking area as a fringe benefit to the employees and the claimant sustains injury while using the lot. *It is not essential to a finding of compensability that the employer actually own or physically operate and maintain the lot for this exception to apply.* See *Woodruff World Travel v. Industrial Claim Appeals Office*, 38 Colo. App. 92, 554 P.2d 705 (1976); *Rodriguez v. Exempla Healthcare, Inc.* W.C. No. 4-705-673 (ICAO, Apr 30, 2008). As Professor Larson noted:

As to parking lots owned by the employer, or maintained by the employer for its employees, practically all jurisdictions now consider them part of the "premises," whether within the main company premises or separated from it. *This rule is by no means confined to parking lots owned, controlled, or maintained by the employer.* The doctrine has been applied when the lot, although not owned by the employer, was exclusively used, or used with the owner's permission, or just used, by the employees of this employer. Thus, *if the owner of the building in which the employee works provides a parking lot* for the convenience of all tenants, or if a shopping center parking lot is used by employees of businesses located in the center, the rule is applicable. (emphasis added).

Larson's Workers' Compensation Law, § 13.04 [2] [a] [b] (footnotes omitted); see In re Wilson, W.C. No. 4-937-322-01 (ICAO, Mar. 16, 2015). Additionally, once a parking lot has achieved the status of "a portion of the employer's premises, compensation coverage attaches to any injury that would be compensable on the main premises." Larson's Workers' Compensation Law, § 13.04 [2] [b].

10. Similarly, special circumstances may be found where the employer, for its own benefit, intervenes in the employee's parking choices as a matter of policy. In such circumstances selection or use of a parking area is not a purely personal choice. *Friedman's Market, Inc. v. Welham*, 653 P.2d 760 (Colo. App. 1982). Further, in order for an employee's action to "arise out of" the employment it is not necessary that the activity be a strict duty or requirement of the employment. Rather if the injury arises out of a risk that is *reasonably incidental* to the conditions and circumstances under which

the employment is usually performed the resulting injury arises out of the employment. *Panera Bread v. Industrial Claim Appeals Office*, 141 P.3d 970 (Colo. App. 2006).

11. Thus, had Claimant driven herself in to work, and fallen on this very spot on her way in from the parking lot (thus walking an even greater distance), her injury would be compensable. It follows that being dropped off by her son in the manner that occurred here would yield a similar result. The risk faced by Claimant here, the ALJ concludes, was *reasonably incidental* to the conditions and circumstances under which her employment was usually performed; thus her injury arose out of her employment. Claimants injuries, therefore, are compensable.

Temporary Total Disability

12. To establish entitlement to temporary disability benefits, an employee must prove that the industrial injury, or occupational disease, has caused a “disability,” and that he/she suffered a wage loss that, “to some degree,” is the result of the industrial disability. § 8-42-103(1), C.R.S. (2009); *PDM Molding, Inc. v. Stanburg*, 898 P.2d 542, 546 (Colo. 1995). The term “disability,” as used in workers’ compensation cases, connotes two elements. The first is “medical incapacity” evidenced by loss or reduction of bodily function. “Disability” connotes both medical incapacity and restrictions to bodily function. Disability from employment is established when the injured employee is unable to perform the usual job effectively or properly. *Jefferson Co. Schools v. Headrick*, 734 P.2d 659 (Colo. App.1986). This is true because the employee's restrictions presumably impair her opportunity to obtain employment at pre-injury wage levels. *Kiernan v. Roadway Package System*, W.C. No. 4-443-973 (ICAO, December18, 2000).

13. The second element of temporary disability is loss of wage earning capacity. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of “disability” may be evidenced by a complete or partial inability to work, or physical restrictions that preclude the claimant from securing employment.

14. Because there is no requirement that a claimant must produce evidence of medical restrictions (although they are in existence here through Respondents’ own IME Physician), a claimant’s testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic*, 952 P.2d 831, 833 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

Temporary Total Disability, as Applied

15. As found, Claimant has suffered both medical incapacity and temporary wage loss during the period from February 18, 2019 and continuing. Claimant's testimony was uncontested that she has not worked since her accident. She was under restrictions from standing, walking and lifting by her treating doctors. The medical basis for her work restrictions was further supported by the opinions of Dr. Steinmetz, who felt permanent restrictions were appropriate, after he opined that Claimant was at MMI.

16. No treating authorized treating physician has placed Claimant at MMI, nor has one provided Claimant a written release to return to her regular employment. Therefore, Respondents' liability for temporary disability benefits continues. Consequently, the Claimant was temporarily "disabled" under § 8-42-105, C.R.S. (2012), 8-42-106, C.R.S. (2012), and is entitled to TTD benefits from February 18, 2019 and continuing until termination pursuant to the Colorado Workers' Compensation Act. See *Culver v. Ace Electric*, supra; *Hendricks v. Keebler Company*, W.C. No. 4-373-392 (ICAO June 11, 1999).

Medical Benefits, Generally

17. Respondents are liable for authorized medical treatment that is reasonably necessary to cure and relieve the effects of a work-related injury. Section 8-42-101(1) (a), C.R.S. (2008); *Yeck v. Industrial Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Where a claimant's entitlement to benefits is disputed, the Claimant has the burden to prove a causal relationship between a work-related injury and the condition for which benefits are sought. See *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Whether a claimant sustained his burden of proof is generally a factual question for resolution by the ALJ. See *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997).

Medical Benefits, as Applied

18. Claimant's medical benefits received by UC Health from February 18, 2019 to February 28, 2019 were reasonable, necessary and related to her compensable left leg injury. Claimant credibly testified to seeking medical treatment at UC Health on the date of her injury and undergoing surgery for her work injury. The UC Health medical records documents Claimant's history of injury following her fall while arriving at work. Dr. Steinmetz even provided his opinion that the medical treatment was reasonable and necessary. As a result, Respondents are liable for the medical treatment from UC Health.

19. Claimant's medical benefits from Life Care Centers from March 1, 2019 to April 6, 2019 were also reasonable, necessary and related to her compensable left leg injury. Claimant credibly testified she was referred by her health care providers at UC Health for acute rehabilitation care and this information is supported by the medical

records at UC Health. The medical and therapy records from Life Care Center confirm and document the medical treatment for Claimant's left leg injury. Again, Dr. Steinmetz provided his opinion that the medical treatment from the rehabilitation facility was generally reasonable and necessary. As a result, Respondents are liable for the medical treatment from Life Care Centers-so long as such treatment is related to Claimant's injury to her leg.

20. By agreement of the parties, and due to the lack of medical records in support at this time, the ALJ will not address any UC Health medical records which might exist beyond Claimant's discharge date of February 28, 2019, nor address at this time other conditions beyond Claimant's repair of her left leg fracture, the DVT which ensued, and her therapy and rehab to address those conditions.

Authorized Treating Provider / Right of Selection

21. Section 8-43-404(5)(a), C.R.S. permits an employer or insurer to select the treating physician in the first instance. *Yeck v. Indus. Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999). However, the Colorado Workers' Compensation Act requires that respondents must provide injured workers with a list of at least four designated treatment providers. §8-43-404(5)(a)(I)(A), C.R.S. Section 8-43-404(5)(a)(I)(A), C.R.S. states that, if the employer or insurer fails to provide an injured worker with a list of at least four physicians or corporate medical providers, "the employee shall have the right to select a physician." W.C.R.P. Rule 8-2 further clarifies that once an employer is on notice that an on-the-job injury has occurred, "the employer shall provide the injured worker with a written list of designated providers." W.C.R.P. Rule 8-2(E) additionally provides that the remedy for failure to comply with the preceding requirement is that "the injured worker may select an authorized treating physician of the worker's choosing." An employer is deemed notified of an injury when it has "some knowledge of the accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim." *Bunch v. industrial Claim Appeals Office*, 148 P.3d 381, 383 (Colo. App. 2006).

22. Claimant suffered from a severe injury, which constituted a bona fide emergency. She was taken by her son straight to the emergency room, where all parties agree she received reasonable and necessary medical care from that point onwards. In this instance, Employer was put on notice no later than February, 20, 2019 when the initial Incident Report was filed. A "reasonably conscientious manager" would have followed up, and provided a list of medical providers upon Claimant's release from the ER. Instead, Employer filed a Notice of Contest on March 15, 2019. Employer denied medical treatment without further inquiry, it would appear. At no point did Employer provide a designated provider list. Instead, Claimant was apparently discharged from employment.

23. A surgery on Claimant's leg was inevitable. In this case, the right of selection has passed to Claimant in its entirety, and the ALJ so finds. Employer,

through its Notice of Contest, has surrendered any influence over who will treat Claimant. Dr. Caley Copeland, MD, the hospitalist who (apparently) oversaw Claimant's treatment at UC health, and her designees, are therefore Claimant's Authorized Treating Physicians.

ORDER

It is therefore Ordered that:

1. Claimant suffered a compensable injury on February 18, 2019.
2. Claimant's Average Weekly Wage is \$538.64.
3. Respondents are responsible for Claimant's medical treatment at UC Health from February 18, 2019 through February 28, 2019, and from Life Care Rehab Centers from February 28, 2019 to April 6, 2019, so long as such care pertains to treatment for her left leg injury, DVT, and therapy and rehabilitation for same. Other such issues (such as overuse of Claimant's hand, speech therapy, teeth disorders, diabetes treatment) are *deferred* until they can be linked to the work injury.
4. Respondents will pay TTD benefits from February 18, 2019 and ongoing, until terminated by operation of law.
5. Claimant's Authorized Treating Physician is Dr. Caley Copeland, and her designees.
6. Respondents shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.
7. All matters not determined herein are reserved for future determination.

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

petition to review form at: <http://www.colorado.gov/dpa/oac/forms-WC.htm>. In addition, it is recommended that you send a copy of your Petition to Review to the Colorado Springs OAC via email at oac-csp@state.co.us.

DATED: March 10, 2020

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

- I. Whether Claimant proved by a preponderance of the evidence he sustained a compensable industrial injury to his right arm.
- II. If compensable, whether Claimant proved by a preponderance of the evidence he is entitled to reasonable, necessary and related medical benefits.
- III. If compensable, whether Claimant proved by a preponderance of the evidence he is entitled to temporary total disability (TTD) from June 4, 2019 through June 24, 2019 and August 19, 2019 through October 1, 2019. If so, whether Respondents proved, by a preponderance of the evidence, Claimant is responsible for his termination.
- IV. Average weekly wage (AWW).
- V. The issues of permanent partial disability (PPD) and permanent total disability (PTD) as endorsed by Claimant were not ripe for hearing and are not addressed by the ALJ in this order.

FINDINGS OF FACT

1. Claimant is a 58-year-old man who has worked in construction for over 25 years. Claimant worked for Employer as a journeyman ironworker. Claimant began his employment with Employer on or around January 31, 2019. Claimant's job duties included installing windows and frames.

2. Claimant initially worked for Employer at a jobsite in downtown Denver. Claimant worked at that jobsite for several months before Employer transferred him to a different jobsite in Lakewood, Colorado. Employer removed Claimant from the downtown Denver jobsite due to allegations Claimant made inappropriate comments to a third-party. Claimant was aware of the allegations and why he was being transferred. Claimant denies the allegations.

3. Claimant began working on the new jobsite in Lakewood, Colorado on or around May 18, 2019. Claimant sustained an industrial injury to his right upper extremity while performing his job duties on May 20, 2019. Claimant testified that, while screwing screws into a window frame overhead, the screw gun torqued, causing his arm to twist. Claimant testified he felt a pop and sharp pain in his right elbow at the time. Claimant continued to perform his job duties. Approximately one hour later while carrying glass Claimant noticed swelling and weakness in his right upper extremity. Claimant testified he told the foreman on site, Robert B[Redacted], about the incident and that he thought he may have injured his arm. Claimant testified Mr. B[Redacted] instructed him to inform

Skip H[Redacted], Safety Manager, the following day. Claimant returned to work on May 21, 2019 at which time Mr. H[Redacted] instructed Claimant to go to urgent care.

4. Claimant presented to Robert Fromcheck, M.D. at CareNow Urgent Care on May 21, 2019. Claimant reported that, on May 20, 2019, he felt a pop when using a drill that torqued his right upper extremity. Claimant complained of pain, swelling and decreased range of motion in his right elbow. Claimant informed Dr. Fromcheck he had two elbow surgeries in the past – one to reattach his biceps tendon and another to “clean out the joint.” On examination, Dr. Fromcheck noted swelling of the medial aspect of the right elbow with tenderness to palpation over the olecranon and decreased range of motion on flexion and extension. An x-ray of the right elbow was obtained. The radiologist noted “severe degenerative and postoperative changes along the joint spaces, with osteophytes, spurs intra-articular bodies” and elbow joint effusion. His impression was as follows: “Postoperative and old posttraumatic changes. Positive elbow joint effusion, therefore an occult acute fracture cannot be excluded.” Dr. Fromcheck diagnosed Claimant with a right elbow sprain and referred Claimant for physical therapy and an orthopedic surgical consultation at Colorado Orthopedic Consultants. He noted that, based on the history and physical findings, there was greater than 50% probability Claimant sustained a work-related injury. Dr. Fromcheck released Claimant to modified duty. The specific work restrictions are not detailed in Dr. Fromcheck’s medical record. Neither party offered into evidence Dr. Fromcheck’s WC164 form listing the specific restrictions assigned.

5. Claimant spoke with an adjuster on the claim on May 28, 2019. The adjuster’s employee interview notes indicate Claimant reported hearing a pop in his right elbow when pushing a screw in overhead with a torque gun, telling his supervisor “Bobby” about the incident, and being sent to urgent care by Mr. H[Redacted] the following day.

6. On May 28, 2019, Employer offered Claimant a light duty position in Mead, Colorado installing foam and caulk. Claimant accepted the light duty position and began on May 29, 2019.

7. On June 3, 2019, Claimant presented to Craig Davis, M.D. at Colorado Orthopedic Consultants for an orthopedic consultation. Regarding the mechanism of injury, Dr. Davis noted Claimant was lifting a heavy frame when he experienced a pop and sudden pain in the right elbow area. Claimant complained of experiencing significant grinding, pain, weakness and loss of motion since the incident. Dr. Davis noted Claimant had a history of right distal biceps repairs in same elbow 10 years ago with good results. On examination, Dr. Davis noted grinding with range of motion mostly over the lateral aspect and range of motion of 15-145 degrees with pain at extremes. He noted Claimant brought x-rays with him, which demonstrated moderate to severe degenerative disease of the right elbow with what appear to be intra-articular loose bodies in the anterior compartment and osteophytes and joint space narrowing around the radiocapitellar joint in particular. Dr. Davis opined Claimant suffered from degenerative joint disease that was aggravated by the work injury, noting Claimant was asymptomatic prior to the injury. Dr. Davis administered an injection and prescribed

medication. He recommended an MRI and, possibly, surgical intervention, if Claimant did not experience any improvement.

8. Claimant testified that, although Dr. Davis only noted the lifting of the frame with respect to the mechanism of injury, he did tell Dr. Davis of the screw gun incident.

9. Employer terminated Claimant's employment on June 4, 2019. A June 4, 2019 indicates the foreman on the Mead, Colorado job requested Claimant's removal from his site because Claimant's work was substandard and required "re-work."

10. David S[Redacted], Operations Manager, testified on behalf of Respondents. Mr. S[Redacted] testified Employer has a three-strike termination policy for performance and attendance. Mr. S[Redacted] testified employees are informed of the policy. Mr. S[Redacted] testified that, in his view, Claimant's first strike was his removal from the downtown Denver jobsite due to the alleged inappropriate remarks. He testified Claimant's second strike was that he believed Claimant lied about being on light duty. Mr. S[Redacted] testified that Claimant informed him he was assigned to light duty; however, per Mr. S[Redacted]'s reading of the May 21, 2019 Urgent Care report, he was not assigned to light duty. Mr. S[Redacted] further testified that the third strike leading to Claimant's termination was substandard work on the Mead jobsite. Upon further questioning by Respondents' counsel, Mr. S[Redacted] testified that an additional factor in Claimant's termination was a no-call, no-show on Monday, June 3, 2019.

11. Claimant testified he was not informed of any three-strike policy. Claimant testified he spoke to Mr. S[Redacted] by telephone on June 4, 2019 and Mr. S[Redacted] told him he was being terminated because he was not doing enough work and his work was substandard. Claimant testified his work was not substandard and he believed he was performing the quality and quantity of work required. Claimant further testified that, to the extent his work required any re-work, it would not have exceeded the normal amount of re-work expected on any job. Claimant testified that he was never a no-call, no-show. He stated that he did miss work at times due to attending doctor's appointments for the work injury, but always gave Employer prior notice of his absences.

12. Scott Harris testified at hearing on behalf of Respondents. Mr. Harris worked with Claimant on the Mead jobsite as a glazer. Mr. Harris was not a foreman on the jobsite. Mr. Harris testified he observed Claimant's work and described the quality of Claimant's work as "poor." He testified that some of Claimant's work required re-work to ensure the seals were not subject to leaks.

13. John G[Redacted] testified at hearing on behalf of Respondents. Mr. G[Redacted] worked as a glazer with Claimant at the downtown Denver jobsite. He testified Claimant did good work on that project. Mr. G[Redacted] testified it was his understanding Claimant was transferred to a different jobsite because a woman alleged Claimant directed an inappropriate comment to her.

14. Robert B[Redacted] testified at hearing on behalf of Employer. Mr. B[Redacted] worked with Claimant on the Lakewood jobsite as a journeyman. Mr. B[Redacted] testified that, on May 21, 2019, Claimant informed him he may have hurt himself the day before and stated he needed to get his arm evaluated at urgent care. Mr. B[Redacted] testified that Claimant stated he felt a pop in his arm while getting dressed for work. Mr. B[Redacted] testified Claimant did not indicate to him the injury occurred at work installing frames and moving glass. Mr. B[Redacted] testified he then contacted Mr. H[Redacted], who took Claimant for medical evaluation at the urgent care.

15. Alicia L[Redacted] testified at hearing on behalf of Employer. Ms. L[Redacted] worked with Claimant on the Lakewood jobsite installing windows and is Mr. B[Redacted]' girlfriend. Ms. L[Redacted] testified she does not recall Claimant mentioning any pain or injury to her. Ms. L[Redacted] testified she heard Claimant telling Mr. B[Redacted] he popped his elbow while putting on clothes that morning.

16. Claimant testified he did not work from June 4, 2019 to June 23, 2019 because he was terminated by Employer. He testified he was looking for work during that time period. Claimant began working for a different employer on June 24, 2019.

17. Dr. Davis reevaluated Claimant on June 17, 2019. He noted Claimant underwent an MRI that demonstrated severe degenerative arthritis of the elbow with large osteophytes forming along the distal humerus and the proximal ulna as well as multiple loose bodies in the joint. The MRI also showed a low-grade partial tear of the extensor origin of the lateral epicondyle and some tendinosis of the flexor pronator origin at the medial epicondyle. Dr. Davis recommended proceeding with an arthroscopic debridement of the joint with removal of loose bodies and osteophytes.

18. Claimant underwent right elbow surgery on August 19, 2019. Dr. Davis performed arthroscopy with synovectomy, removal of 20 loose bodies and fragments of bone, excision of the coronoid process, distal humerus, and partial excision of the olecranon process.

19. Claimant did not work from August 19, 2019 to September 30, 2019 due to recovering from right elbow surgery. Claimant returned to light duty work on October 1, 2019 and has continued working since such time.

20. On November 18, 2019, John J. Aschberger, M.D. performed an Independent Medical Examination (IME) at the request of Respondents. Dr. Aschberger performed a medical record review and physical examination. Regarding the mechanism of injury, Claimant reported feeling a twist and a pop at the right elbow when using a power screwdriver to put screws into a window frame. He reported that, an hour later, he experienced weakness, pain and swelling at the elbow while lifting windows. Claimant informed Dr. Aschberger he was functioning fine and not missing any work up until the May 20, 2019 injury. Dr. Aschberger noted Claimant underwent elbow surgery in 1995 and a biceps tear repair in 1999. Dr. Aschberger opined Claimant sustained a work-

related right elbow sprain that aggravated his underlying degenerative condition. He opined physical therapy and orthopedic follow-up would be reasonable care.

21. Dr. Davis issued an undated letter reiterating his opinion that Claimant sustained a work-related aggravation. Dr. Davis noted Claimant sustained a right elbow injury on May 20, 2019 when he had a pop in his elbow when lifting a heavy frame. He wrote, “

Although [Claimant] does have degenerative arthritis, he also had loose bodies in his elbow. It's likely that the job injury either caused one of those loose bodies to catch in the joint or resulted in an osteophyte or some cartilage breaking off in the joint and causing it to become symptomatic at that point.

In other words, regarding causality, although he did have pre-existing arthritis in his elbow, it was substantially aggravated by his work injury which occurred May 20, 2019. Were it not for the lifting injury that he sustained on May 20, 2019, he would probably not have required surgical treatment for his elbow.

22. Division of Workers' Compensation records (Respondents' Exhibit A) indicate Claimant has had three prior workers' compensation claims with different employers for right upper extremity injuries, including a June 2001 injury to Claimant's radial ulnar nerve/low arm, a December 1994 injury to unspecified part of the upper extremity, and an August 1993 injury to the elbow/radial head. The prior claims resulted in payments of TTD and PPD.

23. Claimant did not identify any of the aforementioned prior workers' compensation claims in his responses to Respondents' interrogatories. Claimant did disclose in his responses a prior claim in October 2006 for a rotator cuff tear, and a claim in December 2012 for a herniated disc. When asked on cross-examination why he did not include the prior workers' compensation claims related to his upper extremity, Claimant testified he addressed the same question at a prehearing conference. Claimant testified he believed Respondents' interrogatories were asking for information from within the last 15 years. Claimant testified he disclosed the information he believed was required and did so to the best of his recollection. Claimant testified he did report prior injuries and treatment of his right upper extremity to his providers. Claimant testified that, despite the prior surgeries to his right upper extremity and pre-existing elbow arthritis, he was not experiencing any issues with his right elbow leading up to the May 20, 2019 work injury and was able to perform his normal job duties.

24. The ALJ finds Claimant's testimony more credible and persuasive than the testimony of Mr. S[Redacted], Mr. B[Redacted], Ms. L[Redacted], Mr. G[Redacted] and Mr. Harris. The ALJ credits the opinions of Drs. Fromcheck, Davis and Aschberger.

25. Claimant proved it is more probable than not he sustained a compensable industrial injury arising out of and in the course of his employment on May 20, 2019. Claimant's work duties aggravated Claimant's pre-existing degenerative condition, producing the need for medical treatment.

26. Claimant has proven the evaluations and treatment by Drs. Fromcheck and Davis, including the surgery performed by Dr. Davis, were reasonable, necessary and causally related to the industrial injury.

27. Claimant failed to prove entitlement to TTD benefits between June 4, 2019 and June 24, 2019. While Claimant did not work during this time period, Claimant did not leave work during this time frame due to a disability caused by the work injury. Claimant was not working because he was terminated due to alleged job performance issues.

28. Claimant proved by a preponderance of the evidence he is entitled to TTD benefits for lost wages incurred between August 19, 2019 and October 1, 2019. The wage loss suffered during this time period was due to Claimant undergoing right elbow surgery resulting from the May 20, 2019 industrial injury.

29. Respondents failed to prove by a preponderance of the evidence Claimant was responsible for his termination and thus not entitled to TTD benefits.

30. Claimant earned \$30.85 per hour. The number of hours Claimant worked varied, as detailed below:

| Period End Date | Total Hours |
|------------------------|--------------------|
| 2/9/2019 | 40 |
| 2/16/2019 | 37.5 |
| 2/23/2019 | 32 |
| 3/2/2019 | 38.5 |
| 3/9/2019 | 32 |
| 3/16/2019 | 32 |
| 3/23/2019 | 24 |
| 3/30/2019 | 40 |
| 4/6/2019 | 38 |
| 4/13/2019 | 32 |
| 4/20/2019 | 40 |
| 4/27/2019 | 32 |
| 5/4/2019 | 40 |
| 5/11/2019 | 40 |
| 5/18/2019 | 40 |

Claimant worked an average of 36 hours per week in the 15 full weeks of employment leading up to the work injury. An AWW of \$1,110.60 is a fair approximation of Claimant's wage loss and diminished earning capacity.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Compensability

The claimant was required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.*, 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals*

Office, 107 P.3d 999 (Colo. App. 2004); H & H Warehouse v. Vicory, 805 P.2d 1167 (Colo. App. 1990). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. City of Boulder v. Streeb, 706 P.2d 786 (Colo. 1985); Faulkner v. Industrial Claim Appeals Office, 12 P.3d 844 (Colo. App. 2000).

Respondents contend Claimant failed to meet his burden to prove he sustained a compensable industrial injury, pointing to inconsistencies in Claimant's reports regarding the mechanism of injury and failure to disclose in responses to interrogatories prior claims involving the right upper extremity. The ALJ considered this, among other things, in making her credibility determination and, as found, deemed Claimant's testimony credible and persuasive. Claimant credibly testified he felt a pop in his right elbow when the drill torqued. He credibly testified he felt additional symptoms, including swelling and weakness, while carrying a window approximately one hour later. Claimant's testimony regarding feeling a pop while drilling is consistent with his reports to Dr. Fromcheck, the adjuster, and Dr. Aschberger. Claimant also credibly explained that he also mentioned the drilling incident to Dr. Davis.

Although Mr. B[Redacted] and Ms. L[Redacted] testified Claimant reported injuring his arm while dressing at home for work, the ALJ did not find their testimony credible and persuasive. No reasonable explanation was offered by Mr. B[Redacted] or any other Employer witness as to why, in a non-emergent situation, Employer felt it was necessary to notify Mr. H[Redacted], and take Claimant to urgent care if there was no indication whatsoever Claimant was alleging a work-related injury. Furthermore, Claimant provided a credible explanation for his initial failure to disclose prior right upper extremity claims in his responses to interrogatories. The claims involving Claimant's right upper extremity took place 18 to 26 years prior to the injury at issue. The ALJ is not persuaded Claimant was attempting to conceal prior relevant right upper extremity conditions, as Claimant reported having prior treatment to his providers and provided further explanation to Respondents at a prehearing conference.

Claimant's providers, Drs. Fromcheck and Davis, along with Respondents' IME, Dr. Aschberger, all credibly opine Claimant's pre-existing right elbow condition was aggravated by the work injury. Each physician was aware Claimant had some prior treatment to his right upper extremity several years prior. Claimant credibly testified he was not experiencing symptoms in his right upper extremity leading up to the work injury. No evidence to the contrary was offered at hearing indicating that, prior to the work injury, Claimant was seeking treatment or had any issues performing the duties of his physically demanding job. Although Claimant suffered from a pre-existing condition, it is more likely than not the work injury aggravated his condition and caused the need for his medical treatment.

Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School District #11*, W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012). Our courts have held that in order for a service to be considered a “medical benefit” it must be provided as medical or nursing treatment, or incidental to obtaining such treatment. *Country Squires Kennels v. Tarshis*, 899 P.2d 362 (Colo. App. 1995). A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the claimant’s physical needs. *Bellone v. Industrial Claim Appeals Office*, 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines, Inc.*, W.C. No. 4-517-537, (ICAO, May 31, 2006). A service is incidental to the provision of treatment if it enables the claimant to obtain treatment, or if it is a minor concomitant of necessary medical treatment. *Country Squires Kennels v. Tarshis*, 899 P.2d 362 (Colo. App. 1995); *Karim al Subhi v. King Soopers, Inc.*, W.C. No. 4-597-590, (ICAO, July 11, 2012). The determination of whether services are medically necessary, or incidental to obtaining such service, is a question of fact for the ALJ. *Bellone v. Industrial Claim Appeals Office*, 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines, Inc.*, W.C. No. 4-517-537, (ICAO, May 31, 2006).

As Claimant proved he sustained a compensable injury, Respondents are liable for reasonably necessary and related medical benefits. As found, the evaluations and treatment by Drs. Fromcheck and Davis, including the surgery performed by Dr. Davis, are reasonable, necessary and causally related to the industrial injury.

TTD Benefits

To prove entitlement to TTD benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. See Sections 8-42-(1)(g), 8-42-105(4); *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office*, 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term “disability” connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (citing *Ricks v. Industrial Claim Appeals Office*, P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant’s testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic*, 952 P.2d 831, 833 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the

employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

As found, Claimant failed to prove entitlement to TTD benefits for any lost wages between June 4, 2019 and June 24, 2019. Although Claimant was not working during such time period, the preponderant evidence does not establish he left work as a result of a disability resulting from the industrial injury. Claimant did not work between June 4, 2019 and June 24 2019 because he was terminated by Employer and could not find other work. Although Claimant remained on restrictions at the time, there was no testimony he was unable to work due to any disability during that time period.

Nonetheless, the preponderant evidence establishes Claimant is entitled to TTD benefits for lost wages from August 19, 2019 to October 1, 2019. Claimant's lost wages during this time period were the direct result of Claimant undergoing surgery and recovery for the May 20, 2019 industrial injury.

Responsible for Termination

Under the termination statutes in §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. a claimant who is responsible for his or her termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and wage loss. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1131 (Colo. App. 2008). The termination statutes provide that, in cases where an employee is responsible for her termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, W.C. No. 4-631-681 (ICAO, Apr. 24, 2006). A claimant does not act "volitionally" or exercise control over the circumstances leading to her termination if the effects of the injury prevent her from performing her assigned duties and cause the termination. *In re of Eskridge*, W.C. No. 4-651-260 (ICAO, Apr. 21, 2006). Therefore, to establish that Claimant was responsible for her termination, respondents must demonstrate by a preponderance of the evidence that Claimant committed a volitional act, or exercised some control over her termination under the totality of the circumstances. *See Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994). An employee is thus "responsible" if she precipitated the employment termination by a volitional act that she would reasonably expect to cause the loss of employment. *Patchek v. Dep't of Public Safety*, W.C. No. 4-432-301 (ICAP, Sept. 27, 2001).

Violation of an employer's policy does not necessarily establish the claimant acted volitionally with respect to a discharge from employment. *Gonzales v. Industrial Commission*, 740 P.2d 999 (Colo. 1987). An "incidental violation" is not enough to show that the claimant acted volitionally. *Starr v. Industrial Claim Appeals Office*, 224 P.3d 1056, 1065 (Colo. App. 2009). However, a claimant may act volitionally, and therefore be "responsible" for the purposes of the termination statute, if they are aware of what the employer requires and deliberately fails to perform accordingly. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008). This is true even if the

claimant is not explicitly warned that failure to comply with the employer's expectations may result in termination. See *Pabst v. Industrial Claim Appeals Office*, 833 P.2d 64 (Colo. App. 1992) (claimant disqualified from unemployment benefits after discharge for unsatisfactory performance when aware of expectations, even if not explicitly warned that job was in jeopardy). Ultimately, the question of whether the claimant was responsible for the termination is one of fact for determination by the ALJ. *Apex Transportation, Inc. v. Industrial Claim Appeals Office*, 321 P.3d 630, 632 (Colo. App. 2014).

Respondents failed to establish Claimant was responsible for his termination and thus not entitled to TTD benefits. The ALJ did not find Mr. S[Redacted]'s testimony credible and persuasive. Respondents contend Claimant was terminated due to violating Employer's three-strike policy. Mr. S[Redacted]'s explanation regarding the termination was disjointed and incredible. Mr. S[Redacted] initially testified Claimant's "second strike" was lying about requiring light duty. This explanation was nonsensical, as the medical record specifically referred to by Mr. S[Redacted] clearly states Claimant required light duty work. Mr. S[Redacted] only included alleged no-call, no-shows as a reason for Claimant's termination when it was specifically brought up by Respondents' counsel.

Regarding alleged no-call, no-shows, Claimant credibly testified he gave prior notice to Employer when he was going to miss work due to attending medical appointments. Claimant credibly testified he was not aware of a three-strike policy. With respect to the allegations regarding Claimant's work performance, Claimant credibly and persuasively testified he kept busy and met performance standards to the best of his ability. To the extent re-work was required, the ALJ is persuaded the amount of re-work did not exceed the normal amount to be expected on any given job. Respondents failed to show by a preponderance of the evidence Claimant committed a volitional act or exercised some control over his termination under the totality of the circumstances.

Average Weekly Wage

Section 8-42-102(2) requires the ALJ to base the claimant's AWW on his or her earnings at the time of injury. However, under certain circumstances the ALJ may determine the claimant's AWW from earnings received on a date other than the date of injury. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Specifically, §8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp.*, *supra*. Where the claimant's earnings increase periodically after the date of injury the ALJ may elect to apply § 8-42-102(3) and determine that fairness requires the AWW to be calculated based upon the claimant's earnings during a given period of disability, not the earnings on the date of the injury. *Campbell v. IBM Corp.*, *supra*.

As found, Claimant worked an average of 36 hours per week at \$30.85 per hour. An AWW of \$1,110.60 represents a fair approximation of Claimant's wage loss and diminished earning capacity.

ORDER

1. Claimant proved by a preponderance of the evidence he sustained a compensable injury on May 20, 2019.
2. Respondents shall pay the costs of all reasonable, necessary and related medical treatment, including outstanding balances and reimbursement for expenses incurred in connection with the medical treatment of Drs. Fromcheck and Davis.
3. Respondents shall pay Claimant TTD benefits from August 19, 2019 to October 1, 2019. Claimant is not entitled to TTD benefits from June 4, 2019 to June 24, 2019.
4. Claimant's AWW is \$1,110.60.
5. All matters not determined herein are reserved for future determination.

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

DATED: March 12, 2020



Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that the chiropractic treatment and massage therapy orders from Dr. Schneider on August 1, 2019 December 30, 2019 for ordering diagnoses of right shoulder pain and cervical radiculopathy are reasonable, necessary, and causally related to Claimant's July 22, 2003 work injury or the sequelae of the injury.

FINDINGS OF FACT

1. Claimant is a 61-year-old male who was employed by Employer as a network technician.

2. On July 22, 2003, Claimant sustained an admitted injury to his left ankle in the course and scope of his employment with Employer.

3. As a result of the admitted injury, Claimant underwent multiple surgeries including multiple attempts at ankle fusion. Claimant developed complications with infections and eventually had a below the knee amputation of his left leg on May 2, 2012.

4. Claimant has treated with multiple providers from the date of his injury in 2003 through the current date. Currently, David Schneider, M.D. is an authorized treating provider on his claim.

5. On February 13, 2013, Nicholas Olsen, D.O. performed an independent medical examination. Dr. Olsen reviewed significant medical records, performed an examination, and provided an assessment. The examination included obtaining a history of the initial work injury and of subsequent reported falls. Claimant reported in a subsequent fall he jammed his shoulder and Claimant reported pain in both shoulders from using crutches. The medical records reviewed showed that Claimant had reported bilateral shoulder pain especially since using crutches. However, a pain diagram Claimant filled out at that visit noted pain only in the left shoulder, right knee, and left lower extremity. See Exhibits 13, A.

6. Dr. Olsen also performed an independent medical examination on May 1, 2017. On that date, Claimant filled out a pain diagram noting pain in both shoulders, in his lower back, in his right knee, and in his left lower extremity. See Exhibit A.

7. On July 13, 2018, Claimant underwent a left shoulder replacement performed by Dr. Schneider. Following surgery, Claimant underwent physical therapy.

8. On June 19, 2019, Dr. Olsen performed an independent medical examination. Claimant reported right shoulder pain at an 8/10 increased with any motion of the right shoulder. Dr. Olsen noted that Claimant underwent a left shoulder reverse arthroplasty last fall that was quite successful. Dr. Olsen reviewed medications Claimant was taking. Dr. Olsen also reviewed past surgical history that included ten surgeries on the left ankle, left knee below knee amputation, right quadriceps tendon repair, left knee patellofemoral arthroplasty, and left shoulder reverse arthroplasty. Claimant reported anxiety, irritability, and depression and also reported a weight gain of 80 pounds. Claimant reported excessive fatigue and poor sleep with use of chronic pain medications. Claimant reported stress in his home life since he was not able to function as he once had. Claimant reported headaches twice per week and also reported tinnitus. Dr. Olsen reviewed medical records and performed a physical examination. Dr. Olsen ultimately opined that the need for right shoulder surgery was related to Claimant's end stage osteoarthritis and age related degenerative changes and was not related to Claimant's intermittent crutch use in the year 2013. See Exhibit 12.

9. On August 1, 2019, Dr. Schneider evaluated Claimant. Dr. Schneider referred Claimant to physical therapy 1 time per week for 6 weeks for chiropractic spine adjustment (no adjustment of the left shoulder) and noted in the order referral that the ordering diagnosis was pain in the right shoulder. He also indicated that the site was to be back, right shoulder, and neck massage. See Exhibits 14, B.

10. Respondents denied Dr. Schneider's August 1, 2019 referral and Claimant filed an Application for Hearing requesting authorization for the care in the referral. See Exhibit 1.

11. On October 29, 2019, ALJ Cannici issued an order finding that Claimant's request for a right total shoulder arthroplasty was not causally related to Claimant's July 22, 2003 industrial injury. ALJ Cannici found that the evidence did not support Claimant's contention that the use of crutches aggravated Claimant's right shoulder condition. ALJ Cannici found Dr. Olsen persuasive in opining that the use of crutches did not contribute or lead to the development of arthritis or the need for surgery. ALJ Cannici found that any temporary aggravation to Claimant's shoulder while using crutches in 2013 did not contribute to Claimant's need for surgery and that the need for surgery was due to end stage osteoarthritis familial and consistent with age related degenerative arthritis. See Exhibits 10, K.

12. On December 9, 2019, Nicholas Olsen, D.O. issued a letter to Respondents' counsel. Dr. Olsen reviewed information that Claimant had recently received a referral from his physicians for a chiropractic evaluation of neck pain and headaches. Dr. Olsen opined that Claimant had no indication of neck pain complaints or headaches when evaluated on February 13, 2013. Dr. Olsen noted that while Claimant had some reports of headaches up to two per week when Claimant was seen on June 19, 2019, it was clear that the headaches were not related to Claimant's work injury. Dr. Olsen opined that Claimants' complaints of neck pain and headaches were not claim related and should be treated outside of workers' compensation. See Exhibits 11, A.

13. On December 30, 2019, Dr. Schneider evaluated Claimant. Dr. Schneider referred Claimant for physical therapy two times per week for six weeks. Dr. Schneider noted in the order referral that the ordering diagnosis was cervical radiculopathy and that the surgery procedure was a left reverse total shoulder arthroplasty with strengthening of the shoulder girdle and lower cuff needed to compensate for irreparable superior cuff tear. Dr. Schneider noted that massage was okay. See Exhibit 14.

14. Claimant testified at hearing. Claimant reported that after his left total shoulder replacement and since 2016, he has had aching at the base of his neck. Claimant testified that the aching at the base of his neck did not exist prior to his left total shoulder replacement. Claimant testified that it had gotten worse and worse and that he had to go back to pain medications. Claimant testified that he wanted massage and chiropractic care.

15. Dr. Olsen also testified at hearing. Dr. Olsen testified that he had evaluated Claimant four times at independent medical examinations between February of 2013 and June of 2019. Dr. Olsen testified that he reviewed extensive medical records. Dr. Olsen noted that Claimant's left lower extremity, right knee, and left shoulder were all work related conditions related to his July 22, 2003 work injury but that Claimant's right shoulder was not a work related condition. Dr. Olsen testified that the medical records fail to demonstrate that Claimant has reported neck pain and he opined that there was no explanation of how neck pain would be related to the left shoulder. Dr. Olsen opined that treatment to the neck or for headaches was not due to Claimant's left shoulder surgery. Dr. Olsen noted that there was no neck pain reported before the left shoulder surgery nor were there neck complaints after the left shoulder surgery. However, despite this, Dr. Olsen testified that way after surgery and on August 1, 2019, there was an order for treatment to the neck and the right shoulder despite the right shoulder not being work related.

16. Dr. Olsen testified that trapezius tightness can be related to a shoulder issue and agreed that cervical symptoms could develop following a shoulder surgery. However, he testified that usually the symptoms would develop almost immediately following surgery and not 1.5 years later. Dr. Olsen testified and opined that cervical radiculopathy, listed as the ordering diagnosis in Dr. Schneider's December 30, 2019 order, was not work related or a sequelae of the left shoulder surgery. Dr. Olsen testified that symptoms would have presented within weeks of surgery if it were related and that it was probable that any cervical symptoms were due to genetics and age/time and not due to the left shoulder surgery. Dr. Olsen testified that Claimant's current complaints of cervical symptoms and headaches that would be addressed by the order of massage therapy and chiropractic treatment are not causally related to the work injury.

17. Dr. Olsen is found credible and persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. See § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. See § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School District #11*, W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012).

Claimant has failed to establish by a preponderance of the evidence that the care recommended by Dr. Schneider in the August 1, 2019 and December 30, 2019 orders is reasonable, necessary, and causally related to his work injury. As found above, the orders indicated ordering diagnoses of right shoulder pain and cervical radiculopathy. Claimant's right shoulder pain has been previously determined not related to his work injury. Dr. Olsen, in this case, is found persuasive that the cervical complaints also are not related to the work injury. Although Claimant testified that his left shoulder replacement performed on July 13, 2018 caused new tightness in his cervical spine and trapezius and caused headaches, this testimony is not found persuasive. Dr. Olsen testified credibly that the time period between the left shoulder surgery and the onset of cervical symptoms was too great for the symptoms to be related to the left shoulder surgery. Although it is possible for a left shoulder surgery to cause tightness in adjacent areas of the trapezius and cervical spine musculature, Dr. Olsen opined credibly and persuasively that in this case there is no causal connection. Claimant has failed to establish, more likely than not, that his July 2003 injury or the sequelae of the injury resulted in the cervical symptoms Claimant is now reporting. Dr. Olsen is credible and persuasive that Claimant's symptoms are due to age/genetics and not due to the left shoulder surgery. Thus, Claimant's request that Respondents authorize chiropractic care and massage therapy for any cervical symptoms and/or headaches is denied and dismissed.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish by a preponderance of the evidence that the chiropractic treatment and massage therapy orders from Dr. Schneider on August 1, 2019 and December 30, 2019 are reasonable, necessary, and causally related to Claimant's July 22, 2003 work injury or the sequelae of the injury. Claimant's request for massage and chiropractic treatment to his cervical area is denied and dismissed.
2. All issues not decided herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference,

see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: <http://www.colorado.gov/dpa/oac/forms-WC.htm>.

DATED: March 12, 2020

/s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

- Whether the claimant has demonstrated, by a preponderance of the evidence, that on August 18, 2019 she suffered an injury arising out of and in the course and scope of her employment with the employer.
- If the claimant proves a compensable injury, whether the claimant has demonstrated, by a preponderance of the evidence, that medical treatment she has received to her right ankle is reasonable, necessary, and related to her work injury.
- If the claimant proves a compensable injury, whether the claimant has demonstrated, by a preponderance of the evidence, that she is entitled to temporary total disability (TTD) benefits for the period of August 19, 2019 through September 2, 2019.
- If the claimant proves a compensable injury, whether the claimant has demonstrated, by a preponderance of the evidence, that she is entitled to temporary partial disability (TPD) benefits for the period of September 23, 2019 through September 30, 2019.
- If the claimant proves a compensable injury, whether the claimant has demonstrated, by a preponderance of the evidence, that she is entitled to temporary total disability (TTD) benefits beginning October 1, 2019, and ongoing.
- If the claimant proves a compensable injury, what is the claimant's average weekly wage?

FINDINGS OF FACT

1. The claimant was employed with the employer as a certified nursing assistant (CNA) and medication technician. The claimant's job duties included going into client homes and assisting with daily needs and administration of medications.

2. The claimant testified that on August 18, 2019, she was in a client's home performing cleaning duties. The claimant further testified that while walking from the living room to the bathroom, she tripped over the client's kitten. It was the claimant's testimony that this caused her right ankle to roll and she fell into the doors of the boiler room. On that same date, the claimant notified the employer of her tripping incident. She was directed to seek medical treatment at urgent care.

Medical records prior to August 18, 2019

3. Prior to the reported August 18, 2019 tripping incident, the claimant sought treatment for her right ankle.

4. On January 10, 2019, an x-ray of the claimant's right ankle showed mild degenerative changes, no soft tissue swelling, and no acute fracture. The reason for the x-ray is listed as "osteoarthritis involving multiple joints, [s]prain of right ankle, unspecified ligament".¹

5. On April 9, 2019, the claimant was seen at Marillac Clinic by Dr. Jeanne Haberer. On that date, the claimant reported pain in her right hip, right ankle, and lumbar spine. Following her exam of the claimant, Dr. Haberer noted some swelling in the claimant's right ankle. Dr. Haberer did not opine as to a specific diagnosis of the claimant's right ankle. However, she assessed "[o]ther osteoarthritis involving multiple joints" and recommended pain medications, including oxycodone-acetaminophen.

6. On April 22, 2019, the claimant returned to Marillac Clinic and was seen by Roseanna Jennings, NP. On that date, the claimant reported that she injured her right ankle a few days prior. Ms. Jennings recorded that the claimant's ankle "has been hurting for months and is now worse that she twisted it." On exam, Ms. Jennings noted mild swelling of the claimant's right ankle. Ms. Jennings diagnosed "acute on chronic ankle pain" and ordered x-rays of the claimant's right ankle.

7. The following day, April 23, 2019, the claimant sought treatment at the emergency department at St. Mary's Medical Center and was seen by Andrew Miller, PA-C. The claimant reported that she initially injured her right ankle one year prior and had been experiencing "persistent pain". The claimant also told Mr. Miller that x-rays of her right ankle showed arthritis. Mr. Miller recorded that the claimant had reinjured her right ankle two days prior, while fishing. Specifically, the claimant described sliding down the bank of a river. Mr. Miller noted right ankle swelling and ordered additional x-rays. These x-rays showed soft tissue swelling, and no evidence of an acute injury.

8. The claimant returned to Dr. Haberer the next day on April 24, 2019. The claimant reported the same fishing related mechanism of injury to her right ankle. On that date, the claimant reported pain in her right ankle into her right calf. Dr. Haberer recommended the use of a walking boot. In addition, Dr. Haberer determined that the claimant could return to work on April 27, 2019.

9. On June 12, 2019, the claimant returned to Dr. Haberer and reported improved ankle pain. However, on July 10, 2019, the claimant informed Dr. Haberer that she had persistent right ankle pain with intermittent numbness and tingling. On that date, the claimant requested a magnetic resonance image (MRI) of her right ankle and a referral to orthopedics. On exam, Dr. Haberer noted right ankle swelling. As requested by the claimant, Dr. Haberer ordered a right ankle MRI and made a referral to orthopedics.

10. On July 23, 2019, a right ankle MRI showed advanced degenerative joint disease (DJD), tendinopathy and partial thickness tearing of the posterior tibial tendon.

¹ The parties did not provide the ALJ with medical records prior to the January 10, 2019 x-ray report.

11. Thereafter on July 15, 2019, the claimant returned to Dr. Haberer for treatment of anxiety and depression. The claimant reported feeling “anxious, sad, tired” after the death of her dog and her ankle injury.

12. The claimant again sought treatment with Dr. Haberer on August 12, 2019. The claimant continued to report persistent ankle pain, and requested a refill for her Percocet. Dr. Haberer noted that the MRI showed arthritis in the claimant’s right ankle. As a result, Dr. Haberer recommended an injection to the claimant’s right ankle. However, she noted that the claimant did not have insurance and no injection was administered.

Medical records beginning August 18, 2019

13. The claimant’s first medical treatment after the August 18, 2019 incident was on that same day at Colorado Mesa University Community Care. On that date, the claimant was seen by Melissa Hein, PA-C. The claimant reported that she tripped over her client’s kitten and twisted her right ankle. The claimant also reported that she had “a torn ligament in her right ankle that she injured several months ago”. On exam, Ms. Hein noted swelling and tenderness of the claimant’s right ankle. Ms. Hein reviewed x-rays taken that day and read them as “negative”. She recommended that the claimant use her walking boot and over the counter pain medications.

14. On August 21, 2019, the claimant began treating with SMMG Occupational Health Center as her authorized treating provider (ATP). On that date, the claimant was seen by Dr. Craig Stagg. The claimant reported tripping over a kitten on August 18, 2019, inverting her right ankle. The claimant also reported that she had a prior injury to her right ankle while fishing “three or four months ago”. The claimant disclosed that x-rays and an MRI had been performed related to that prior incident. In addition, the claimant reported that she had been working full duty and her ankle had not been bothering her prior to August 18, 2018. Dr. Stagg recommended that the claimant use her CAM boot and limited her to sedentary work. In addition, Dr. Stagg recommended that the claimant see a foot and ankle specialist. Dr. Stagg indicated that he could not opine as to causation until he reviewed the claimant’s prior medical records.

15. On September 5, 2019, the claimant was seen at Western Orthopedics by Dr. Christopher Copeland. The claimant reported dull, aching pain, and swelling in her right ankle. An x-ray of the claimant’s right ankle was taken at that time and showed “significant pes planus”. Dr. Copeland reviewed that x-ray and the July 23, 2019 MRI and noted that the claimant had a posterior tibial tendon tear and ankle impingement syndrome. Dr. Copeland recommended the claimant pursue physical therapy, bracing, arch support, and pain medications. If surgery were pursued, Dr. Copeland recommended a stage two flat foot reconstruction. Dr. Copeland did not opine regarding causation.

16. On September 6, 2019, weight bearing x-rays of the claimant's right ankle showed abduction, pes planus with significant sagging of the talonavicular joint, and peri talar subluxation.

17. On September 9, 2019, the claimant returned to Dr. Stagg and reported right ankle pain. Dr. Stagg reiterated that he could not opine regarding causation until he reviewed the claimant's prior medical records.

18. On September 11, 2019, Dr. Haberer referred the claimant to Western Orthopedics. In the referral, Dr. Haberer noted that the claimant had persistent ankle pain and swelling for several months, and use of a brace for two months.

19. On September 19, 2019, the claimant was seen at Occupational Health Center by James Harkreader, NP. At that time, the claimant reported the same kitten related tripping incident. Mr. Harkreader recommended the continued use of the CAM boot. Mr. Harkreader also addressed the need review medical records before opining on causation.

20. There is an additional September 19, 2019 medical record authored by Mr. Harkreader following his review of the claimant's Marillac Clinic records. Mr. Harkreader opined that the August 18, 2019 tripping incident was not "due to [the claimant's] work." In support of this opinion, Mr. Harkreader noted that the claimant had an x-ray of her right ankle on January 10, 2019 that showed "mild soft tissue swelling, mild degenerative changes." He also referred to the April 23, 2019 right ankle x-ray that showed soft tissue swelling, as well as the July 2019 MRI that showed the partial tear of the posterior tibial tendon.

21. On October 3, 2019, the claimant returned to Mr. Harkreader and reported that prior to tripping on August 18, 2019, her right ankle was "at baseline". Mr. Harkreader reiterated his opinion that the claimant's right ankle symptoms were not work related. In addition, he noted that the claimant was at maximum medical improvement.

22. On October 8, 2019, the respondents filed a Notice of Contest of the claimant's claim. The reason for the contest was that the respondents believe that the claimant's injury is not work related.

23. The claimant testified that although she had prior right ankle issues, she was experiencing only "a little soreness" immediately prior to tripping over her client's kitten. In addition, she was working full-time and was "fine". The claimant described a change in her right ankle symptoms on August 18, 2019 that included increased pain and swelling. The ALJ does not find the claimant's testimony on this issue to be credible or persuasive.

24. The claimant testified that her current symptoms include right ankle pain, throbbing, and swelling.

25. Payroll records entered into evidence indicate that the claimant was paid two different rates; \$11.10 per hour and \$13.25 per hour. In addition, the payroll records show that the claimant was paid \$8,744.48 from January 1, 2019 through August 4, 2019. That is a 31-week period. When averaged² over 31 weeks, this equates to \$282.08.

26. The ALJ credits the medical records and the opinions of Mr. Harkreader and finds that the claimant has failed to demonstrate that it is more likely than not that she suffered a compensable work injury on August 18, 2019. The claimant's need for right ankle treatment (including surgery) is related to her prior and longstanding right ankle condition. The ALJ concludes that the August 18, 2019 kitten related incident did not aggravate, accelerate, or combine with the claimant's preexisting condition to necessitate treatment. On the contrary, the July 2019 MRI that showed the partial tear of the posterior tibial tendon, which was prior to August 18, 2019.

CONCLUSIONS OF LAW

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

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *CJI*, Civil 3:16 (2018).

4. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where

² The ALJ calculated \$8,744.48 divided by 31 is \$282.08.

the industrial aggravation is the proximate cause of the disability or need for treatment. See *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); see also *Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it “aggravates accelerates or combines with a preexisting disease or infirmity to produce disability or need for treatment.” See *H & H Warehouse v. Vicory*, *supra*.

5. As found, the claimant has failed to demonstrate by a preponderance of the evidence that on August 18, 2019 she suffered an injury arising out of and in the course and scope of her employment with the employer. As found, the claimant has failed to demonstrate by a preponderance of the evidence that the August 18, 2019 incident aggravated, accelerated, or combined with the claimant’s preexisting right ankle condition to necessitate treatment. As found, the medical records and the opinions of Mr. Harkreader are credible and persuasive.

ORDER

It is therefore ordered that the claimant’s claim for workers’ compensation benefits related to an August 18, 2019 date of injury is denied and dismissed.

Dated this 17th day of March 2020.



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

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

ISSUES

- Did Claimant prove by a preponderance of the evidence a left total knee arthroplasty (TKA) is reasonably necessary and related to his admitted industrial injury?

FINDINGS OF FACT

1. Claimant suffered an admitted injury to his left knee on May 2, 2018, while working for Employer as a building maintenance technician. He was walking up an incline and felt a painful pop in his left knee when he took a step.

2. Claimant had a history of left knee problems and treatment before the work accident. In 1996, he tore his ACL and MCL in a skiing accident. He underwent ACL/MCL reconstruction surgery and ultimately returned to work without restrictions. He resumed skiing, but wore a knee brace when doing so. He eventually stopped using the brace because he grew out of it. There is no persuasive evidence of any treatment for the left knee until after the May 2, 2018 work accident.

3. Claimant worked for several employers from 1996 until he started working for Employer in June 2017. All of his jobs were relatively demanding, including road maintenance, concrete work, and garbage disposal. There is no persuasive evidence Claimant's left knee interfered with his ability to perform any work tasks before May 2018.

4. Claimant injured his right knee on February 1, 2016 while working for a garbage disposal company. Two treatment records from that claim refer to the left knee. An April 1, 2016 note from CCOM stated, "he has had issues with his other [left] knee from skiing, but has not skied in 2 years." The ALJ infers the provider was referring to the original 1996 skiing injury. Claimant disputed the statement he had not skied in two years, estimating he skied four or five times in the two years before the February 2016 accident. There is no persuasive evidence to contradict Claimant's testimony in this regard. The other record is an April 18, 2016 note from Dr. Peter Janes, in the context of a surgical consultation for the right knee, noting mild effusion in the left knee and "limitation of termination flexion."

5. After the May 2, 2018 work accident, Claimant was evaluated at Arapahoe Peak Health Center on May 11, 2018. He was put on work restrictions and referred for an MRI.

6. Respondents initially denied liability for Claimant's May 2, 2018 injury, but covered conservative treatment despite the denial. Employer eventually terminated Claimant's employment because it could not accommodate his restrictions.

7. Claimant underwent a left knee MRI on May 23, 2018. The significant findings included: (1) mild diminution and fraying of the medial meniscus, (2) mild to severe multi-compartmental articular cartilage degeneration, (3) thickening and edema of the medial collateral ligament suggesting a grade 2 MCL sprain, and (4) moderate knee joint effusion.

8. Claimant had a surgical evaluation with Dr. Mitchell Seemann on August 1, 2018. Dr. Seeman discussed options of aspiration and cortisone injections versus arthroscopic surgery. Claimant was eager for a definitive solution because he was out of work and needed to find another job as soon as possible. Dr. Seeman recommended arthroscopic chondroplasty and partial meniscectomy.

9. Claimant saw Dr. Kevin Nagamani, an orthopedic surgeon, for an IME at Respondents' request on October 12, 2018. Claimant denied ongoing problems with the left knee after recovering from the ACL reconstruction in 1996; he hiked and mountain biked without difficulty before the work injury. Dr. Nagamani concluded the May 2, 2018 work accident aggravated Claimant's pre-existing arthritis. He thought the described mechanism of injury was sufficient to cause Claimant's symptoms, noting, "It is certainly possible that walking on an incline could have caused an awkward step that would have exacerbated or irritated arthritis within his knee." Dr. Nagamani opined, "treatment for arthritis exacerbation is reasonable," and should include anti-inflammatory medications, rest, ice, and physical therapy. The next steps would be a cortisone injection and possibly viscosupplementation injections. He thought surgery would not likely help because the meniscus tear appeared "very minimal" and the underlying arthritis was "significant." He opined arthroscopy could be a reasonable consideration if conservative treatment failed.

10. Respondents filed a General Admission of Liability on November 5, 2018 after receiving Dr. Nagamani's report. Respondents also authorized the surgery recommended by Dr. Seemann.

11. Dr. Seemann performed arthroscopic left knee surgery on December 5, 2018. His significant intraoperative findings included a complex tear of the posterior horn of the medial meniscus and a radial posterior root tear. Dr. Seemann excised approximately 50% of the posterior horn of the medial meniscus and performed chondroplasty in multiple areas.

12. Claimant did not respond well to the surgery. He remained symptomatic despite attended multiple post-surgery therapy sessions, aspiration, and injections. He continued to have difficulty walking and fell at least once because his knee gave out. On March 12, 2019, Dr. Seemann noted,

[Claimant] is now three months status post a left knee arthroscopy, partial medial and lateral meniscectomy, and chondroplasty. He was having some difficulty with pain and swelling, so he of actually aspirated his knee and did two cortisone shots. He kind of backed off on his physical therapy, but he is still in a position where he is unable to work I am not sure I can explain the persistent pain and swelling that he has which were clearly evident on

exam. We have discussed a different [avenues] with which to address this further, but in the end I think the most direct way is just to stick a scope in there to do a repeat arthroscopy to assess what may be causing his persistent swelling. From time to time we have seen articular cartilage break off . . . I think at this point in time, it is the only thing I could offer.

13. On April 10, 2019, Dr. Seemann performed a second arthroscopic surgery. He performed a synovectomy to address “thick” synovium in the anterior interval, trimmed the medial meniscus, debrided an unstable root of the lateral meniscus that was pinched between the femur and tibia, and smoothed the articular cartilage on the patella and trochlear groove.

14. The second surgery was not helpful, and Dr. Seemann referred Claimant to Dr. Peter Lammens for consideration of an arthroplasty.

15. Claimant saw Dr. Lammens on July 17, 2019. He described persistent and progressive left knee pain, exacerbated by standing, walking, and prolonged activity. X-rays showed grade 4 narrowing of the medial compartment with bone-on-bone contact. Dr. Lammens recommended a left total knee arthroplasty (TKA) to address “end-stage bone-on-bone osteoarthritis.”

16. Claimant saw Dr. Timothy O’Brien on August 23, 2019 for an IME at Respondents’ request. Dr. O’Brien opined Claimant’s ongoing left knee symptoms were not work-related and merely reflected the natural progression of his pre-existing degenerative arthritis. Dr. O’Brien opined the left knee pop was not evidence of an injury, and Claimant sustained no injury at work on May 2, 2018. He opined the MRI showed only pre-existing osteoarthritis related to the ACL reconstruction in 1990s, but no acute injury. Dr. O’Brien opined Dr. Seemann should not have performed the two arthroscopies:

Orthopedic surgeons frequently bill these surgeries as minimally invasive but nothing could be further from the truth. The surgeries are significantly traumatic especially when they are performed within the backdrop of osteoarthritis. The surgical trauma only serves to create an intractable synovitis due to the wakening of quiescent areas of chondromalacia and in so doing knee pain is made worse and the arthritic condition progresses.

17. Dr. O’Brien agreed a TKA is reasonable but not related to Claimant’s work.

18. Dr. O’Brien testified the arthroscopic surgeries performed by Dr. Seemann traumatized Claimant’s arthritic knee, so he is not surprised Claimant got worse instead of better. He noted the relatively rapid progression of between the first and second surgery, and opined the surgery aggravated and accelerated the underlying arthritis, which, in turn, is now driving Claimant’s need for the knee replacement.

19. Dr. Nagamani’s opinion Claimant aggravated his pre-existing knee arthritis while working on May 2, 2018 is credible and persuasive.

20. The arthroscopic surgeries performed by Dr. Seemann to treat Claimant's compensable injury were reasonably necessary based on the circumstances and information available at the time.

21. The ALJ credits Dr. O'Brien's opinion the arthroscopic surgeries aggravated and accelerated Claimant's underlying arthritis, which ultimately caused the current need for a TKA.

22. Claimant proved the left TKA proposed by Dr. Lammens is reasonably necessary to cure and relieve the effects of his compensable injury.

CONCLUSIONS OF LAW

The respondents are liable for medical treatment reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101. The mere occurrence of a compensable injury does not compel the ALJ to approve all requested treatment. Even if the respondents admit liability for an accident, they retain the right to dispute the reasonable necessity or relatedness of any particular treatment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). Where the respondents dispute the claimant's entitlement to medical benefits, the claimant must prove the treatment is reasonably necessary and causally related to the industrial accident. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). The claimant must prove entitlement to medical benefits by a preponderance of the evidence. *Page v. Clark*, 592 P.2d 792 (Colo. 1979).

The existence of a pre-existing condition does not preclude a claim for medical benefits if an industrial injury aggravated, accelerated, or combined with the pre-existing condition to produce the need for medical treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). The ultimate question is whether the need for treatment was the proximate result of an industrial aggravation or is merely the direct and natural consequence of the pre-existing condition. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Carlson v. Joslins Dry Goods Company*, W.C. No. 4-177-843 (March 31, 2000).

Injuries suffered while pursuing authorized treatment for a compensable injury are compensable consequences of the original injury under the "quasi-course of employment" doctrine. *Travelers Insurance Company v. Savio*, 706 P.2d 1258 (Colo. 1985); *Excel Corp. v. Industrial Claim Appeals Office*, 860 P.2d 1393 (Colo. App. 1993). But the mere fact medical treatment was authorized and provided in a workers' compensation claim does not automatically mean all consequences of that treatment are compensable if the evidence shows the original injury was not work-related. *Gordon v. Ross Stores, Inc.*, W.C. No. 4-878-759-05 (February 5, 2015) (CRPS caused by authorized carpal tunnel surgery no longer a compensable consequence after respondents were allowed to withdraw their GAL).

As found, Claimant proved the left TKA proposed by Dr. Lammens is reasonably necessary to cure and relieve the effects of his compensable injury. Everyone agrees a

TKA is reasonable, and the primary dispute relates to causation. Dr. Nagamani's opinion Claimant aggravated his pre-existing knee arthritis at work on May 2, 2018 is persuasive and consistent with other evidence of record. Claimant had significant pre-existing degenerative arthritis in his knee, but it was asymptomatic or minimally symptomatic before the work injury, and caused no functional limitations or need for treatment. After recovering from the ACL reconstruction in 1996, Claimant worked physically demanding jobs and sought no treatment relating to his left knee for over twenty years. He also enjoyed recreational activities such as skiing, hiking, and mountain biking. Although the two surgeries performed by Dr. Seeman ultimately failed, they were reasonable at the time based on the available information. Dr. Seemann was not particularly enthusiastic about either surgery, but he thought surgery was the only remaining option with a reasonable chance of improving Claimant's symptoms and allowing him to return to work. Dr. O'Brien opinion the surgeries aggravated and accelerated Claimant's pre-existing arthritic changes is persuasive, and supported by the rapid progression of degeneration between the first and second surgery.

ORDER

It is therefore ordered that:

1. Insurer shall cover the left total knee arthroplasty recommended by Dr. Lammens.
2. All issues not decided herein are reserved for future determination.

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

DATED: March 17, 2020

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-975-232-002**

ISSUE

Claimant's request for reimbursement of medical costs related to right knee treatment.

FINDINGS OF FACT

1. Claimant filed an application for hearing dated October 23, 2019 endorsing the issues of medical benefits and petition to reopen claim. The medical benefits request pertains to a right knee surgery that occurred on September 6, 2019 and follow-up treatment.

2. At hearing, the parties submitted exhibits and stipulated on the record that Claimant paid out-of-pocket medical costs for her right knee surgery. The parties agreed to a reimbursement amount of \$6,911.15.

3. Respondent will reimburse Claimant the amount of \$6,911.15. The preceding amount fully resolves all out-of-pocket medical costs associated with the September 6, 2019 surgery and subsequent rehabilitation.

CONCLUSIONS OF LAW

Instead of an order reopening the matter, the parties agreed that Respondent will file a Final Admission of Liability (FAL) reflecting the additional \$6,911.15 in the column noted "medical to date." This will be the only change on the most recent FAL filed on November 10, 2016.

ORDER

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

1. Respondent will reimburse Claimant the amount of \$6,911.15 for out-of-pocket medical costs for her September 6, 2019 right knee surgery and associated treatment.

2. Respondent will file a FAL reflecting the additional \$6,911.15 in the column noted "medical to date." This will be the only change on the November 10, 2016 FAL.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as

long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at <http://www.colorado.gov/dpa/oac/forms-WC.htm>.*

DATED: March 18, 2020.

DIGITAL SIGNATURE:


Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-061-617-002**

ISSUES

- Did Claimant prove by a preponderance of the evidence the average weekly wage (AWW) should be increased to account for tips she received in concurrent employment?
- If so, what is the new AWW?

STIPULATIONS

1. The parties stipulated the admitted AWW of \$347.47 accurately reflects Claimant's wages while working for Employer.
2. Respondents agree Claimant's AWW should be increased based on concurrent wages from the Magnolia Hotel, but dispute that tips should be included.

FINDINGS OF FACT

1. Claimant suffered an admitted injury on October 9, 2017 while working for Employer.
2. At the time of the injury, Claimant was concurrently employed at the Magnolia Hotel. She worked two different jobs at the Magnolia: room service and banquets. Claimant was paid \$15.00 per hour when she worked banquets. When working room service, she was paid \$9.30 per hour plus gratuity and tips. An automatic "gratuity" of 24% was added to every room service order and was automatically applied to Claimant's wages. If a guest wanted to add an additional tip to the room service order, it was added as a credit card tip and automatically included in Claimant's paycheck.
3. Claimant occasionally received cash tips. She did not record or report cash tips and paid no taxes on them.
4. The Magnolia Hotel withheld income and FICA taxes from Claimant's wages, including the gratuities and tips.
5. The Magnolia Hotel filed a 2017 Form W-2 reflecting Claimant's earnings and withholdings for the year.
6. Claimant neglected to file a timely Federal income tax return for 2017. She filed a 2017 Form 1040EZ on December 10, 2019.
7. Respondents admitted an AWW of \$347.47, based solely on Claimant's earnings from Employer.

8. Claimant was put at MMI on October 5, 2018, with an 11% whole person impairment rating. Respondents filed a Final Admission of Liability (FAL) on October 11, 2018. The FAL admitting \$1,526.07 of TPD benefits between October 23, 2017 and April 1, 2018, with a weekly rate of "VARIED." The FAL admitted for \$11,211.86 in PPD benefits.

9. Claimant proved her AWW should be adjusted to include wages from concurrent employment at the Magnolia Hotel, including gratuity and tips.

10. The 36 weeks before the date of injury are fairly representative of Claimant's typical earnings at the Magnolia Hotel. Claimant's AWW from concurrent employment is \$449.77 ($\$16,191.65 \div 36 = \449.77).

11. Claimant's combined AWW is \$797.24 ($\$347.47 + \$449.77 = \797.24).

12. The admitted 11% whole person rating is worth \$25,724.12 based on the combined AWW ($400 \text{ weeks} \times \$531.49 \times 1.1 \times 0.11 = \$25,724.12$).

CONCLUSIONS OF LAW

Section 8-42-102(2) provides compensation shall be based on the employee's average weekly earnings "at the time of the injury." The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. But § 8-42-102(3) gives the ALJ wide discretion to "fairly" calculate the employee's AWW in any manner that seems most appropriate under the circumstances. The entire objective of AWW calculation is to arrive at a "fair approximation" of the claimant's actual wage loss and diminished earning capacity because of the industrial injury. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). If a claimant was concurrently employed at the time of the accident, "the ALJ may, in order to achieve fairness, include all such wages in the computation of average weekly wage." *Broadmoor Hotel v. Industrial Claim Appeals Office*, 939 P.2d 460, 461 (Colo. App. 1996); see also *St. Mary's Church & Mission v. Industrial Commission*, 735 P.2d 902 (Colo. App. 1986). There is no *ipso facto* rule that the AWW must invariably include wages from concurrent employment, and the ALJ should consider the specific factors in each case. *Jefferson County Schools v. Dragoo*, 765 P.2d 636 (Colo. App. 1988).

A. Should Claimant's AWW include tips and gratuities?

Under § 8-40-201(19)(b), the term "wages" includes "gratuities reported to the federal internal revenue service by or for the worker for purposes of filing income tax returns." The ICAO has repeatedly held that,

[T]he plain and ordinary meaning of the statute is that gratuities which the claimant receives in the course of employment may be considered in calculating the AWW, but only if those gratuities were reported to the IRS by the claimant, or by some other party (such as the employer) on behalf of the claimant. . . . [T]he apparent purpose of the requirements that tips be reported to the IRS is to discourage fraud by requiring reliable documentary

evidence tending to corroborate the claimant's testimony concerning the amount of the tips received.

Measho v. Brown Palace Hotel, W.C. No. 4-452-636 (June 14, 2001).

Despite acknowledging that the Magnolia Hotel filed a Form W-2 reflecting Claimant's 2017 earnings, including her tips, Respondents focus on two provisions of § 201(19)(b) to argue the tips should not be included here. First, Respondents note that the tips must be "reported to the [IRS]." Because Form W-2 is sent to the Social Security Administration instead of the IRS, Respondents argue a W-2 does not satisfy the requirement of the statute. But Respondents' argument misapprehends the interplay between the SSA and the IRS in the wage reporting process, because the SSA receives and processes wage data behalf of the IRS. 20 C.F.R. §422.114(a) provides,

SSA and IRS have entered into an agreement that sets forth the manner by which SSA and IRS will ensure that the processing of employee wage reports is effective and efficient. Under this agreement, employers are instructed by IRS to file annual wage reports with SSA on [Forms W-2 and W-3] SSA processes all wage reporting forms for updating to SSA's earnings records *and IRS tax records* (Emphasis added).

The cited regulation also describes the agencies' joint roles in identifying and reconciling discrepancies between Forms W-2/W-3 and other withholding tax forms filed by employers during the year (such as Form 941 – Employer's Quarterly Federal Tax Return). The ALJ concludes tips shown on a W-2 are "reported to the IRS."

Second, Respondents point to the phrase "for purposes of filing income tax returns," and argue that only those tips reported on an income tax return can be included in a claimant's AWW. Neither party has cited a case addressing this argument, but the ALJ is not persuaded, for several reasons. First, the completion and filing of W-2 forms by employers is intimately tied to the filing of income tax returns by individuals.¹ Taxpayers are required to report wages and withholding as reported on W-2 forms filed by the employer.

As Claimant notes, if a tax return were the only way to prove gratuities and tips for AWW purposes, an injured worker who earns tips would have to forego benefits until the tax return is filed regardless of the information on his or her pay stubs or a W-2. Furthermore, many workers never file a tax return because their total wages are below the threshold for filing a return.² Under Respondents' theory, those claimants could never

¹ Tax Topic No. 154 advises taxpayers, "If your form W-2 . . . [is not] available to you by January 31, 2020, or if your information is incorrect on these forms, **contact your employer/payor**. If you still having received the missing or corrected form by the end of February, you may call the IRS [] for assistance. . . . The IRS will contact the employer/payor for you and request the missing or corrected form. . . . If you don't receive the missing or corrected form in sufficient time to file your tax return, you may use Form 4852 to complete your return. You'll estimate your wages or payments made to you and taxes withheld on Form 4852." (Bolding in original).

² The current gross income thresholds can be found in IRS Publication 501, Dependents, Standard Deduction, and Filing Information (2019), at p.2.

have tips included in their AWW. There is no persuasive reason to believe the General Assembly intended to exclude workers in those circumstances were, as here, the tips were reported on Form W-2 by the employer.

All the income Claimant seeks to include in her AWW was subject to withholding and reported on Form W-2, including tips and gratuities. Thus, her earnings from the Magnolia Hotel earnings satisfy the requirements of the statute, and Claimant's failure to file a tax return is immaterial.

B. *What is the proper AWW?*

As found, Claimant's AWW from concurrent employment at the Magnolia Hotel is \$449.77. Her weekly earnings at the Magnolia Hotel varied fairly significantly, from a high of \$742.43 to a low of \$108.86. It is reasonable to average her earnings over a relatively long period of time to fairly account for that variability.

ORDER

It is therefore ordered that:

1. Claimant's AWW is \$797.24, including wages from concurrent employment.
2. Insurer shall pay Claimant \$25,724.12 in permanent partial disability benefits for an 11% whole person impairment based on an AWW of \$797.24. Insurer may take credit for PPD benefits previously paid in connection with this claim.
3. Insurer shall recalculate the admitted temporary partial benefits based on an AWW of \$797.24.
4. Insurer shall pay Claimant the difference between the admitted temporary partial disability benefits and the recalculated benefits within 30 days of this order.
5. Insurer shall pay Claimant statutory interest of 8% per annum on all benefits not paid when due.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference,

see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: <http://www.colorado.gov/dpa/oac/forms-WC.htm>.

DATED: March 20, 2020

s/Patrick C.H. Spencer II

Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

- Did Respondents prove they are entitled to withdraw their admission of liability for medical benefits after MMI?
- Did Claimant prove lumbar epidural steroid injections (ESIs) recommended by Dr. Lee are reasonably necessary and causally related to the industrial injury?

FINDINGS OF FACT

1. Claimant suffered admitted injuries on October 9, 2015 while working as an automobile service technician. He was opening Employer's shop in the morning when he was startled by cats and fell backwards over a stack of tires. He landed on the right side of his body. He felt immediate pain in his neck, right shoulder, and low back.

2. PA-C Tim Bewley at High Planes Community Health Center served as Claimant's primary ATP. Mr. Bewley is also Claimant's primary care provider.

3. Mr. Bewley referred Claimant for lumbar and cervical MRIs, which were completed on November 2 and November 3, 2015, respectively. The lumbar MRI showed multilevel degenerative disc disease, multilevel foraminal stenosis, grade 1 anterior spondylolisthesis of L3 on L4, a posterior annular bulge with tear at L4-5, and a posterior midline disc extrusion at L5-S1. The cervical MRI showed multilevel degenerative changes, including disc herniations and bulges. Multiple physicians have reviewed the MRIs during this claim and agree the demonstrated spinal pathology is degenerative in nature, with no acute findings.

4. Claimant had a surgical consultation with Dr. Roger Sung on November 19, 2015. Dr. Sung determined Claimant was not a surgical candidate because most of his pain was in his low back, with no neurological deficits. Dr. Sung recommended physical therapy and possible injections if the pain did not improve.

5. On November 24, 2015, Claimant's physical therapist reported, "The patient does have a history of chronic back pain but states that he was functioning well and doing okay at work without pain med intervention when this happened" The therapist assessed cervical and lumbar DJD "with recent exacerbation at work."

6. Claimant returned to unrestricted work on December 21, 2015.

7. Claimant completed physical therapy by January 4, 2016. The discharged report documented Claimant felt nearly back to his previous level of function.

8. Claimant followed up with Mr. Bewley on January 19, 2016. He had returned to work and "having some good days and bad days." He was still having 6-7/10 back pain

at night, but Vicodin helped “a great deal and he is able to sleep well.” He was also taking Naprosyn and gabapentin. Mr. Bewley renewed Claimant’s prescriptions.

9. On April 8, 2016, Mr. Bewley wrote to the claims adjuster and opined, “I believe [Claimant] has reached MMI as of my last exam date. He did have some pre-existing neck and back problems but in terms of his acute injury there will be no impairment rating. He may need PT in the future to manage his chronic musculoskeletal condition and should stay on NSAIDs long-term with monitoring.”

10. Claimant attended an IME with Dr. Gwendolyn Henke at Respondents’ request on August 21, 2016. Dr. Henke diagnosed lumbar, cervical and right shoulder strains related to the work accident. She opined the accident temporarily exacerbated Claimant’s underlying degenerative conditions but agreed with Mr. Bewley Claimant reached MMI with no impairment on January 19, 2016. She opined the work-related strains resolved and Claimant’s residual symptoms were related to his chronic, preexisting conditions.

11. Claimant had a DIME with Dr. Michael Janssen on August 23, 2016. Dr. Janssen determined Claimant was at MMI as of the date of the DIME, with a 19% whole person rating. The rating was based on 7% for the cervical spine and 13% for the lumbar spine. The lumbar spine rating included 7% under Table 53(II)(c) for six months of medically documented pain and rigidity associated with *moderate to severe* degenerative changes.

12. Dr. Janssen issued an addendum report on October 24, 2016 after reviewing Dr. Henke’s report. He saw no reason to change any of his conclusions.

13. Respondents requested a hearing to challenge Dr. Janssen’s DIME rating. A hearing was held before ALJ Felter on January 24, 2017. Respondents stipulated to an admission for reasonably necessary and related medical benefits after MMI, and the parties sole issue for hearing was overcoming Dr. Janssen’s rating. In an Order dated February 14, 2017, Judge Felter determined Respondents failed to overcome the DIME by clear and convincing evidence. Judge Felter found Claimant’s preexisting degenerative changes in his neck and low back were “incipient” and “non-disabling” before being aggravated by the work accident. Judge Felter concluded Dr. Henke’s causation opinions reflected “a mere difference of opinion” and were insufficient to overcome Dr. Janssen’s rating by clear and convincing evidence.

14. Respondents filed a FAL on March 23, 2017 based on Judge Felter’s order. The FAL admitted for “authorized medical benefits to maintain MMI.”

15. Claimant’s back symptoms steadily worsened starting in the Fall of 2017.

16. In September 2017, Claimant reported ‘now having more pain generally.’

17. Claimant saw Mr. Bewley on October 26, 2017 after having back spasms for two days. Mr. Bewley noted,

[H]is back pain . . . seems to be worse than usual especially the low back, now he's having a lot of shoulder pain. In terms of medication is really on the maximum amount of meds he can take. He does still work as a mechanic and with his musculoskeletal issues this keeps his pain active. He also has to stand on concrete for extended period of time each day which [is making] the back pain worse. At this point he has no other option in terms of his job. He seems to be having more trouble getting through the day without a great deal of pain.

18. On April 11, 2018, Mr. Bewley noted Claimant was "still working at the garage and has to stand for prolonged periods on a concrete [floor]." Claimant's had recently driven to Texas to visit his daughter, which severely aggravated his back for several days. Mr. Bewley wrote, "Patient continues to have the same cycle of pain primarily seems to be a related to the prolonged standing and working []. His medications take the edge off, but the pain is still impacting his wife a great deal. We had a discussion again today as we have in the past about possibly finding a different way to make a living that wasn't so hard on his back. . . . [A]s long as this continues, I'm concerned that he'll continue to have a functional decline and he should strongly consider a different [v]ocation."

19. On April 24, 2018, Mr. Bewley reported, "[Claimant]'s having a great deal more low back pain in the last month. He has been to a chiropractor 6 times in the last month. Pt. is at a 10 most of the day unless he can sit down or lay down. He is using ice on a regular basis. Now having pain shooting down the L leg and falling asleep with numbness down to toes." Mr. Bewley increased Claimant Norco dosage.

20. In approximately June 2018, Mr. Bewley added MS Contin to augment the Norco.

21. Claimant started physical therapy on July 5, 2018. He told the therapist "his back pain has become particularly severe over the course of the last couple months." Claimant had purchased an inversion table and a new mattress in hopes of finding some relief for his low back pain. The therapist noted, "his work as a mechanic requires him to intermittently lift very heavy loads and to spend most of his day in a flexed position in the lumbar spine." The therapist documented 3-/5 strength in the bilateral lower extremities. The therapist thought Claimant's symptoms were consistent with a herniated lumbar disc.

22. The therapist terminated PT on July 23, 2018 because Claimant was not responding. He noted, "[Claimant] has persistent radiculopathy in his lower extremities and pain that prevents him from conducting many typical daily activities. . . . I recommend that he receive an MRI to diagnose disc pathology and a referral to a spine specialist for higher level of care."

23. On July 25, 2018, Mr. Bewley again increased the dosage of narcotics and referred Claimant to Dr. Larry Lee, a surgeon.

24. Dr. Lee evaluated Claimant on August 30, 2018. Claimant reported 9/10 low back radiating into his left leg and making his foot go numb. The pain was interfering with Claimant's ability to do his job. He told Dr. Lee the symptoms were "very consistent with the type and distribution of pain he has had for the last three years." That history is not accurate, because left foot numbness was not documented until April 2018. Dr. Lee's physical examination demonstrated loss of strength (4+/5) in the left S1 myotomal distribution, which was also a new finding.¹ Straight leg raise was positive on the left.² Dr. Lee opined Claimant's symptoms were consistent with radiculopathy from a left L5-S1 herniated disc. He requested an updated lumbar MRI and ordered an L5-S1 ESI. Dr. Lee's evaluation was the first physician exam since the October 2015 injury documenting clinical neurological signs consistent with lower extremity radiculopathy.

25. The repeat lumbar MRI was completed on August 20, 2019. The radiologist interpreted multilevel degenerative changes, "not significantly changed compared to the prior exam from 2015."

26. Claimant followed up with Dr. Lee on September 20, 2019 to review the MRI. Dr. Lee personally reviewed the images and disagreed with the radiologist's interpretation. Specifically, he saw "more spondylosis at the L4-5 level especially in facet fluid versus 4 years ago. This is suspicious for a mobile L4-5. This is not apparent on the imaging in 2015."

27. Dr. Lee referred Claimant to Dr. Finn, and Dr. Finn's office requested authorization for an L4-5 ESI. Respondents denied the procedure.

28. Flexion-extension x-rays taken on December 2, 2019 showed 1.2 cm anterolisthesis with flexion and 8 mm with extension at L4-5. Dr. Lee opined,

While the spine MRI did not show spondylolisthesis, the fact that he slips 1.2 cm on standing films places him firmly in the unstable spondylolisthesis category. This is what we suspected at the last visit. As a result, I would recommend the same plan as previously stated.

Exam and symptoms . . . are consistent with a L4-5 spondylolisthesis leading to compression of the left L4 nerve root. . . . As the symptoms do include weakness, I would recommend a more aggressive conservative approach.

29. Dr. Jeffrey Wunder conducted an IME and a record review for Respondents in 2019. Dr. Wunder opined none of Claimant's current symptoms are causally related to his October 2015 work accident.

30. Respondents proved treatment for Claimant's low back is no longer causally related to the October 2015 injuries. The treatment now recommended by Dr. Lee is aimed at radiculopathy and unstable spondylolisthesis, neither of which were caused or

¹ Dr. Janssen found normal strength throughout both legs. Dr. Sung also found normal strength.

² SLR was negative bilaterally at Dr. Janssen's examination.

aggravated by the accident. The worsening of Claimant's condition since 2017 reflects the natural progression of his underlying degenerative conditions without contribution from the work accident.

31. Claimant continues to periodically complain of neck and right shoulder symptoms, but there is no persuasive evidence any provider is recommending specific treatment for his neck or shoulder. Mr. Bewley has focused on Claimant's lumbar spine for at least the last two years. Dr. Lee recommended treatment for Claimant's low back only. Any ongoing right shoulder or neck symptoms are related to underlying degenerative conditions and Claimant's personal health status. Respondent proved Claimant requires no further treatment for his neck or right shoulder in relation to his industrial injuries.

CONCLUSIONS OF LAW

Respondents are liable for medical treatment from authorized providers that is reasonably necessary to cure or relieve the employee from the effects of the industrial injury. Section 8-42-101(1)(a); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). The need for medical treatment may extend beyond maximum medical improvement (MMI) if the claimant requires periodic maintenance care to prevent further deterioration of their physical condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). An injury need not be the sole cause of a claimant's need for treatment so long as there is a "direct causal relationship" to the industrial accident. *Seifreid v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1996); *Munoz v. JBS Swift & Co. USA, LLC*, W.C. No. 4-780-871-03 (October 7, 2014).

Even where the respondents admit liability for medical benefits after MMI, they retain the right to challenge the compensability and reasonable necessity of specific treatment. *Hanna v. Print Expeditors Inc.*, 77 P.3d 863 (Colo. App. 2003). Ordinarily, the claimant must prove by a preponderance of the evidence that an injury directly and proximately caused the condition for which he seeks benefits, and that the requested treatment is reasonably necessary. *Walmart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). But § 8-43-201(1) was amended in 2009 to place the burden of proof on the party seeking to modify an issue determined by an admission or order. If the effect of the respondents' challenge to medical treatment is to terminate all previously admitted maintenance benefits, the respondents must prove no further treatment is reasonable, necessary or related to the injury. *Salisbury v. Prowers County School District RE2*, W.C. No. 7-702-144 (June 5, 2013); *Dunn v. St. Mary Corwin Hospital*, W.C. No. 4-754-838 (October 1, 2013). The fact a claimant received a DIME rating for a particular diagnosis or body part does not bind the ALJ when considering relatedness of medical treatment after MMI. *Yeutter v. CBW Automation, Inc.*, W.C. No. 4-895-940-03 (February 26, 2018).

As found, Respondents proved there is no causal connection between any ongoing need for treatment and the 2015 admitted injury. The work accident caused no structural damage to Claimant's spine, and his injuries were limited to strains and a purely symptomatic aggravation of his preexisting conditions. He reasonably required treatment,

which satisfied the threshold criteria for a compensable claim. The pain and rigidity persisted for more than six months, which entitled him to a rating and PPD award. Claimant's condition has worsened since the FAL was filed in March 2017. His pain level has been consistently higher, and he started exhibiting clinical findings consistent with radiculopathy. Dr. Lee persuasively explained the spondylolisthesis at L4-5 has progressed since the 2015 MRI, with current findings suggestive of instability. The treatment recommended by Dr. Lee is directed to spinal pathology unrelated to the work accident. Similarly, the medications being prescribed by Mr. Bewley are for symptoms related to nonwork-related conditions. Claimant's current symptoms represent the natural progression of his underlying degenerative conditions, with probably at least some contribution from his continued heavy work as an automobile mechanic (for other employers). None of his current symptoms are proximately caused by the October 2015 work accident.

ORDER

It is therefore ordered that:

1. Respondents' request to withdraw their admission of liability for medical benefits after MMI is granted.
2. Claimant's claim for further medical benefits related to the October 9, 2015 accident is denied and dismissed.

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

DATED: March 31, 2020

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

- I. Have Respondents shown, by a preponderance of the evidence, that Claimant is barred, by issue preclusion, from relitigating the issues of reasonable, necessary, and related medical benefits for his cervical and lumbar spine?
- II. Have Respondents shown, by a preponderance of the evidence, that Claimant's 2018 lumbar and cervical surgeries served as intervening events, thereby severing Respondents from further liability for the medical treatment being requested by Claimant?
- III. Has Claimant shown, by a preponderance of the evidence, that he is entitled to a general award of medical benefits for his neck and back injuries?
- IV. Has Claimant shown, by a preponderance of the evidence, that he is entitled to specific medical benefits as being reasonable, necessary, and related to his 4/13/2018 work injury, to wit: Brain MRI as recommended by Dr. Schalin; Physical Therapy as recommended by Drs. Stanton and Schalin; Neck and Back Treatment recommended by Dr. Stanton (not to include surgeries as already performed); Lumbar MRI as recommended by Dr. Stanton; Treatment with Dr. Malinky as referred by Dr. Schalin?

ADMINISTRATIVE NOTICE

On February 26, 2019, a hearing was held in WC 5-078-097-003 before the undersigned ALJ on the issues of the reasonableness, relatedness, and necessity of 1) cervical spine surgery as performed by Dr. Stanton on 7/30/2018, and 2) lumbar surgery as performed by Dr. Stanton on 12/12/2018. On April 16, 2019, this ALJ issued an Order *denying* the relief sought by Claimant. As noted by the parties, the Order was not appealed, and that Order is now final.

On May 22, 2019, a hearing was held in WC 5-078-097-004 before ALJ Patrick Spencer on the on the issue of whether the orthopedic evaluation by Dr. Simpson for Claimant's right knee was causally related to the April, 2018 work accident. On June 11, 2019, ALJ Spencer issued an Order *granting* the relief sought by Claimant, in this case the orthopedic evaluation of his right knee by Dr. Simpson.

The undersigned ALJ takes administrative notice of both Orders (Ex. B, Ex. C), and incorporates by reference all Findings of Fact and Conclusions of Law issued in connection therewith, and will not repeat those here, except as noted.

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

Claimant's February 11, 2020 Hearing Testimony

1. Claimant testified at hearing. He described the weather conditions, and slip and fall injury, detailing which body parts were injured. He described injuring his "head, neck, my hips, my right leg, knee, foot, then then my right elbow."
2. Claimant also described details of the mechanism of injury, treatment history, and return to work for his prior, 2009 work-related injury. Similarly, Claimant was able to recall and testify to the details of a 2006 work-related injury, treatment, and return to work. Claimant testified, in detail, to his history of pain medications and ongoing back pain.
3. However, on cross-examination, Claimant was unable to recall anything about the 29% whole person impairment rating he received through a workers' compensation claim in 2010.
4. On direct examination, Claimant testified that he felt like he broke something in his neck and low back during his slip and fall accident. On cross-examination, Claimant again testified that he hit his head during the slip-and-fall accident. Claimant also testified that his initial treating providers did not list everything that he asked them and that they did not document everything the way it should have been.
5. The medical records do not reflect any report of head or neck injury, either in the initial report to the employer or in initial treatment to any treating physician. (Ex. B, pp. 4-5).
6. Claimant testified he continues to experience symptoms related to his neck injury that include numbness in hands and forearms, weakness in his arms and hands, and neck pain. And his current low back symptoms include "out of control pain" that radiates into his legs. He explained the pain is different than that he experienced prior to the injury; the pain back then was "a little nagging numbness from overworking my back" but now it is "chronic" and feels like "electrical surges at times, from my butt bone all the way down my legs and in my hips and into my groin." When medications "take the edge off," he is left with a "dull, grinding pain."
7. Claimant initially testified, regarding his low back, that it was just 'out of control' pain. He then testified, regarding the lumbar fusion, that it 'greatly improved' his condition. He also testified that he remembered testifying that the back surgery greatly improved his condition.

8. Claimant testified that he was told that he was discharged from physical therapy because he had a fall, and that he was advised to stop by Dr. Shalin. However, on March 5, 2019, Dr. Shalin documented that the reason Claimant was discharged from post-surgical physical therapy as "...lack of progress. Per PT has had trouble remember [sic] what he was instructed to practice at home for unclear reasons." (Ex. U, p. 196).

9. On cross-examination, Claimant testified that his foot was dragging in advance of the lumbar fusion but he wasn't overly aware of it. However, the left foot drop was not documented in medical records until Dr. Shalin did so on July 15, 2019. (Ex. U, p. 264).

10 Claimant explained he has fallen numerous times because of his right knee injury; "my knee just buckles and gives out and then I fall..." He testified he has struck his head and sustained concussions as a result of these falls.

11. Claimant testified he wishes to receive the additional treatment that has been recommended for his neck and his low back because he "wants to get back work" and wants to "get back to normal."

Claimant's Treatment since the February 26, 2019 Hearing

12. On March 5, 2019 Dr. Schalín observed; "GAIT: walks very slowly, cautiously, with a shuffling gait using his walker. Is independent doing this. Is able to lift the walker over a threshold, down a curb or folding & placing it in the trunk of his car, all in slow motion. Then walks himself to drivers side of car lightly balancing himself with right hand on the car. Is able to sit down in the car by lifting each leg into the car." (Ex. 1, pg. 155). She noted he suffered from "frequent falls & unsteadiness." *Id* at 156.

13. Dr. Schalín noted, "...Discussed last week's discharge from physical therapy due to lack of progress & difficulty at times remembering the instructed home exercises. I had patient show me today, some of what he is practicing doing at home, and he was able to show me 3-4 movements. Will check in this each follow-up visit. I discussed with patient my conversation this morning with Dr. Stanton regarding the recent discharge from physical therapy, his difficulties progressing, some of the hindering factors (ex. excessive pain L lateral hip, deep abdominal pain, frequent falls)..." *Id*.

14. Also on March 5, 2019 Dr. Stanton recommended repeat lumbar MRI "...to be sure he has not had any new onset disk herniation or other collapse." He administered a left hip injection. (Ex. 3, p. 285).

15. On April 1, 2019, Dr. Schalín noted, "NECK: continues with ongoing neck pain & stiffness with tingling & numbness in both hands finger tips. Arms feel weak & kind of 'fumbly'...LOWER BACK & LEFT HIP hurts 8/10 right now, at worst 10/10, best 7/10 and on average 8/10. Pain is worse with movement, activity, sitting or standing for any length of time...Both legs are still numb & weak, L more weak than the right and he has sciatic pain radiation into both

legs.” (Ex. 1, p. 136). She recommended additional physical therapy for the neck and back. *Id* at 131.

16. Dr. Stanton injected Claimant’s left hip again on April 2, 2019 and noted, “...I believe the patient would benefit from a course of physical therapy. This will include flexibility, range of motion, and strength exercises.” (Ex. 3, pg. 281). Dr. Stanton submitted a formal request for lumbar spine physical therapy and certified it was “medically necessary.” *Id* at 278, 279.

17. On April 30, 2019 Dr. Schalin reported, “...Has been having *frequent falls before & after lumbar fusion*, slowly lessening...Did try mowing lawn with motorized hand held lawn mower fell on right side. Sees Stanton 5/21. Has not started PT, approval pending.” (Ex. 1, p. 117)(emphasis added).

18. On May 14, 2019 Dr. Schalin again noted Claimant’s “continued frequent falls,” and stated, “...The falls are likely related to still having severe weakness in the legs, especially in the *left* leg (ankle & hip). We discussed that being able to resume formal physical therapy would likely speed up his healing time.” (Ex. 1, p. 111)(emphasis added).

19. On May 21, 2019 Dr. Stanton noted Claimant was still having persistent *left* lower extremity symptoms. He again recommended repeating the lumbar MRI. *Id* at 274.

20. On July 1, 2019 Dr. Schalin noted Claimant was still waiting for authorization of physical therapy, as well as the repeat MRI Dr. Stanton recommended. She placed an order for EMG testing of the lower extremities. (Ex. 1, p. 99). Dr. Schalin noted Claimant was suffering from “...continued severe bilateral sciatica & leg weakness, L > R with left drop foot. Please provide patient with an Arizona AFO for left ankle/drop foot.” *Id* at 84.

21. On July 29, 2019 Claimant was seen by Kimberly Shenuk, PA-C, in the office of orthopedist Dr. Michael Simpson. She reported, “...Unfortunately work comp is currently denying his lumbar spine and anything associated with that...He does have a meniscal tear and will require surgery at some point, but we need to have him in an AFO brace before we can consider that. He need to have a stable gait prior to proceeding with any surgical intervention on his knee...” (Ex. W, p. 286).

22. Also on July 29, 2019 Dr. Schalin reported the recommended MRI, EMG testing, physical therapy, and AFO brace were “...all needed for further evaluation to see why he is not improving adequately, to look for complications & treatable problems, the PT to strengthen his legs so that he can tolerate right knee surgery, the AFO brace for L drop foot to help improve his gait...” (Ex. 1, p. 77).

23. Claimant saw Aaron White, PA-C, in Dr. Stanton’s office on August 1, 2019. Mr. White noted the requested MRI, AFO brace, and EMG testing had been denied by insurance. Mr. White noted, “...In reviewing his chart it did not

appear that Mr. McIntyre had left lower extremity weakness when he saw Dr. Stanton. This is a new finding.” (Ex. 3, p. 270).

24. On August 12, 2019 Dr. Schalin noted Claimant “...fell again this a.m., walking unsupported into his closet and kicked right 3, 4, 5 toes hard against door jam base. It hurts like they are broken...His lower back & bilateral hip pain is worse with activity, walking more than 100 yards...Continues with severe pain bilateral hip post trochanteric bursa and severe bilateral leg sciatica, L > R with severe leg weakness left leg.” (Ex. Z, p. 306).

25. On August 19, 2019 Ms. Shenuk reported, “...There is still no word on authorization for his AFO from his insurance company. He does go to court next month. He still [sic] having significant issues and has had multiple falls since his last visit. He did injure his *right* foot recently. He fell about a week ago and has significant swelling and bruising to his third and fourth toes.” (Ex. AA, p. 321). Claimant was provided with a *right* knee brace. *Id* at 319.

26. On August 26, 2019, Dr. Schalin recommended MRI of the brain “...due to severe concussion symptoms, headaches, L tinnitus since fall twice a couple of weeks ago (due to *left* leg weakness).” She noted Claimant was waiting for right knee meniscus surgery with Dr. Michael Simpson, “...which can only be done once he has the AFO brace for L drop foot & legs are stronger.” She again recommended physical therapy, the AFO brace, lumbar MRI, and EMG testing. (Ex. 1, p. 64).

27. Claimant underwent the repeat lumbar MRI at his own expense on September 9, 2019. (Ex. 5, pp. 399-400).

28. On September 14, 2019 Respondents denied payment for Claimant’s office visit with Dr. Stanton, and lumbar and hip x-rays, all conducted on May 21, 2019. (Ex. 6, pp. 412-413).

29. On September 23, 2019 Dr. Schalin reported, “...Right knee surgery is approved by WC, but needs legs to be stronger first.” She noted Claimant had the MRI, and that EMG testing was upcoming, but he had still not started physical therapy, received the AFO brace, or had the brain MRI she recommended. (Ex. 1, p. 50).

30. Dr. Katharine Leppard performed lower extremity EMG testing on October 2, 2019 and found the results to be “normal.” (Ex. CC, p. 351).

31. On October 8, 2019, Respondents denied payment for the lumbar MRI performed on September 9, 2019. (Ex. 6, p. 411).

32. Claimant saw Dr. Malinky on October 23, 2019 and the doctor noted that after the neck and back surgeries, “...His neck is doing better. However, he is still having back pain, leg pain, and some weakness...” (Ex. 2, pg. 246). Dr. Malinky adjusted Claimant’s medications, and discussed performing an epidural steroid injection “in the next week or two.” (*Id.*) He submitted a request for authorization of the injection on October 29, 2019. (*Id.* at 240).

33. On November 4, 2019 Dr. Schalin noted, "...He is still awaiting the approved right knee surgery, because he needs the Arizona AFO brace for L dropfoot, and physical thx to strengthen the legs first. These were approved, but has not happened yet." (Ex. 1, pg. 35). Dr. Schalin referred Claimant to Dr. Malinky "...for lumbar injection as per Dr. Stanton's 9/17 recommendation, and for pain management / pain meds. Refer to Dr. Stanton for cortisone inj of bilateral hip post-trochanteric bursitis pain." (Id. at 36).

34. On November 7, 2019 Respondents' counsel notified Dr. Malinky that his request for authorization of the injection was denied. Counsel represented that this ALJ's Order of April 16, 2019 determined the lumbar spine "...was not related to Claimant's current workplace injury." [This ALJ did conclude that the lumbar (and cervical) *surgeries* were not related to the work injury, and therefore denied and dismissed Claimant's *request for reimbursement of the costs of the surgeries*. The April 16, 2019 Order did not specifically conclude that Claimant's lumbar spine *condition* (or cervical spine condition) was unrelated to the work accident. The April 16, 2019 Order did find *an absence of sufficient evidence that Claimant ever struck his head or neck* in the fall for which he is seeking compensation.]

35. On November 20, 2019 Dr. Malinky reported, "...He has not been in physical therapy and at this point I feel like this is a significant factor negatively affecting him as he had significant trauma along with surgery. He definitely needs to be in rehab to regain strength, balance, and some neuromuscular function. I'm going to send a referral under his commercial insurance for warm water therapy. Patient definitely needs to be in therapy for at least twice a week for the next four to six weeks so he can improve his gait, get rid of his walker, improve his strength and weakness, as well as his foot drop." (Ex. 2, pg. 239).

36. On December 3, 2019, Dr. Schalin reported Claimant had received the AFO brace, but "...insurance is still denying physical therapy for anything else than right knee, so the leg strengthening will likely not happen..." She noted she would be retiring at the end of the year, and was referring Claimant to Dr. Miguel Castrejon to take over care. (Ex. 1, pg. 21).

37. On December 31, 2019 Dr. Schalin identified "problems still requiring active treatment" to include the right knee, lumbar strain with sciatica, left foot drop, concussion due to repeated falls, and neck strain. She confirmed "...Worker's comp never approved physical therapy to strengthen legs prior to surgery, so arrangements is [sic] being made to have the surgery anyhow..." (Ex. 1 pp. 8, 9).

38. On January 15, 2020, Mr. Haeffner at Dr. Malinky's office noted the medications Claimant required for his moderate-to-severe back pain included Oxycodone, Ztampza, Robaxin, and Lyrica. (Ex. 2, pg. 233). He noted a L5-S1 selective nerve root block for low back pain and radiculitis had been ordered, "...but pt couldn't afford at this time as he is having a lot of difficulty with W/C denying coverage for this and other appropriate medical treatments...Water therapy helped but he can't go often since he has to pay on his own." (Id.)

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. §8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. §8-43-201, C.R.S.

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

C. Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). In this case (as was the case in the prior hearing), Claimant has not been a consistent or reliable medical historian. At hearing, he attributes a lack of documentation in his medical files to inattention or mistakes by his medical providers, when in fact the evidence shows that Claimant, perhaps in spite of himself, simply cannot recall what he has told his providers throughout the course of his treatment. Regular usage of opioids, unfortunate as it is, cannot be ignored in this instance.

D. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55, P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

E. Further, courts are to be "mindful that the Workmen's Compensation Act is to be liberally construed to effectuate its humanitarian purpose of assisting injured workers." *James v. Irrigation Motor and Pump Co.*, 503 P.2d 1025 (Colo. 1972).

Claim Preclusion

F. Claim preclusion works to bar the re-litigation of matters that have already been decided as well as matters that could have been raised in a prior proceeding but were not. Claim preclusion protects "litigants from the burden of relitigating an identical issue with the same party or his privy and ... promote[s] judicial economy by preventing needless litigation." *Lobato v. Taylor*, 70 P.3d 1152, 1165-66 (Colo. 2003)(quoting *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326, 99 S. Ct. 645, 649, 58 L.Ed.2d 552 (1979)). For a claim in a second proceeding to be precluded by a previous judgment, there must exist: (1) finality of the first judgment, (2) identity of subject matter, (3) identity of claims for relief, and (4) identity of or privity between parties to the actions. *Holnam v. Industrial Claim Appeals Office*, supra.

G. As those elements are applied here; (1) this ALJ's Order dated April 16, 2019 became final on or about May 6, 2019 after neither party appealed. There is finality of the first judgment. (2) Both the hearing on February 26, 2019 and the hearing on February 11, 2020 involved the scope of Respondents' liability for Claimant's industrial injuries. In that sense, there is arguably identity of subject matter. (4) The parties to both proceedings are the same. However, element (3) – identity of claims for relief – is not satisfied.

H. Claimant argues that the February 26, 2019 hearing concerned only Respondents' potential liability for the neck and low back *surgeries*. It did not concern Respondents' liability for *other treatment* for those injuries, nor was the issue ripe at the time of that hearing. Further, there was not the opportunity to prepare and cross-examine Dr. Rauzzino during his 2/25/2019 deposition on the issue of the treatments *now* being sought. The ALJ concurs. As noted above, Respondents appear not to have denied any treatment to the neck or back at issue here until September 14, 2019 - well *after* the Order from the first hearing became final. The requested neck and back treatment (other than surgeries) was not ripe for the first hearing, since at that time Respondents had not denied anything beyond those two surgeries. The ALJ finds, therefore, that relief sought by Claimant in this matter is not precluded by either prior Order issued in this case.

Claimant's Entitlement to Medical Benefits, on the Merits

I. Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. C.R.S. §8-42-101; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). Claimant must prove entitlement to benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

J. A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). Moreover, a claimant is not required to prove causation by medical certainty. Rather, it is sufficient if the claimant presents evidence of circumstances indicating with reasonable probability that the condition for which he seeks medical treatment resulted from or was precipitated by the industrial injury, so that the ALJ may infer a causal relationship between the injury and the need for treatment. *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968).

Medical Benefits, as Applied

K. This is an admitted claim. A General Admission of Liability was filed on 7/3/2018, admitting for TTD and medical benefits. To the extent that Claimant is requesting a general award of medical benefits, which are reasonable, necessary, and *related* to his work injury – including his neck and back - that has already been granted by Respondents. The devil is in the details.

L. With respect to the cervical spine, records do not support that the April 13, 2018 work accident caused Claimant's current cervical spine issues. In Claimant's initial report to Employer, he does not mention any involvement or pain in the head or neck. Medical records following the accident do not describe Claimant as having any cervical pain or cervical injury. The medical evidence showed, then and now, that Claimant's cervical spine issues were pre-existing, degenerative cervical spinal disease, so extensive that they required a cervical fusion surgery which encompassed virtually the entire cervical spine. As noted, this ALJ has previously found an *absence of sufficient evidence* to show that *Claimant struck his head or neck* at all during this fall.

M. With respect to the lumbar spine, records do not support that the April 13, 2018 work accident caused Claimant's current lumbar spine issues. Claimant has a well-documented history of degenerative lower back conditions, so much so that Claimant underwent an extensive, unrelated lumbar fusion surgery. This lumbar fusion was so extensive as to effectively treat the entirety of the lumbar spine, demonstrating a

chronic, degenerative deformity, rather than an acute structural injury resulting from a single fall. Claimant's degenerative lumbar spine issues were painful enough that shortly **before** this work accident, he reported for medical care and requested an *increase* to his methadone dosage. And while physical therapy offered for his lumbar strain and contusion was likely *related* to his fall early on, certainly that is no longer the case. The requested physical therapy is now many months after the fact, and following lumbar fusion surgery.

N. The ALJ notes the physician's initial intake notes from 4/19/2018 state: "Initial Visit: DOI 4-14 on a sat not 4-10 as he [Claimant] put on intake...he had *some* increase in his *chronic* back pain..." (Ex. K, p. 73). Claimant himself waited 5 to 6 days (at hearing, he testified he was injured on 4/13/2018) before reporting this work fall, then apparently got the date wrong on the intake form-suggesting that 9 days had passed. This, especially coming from a health care worker, is strongly suggestive of a fall not causing severe trauma. As such, the ALJ cannot conclude that Claimant aggravated a preexisting condition only now requiring the requested medical treatment.

O. Since the time of Claimant's (denied) cervical and lumbar surgeries, Claimant's gait has deteriorated, resulting in frequent *falls and head injuries*, and he began reporting issues with his left leg, left foot drop, left hip, increased symptoms of erectile dysfunction and the need for ongoing treatment to his cervical and lumbar spine. These problems are on his *left* side, and have not been shown to be due to the injury to Claimant's *right* knee. Nor have they been shown to relate to the relatively minor work injury to his back.

P. As unfortunate as Claimant's medical situation is, the ALJ finds and concludes that Claimant's medical complaints, for which he now seeks further treatment stem from his longstanding degenerative issues, and were *not proximally caused* by the April 13, 2018 slip and fall accident. They did not stem from his right knee injury. While arguably reasonable, even necessary, to treat Claimant's medical condition, these treatments are not *related* to his work injury, and should be addressed outside the Workers Compensation system. Those treatment modalities specifically denied are the brain MRI, physical therapy for neck and back, lumbar MRI, and treatment by Dr. Malinky.

Lumbar and Cervical Surgeries as Intervening Events

Q. Because Claimant has failed to show that the treatments now being sought are **related** to his work injury, it is not necessary for Respondents to show that his (non-work-related) lumbar and cervical surgeries served as intervening events.

ORDER

It is therefore Ordered that:

1. Claimant's request for medical benefits, specifically: Brain MRI, physical therapy now recommended relating to Claimant's neck and back, repeat lumbar MRI, and treatment now recommended by Dr. Malinky, is denied and dismissed.
2. All matters not determined herein are reserved for future determination.

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

DATED: March 23, 2020

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

- I. Whether Claimant established by a preponderance of the evidence that he suffered a compensable injury involving his left shoulder.
- II. Whether Claimant established that the right to select a medical provider passed to Claimant.
- III. Whether Claimant established by a preponderance of the evidence that he is entitled to reasonable, necessary, and related medical treatment, including the treatment he received through Banner Health, Dr. Reynoso, and Dr. Reynoso's referrals.
- IV. Whether Claimant is entitled to temporary disability benefits.
 - Whether Claimant established by a preponderance of the evidence that he is entitled to temporary total disability benefits as of December 24, 2017.
 - Whether Respondents established by a preponderance of the evidence that Claimant is at-fault for his wage loss and not entitled to temporary disability benefits.
- V. Whether Respondents established by a preponderance of the evidence, that Claimant violated § 8-43-102(1), in failing to timely report the June 20, 2017 industrial injury in writing and that penalties should be assessed if the claim is found to be compensable.

STIPULATIONS OR ADMISSIONS

Pursuant to Respondents' Proposed Specific Findings of Fact, Conclusions of Law, and Order, they contend Claimant's average weekly wage is \$1,249.64, without inclusion and adjustment of the Employer sponsored health insurance. Therefore, such figure will be used in this order, but Claimant is not bound by this figure since Claimant did not confirm in his proposed order that he reached an agreement with Respondents regarding his average weekly wage.

FINDINGS OF FACT

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

1. Claimant, [Claimant's name Redacted], was born on July 10, 1953, and is currently 66 years old.

2. Claimant has been a truck driver since 2007. He was hired by Employer on June 8, 2015. (*T1, p. 53*)
3. Claimant passed a pre-employment physical when he was hired and had to pass subsequent physical exams every two years to maintain his DOT license. (*T1, p. 55*)
4. Claimant's job duties involved driving semi-trucks for Employer. He drove trucks between railroad yards and oil fields. His duties also included having to go inside the large containers used to haul sand on occasion and clean them out. At first, Claimant worked the day shift, but he switched to the nightshift where he was picking-up and delivering sand used for fracking to oil well sites. Claimant testified that he accepted the transfer since the need for the sand deliveries was year-round and that he would no longer be laid-off during the cold weather months. (*T1, p. 58*)
5. Based on his payroll records, Claimant started working the night shift towards the end of January in 2017. (*Exhibit L, p. 57*)
6. Claimant testified that the new job required the normal checking the tires, and so on, regarding his truck at the start of his shift and then driving to a sand dump site where large bins on his trailer would be filled with sand. He would then drive to the oil field and deliver the sand. He stated that his duties required him to position openings in the top of the large bins under distribution shoots, and then climb on top of the large sand containers and open metal lids to allow the sand to be dumped into the containers. Claimant would then have to close the metal lids once the containers were full of sand. Claimant testified that the loading of the sand at the OmiTrax facility required him to drive his truck up onto a ramp and then climb down steps to put information into a computer. He would then have to climb a set of stairs to get up to a catwalk, level with the top of his trailer, so he could open the hatches or lids on top of the containers. Once the containers were full of sand he would close the lids and climb back down the stairs and climb up into his truck cab before driving off.
7. Claimant testified that he had no problems performing his job duties before June 2017. He also testified that on or about June 20, 2017, however, he was at a sand delivery site and was climbing down from his cab, while holding on to the truck steering wheel with his left hand. As he did so, he stepped into a water filled hole which was deeper than he expected and he felt a pull in his left shoulder. He called his direct supervisor, Shawn T[Redacted], and reported the work injury. Claimant finished his shift without further incident. Claimant testified that when we woke up the next day he could barely use his left arm. He then discussed the matter with Mr. T[Redacted] again and was told to take a few days off and rest his shoulder. At this time, Mr. T[Redacted], Claimant's supervisor, knew about the accompanying facts connecting Claimant's shoulder injury with his employment and that his injury might involve a workers' compensation claim. Moreover, Mr. T[Redacted] testified that he advised his supervisor and/or the safety manager about Claimant's shoulder injury. Despite having actual knowledge of Claimant's work injury, neither Mr. T[Redacted] nor any other Employer representative

directed Claimant to seek medical treatment from one of the Employer's designated medical providers in June 2017.

8. After taking a few days off work, at the direction of his supervisor, Claimant was still having problems with his shoulder. But because the Employer did not timely direct Claimant to seek medical treatment from a designated medical provider, Claimant sought medical treatment with a physician on his own.
9. On June 23, 2017, Claimant sought medical treatment at Banner Health and was seen by Alan Reynoso, M.D. As noted in the report from his visit that day, Claimant's chief complaint was that he developed shoulder pain due to an accident at work and had not worked for the last three days. The history provided by Claimant, as documented by Dr. Reynoso, shows Claimant had gone back to truck driving at some point and had started developing mild pain in his left shoulder. Then, while he was getting out of his truck on or about June 20, 2017, "he fell when he was unsure of the footing and it was deeper than he thought and pulled the whole shoulder." Dr. Reynoso also said in his report that although Claimant felt much better – after not working for three days - Claimant was concerned about going back to work and further injuring his left shoulder. Moreover, at this first visit for his shoulder injury, Claimant's weight was listed as 163.9 kilograms, which is equivalent to 361.34 pounds. (*Exhibit 3, pp. 10-11*)
10. On physical examination, Dr. Reynoso documented Claimant had decreased range of motion regarding his left arm and still had pain involving his left triceps and rotator cuff. He prescribed physical therapy and recommended Claimant take over the counter medications for any pain and discomfort. Dr. Reynoso also restricted Claimant to light duty work. (*Exhibit 3, pp. 10-11*) However, because the Employer did not refer Claimant to a designated provider for his work injury, Dr. Reynoso did not complete a Physician's Report of Workers' Compensation Injury, Form WC164, and provide it to the Insurer, as required by the Workers' Compensation Rules of Procedure. Had he done so, the Insurer – and most likely the Employer - would have been apprised of Claimant's work restrictions, need for physical therapy, modified work options, and possible need for lost wage benefits.
11. Because Claimant was not directed to seek medical treatment from a designated provider, who may have also apprised the Employer about Claimant's injury and work restrictions, Claimant returned to work and attempted to do his job. But because of his injury, and inability to perform his job, Claimant began missing time from work. Claimant testified that although he had good attendance before the injury, he started losing time for work after he injured his shoulder because doing any kind of heavy or repetitive work with his left arm caused significant pain. Moreover, Claimant's supervisor, Mr. T[Redacted], testified and confirmed Claimant had first reported the injury to him and that he had passed the information on to his two supervisors, Thad H[Redacted], and Eric A[Redacted], who would have had to direct Claimant to get medical treatment from a designated provider. Mr. T[Redacted] testified that Claimant was a "workaholic" and seldom ever missed work before he injured his shoulder. He also testified that after the injury, Claimant missed a great deal of time from work due to shoulder pain, and that he, in fact, had sent Claimant home on occasion because it was obvious he was in significant

pain. (*T1, pp. 45-46*) However, despite knowing Claimant injured himself at work, and was having problems performing his job, Mr. T[Redacted] neither directed Claimant to seek medical treatment from a designated medical provider nor escalated the matter with his superiors by again advising them about Claimant's work injury and need for medical treatment. Based on the Employer's failure to provide Claimant medical treatment promptly and on an ongoing basis, Claimant continued working and doing the best he could to meet the delivery demands of the Employer and its customers.

12. Moreover, Claimant credibly testified that during the end of 2017, the Employer stopped having supervisors work during the night shift. According to Claimant, during such time, the supervisors were at home sleeping while the rest of the night employees were out working. As a result, if Claimant had an issue during the night shift, he was pretty much on his own. (*T1, p.76*)
13. A review of Claimant's wage records reveals Claimant's hours varied once he started working the night shift. The records reveal a moderate decrease in the hours Claimant worked during the end of February and the month of March in 2017. Yet, after that period, his hours increased and remained fairly consistent until his June 20, 2017, work injury. Then, after his injury, his hours decreased significantly through about July 4th. Later, his hours climbed through July, but then became more sporadic in comparison to hours before the work injury. As a result, Claimant's wage records support the testimony of Mr. T[Redacted] and Claimant that after June 20, 2017, Claimant started missing time from work because of his shoulder injury.
14. Claimant continued working for Employer, although missing some time from work because of his shoulder pain, until December 2017. Claimant testified that he was supposed to be off work for the last two weeks of December, but the Employer requested Claimant to come to work on December 22, 2017 at the last minute. Claimant testified that the weather was very bad that evening and that there was a significant blizzard occurring. Claimant testified that he was afraid to perform the climbing activities required for his job at one of the sand delivery sites, OmniTrax, because of the icy conditions on the steps and the lack of sufficient railings on the steps. Claimant also testified that when he did work at this location, he did so "painfully" because of the activities that were required to load his truck with sand and input information into the computer system were unique to the OmniTrax location. Based on the unique work requirements at this jobsite, the bad weather, and his shoulder injury that made it difficult to work at this location without pain, he was afraid he might fall on the stairs and get hurt. Moreover, there was a lack of supervisors available during the nightshift that might have been able to help Claimant. As a result, he asked his son-in-law, Jeremy K[Redacted], if he would meet him at the OmniTrax loading site and help him open and close the lids on the sand boxes, which required Claimant to climb up and down the stairs of the catwalk.
15. Claimant's testimony that he was fearful of suffering another accident and injury while performing his job duties on the night of December 22, 2017, is found to be credible for many reasons. First, Claimant's medical records document that he is

morbidly obese. He is 5'11" and weighs about 360 pounds. Second, at the time of the OmniTrax incident Claimant was 64-years-old. Third, the surveillance video submitted by Respondents also shows Claimant's lack of agility because of his age and weight. Fourth, the conditions under which he had to perform his job at the OmniTrax facility on a normal evening seemed challenging, if not perilous, for Claimant based on his age and weight. On December 22, 2017, however, the Employer sent Claimant to perform his job under blizzard conditions and at night.

16. Mr. K[Redacted] testified that he agreed to assist Claimant at the job site and drove to the site in his own car. He testified he arrived at the site before Claimant arrived with his truck. Mr. K[Redacted] testified that he went into a trailer at the site and informed a OmniTrax worker why he was there and was granted permission to assist Claimant once he arrived. That said, it does not appear Mr. K[Redacted] advised the OmniTrax worker that he was not a co-worker of Claimant.
17. Both Claimant and Mr. K[Redacted] testified that Mr. K[Redacted] assisted Claimant by climbing up onto the catwalk and opening and closing the lids on the sand boxes. Mr. K[Redacted] testified that after he completed the work activities he approached a worker at the site to ask for a light for a cigarette. At that point, the worker started yelling at Mr. K[Redacted] that he should not be at the work site without a hard hat on. Mr. K[Redacted] told the worker he had one, but that he had left it in his car. The worker and Mr. K[Redacted] had words and Mr. K[Redacted] was told to vacate the property, which he did.
18. Someone from OmniTrax called the Employer and complained about Mr. K[Redacted] being on the job site. When Claimant returned to the Employer's location with his truck he was confronted by management personnel about the incident. Although Claimant first denied the allegations, Claimant eventually admitted that he had asked Mr. K[Redacted] to come to the job site to assist him. Claimant said that he did not get the impression that the incident would be any big deal at that point. The Employer, however, was also advised by OmniTrax that based on the incident involving Claimant's son-in-law, Claimant was not allowed to return to their site.
19. After the incident at OmniTrax, the Employer placed Claimant on suspended duty while they investigated the matter and decided what to do. During this time, Claimant also advised the Employer that he was having a problem with his eyesight and would have it checked out. He was seeing flashing lights. As a result, due the OmiTrax incident and his eyesight problems, the Employer kept Claimant on suspended duty and did not terminate him.
20. Soon after, and while on suspended duty, Mr. A[Redacted] drove by the shop and saw Claimant's personal vehicle. Thus, he decided to stop in the shop and ask Claimant about his eye problem. During this visit, which was shortly after Christmas, Claimant advised Mr. A[Redacted] that he had also injured his shoulder at work back in June and that he wanted to get additional medical treatment for his injury. (T2, pp.32-33). Claimant testified that his supervisors' attitudes toward him changed drastically when he mentioned he had a workers' compensation injury.

21. After Claimant provided the Employer notice of his work injury a second time, the Employer directed Claimant to obtain medical treatment from WorkWell, which the Employer advised Claimant was its designated provider for work injuries.
22. On January 9, 2018, Claimant went to WorkWell for evaluation of his left shoulder pain. At his first appointment, Claimant was evaluated by Malcolm Staton, PA-C. The report from this visit indicates Claimant described injuring his left shoulder while getting out of his truck. The report shows Claimant described losing his footing when went to step down on the ground while getting out of his truck. When he went to put his foot on the ground, there was some standing water in a deep hole and he pulled his left shoulder when he lost his footing. The report also says Claimant stated that his pain has continued to get worse and that he also feels like his grip is becoming weaker. At this appointment, Claimant rated his pain level at a 6/10, and described his shoulder as feeling tight. (*Exhibit 4, pp. 17-20*) PA Staton performed a thorough examination of Claimant's left shoulder and noted the following tests he performed were positive: Crossover; Hawkins; Supraspinatus Empty Can; and the Drop Arm. He also noted the following tests were negative: Neer's; Yergason's; Speed's; and Spurling's. Based on his examination of Claimant, PA Staton opined Claimant had a torn rotator cuff and possibly a torn labrum of his left shoulder. PA Staton, as well as the supervising physician, also assigned work restrictions of: "No lifting, carrying, pushing, or pulling more than 5 pounds. No climbing or crawling." (*Exhibit 4, pp. 17-20*)
23. PA Staton concluded his report by ordering an MRI and stating that Claimant will be scheduled to return to WorkWell after his MRI to determine future treatment and whether surgery might be appropriate. PA Staton and the supervising physician also completed a Form WC164, which documented Claimant's work restrictions and also listed his return appointment for January 25, 2018, to go over the results of the MRI and determine the next steps for treating Claimant's shoulder injury.
24. Claimant testified that after the January 9, 2018, appointment at WorkWell, he was happy that someone was finally trying to figure out what was wrong with his shoulder. He was happy that he would get an MRI and return to WorkWell in 2 weeks, on January 25, 2018, to go over the results and determine what could be done to fix his shoulder. Claimant's happiness, however, was short-lived. He was called the next morning and advised that his Claim was denied. (T1, p. 82) Since Claimant's claim was denied, WorkWell did not obtain the MRI and did not provide Claimant his follow up appointment that was scheduled for January 25, 2018, or any other follow up appointment, to assess and treat Claimant's work injury. This amounted to a refusal to treat by WorkWell for non-medical reasons.
25. Because WorkWell would not treat Claimant for his work injury after Respondents denied liability, Claimant again sought treatment from Dr. Reynoso at Banner Health. Dr. Reynoso is the doctor Claimant originally selected when the Employer failed to timely provide Claimant with a list of designated medical providers from whom he could obtain medical treatment when he reported his injury on June 20, 2017 to Mr. T[Redacted].

26. On January 31, 2018, Claimant returned to Dr. Reynoso. At this visit, Dr. Reynoso noted the following: "Patient is a 64-year-old gentlemen comes in for left shoulder pain. He says he is unable to work because if he does any activity for very long with the shoulder he has excruciating pain." The report from this visit also states that even though Claimant previously reported his shoulder injury to his employer, his employer did not have any record of his injury. Dr. Reynoso performed provocative testing at this appointment that revealed positive Hawkin's and impingement signs. Based on the information provided by Claimant, and Dr. Reynoso's physical examination, he concluded Claimant might have a torn rotator cuff, a torn labrum, or both. To continue to evaluate Claimant's shoulder problem, he ordered an MRI. (*Exhibit 3, p. 12*)
27. On April 9, 2018, Claimant obtained an IME with John Hughes, M.D. Dr. Hughes obtained a history, reviewed Claimant's medical records, and performed a physical examination. Dr. Hughes diagnosed Claimant as likely having a rotator cuff injury of his left shoulder and concluded that the condition was caused, or aggravated, by Claimant's work injury in June 2017. Dr. Hughes based this opinion on the history provided by Claimant and his physical examination of Claimant. Dr. Hughes also based his opinion on Claimant's medical records, which included Dr. Reynoso's June 23, 2017, report that documents Claimant's description of the work accident a few days after it occurred. (*See Exhibit 9*)
28. Since Respondents did not timely designate a medical provider and their denial of the Claim in January caused WorkWell to refuse to treat Claimant for non-medical reasons, Claimant continued seeking medical care on his own. Since his Employer cancelled his health insurance after he was terminated, Claimant went through Medicaid to get the prescribed MRI. The MRI demonstrated swelling, degenerative arthritic changes, and several soft tissue tears. (*Exhibit 5, pp. 40-41*)
29. Respondents had Claimant evaluated by Dr. F. Mark, Paz, M.D. Dr. Paz examined Claimant and reviewed some of Claimant's medical records. Dr. Paz testified that it was his opinion that Claimant did not suffer a work-related injury to his shoulder. Dr. Paz based his opinion mostly on some differences with dates of onset, in the medical records, most of which appear to be typographical or transcriptional errors. He ignored the fact that the basic history of the occurrence of the injury at work was substantially the same and in agreement with the testimony of Claimant and Claimant's former supervisor. Dr. Paz also testified that even if Claimant's account of the accident is accurate, he would not have suffered a torn rotator cuff since the majority of Claimant's weight would be placed mainly on the deltoid muscle. But this opinion was not offered in his report and the emergence of this new theory at hearing, which was not adopted or even considered by any other physician or medical provider, is not found to be persuasive. The Administrative Law Judge finds that the opinions of Dr. Reynoso, the medical providers at WorkWell, and Dr. Hughes, to the effect that Claimant did suffer a work-related injury to his shoulder, to be more persuasive than the opinion of Dr. Paz on causation.
30. The MRI results are objective and confirm Claimant has abnormalities in his left shoulder. Dr. Paz admitted upon cross-examination that the abnormalities shown on the MRI can cause pain. He also admitted that there was no evidence in the

medical records that Claimant had any problems with his left shoulder before June 20, 2017. (T2, p. 129)

31. Considering all of the hearing testimony and the contents of the exhibits, the ALJ finds Claimant suffered an injury to his left shoulder in the course of his employment on or about June 20, 2017.
32. Claimant testified that after he injured his shoulder on or about June 20, 2017, his injury caused him to take a few days off from work. After first taking a few days off from work right after the accident, Claimant continued having problems performing his job duties at times because of his left shoulder injury and would miss time from work. This was also confirmed by his supervisor, Mr. T[Redacted], who testified that Claimant had problems performing his job after his shoulder injury and that Claimant missed time from work because of his shoulder injury.
33. Claimant also testified that various physicians had given him work restrictions. The assignment of work restrictions is confirmed by the medical records submitted at hearing. As found above, on June 23, 2017, Dr. Reynoso placed Claimant on light duty at work. (*Exhibit 3, pp. 10-11*).
34. In addition, Claimant's decision to ask his son-in-law for help at the OmniTrax location on December 22, 2017, was in part, because of his shoulder injury, and is further evidence that Claimant's work injury precluded Claimant from performing all of his regular job duties.
35. Moreover, on January 9, 2018, Claimant was provided work restrictions by Malcolm Staton, PA-C, and the supervising physician, which included: "No lifting, carrying, pushing, or pulling more than 5 pounds. No climbing or crawling." (*Exhibit 4, pp. 17-23*)
36. Eric A[Redacted] testified on behalf of Respondents. Mr. A[Redacted] is the Employer's health, safety, and environmental manager (HSE Manager). Mr. A[Redacted] testified that because of Claimant's shoulder injury and his work restrictions, the Employer arranged light duty work for Claimant in January 2018.
37. As a result of the above findings, the ALJ finds Claimant's work injury prevented him from performing his regular job duties as of June 20, 2017 and continuing.
38. Mr. A[Redacted] also testified that only authorized employees were allowed to be in company vehicles and that he was unaware of any requests from Claimant as needing assistance on a jobsite. (T. 2, pp. 38, 41). On the other hand, Claimant credibly testified that during his employment, he had seen other employees driving with passengers, who were not employees, in their work truck.
39. Mr. K[Redacted] testified at hearing that on the night of December 22, 2017, he arrived at the OmniTrax facility to assist Claimant. Mr. K[Redacted] also testified that while at the OmniTrax facility, following an verbal altercation about Mr. K[Redacted]'s lack of safety gear, he was instructed by multiple OmniTrax employees to leave the jobsite. (T. 2, pp. 9, 10, 12).
40. T.J. X[Redacted] testified on behalf of Respondents. He testified that he was Claimant's supervisor on December 22, 2017, and in the early morning hours

received reports from dispatch of Claimant working at the OmniTrax facility and having an unauthorized rider with him. Mr. X[Redacted] also testified Claimant first told him that his son-in-law appeared at the facility unannounced to deal with a family dispute. Mr. X[Redacted] also testified later that night he spoke with Claimant at the terminal and Claimant first tried to deny it but, finally admitted that his son-in-law was with him at the OmniTrax facility. (T. 2, pp. 70-71, 75).

41. Mr. X[Redacted] testified that the exclusion of non-employee riders was “mainly because we’re going to oil and well sites, heavily regulated and all employees that are on site have gone through numerous trainings.” Having non-employees present was “a huge liability for the company and the oil company.” Mr. X[Redacted] also testified that the non-rider policy is covered in that new hire orientation. (T. 2, pp. 76, 78).
42. Mr. A[Redacted] further testified that at first, Claimant was placed on a suspension following the December 22, 2017 OmniTrax incident for violating company policy. He also said that Claimant was on suspended duty because of his eye problem and that he could not let Claimant drive until the eye problem was resolved.
43. Mr. A[Redacted] then testified that Claimant was ultimately terminated on January 31, 2018 for a combination of things. One factor was that because of the OmniTrax incident, OmniTrax had banned Claimant from their facility and they did not have another driving position open at that time. That said, this reason does not make sense because Claimant was on restricted duty and could not drive a semi-truck at that time. As a result, the lack of an opening at that time to drive a semi-truck would not preclude the Employer from retaining Claimant until his restrictions changed and would allow Claimant to return to his regular job duties and then assess whether there was a driving position that was available. Another reason Mr. A[Redacted] provided for Claimant’s termination was Claimant’s violation of the Employer’s rule against having any non-employees in the company’s trucks. He admitted, however, that he never saw anyone riding in Claimant’s truck himself, and it is not clear whether Claimant’s son-in-law was riding in Claimant’s truck.
44. Mr. A[Redacted] further testified that the triggering event that led to Claimant’s termination was Claimant’s violation of the Employer’s “three-day no call, no show policy.” According to Mr. A[Redacted], the Employer set up modified work for Claimant and Claimant failed to show up and perform the modified work three times and also failed to call in before each of those shifts to provide proper notice that he would be unable to work that day.
45. The Employer, however, submitted a letter, dated January 18, 2018, outlining the basis for terminating Claimant. In the letter, the Employer contends they terminated Claimant for having his son-in-law riding in his truck cab. There is no indication in the letter that Claimant was terminated for his failure to show up for modified duty. (Exhibit J) There was also no credible and persuasive documentary evidence submitted at the hearings which clearly set forth the modified duty that was allegedly offered to Claimant and that it was consistent with the Employer’s policy regarding how modified duty will be assessed, approved, and offered to their employees.

46. Respondents contend Claimant received extensive training on how to report workplace injuries and that Claimant failed to timely report his work injury. Respondents also contend Claimant was advised of the rules that prohibit non-employees from riding with employees or assisting them with their job duties. Respondents also contend they have a no-show, no-call, policy and 3 events lead to termination. And Respondents contend Claimant was provided modified employment, but failed to show up for his modified employment three times and was therefore terminated. In support of these contentions, Respondents submitted several exhibits. These exhibits include the following:

- Standard Operating Procedure (SOP): The SOP sets forth the procedures for the company as a whole about the reporting of work-related injuries. The SOP discusses the progression of reporting that is required. Thus, the SOP governs the responsibilities of the employee, the employee's supervisor, the Human Resource Manager, and the Safety Manager. Yet the Employer left blank those portions of the SOP that require the Employer to specify when the procedures were implemented, last reviewed, last updated, and last approved. In the end, all this document establishes is that the Employer has this document and submitted it at hearing. It does not establish the Employer implemented these procedures and made them standard operating procedures for their employees and specifically Claimant. (*Exhibit F, p. 23*)
- New Hire Orientation. This document sets forth a laundry list of topics and/or documents that were allegedly discussed with Claimant and/or provided to Claimant during his orientation. Claimant and an Employer representative initialed over 30 topics that were allegedly covered during Claimant's orientation. Respondents highlighted "Employee Handbook." That said, Respondents did not submit into evidence a copy of the "Employee Handbook" that allegedly contains the rules Respondents contend were conveyed to Claimant and violated by Claimant.
- Driver Safety and Policy Manual Employee Receipt. This document was signed by Claimant on June 5, 2015. It confirms Claimant received a "Driver's Company Safety and Policy Manual." But despite there being a place for a company official to sign and date the receipt, that portion is blank. And the title of the manual is slightly different from the title listed on the New Hire Orientation that lists a "Commercial Motor Vehicle Driver Safety/Maintenance Policy." (See *Exhibit F, p. 26*) Nor did Respondents submit into evidence a copy of either the Commercial Motor Vehicle Driver Safety/Maintenance Policy or the Drivers' Company Safety and Policy Manual.
- New Employee Orientation and Checklist. This document was also initialed and signed by Claimant. By signing this document, Claimant confirmed that the various safety, injury reporting, and return to work policies were explained to him and that he understood them. But like many of the other documents submitted by Respondents, this document is only partially completed. For example, the spaces that require Claimant's printed name, the date he was hired, and the name of his supervisor are blank. Most importantly, the bottom

portion of the document, which requires Claimant's supervisor or safety coordinator to sign off and confirm that they "instructed the above named employee in the subjects listed above during orientation" is also blank and not signed. As a result, this document does not confirm the Employer instructed Claimant about the Employer's safety, injury reporting, and return to work policies during orientation. (*Exhibit F, p. 27*)

- Return-to-Work Policy. Claimant signed this document. Respondents also highlighted a portion of the policy that outlines how injuries are to be reported and the section that lists two medical facilities from which employees must seek medical care. But this document is written in a manner that outlines the responsibilities of the safety manager, who is to act as the "designated coordinator" for executing the Employer's return-to-work policy, rather than outline Claimant's responsibilities. For example, section 5, provides:

The designated coordinator will maintain a list of modified duty tasks. Once the employer is ready to make a job offer to the injured worker, the coordinator sends the proposed tasks to the treating physicians for approval, in accordance with the formal job offer process. (*Exhibit F, p.28*)

Mr. A[Redacted] testified that the Employer provided Claimant with a modified job and Claimant failed to show up for such job. Mr. A[Redacted] further testified that the Employer has a no-call no-show policy which provides that an employee will be terminated if they fail to show up for work and do not call in on three occasions. He also testified that it was Claimant's failure to show up for the modified job that ultimately resulted in his termination. (*T2, p. 52*) However, despite this testimony, there was no documentary evidence submitted establishing the Employer sent the job tasks involved in the modified duty to Claimant's physician for approval as required by the Employer's own Return to Work Policy. (*Exhibit F, p. 28*)

- Safety Meeting Attendance Sheet. Respondents also submitted the sign up sheet for the August 31, 2016, safety meeting that Claimant attended. The document signifies that the topics to be discussed included "Sexual Harassment/Work Injury." That said, there is no other documentary evidence or credible testimony in the record about the specific information that was discussed at the meeting and whether any of the information discussed is relevant to the issues involved in this case. (*See Exhibit F, p. 29*)

47. The Employer contends they have policies, procedures, and safety rules that govern their employees. But based on the evidence presented at hearing, Respondents failed to establish that these policies, procedures, and safety rules were adequately defined, implemented, and conveyed to all their employees – and specifically Claimant. To have legal significance, a policy is not a policy and a rule is not a rule if it merely resides on a piece of paper and sees the light of day only briefly during an employee's orientation. When an Employer manages their policies and rules in such a way, they are not policies and rules, they are merely thoughts about how things should be - but are not.

48. Claimant testified that the only thing he took away from all the information provided by the Employer about what to do if he was injured at work was to report every injury, no matter how minor, to your supervisor - which he did.
49. The failure of Claimant's supervisors to promptly send him for medical treatment led Claimant to continue trying to work with an injured shoulder. And it was the Employer's failure to timely send Claimant for medical treatment that ended up being part of the reason Claimant needed help performing his job duties on December 22, 2017 and he decided to ask his son-in-law for help at the OmniTrax location. Plus, as testified to by Claimant, the Employer stopped having supervisors work during the night shift and he felt like he had no other options under the circumstances.
50. In the end, it was the consequences of Claimant's work injury combined with the Employer's failure to implement and execute policies, procedures, and rules as well as their failure to have supervisors available during the night shift that created the conditions for which they contend they used to terminate Claimant. In other words, the reasons they contend support their decision to terminate Claimant are manifestations of the Employer's management, or mismanagement, of Claimant's work injury. This includes their failure to provide medical treatment, accommodate his work restrictions, and provide modified work. And this also includes the Employer's decision to send Claimant out to work the night shift unexpectedly during a blizzard. This placed Claimant in a situation at the OmniTrax facility for which he was not properly trained to handle and resolve.
51. Moreover, the ALJ does not find the overall testimony and evidence submitted by Employer to be credible and persuasive regarding the reason or reasons for Claimant's termination. Therefore, based on the evidence presented at hearing, the ALJ finds Respondents failed to establish by credible and persuasive evidence the actual reason that formed their decision to terminate Claimant. As a result, the ALJ finds that Respondents failed to establish Claimant is at-fault for his termination and subsequent wage loss.
52. The ALJ finds Claimant's testimony and statements to his medical providers to be credible. The ALJ finds Claimant's testimony to be credible because the general mechanism of injury, and the approximate date of injury, aligns with the initial medical report of June 23, 2017, and some of the subsequent records. Moreover, Claimant's statements to medical providers and evaluators has remained consistent throughout his claim. While there are some inconsistencies in some of the later medical records, the inconsistencies seem to be due to transcription errors, which includes errors in recording the history provided by Claimant, and not misstatements by Claimant that were properly recorded. Moreover, Claimant's testimony about the reporting of his injury to Mr. T[Redacted] is also deemed credible and persuasive.
53. The ALJ also finds the testimony of Mr. T[Redacted], Claimant's supervisor at the time of his injury, to be credible and persuasive for many reasons. First, Mr. T[Redacted]'s testimony tracked Claimant's testimony. Second, Mr. T[Redacted]'s testimony matched Claimant's medical records as it relates to the date of injury

and that Claimant took a few days off of work after the initial incident. Moreover, Mr. T[Redacted]'s testimony aligns with Claimant's wage records that reveal Claimant's work became more sporadic after the injury because Claimant had to take time off due to his shoulder injury which prevented him from fully performing his regular job duties.

CONCLUSIONS OF LAW

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

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is what leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

Claimant must prove causation to a reasonable probability. Lay testimony alone may be sufficient to prove causation. But where expert testimony is presented on the issue of causation it is for the ALJ to determine the weight and credibility to be assigned such evidence. *Rockwell Int'l v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990); *Marjorie Jorgensen v. Air Serve Corporation*, W.C. No. 4-894-311-03, (ICAO, Apr. 9, 2014).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice,

or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Claimant established by a preponderance of the evidence that he suffered a compensable injury involving his left shoulder.

To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S. (2006); see *City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991). Claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.*, 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Indus. Claim Appeals Office*, 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *Enriquez v. Americold D/B/A Atlas Logistics*, W.C. No. 4-960-513-01, (ICAO, Oct. 2, 2015)

But the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition unrelated to the employment. See *F.R. Orr Constr. v. Rinta*, 717 P.2d 965 (Colo. App. 1995); *Atsepoi v. Kohl's Department Stores*, W.C. No. 5-020-962-01, (ICAO, Oct. 30, 2017).

Moreover, causation may be established entirely through circumstantial evidence. *Rockwell Int'l v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990). In fact, the finding of a compensable injury may be upheld where the exact medical cause of the injury remains shrouded in mystery, but the circumstantial evidence as a whole can justify the inference that it was work-related. *Indus. Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968). Medical evidence is neither required nor determinative of causation. A claimant's testimony, if credited, may alone constitute substantial evidence to support the ALJ's determination of the cause of the claimant's condition. See *Apache Corp. v. Indus. Commission*, 717 P.2d 1000 (Colo. App. 1986) (claimant's testimony was substantial evidence that his employment caused his heart attack); *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983); see also *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997) (lay testimony sufficient to establish disability). But to the extent that medical

testimony is presented, it is the ALJ's province to assess its weight and credibility. *Rockwell Int'l v. Turnbull, supra*.

Whether Claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000). *Fuller v. Marilyn Hickey Ministries, Inc., W.C. No. 4-588-675*, (ICAO, Sept. 1, 2006).

The ALJ found Claimant's testimony and statements to his medical providers to be credible and persuasive. The ALJ also found the testimony of Claimant's direct supervisor, Mr. T[Redacted], to be credible and persuasive. And although Claimant might have been having some mild shoulder pain before the incident of June 20, 2017, the ALJ finds and concludes that it was the June 20, 2017, work accident that occurred while he was getting out of his semi-truck that caused either a discrete shoulder injury or aggravated a preexisting shoulder condition and necessitated the need for medical treatment. In addition, the work accident also restricted Claimant's ability to perform his regular job duties and caused him to at first miss three straight days from work and then more time thereafter. As a result, the ALJ finds and concludes Claimant established by a preponderance of the evidence that he suffered a compensable injury involving his left shoulder.

II. Whether Claimant established that the right to select a medical provider passed to Claimant.

Section 8-43-404(5)(a), C.R.S. permits an employer or insurer to select the treating physician in the first instance. *Yeck v. Indus. Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999). But the Colorado Workers' Compensation Act requires that respondents must provide injured workers with a list of at least four designated treatment providers. §8-43-404(5)(a)(I)(A), C.R.S. Section 8-43-404(5)(a)(I)(A), C.R.S. states that, if the employer or insurer fails to provide an injured worker with a list of at least four physicians or corporate medical providers, "the employee shall have the right to select a physician." W.C.R.P. Rule 8-2 further clarifies that once an employer is on notice that an on-the-job injury has occurred, "the employer shall provide the injured worker with a written list of designated providers." W.C.R.P. Rule 8-2(E) also provides that the remedy for failure to comply with the preceding requirement is that "the injured worker may select an authorized treating physician of the worker's choosing."

An employer is considered notified of an injury when it has "some knowledge of the accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim." *Bunch v. industrial Claim Appeals Office*, 148 P.3d 381, 383 (Colo. App. 2006).

Moreover, if upon notice of the injury the employer timely fails to designate an ATP, the right of selection passes to the claimant. *Rogers v. Indus. Claim Appeals Office*, 746 P.2d 565 (Colo. App. 1987).

In *Squitieri v. Tayco Screen Printing, Inc.*, W.C. No. 4-421-960 (ICAO Sept. 18, 2000), the ICAO held that held that the term "select," as it appears in the predecessor to

§ 8-43-404(5)(a)(I)(A) is unambiguous and should be construed to mean “the act of making a choice or picking out a preference from among several alternatives.” See *In re Loy*, W.C. No. 4-972-625-01 (ICAO, Feb. 19, 2016). Thus, a claimant “selects” a physician when she “demonstrates by words or conduct that [she] has chosen a physician to treat the industrial injury.” *Williams v. Halliburton Energy Services*, W.C. No. 4-995-888-01, (ICAO, Oct. 28, 2016). The ICAO also noted that the question of whether the claimant selected a particular physician as the ATP is one of fact for determination by the ALJ, and the ALJ’s resolution of this issue must be upheld if supported by the record. *Squitieri v. Tayco Screen Printing, Inc.*, W.C. No. 4-421-960 (ICAO, Sept. 18, 2000).

As found, Claimant immediately reported his work injury on June 20, 2017, to his supervisor, Mr. T[Redacted]. In turn, Mr. T[Redacted] advised his supervisors of Claimant’s work injury and Mr. T[Redacted] directed Claimant to take a few days off from work. That said, despite the Employer allowing Claimant to take a few days off work due to his work injury, they did not timely designate a medical provider at the time of the accident. Moreover, even after Claimant took a few days off, Mr. T[Redacted] noticed Claimant’s shoulder injury would at times prevent Claimant from working and he would even send Claimant home on occasion. Despite this knowledge of Claimant’s injury, and his inability to perform his work, the Employer still did not timely designate a medical provider to evaluate and treat Claimant’s work injury. As a result, the right of selection passed to Claimant at the time of the injury.

Since the Employer did not timely designate a medical provider and provide Claimant a list of 4 medical providers, Claimant selected Banner Health and Dr. Reynoso to treat him for his work injury and starting treating with Dr Reynoso on June 23, 2017. For that reason, Dr. Reynoso and his referrals are authorized to treat Claimant for his work injury as of June 23, 2017.

III. Whether Claimant established by a preponderance of the evidence that he is entitled to reasonable, necessary, and related medical treatment, including the treatment he received through Banner Health, Dr. Reynoso, and his referrals.

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. Whether Claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

As found, Claimant’s work injury necessitated the need for medical treatment to diagnose and cure Claimant from the effects of his work injury. To determine the extent of Claimant’s work injury, he sought medical treatment at Banner Health and was treated by Dr. Reynoso. Dr. Reynoso evaluated Claimant, prescribed treatment, which included physical therapy, work restrictions, and an MRI. Dr. Hughes also opined Claimant suffered a compensable injury and is need of more medical treatment to determine the extent of his injury and the extent of future medical treatment necessary to cure Claimant from the effects of his work injury. As a result, the ALJ finds and concludes that Claimant

established by a preponderance of the evidence that he is entitled to reasonable, necessary, and related medical treatment.

The ALJ further finds and concludes that the treatment recommended by Dr. Reynoso, which included the MRI and physical therapy is also reasonable, necessary, and related to Claimant's work injury. But since the issue of reimbursement under § 8-42-101(6) was only raised by Claimant in his post hearing submission and not tried at the hearing, the issue of reimbursement for treatment paid by others is reserved.

IV. Whether Claimant established by a preponderance of the evidence that he is entitled to temporary total disability benefits starting December 24, 2017.

V. Whether Respondents established by a preponderance of the evidence that Claimant is at-fault for his wage loss and not entitled to temporary disability benefits.

To prove entitlement to Temporary Total Disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. See Sections 8-42-103(1)(g), 8-42-105(4); *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office*, 954 P.2d 637 (Colo. App. 1997).

Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (citing *Ricks v. Industrial Claim Appeals Office*, P.2d 1118 (Colo. App. 1991)).

Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic*, 952 P.2d 831, 833 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

Although Section 8-42-103 sets forth the threshold conditions that must apply before a claimant becomes entitled to temporary total disability benefits, pursuant to Section 8-42-103(1)(g), threshold entitlement to temporary total disability benefits is precluded where the employee is responsible for the termination of employment. The

court of appeals has noted “the wide range of circumstances” the General Assembly sought to address when it enacted § 8-42-103(1)(g). *Colorado Springs Disposal v. Indus. Claim Appeals Office*, 58 1061, 1063 (Colo. App. 2002).

Section 8-42-103(1)(g) provides that if a temporarily disabled employee “is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury.” Because this statute provides a defense to an otherwise valid claim for TTD benefits, the respondents shoulder the burden of proof by a preponderance of the evidence to establish each element of the defense. *Gilmore v. Indus. Claim Appeals Office*, 187 P.3d 1129 (Colo. App. 2008); *Brinsfield v. Excel Corp.*, W.C. No. 4-551-844 (I.C.A.O. July 18, 2003).

In *Colorado Springs Disposal v. Indus. Claim Appeals Office*, 58 P.3d 1061 (Colo. App. 2002), the court held the term “responsible” as used in the termination statutes reintroduces the concept of fault as it was understood before the Supreme Court’s decision in *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). As a result, the concept of fault used in the unemployment insurance context is instructive. Fault requires a volitional act or the exercise of some control given the totality of the circumstances. *Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1994), *opinion after remand*, 908 P.2d 1185 (Colo. App. 1995); *Brinsfield v. Excel Corp.*, *supra*.

That said, violation of an employer’s policy does not necessarily establish a claimant acted volitionally with respect to a discharge from employment. *Gonzales v. Indus. Commission*, 740 P.2d 999 (Colo. 1987). However, a claimant may act volitionally if he is aware of what the employer requires and deliberately fails to perform accordingly. *Gilmore v. Indus. Claim Appeals Office*, *supra*. This is true even if the claimant is not specifically warned that failure to comply with the employer’s expectations may lead to termination. See *Pabst v. Indus. Claim Appeals Office*, 833 P.2d 64 (Colo. App. 1992). Ultimately, whether the Claimant was responsible for the termination is one of fact for determination by the ALJ. *Gilmore v. Indus. Claim Appeals Office*, *supra*.

As found, Claimant suffered a compensable work injury that caused him to be unable to perform his regular job duties as of June 20, 2017. As found, Claimant was disabled and unable to perform all aspects of his job as of June 20, 2017. This was evidenced by his need to initially take three days off after the accident and the fact that he continued missing time from work thereafter. Moreover, it was his shoulder injury that also played a part in his inability to perform his job at the OmniTrax facility and this existed immediately before he was suspended. Plus, he was also restricted from performing his regular job duties by the medical providers at WorkWell in January of 2018. Therefore, Claimant was disabled due to his work injury and precluded from performing his regular job duties as of June 20, 2017 and continuing.

It was also found that the following factors, at a minimum, caused Claimant to seek help from his son-in-law on December 22, 2017:

1. The work injury and resulting disability,
2. The Employer’s failure to provide medical treatment promptly,
3. The Employer’s lack of having supervisors available during the night shift,

4. The Employer's failure to effectively implement safety rules and procedures, and
5. The Employer's decision to call Claimant into work unexpectedly and to work the night shift during a blizzard.

As a result, it was the culmination of the Employer's actions – or lack of action – that led to Claimant being placed in a dangerous situation at the OmiTrax facility.

Once put in that situation, Claimant had to mitigate the risk of further injury while meeting the business needs of his Employer and its clients. Claimant was not provided any specific training by his Employer to help guide him through this situation. He also did not think there was a supervisor he could contact and discuss the matter. As a result, Claimant chose to mitigate the risk of suffering another accident by asking his son-in-law to meet him at the facility and have his son-in-law traverse the stairs and catwalk and open and close the lids on the containers that would be loaded with sand.

However, the ALJ does not find and conclude Claimant was terminated due to the OmniTrax incident. The Employer offered several reasons for terminating Claimant. Although the Employer first stated Claimant was terminated due solely to the OmniTrax incident, the actual reason for terminating Claimant became less clear based on the testimony presented at hearing. For example, at hearing, Mr. A[Redacted] testified that Claimant was ultimately terminated based on his failure to start modified duty. That said, there was a lack of credible and persuasive evidence presented establishing the Employer even offered Claimant bona fide modified duty. Therefore, the Employer failed to establish the actual reason for Claimant's termination. As a result, the Employer failed to establish Claimant was at-fault for his termination. The ALJ thus finds and concludes the Employer failed to establish Claimant was at-fault for his termination and subsequent wage loss. Therefore, Claimant is entitled to temporary total disability benefits as of December 24, 2017, the day his was suspended, and such benefits shall continue until terminated by law.

VI. Whether Respondents established Claimant violated § 8-43-102(1), C.R.S. in failing to timely report the alleged June 20, 2017 industrial injury and that penalties should be assessed if the claim is found to be compensable.

Respondents seek a penalty against Claimant because Claimant failed to timely to report the injury in writing as required by § 8-43-102(1)(a), C.R.S.

Section 8-43-102(1)(a) provides that an employee that sustains an injury from an accident "shall notify the said employee's employer in writing of the injury within four days of the occurrence of the injury." If the employee fails to report the injury in writing, "said employee may lose up to one day's compensation for each day's failure to so report." Because the statute uses the word "may," imposition of a penalty for late reporting is left to the discretion of the ALJ. *LeFou v. Waste Management*, W.C. No. 4-519-354 (I.C.A.O. March 6, 2003).

As found, the Employer had notice of Claimant's injury and that Claimant was missing time from work as of the date of the accident, June 20, 2017. Moreover, after Claimant provided verbal notice to his supervisor, the Employer failed to timely provide medical treatment to Claimant, even though Claimant's direct supervisor knew Claimant was missing time from work because of his shoulder injury and even sent him home from work early at times. There was therefore no prejudice to Respondents because Claimant failed to report his injury in writing on the day it occurred or before December 24, 2017. As a result, the ALJ finds and concludes that Claimant will not be penalized for his failure to report his injury in writing.

ORDER

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

1. Claimant suffered a compensable injury involving his left shoulder on June 20, 2017.
2. The right to select a medical provider passed to Claimant on June 20, 2017, and Claimant selected to treat at Banner Health with Dr. Reynoso. As a result, Banner Health and Dr. Reynoso are authorized to treat Claimant for his compensable work injury.
3. Respondents shall provide Claimant reasonable and necessary medical treatment related to his industrial injury.
4. Claimant is entitled to temporary total disability benefits as of December 24, 2017, and continuing, until terminated by law.
5. Claimant's temporary total disability benefits shall be based on an average weekly wage of \$1,249.64, but subject to redetermination.¹
6. Respondents have a right to take the appropriate offsets against Claimant's temporary disability benefits. Any dispute about the amount or extent of any offsets is reserved and can be addressed at a subsequent hearing if the parties cannot resolve the issue.
7. Respondents request for Claimant's disability benefits to be reduced pursuant to § 8-43-102(1) is denied and dismissed.
8. Claimant shall be paid interest at the rate of 8% per annum on compensation benefits not paid when due.
9. Issues not expressly decided herein are reserved to the parties for future determination.

¹ The ALJ used the AWW figure provided by Respondents in their proposed specific findings of fact, conclusions of law and order. If, however, the AWW figure used in this order is not accurate, the parties can either stipulate to a different AWW or file an Application for Hearing and set the matter for hearing and have the AWW issue resolved by an ALJ.

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

DATED: March 26, 2020.

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- I. Has Claimant shown, by a preponderance of the evidence, that she suffered a compensable work injury to her right knee on February 27, 2019?
- II. If this injury is compensable, has Claimant shown, by a preponderance of the evidence, that she is entitled to medical treatment that is reasonable, necessary, and related to her work injury, including, but not limited to: arthroscopic surgery as recommended by Dr. Minihane?
- III. If this injury is compensable, has Claimant shown, by a preponderance of the evidence, that she is entitled to Temporary Partial Disability (“TPD”) payments from June 10, 2019, and ongoing?

STIPULATIONS

The parties stipulated to an Average Weekly Wage (“AWW”) of \$383.70. The ALJ accepted this stipulation.

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

Claimant’s Hearing Testimony

1. Claimant testified at hearing. She testified that on February 27, 2019, at around 8:30 a.m., she was kneeling on both knees, ‘zoning’ merchandise on the lower shelves at Walmart. When she stood up, she felt “awful pain” extending from her right knee all the way down her leg, which she rated at a level 9/10. After approximately 30 seconds, Claimant’s knee pain abated to a “dull ache”. However, she continued to work, and completed her regularly scheduled shift.
2. Later that same evening, Claimant experienced severe pain, swelling and bruising of the right knee down the leg to the bottom of the foot. When the pain, swelling and bruising continued the following day, she reported her right knee injury to Employer. A First Report of Injury was timely filed. (Ex. A, p.1).
3. Claimant continues to experience occasional popping inside her knee, and says something still feels “wrong” and “swollen”. She has never experienced this “popping” sensation prior to the work incident, nor the type of pain she has experienced. She testified that she had not engaged in any ‘new’ activities in the months preceding her work injury, such as bicycle riding, which might have aggravated her knee.

4. Claimant testified that she is now restricted to working 4 hours per day, 4 days per week. Were it not for these work restrictions, she would be working more hours. [No additional testimony was elicited on this issue].

Claimant's Treatment by her ATPs

5. Claimant was seen by PA Steven Quackenbush at Centura Health Urgent Care on 2/28/2019. She gave PA Quackenbush a history of "zoning", when she bent down to move some stock forward and she was bent down onto her right knee. Claimant stated that she had done this on multiple times during the day and:

...as she stood up on one of these times, she developed right knee pain. There was no popping of the knee. No feeling of instability. The knee has not popped or felt unstable since the incident.... She did not slip or trip or fall. There was no fluid on the ground and no unevenness of the floor. She was not carrying anything in her arms at the time. She was not wearing any unusual footwear. She did not hit her knee." (Ex. C, p. 6).

6. On physical exam, PA Quackenbush noted the right knee was without discoloration or erythema or abrasions or ecchymosis, with very minimal swelling globally of the right knee without appreciable pain with palpation of the medial or lateral joint space. He documented "very minimal tenderness" over the tibial tubercle without palpable deformity, with "full active and passive extension and flexion of the right knee without popping or locking or crepitus". (Ex. C, p. 7).

7. X-rays were read as negative. PA Quackenbush prescribed a Medrol Dosepak and a right hinge knee brace. Despite these prescriptions, PA Quackenbush further noted:

This case is left *undetermined* regarding workplace causality as the patient was kneeling and stood up developing right knee pain. She did not slip or twist or catch her foot. She was not wearing any unusual footwear at the time. There was no fluid on the floor, unevenness of the floor. She states she did not have anything in her hands at the time of development of her symptoms." (Ex. C, p. 5)(emphasis added).

8. PA Quackenbush completed a February 28, 2019, M-164, countersigned by Dr. John Reasoner. PA Quackenbush did not respond to question 3(b), "Are your objective findings consistent with history and/or work-related mechanism of injury/illness?" (Ex. C, p. 14). He did, however, place Claimant on modified duty, with no crawling, kneeling, or squatting, and prescribed a knee brace, ice, and Medrol Dosepak. Follow-up was set for March 20, 2019. *Id.*

9. By March 20, 2019, Claimant had finished the prescribed Medrol Dosepak, without significant change of symptoms. (Ex. C, p. 19). Dr. Reasoner referred Claimant

for a right knee MRI for “persistent pain and swelling right knee with ‘some’ popping”. The diagnosis was “right knee strain/bursitis possible meniscal tear”. (Ex. C, p. 22).

10. The right knee MRI was performed April 12, 2019. It showed “mild prepatellar soft tissue edema and extending over the region of the tibial tubercle; and prominent superficial veins, with no evidence of a meniscal or cruciate ligament tear. No significant joint effusion was identified”. (Ex. D, p. 62).

11. PA Quackenbush evaluated Claimant again on April 17, 2019. Claimant was noted to be without significant or appreciable antalgic gait. He noted, “Very minimal” swelling of the right knee. (Ex. C, p. 30). Referral was made to orthopedist, Dr. Keith Minihane for “*persistent* right knee *pain/swelling*. . . unremarkable MRI”. (Ex. C, p. 32)(emphasis added).

12. Eve Schoenefeld, P.A., evaluated Claimant on May 2, 2019. On physical exam, PA Schoenefeld noted the right knee was without obvious swelling, had good ligamentous stability and no crepitus. (Ex. C, p. 37). PA Schoenefeld diagnosed right knee “patellar tenderness” and performed a right knee cortisone injection. The PA was “optimistic for resolution of symptoms by next appointment”. *Id* at 38.

13. Claimant returned to PA Quackenbush on May 10, 2019, reporting no improvement with the cortisone injection, and no relief from Voltaren gel. PA Quackenbush’s impressions included right knee strain and bursitis of other bursa, right knee. He then anticipated MMI at the next follow-up visit. (Ex. C, p. 41).

14. Orthopedist Dr. Keith Minihane evaluated Claimant on May 30, 2019. He diagnosed a pes anserinus bursitis of the right knee and injected the right anserine bursa with 1 mL of Lidocaine. (Ex. F, p. 86).

15. Following Dr. Minihane’s exam and injection, Claimant returned to PA Quackenbush on 6/7/2019. On physical exam, Claimant was ambulating without significant appreciable antalgic gait. She moved onto the exam table fluidly. Claimant had no significant reproducible tenderness with palpation of the right knee. She had full active and passive extension of the right knee without popping or locking. MMI was pending review by Dr. Reasoner at Claimant’s next follow-up visit. (Ex. C, pp. 44-46).

16. Dr. Reasoner evaluated Claimant on June 10, 2019. His clinical impressions included chronic pain of the right knee and pes anserinus bursitis of right knee. Dr. Reasoner noted the negative MRI of the right knee and Claimant’s report of no improvement with injections of the knee joint and the right pes anserinus bursa. He suspected Claimant “may be having a flare up of underlying early arthritis.” (Ex. C, p. 48).

17. On July 1, 2019, Dr. Minihane reevaluated Claimant. His diagnosis on that date included “possible medial plica”. He noted, “She has failed to improve with conservative treatments and not able [sic] to return to full work.” Dr. Minihane requested prior authorization of a knee arthroscopy and possible plica excision and chondroplasty of

chondral flap. (Ex. F, p. 90). Claimant understood the proposed surgery, and wished to proceed. *Id.* At hearing, Claimant reiterated her desire to proceed.

18. Authorization was sought for this procedure on July 2, 2019. (Ex. F, p. 93). A Notice of Contest was then filed by Respondents on 7/19/2019, citing the need for "Further Investigation for Prior Medical records". (Ex. B, p. 3). [The ALJ notes no 'prior medical records' now appear anywhere in the record herein].

IME by Dr. Kurz

19. On January 3, 2020, Dr. Nicholas Kurz performed an Independent Medical Exam ("IME") on the Respondents' behalf. Claimant gave Dr. Kurz a history of zoning on her knees for approximately 30 minutes and when she stood up, she felt a pulling sensation in the right knee. Claimant reported that evening she noticed some swelling and spots of bruising at the inferior medial distal patella aspect of her right knee. She also noted additional spots of bruising at her calf and the arch of her foot. (Ex. G, p. 95).

20. On physical exam, Claimant exhibited no obvious upper or lower extremity edema, with full range of motion of the bilateral knees, with negative Homan's testing noted bilaterally, and the ability to do a full squat. The only documented abnormality on physical exam were large tortuous varicose vein deformities noted at the anterior right knee. *Id.* at 97.

21. Based on his review of the medical records, his evaluation of Claimant, and his review of the in-store security video (Ex. H), Dr. Kurz opined that Claimant did not sustain an injury to her right knee related to her employment. Dr. Kurz opined there were no definitive objective findings - per imaging or physical exam - of any acute injuries or lasting effects from her reported injury of February 27, 2019. Dr. Kurz opined an acute structural injury to the right knee would have caused immediate and sustained symptoms. Even an acute contusion or twisting injury that may result in an internal derangement of the knee would cause immediate signs, symptoms and/or abnormal findings on imaging. Claimant's April 12, 2019 MRI was essentially normal.

22. Respondents' Exhibit H, contained two clips of Employer's in-store security video. At hearing, Dr. Kurz testified that based on his review of the medical records, evaluation of the claimant, and review of in-store security video, there was no mechanism to support a work-related right knee injury. There was no evidence of the claimant's right knee striking anything, no twisting mechanism, no wince of pain, and no alteration in weight-bearing. No physician completed a single required M-164 indicating that Claimant's objective findings were consistent with her history and/or a work-related mechanism of injury. Dr. Kurz opined that is not medically probable the claimant injured her right knee in the course and scope of her employment on February 27, 2019. Dr. Kurz felt that Claimant's pain generator was her preexisting varicose veins.

23. Regardless of causation, Dr. Kurz testified that the surgery for which Dr. Minihane has requested prior authorization is not reasonable and necessary. Claimant's right knee diagnoses have included sprain of right knee, strain of right knee,

unspecified ligament damage, bursitis of right knee, unspecified bursa, patella tenderness, pes anserinus bursitis, flare of underlying early arthritis, and possible plica syndrome. Dr. Minihane is requesting prior authorization of a knee arthroscopy and possible plica excising chondroplasty of chondral flap, despite the normal MRI showing no plica and no cartilage defect. Dr. Kurz opined the symptoms of plica syndrome include a catching or locking sensation in the knee when getting up from a chair after sitting for a long period, trouble sitting for long periods, clicking or cracking sounds when the knee is bent or extended and a feeling the knee is going to give out. Claimant reported no such symptoms and no instability in the knee. Dr. Kurz explained the surgery requested by Dr. Minihane is exploratory in nature. Based on Claimant's normal exam and MRI, the surgery is not consistent with Colorado's Medical Treatment Guidelines.

Surveillance Video

24. The ALJ has viewed Exhibit H, the surveillance video, at length. There are two clips, labeled as Clip 1 and Clip 2. Clip 1 runs for about 7 minutes, beginning at 8:50 a.m. (approximately 15 minutes after the work incident described by Claimant). The viewpoint is from slightly above Claimant's right, as she continues with her work duties. In Clip 1, Claimant appears to be able to move about freely, and in no apparent distress, although she disappears from view for a portion of Clip 1. For about 90 seconds, she squats to arrange the merchandise on the 3rd level from the floor, but at no time places either knee onto the floor.

25. Clip 2 runs from 8:29:51 a.m. until 8:36 a.m., from a higher, further vantage point, mostly viewed from Claimant's left. She is working on the lower two shelves, arranging the merchandise. She shifts body positions rather often in an apparent effort to access the lower shelves, including on her buttocks with her left arm outstretched supporting her upper body while arranging the stock with her right. At some points, she is almost laying on her side to accomplish this.

26. At 8:34:37, Claimant appears to have completed the task at hand, and appears to struggle to her feet, not straightening her knees until 8:35:06. During this interval, she can be seen holding her right knee (which was placed on the floor in kneeling position for a few seconds), and then using the shelving with her right hand to assist in getting up. Once Claimant is up, she pulls up her right pant leg, apparently inspecting her right knee, then does so with her left knee. With her left pant leg still up to her knee, Claimant begins to walk away, with a slightly antalgic gait for a few steps, then disappears from view with an apparently normal gait.

27. The ALJ further notes that while Claimant is struggling to get to her feet, an adult male store patron appears to walk at an unusually brisk pace to the aisle where Claimant was, make apparently very brief eye contact with Claimant at 8:34:44, then leave – only to go around the corner and apparently, discreetly, check on her from the other side at 8:35:12. By this time, she had made it to her feet. One could reasonably infer this patron initially heard something from several aisles over and went to check on Claimant. He then left this section of the store, immediately ahead of Claimant, holding

the same object in his left hand as when he first appeared. This patron only made a cursory look at the shelves the entire time. (No such encounter was mentioned, however, in Claimant's testimony).

Temporary Partial Disability

28. After Claimant did not respond as expected to the offered conservative treatments, ATP Dr. Reasoner noted on 6/10/2019, "She continues to work her regular duty as a cashier and irregular hours. Patient will be given modified duties and terms of no crawling, kneeling, or squatting, and no standing for more than 4 hours per day. She can sit her perform [sic] sedentary duties remained in 4 hours [sic]...Anticipated MMI would be in 3-4 weeks if no further intervention is recommended by the orthopedic specialist. (Ex. C, p. 48)(emphasis added).

29. In his Physician's Report of Workers Compensation Injury [WC164] dated 6/10/2019, Dr. Reasoner initiated Temporary Restrictions of "No Standing > 4 hrs/day" (Ex. C, p. 51). Claimant was to follow-up with orthopedist by end of June. *Id*

30. In the final WC164 in the record, dated 7/3/2019, Dr. Reasoner continued the same work restrictions, with a follow-up date of 8/5/2019, and noted that MMI is "now anticipated approximately 4 weeks post surgery." (Ex. C, p. 60).

31. The ALJ has reviewed Exhibit 1 (Claimant's wage records), and notes that Claimant is paid every two weeks by Employer. While there is some variance from pay period to pay period of hours worked, it appears that the parties have stipulated (based upon the stipulated AWW of \$383.70) to a typical bi-weekly pay period averaging 51.65 hours at \$14.86 per hour. The ALJ finds this stipulation to be reasonable, and based upon the Exhibits provided.

32. Claimant began making \$15.16 per hour, beginning with the pay period from 2/16/2019 to 3/1/2019. (Ex. 1, p. 9). For reasons unclear, the wage records in evidence omit the pay period from 6/8/2019 through 6/21/2019 - which brackets the time when the ATP placed Claimant on the new hourly restrictions. Nonetheless, there is a sharp diminution in hours worked, beginning the very next pay period, and continuing through the last date of 12/20/2019 - consistent with Claimant's hearing testimony that her hours have been significantly cut to meet the restrictions. While variable, the average number of hours worked from this point forward averages approximately 32 hours every two weeks.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a

reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

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

C. In deciding whether a party has met their burden of proof, the ALJ is empowered “to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence.” See *Bodensecki v. ICAO*, 183 P.3d 684 (Colo.App. 2008). In short, the ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo.App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo.App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo.App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness’s testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

D. In this instance, the ALJ finds that Claimant has testified credibly at hearing; in addition, she has supplied the best information to her medical providers at all times pertinent in a sincere effort to recover from her injury. The ALJ further finds that Dr. Kurz has testified sincerely in an effort to make sense of Claimant’s injury, and his disagreements with the other medical providers represent a sincere difference in medical opinion. Thus, his opinions will be viewed not in terms of *credibility* per se, but rather in terms of their *persuasiveness* in light of the evidence.

Compensability, Generally

E. According to C.R.S. § 8-43-201, “a claimant in a workers’ compensation claim shall have the burden of proving entitlement to benefits by a preponderance of the

evidence; the facts in a workers' compensation case shall not be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer, and a workers' compensation case shall be decided on its merits." *Also see Qual-Med, Inc. v. Indus. Claim Appeals Off.*, 961 P.2d 590, 592 (Colo. App. 1998) ("The Claimant has the burden of proving an entitlement to benefits by a preponderance of the evidence."); *Lerner v. Wal-Mart Stores, Inc.*, 865 P.2d 915, 918 (Colo. App. 1993) ("The burden is on the claimant to prove his entitlement to benefits by a preponderance of the evidence.").

F. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004).

G. For an injury to be compensable under the Workers' Compensation Act, it must "arise out of" and "occur within the course and scope" of the employment. *Price v. Indus. Claim Appeals Off.*, 919 P.2d 207, 210, 210 (Colo. 1996); *Schepker v. Daewoo North*, W.C. No. 4-528-434 (ICAO April 22, 2003). An injury "arises out of" employment when the origins of the injury are sufficiently related to the conditions and circumstances under which the employee usually performs his or her job functions as part of the employee's services to the employer. *See Schepker, supra*. "In the course of" employment refers to the time, place, and circumstances of the injury. *Id.* There is no presumption that an injury arises out of employment merely because an unexplained injury occurs during the course of employment. *Finn v. Indus. Comm'n*, 165 Colo. 106, 108-09, 4437 P.2d 542 (1968).

H. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. § 8-41-301 (1)(c) C.R.S.; *Faulkner v. Indus. Claim Appeals Off.*, 12 P.3d 844, 846 (Colo. App. 2000). The question of causation is generally one of fact for the determination by the ALJ. *Faulkner*, 12 P.3d at 846.

I. Colorado's Workers' Compensation Act creates a distinction between the terms "accident" and "injury". The term "accident" refers to an "unexpected, unusual, or undesigned occurrence." *See* §8-40-201(1), C.R.S. In contrast, an "injury" refers to the physical trauma caused by the accident. In other words, an "accident" is the cause and an "injury" is the result. *City of Boulder v. Payne*, 426 P.2 194 (1967). No benefits flow to the victim of an industrial accident unless the accident results in a compensable "injury." A compensable injury is one which requires medical treatment or causes a disability.

J. It is the claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between her employment and her injuries. An ALJ might reasonably conclude the evidence is so conflicting and unreliable that the claimant has failed to meet the burden of proof with respect to causation. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186, 191 (Colo. App. 2002) (weight to be accorded evidence on question of causation is issue of fact for ALJ). *See also, In the Matter of the Claim of*

Tammy Manzanares, Claimant, W. C. Nos. 4-517-883 and 4-614-430, 2005 WL 1031384 (Colo. Ind. Cl. App. Off. Apr. 25, 2005).

Compensability, as Applied

K. Dr. Kurz opines that Claimant's pain generator is from preexisting varicose veins, apparently being temporarily exacerbated during this snapshot in time. The ALJ is not persuaded. As noted by Claimant, said veins (as noted in the MRI) appear only on the *lateral* side of Claimant's right knee. Claimant's pain, while elusive at times, has been consistently noted on the *medial* side of her right knee. To the extent that one can observe Claimant on the floor right before she struggles to rise to her feet, she had the *medial* aspect of the front of her knee pressed against the floor.

L. Secondly, the ALJ is not convinced that this is a *temporary* exacerbation of any preexisting injury. As of the hearing date, Claimant's symptoms have persisted for a year since the date of injury. Conservative measures have all failed. *Claimant credibly has reported no similar symptoms at any point in her life until now* – nor have any medical reports been introduced to this effect. The fall in the Walmart bathroom from a date prior resulted in no significant injury or disability. She got to her feet, was checked out medically, and recovered from the bruise. The ALJ finds that incident to be a red herring.

M. From Clip 2 of the video, Claimant can be observed struggling to get to her feet for almost 30 seconds. She grabs her right knee in the process (not a natural movement for someone just getting up off the floor), then pulls up her right pant leg, apparently to inspect it – then appears to look at the left knee for a comparison. Notably, she just leaves the left pant leg up, and lets it fall back down into position on its own – not the actions of someone who is doing this for appearance's sake. As noted, she does nothing to brush off the other parts of her pants that were in significant contact with the floor. She then limps for a few steps, then appears to normalize her gait - consistent with her description of the injury, whereby it hurt severely, then dropped off rather rapidly – thus permitting her to attempt to “shake it off”, and continue her tasks. However, it continued to hurt, and she sought medical attention.

N. Due to the lack of twisting, falling, or any sudden movement, her medical providers were confounded in explaining a definitive diagnosis, despite Claimant's persistent symptoms, albeit mostly subjective in nature - but not to include the popping and clicking. Once Dr. Minihane – an orthopedic surgeon – became involved, he suspected a plica excision was warranted. The ALJ concurs. While plicae exist in a significant portion of the population, they fairly rarely become symptomatic – but that is what occurred here, and as a direct result of Claimant's work activities on 2/27/2019. The ALJ finds the injury to be compensable.

Medical Benefits, Generally

O. A claimant is entitled to medical benefits that are reasonably necessary to cure or relieve the effects of the industrial injury. See § 8-42-101(1), C.R.S. 2003; *Snyder v.*

Industrial Claim Appeals Office, 942 P.2d 1337 (Colo. App. 1997). The question of whether the need for treatment is causally related to an industrial injury is one of fact. *Walmart Stores, Inc. v. Industrial Claims Office*, *supra*. Similarly, the question of whether medical treatment is reasonable and necessary to cure or relieve the effects of an industrial injury is one of fact. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc.*, W.C. No. 4-117-758 (ICAO April 7, 2003).

P. The Medical Treatment Guidelines (Guidelines) are regarded as the accepted professional standards for care under the Workers' Compensation Act. *Hernandez v. University of Colorado Hospital*, W.C. No. 4-714-372 (January 11, 2008); see also *Rook v. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005). The Medical Treatment Guidelines, Rule 17-2(A), W.C.R.P. provide: All health care providers shall use the Guidelines adopted by the Division. In spite of this direction, it is generally acknowledged that the Guidelines are not sacrosanct and may be deviated from under appropriate circumstances. See, Section 8-43-201(3) (C.R.S. 2014). Nonetheless, they carry substantial weight.

Q. Pursuant to Workers' Compensation Rule of Procedure 17-2(A) health care practitioners are to use the *Guidelines* when furnishing medical care under the Workers' Compensation Act. See §8-42-101(3)(b), C.R.S. The ALJ may also appropriately consider the *Guidelines* as an evidentiary tool. *Logiudice v. Siemens Westinghouse*, W.C. 4-665-873 (ICAP, Jan. 25, 2011). However, the ALJ is not required to grant or deny medical benefits based upon the *Guidelines*. *Thomas v. Four Corners Health Care*, W.C. 4-484-220 (ICAP, Apr. 27, 2009). The ALJ's consideration of the *Guidelines* may include deviations where there is evidence justifying the deviations. *Logiudice v. Siemens Westinghouse*, W.C. No. 4-665-873 (ICAP, Jan. 25, 2011). There is no requirement for an ALJ to award or deny medical benefits based on the *Guidelines*. *Thomas v. Four Corners Health Care*, W.C. No. 4-484-220 (ICAP, Apr. 27, 2009); see *Nunn v. United Airlines*, W.C. No. 40785-790 (ICAP, Sept. 9, 2011).

Medical Benefits, as Applied

R. The ALJ has found that Claimant has suffered a compensable injury, causing her to suffer from plica syndrome. As noted by Claimant, Respondents agreed to all conservative treatment modalities – and work restrictions – for several months, up until Claimant's ATP orthopedist recommended surgery. While it might have been reasonable to file a Notice of Contest to "further investigate prior medical records" in the first instance, when no such records were uncovered, the ALJ must look with some skepticism when Respondents persist in denying this surgery. There is no viable explanation for Claimant's symptoms except a work injury.

S. Claimant has been in pain for over a year as a result of this work injury, and the ALJ finds the surgery, as proposed, to be reasonable, necessary, and related to her

work injury, despite the lack of a definitive diagnosis from the MRI imaging study. Clearly, Dr. Minihane has considered the evidence, and suggested this course of action. The ALJ is persuaded by his opinion. To the extent that the procedure is considered “exploratory”, the ALJ finds it to still be reasonable and necessary to cure and relieve Claimant of her injury. There are no further diagnostic tools being proposed by anyone prior to proceeding. To the extent that the Medical Treatment Guidelines would otherwise dictate greater objective evidence before proceeding, the ALJ finds any such deviation to be reasonable and necessary – and as noted, related to her work injury.

Temporary Partial Disability

T. Section 8-42-106(1), C.R.S., provides for an award of Temporary Partial Disability (TPD) benefits based on the difference between the claimant’s AWW at the time of injury and the earnings during the continuance of the temporary partial disability. In order to receive TPD benefits the claimant must establish that the injury has *caused* the disability and consequent partial wage loss. Section 8-42-103(1), C.R.S.; *Safeway Stores, Inc. v. Husson*, 732 P.2d 1244 (Colo. App. 1986) (temporary partial compensation benefits are designed as a partial substitute for lost wages or impaired earning capacity arising from a compensable injury).

U. The ALJ concludes that Claimant has suffered such a partial disability, and subsequent wage loss, as a result of her 2/27/2019 work injury. Since being placed on work restrictions by her ATP (which the ALJ reaffirms were reasonable, and based upon her condition), Claimant’s reduced AWW is \$242.56 (16 hours per week x \$15.16 per hour). Respondents shall pay Temporary Partial Disability benefits until otherwise terminated by operation of law.

ORDER

It is therefore Ordered that:

1. Claimant suffered a compensable work injury on 2/27/2019.
2. Respondents shall pay for all reasonable, necessary, and related medical treatment to cure Claimant of her work injury, including, but not limited to, the surgery as proposed by Dr. Minihane.
3. Respondents shall pay Claimant Temporary Partial Disability benefits from June 10, 2019, and ongoing, until terminated by operation of law.
4. Respondents shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.
5. All matters not determined herein are reserved for future determination.

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

DATED: March 26, 2020

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-110-196-001**

ISSUES

- Did Claimant prove he suffered a compensable injury on May 17, 2019?

If Claimant proved a compensable injury, the ALJ will address the following issues:

- Are Respondents liable for medical treatment provided by Pueblo Community Health Center and Parkview Medical Center?
- Did Claimant prove entitlement to TTD benefits commencing May 18, 2019?
- Did Respondents prove Claimant's TTD benefits should be reduced as a penalty for "late reporting" of the injury?

STIPULATIONS

The parties stipulated to an average with the wage of \$590, and that Southern Colorado Clinic will be the authorized provider if the claim is compensable.

FINDINGS OF FACT

1. Claimant worked in Employer's tortilla factory as a building maintenance technician. The job involved various tasks including structural repair, landscaping, drywall repair, and floor repair.

2. On May 17, 2019, Claimant repaired a large section of damaged drywall. The wall was 12 feet from floor to ceiling, necessitating three 4-foot tall "layers" of drywall. Claimant used a full 4' x 8' sheet at the bottom (oriented horizontally), and several pieces cut into smaller sections for the second and third layers. Claimant used an A-frame ladder to hang the higher pieces.

3. Claimant alleges he injured his low back while installing one of the higher pieces of drywall in an awkward position. Claimant testified he stood on the ladder for 8 to 10 minutes after the injury, waiting for his back pain to subside. He could not continue working, so he returned to the maintenance shop. He made log entries of his progress on the drywall project and told a coworker he was leaving for the day. On his way out of the building, he testified he told another coworker he was leaving and would not return that day. He went home at approximately 3:00 PM and rested. He testified he called his supervisor, Ruben M[Redacted], but Mr. M[Redacted] was unwilling to speak with him and hung up. He testified he then called the office manager in the HR manager and asked to speak to the plant supervisor, but the plant supervisor was unavailable. Claimant testified he called a "4 or 5 times" and spoke with the office manager and HR "a couple of times." He testified he told HR about the problem with his back but Employer did nothing.

4. Claimant completed a Workers' Claim for Compensation dated May 31, 2019. Claimant's counsel's office emailed the claim form to Employer on June 13, 2019 at 5:55 PM. Employer filed an Employer's First Report on June 14, 2019.

5. Claimant sought no treatment for his back pain until June 18, 2019, at Pueblo Community Health Center. Claimant had no insurance at the time of the injury, so he applied for Medicaid, and it took approximately a month for him to be approved. The initial report from PA-C Becerril documents the history as:

[H]e was on an A-frame ladder, was hanging drywall and twisted his back when trying to hold the drywall in place where he was getting his tools. Notes he injured his back. He didn't seek any medical treatment at the time of the injury as he was waiting for his union wrap to tell him where he could go, it ended up not hearing anything so he registered for Medicaid and came here for evaluation.

6. Ms. Becerril opined Claimant's symptoms were consistent with "musculoskeletal back pain" because straight leg raise testing was normal, and there were no other "red flags" suggesting neurologic compromise. She prescribed ibuprofen and referred Claimant to physical therapy.

7. Claimant returned to PA-C Becerril on June 25, 2019, and reported worsening low back pain radiating to the thighs. X-rays showed multilevel degenerative disc disease and advanced facet hypertrophy at L5-S1 resulting in severe bilateral neuroforaminal narrowing.

8. Claimant had a lumbar MRI on July 26, 2019. It showed a right-sided disc extrusion at L1-L2 contacting the right L2 nerve root, and multilevel degenerative foraminal stenosis, most severe at L5-S1.

9. Claimant had a surgical consultation with PA-C Micah Johnson on September 4, 2019. Mr. Johnson appreciated no neurological signs such as weakness or reflex changes. He saw no indication for surgery because Claimant presented primarily with axial back pain. Mr. Johnson recommended conservative treatment, including a lumbar ESI.

10. Claimant had an IME with Dr. Timothy Hall at his counsel's request on September 19, 2019. Claimant told Dr. Hall he "never" had low back pain or a back injury before May 2019. He described struggling to push a 100-pound sheet of drywall up the ladder and fasten it to the wall in May 17, 2019. Dr. Hall noted in his deposition that, "there wasn't a lot to his [physical] exam," other than range of motion deficits. Dr. Hall had only a handful of records to review, and no records pre-dating the alleged injury date. Relying on Claimant's statement had no prior low back problems, coupled with his description of the onset of low back pain while moving a heavy sheet of drywall in an awkward position, Dr. Hall reasonably concluded Claimant suffered a work-related back injury.

11. Claimant saw Dr. Albert Hattem for an IME at Respondents' request on December 3, 2019. Claimant told Dr. Hattem he developed severe back and upper leg

pain while standing at the top of the ladder securing a *full* 4' x 8' drywall sheet to the wall. Claimant said he told at least two coworkers about the injury before he left work. He also said he could not find his supervisor, Ruben M[Redacted], to report the injury. Claimant repeatedly denied having any back pain or treatment for back pain before May 2019.

12. Dr. Hattem's report described multiple medical records from 2016 that contradict Claimant's denial of prior back pain. For example, a February 22, 2016 record from Dr. Tuongvy Zamurs documents "chronic low back pain for the past years. . . . Dr. Thomas Hallfield at the Spanish Peaks Specialty Clinic previously did an MRI and worked the patient up for back pain. . . . He has had a prior MRI and x-rays with disc compression." Claimant rated his pain that date as 6-7/10. A March 2, 2016 report documents back spasms and occasional numbness in both legs. On March 16, 2016, a physical therapist indicated "The patient . . . presents with chronic low back pain that began in October 2013 when he was involved in a work-related accident. . . . He feels he is getting worse over the last year." Claimant went to physical therapy for approximately four months, but still rated his back pain is 6/10 at the last recorded therapy session on July 12, 2016. Additionally, Dr. Hattem noted several inconsistencies regarding Claimant's descriptions of interactions with coworkers and his supervisor on May 17. Dr. Hattem concluded,

[I]f [Claimant's] history of the event on May 17, 2019 is correct, then a work-related injury to the lumbar spine may have occurred. However, in this case, there were multiple inconsistencies that bring into question [Claimant's] credibility and the accuracy of his history. Considering all of these inconsistencies, it is not likely that a low back injury occurred on May 17, 2019, or that [Claimant's] current lumbar spine condition is work-related.

13. Respondents presented testimony of three witnesses, all of whom were credible and persuasive regarding various details of the case.

14. Rosemary A[Redacted], Employer's HR manager, was at the plant all day on May 17, 2019, from approximately 7:30 AM until after 5:00 PM. Another HR representative, Vickmarie M[Redacted], was there all day too. Ms. A[Redacted] recalled a conversation with Claimant the morning of May 17 because he had run out of gas and was late for work. She had no further conversations with Claimant that day. She next spoke with Claimant by phone on Monday, May 20. He was upset that someone had stolen his tools and wanted to view surveillance video. Later that day, Ms. A[Redacted] called Claimant to let him know his tools were there. Claimant wanted Employer to buy him "brand-new tools" using its account at Lowes or Home Depot. Claimant returned to the plant on May 21 to turn in his keys and quit. He told Ms. A[Redacted], "I'm not coming back to this place, you have a thief here." He continued to demand Employer buy him new tools. Claimant never mentioned a work injury during any of those interactions, and Ms. A[Redacted] knew nothing about any the claimed injury until mid-June 2019.

15. Vickmarie M[Redacted] confirmed Claimant receiving training on Employer's policies about reporting all work injuries immediately to a supervisor or HR representative. Although she could not remember the exact date of the conversation, Ms. M[Redacted] corroborated Ms. A[Redacted]'s account of Claimant coming in late on May

17 because he ran out of gas. Ms. M[Redacted] recalled seeing Claimant later that same day fixing a door in the breakroom. She neither saw nor heard from him again that day, and knew nothing about any claimed back injury. She recalls Claimant came in on a later date and was “very disgruntled claiming that someone had done something to his tool box.” He did not mention a work injury at that time or any other time.

16. Ruben M[Redacted] is Claimant’s direct supervisor. He credibly testified Claimant only used one full 4 x 8 drywall sheet on the first layer of the repair (at ground level). He cut the sheets into smaller sections for the layers above that. The only sections Claimant would have to be on the ladder to install were 4’ x 5’ and 4’ x 28”.¹ Before he left work, Claimant spoke with Mr. M[Redacted] about leaving his tools in Mr. M[Redacted]’s office overnight because he wanted to come in early the next morning and finish the drywall project. He said nothing about any back injury, and the ALJ infers he demonstrated no outward appearance of pain or discomfort. Claimant came in to the plant briefly on May 18, 2019, but was angry about his tools and walked off the job shortly after he arrived. Claimant called Mr. M[Redacted] on May 19 (not May 17 as Claimant alleged) but they had a bad cellular connection and Mr. M[Redacted] hung up. He found a place to pull over and called Claimant back. He asked why Claimant had walked off the job on May 18, and Claimant said it was because he was missing tools and some other employees were laughing at him. He did not mention any back injury.

17. Dr. Hattem’s analysis and conclusions are credible and consistent with other persuasive evidence in the record.

18. Claimant failed to prove he suffered a compensable injury on May 17, 2019.

CONCLUSIONS OF LAW

To receive compensation or medical benefits, a claimant must prove he is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo. App. 2001). The claimant must prove that an injury directly and proximately caused the condition for which he seeks benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). A pre-existing condition does not necessarily preclude a claim for compensation. If an industrial injury aggravates, accelerates, or combines with a pre-existing condition to produce disability or a need for treatment, the claim is compensable. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). A claimant must prove a compensable injury by a preponderance of the evidence. *Page v. Clark*, 592 P.2d 792 (Colo. 1979).

As found, Claimant failed to prove he suffered a compensable injury on May 17, 2019. As Dr. Hattem pointed out, there is no objective of evidence of any injury, and this case largely turns on Claimant’s credibility. There are simply too many inconsistencies in Claimant’s story to give his testimony or statements significant weight. For instance, he

¹ Dr. Hattem noted a 4’ x 5’ piece of drywall would weigh approximately 45 pounds, far less than the 80 or 100 pounds Claimant told Dr. Hattem and Dr. Hall, respectively.

told Dr. Hall and Dr. Hattem he “never” had prior back problems, despite medical records showing significant treatment for “chronic” low back pain starting in 2013. He walked off the job on May 18, 2019 because of an unrelated grievance, and thereafter sought no treatment for a month. He told Dr. Hattem he struggled to maneuver a “full” 4’ x 8’ drywall sheet up the ladder, and at least implied the same to Dr. Hall. But Mr. M[Redacted] confirmed the only full sheet Claimant used was at the ground level; he used smaller pieces above that.² No one corroborated Claimant’s statement to Dr. Hattem he told at least two coworkers about the injury before he left work. Claimant alleged he could not find Mr. M[Redacted] to report the injury, but he spoke with Mr. M[Redacted] before he left work about leaving his tools in the office overnight. He said nothing to Mr. M[Redacted] about any injury before he left work, nor did he mention a work injury when he spoke with Mr. M[Redacted] by phone on May 19. Claimant testified he spoke to someone in HR multiple times about the injury, but Ms. A[Redacted] and Ms. M[Redacted] did not speak with him and were not aware of anyone else who did. Claimant has the burden of proof in this matter, and after considering all the evidence, the ALJ concludes he failed to prove he more-likely-than-not suffered a compensable injury on May 17, 2019.

ORDER

It is therefore ordered that:

1. Claimant’s workers’ compensation claim is denied and dismissed.

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

DATED: March 27, 2020

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

² The ALJ agrees with Dr. Hall and Dr. Hattem that moving a 4 x 5 piece of drywall up a ladder could cause a back injury. But that was not how Claimant described the incident, and the key point here is the inconsistency.

ISSUES

Whether the claimant has demonstrated, by a preponderance of the evidence, that lumbar surgery, as recommended by Dr. Kirk Clifford, is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted July 8, 2017 work injury.

FINDINGS OF FACT

1. While working for the employer, the claimant was a landscape and reclamation supervisor. The claimant's job duties included overseeing crews of landscapers. In addition, the claimant performed all of the physical duties of a landscaper. These duties included installing irrigation systems, planting trees and other plants, and laying sod. The claimant credibly testified that his job with the employer was physically demanding.

2. On July 8, 2017, the claimant was working to install a landscaping retaining wall. During this process, the claimant lifted a small boulder, roughly the size of a basketball, and felt a pain in his low back. The claimant reported this incident to the employer. Thereafter, the claimant was referred to SMMG Occupational Health for treatment.

3. During this claim, the claimant's authorized treating provider (ATP) has been SMMG Occupational Health. On August 9, 2017, the claimant was first seen at SMMG Occupational Health by James Harkreader, NP. At that time, the claimant described the July 8, 2017 lifting incident that resulted in a sharp pain in his left low back. Mr. Harkreader diagnosed a lumbosacral back strain. He recommended chiropractic treatment, ice, heat, and ibuprofen. In addition, he assigned a 20 pound lifting restriction. Thereafter, the claimant continued to treat with Mr. Harkreader. The claimant's treatment included the recommended chiropractic treatment, and the use of a TENS unit.

4. On November 15, 2017, the claimant returned to Mr. Harkreader and reported pain of two out of ten. On that date, Mr. Harkreader determined that the claimant had reached maximum medical improvement (MMI). Mr. Harkreader did not assess a permanent impairment or permanent work restrictions. With regard to post-MMI medical treatment, Mr. Harkreader recommended completion of chiropractic treatment and continued use of the TENS unit.

5. On March 20, 2018, a magnetic resonance image (MRI) of the claimant's lumbar spine showed a mild eccentric to the left L5-S1 disc protrusion with abutment of the descending nerve root.

6. On April 10, 2018, the claimant was seen by Dr. Stagg and reported pain levels that ranged from three to eight out of ten. Dr. Stagg noted that the claimant had seen the chiropractor approximately 30 times without relief. Dr. Stagg recommended the claimant undergo physical therapy for core strengthening. In addition, Dr. Stagg referred the claimant to Dr. Kirk Clifford with Western Colorado Spine for a surgical consultation.

7. On June 8, 2018, the claimant returned to Dr. Stagg. At that time, the claimant communicated that Dr. Clifford had recommended an injection¹. Dr. Stagg noted that the claimant continued at MMI.

8. On June 13, 2018, Dr. Clifford administered a left sided L5-S1 transforaminal epidural steroid injection (TFESI).

9. On September 10, 2018, the claimant was seen by Dr. Clifford. In the medical record of that date, Dr. Clifford noted that the claimant had a L5-S1 left sided disc herniation. The claimant reported to Dr. Clifford that following the June 2018 injection, he experienced 90 percent relief of his symptom for four weeks. Dr. Clifford recommended a repeat left L5-S1 TFESI. In addition, Dr. Clifford noted that the claimant was “getting ready to switch jobs”.

10. The claimant testified that in September 2018 he began working for another company as a supervisor. At the time of the hearing, the claimant was continuing to work full-time as a supervisor for that employer.

11. On February 20, 2019, Dr. Clifford administered the repeat left sided L5-S1 TFESI.

12. On March 25, 2019, the claimant returned to Dr. Clifford and reported that the most recent injection provided three weeks of 90 percent improvement. On that date, Dr. Clifford recommended surgical options including an anterior lumbar interbody fusion, or an artificial disc replacement.

13. On May 31, 2019, a lumbar spine MRI showed a left sided disc extrusion at the L5-S1 level. In addition, that disc extrusion was in contact with the thecal sac and the left S1 nerve root. There was also mild retolsthesis and moderate disc space narrowing at the L5-S1 level.

14. On August 29, 2019, the claimant was seen by Dr. Clifford who noted that the claimant had “stable L5-S1 [herniated nucleus pulposus]” and was still at MMI and working full duty.

15. The claimant returned to Dr. Clifford on December 23, 2019 and reported pain of four out of ten. The claimant described his pain as an ache and stabbing in his left low back and into his left buttock. On that date, Dr. Clifford reviewed the May 31, 2019 MRI. He agreed with the radiologist that the claimant had disc degeneration at the

¹ It is unclear from the medical records when this injection was recommended. However, as noted, the injection was administered on June 13, 2013.

L5-S1 level. He also noted that his reading of the MRI showed a small left sided paracentral disc bulge with some mild effacement into the S1 nerve root. Dr. Clifford continued to recommend surgical intervention. He also recommended that the claimant continue core strengthening, stretching, anti-inflammatories, and ice.

16. On January 7, 2019, the claimant was seen by Dr. Stagg. At that time, the claimant reported that his low back pain was radiating into his left lower extremity. Dr. Stagg noted that Dr. Clifford had recommended an additional injection. Dr. Stagg recommended physical therapy. Dr. Stagg noted that the claimant was working full duty.

17. On August 12, 2019, the respondents filed a General Admission of Liability.

18. On October 23, 2019, the claimant attended an independent medical examination (IME) with Dr. Brian Reiss. In connection with the IME, Dr. Reiss reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In his November 12, 2019 IME report, Dr. Reiss opined that the claimant's current symptoms are "secondary to the work injury combined with deconditioning". Despite that opinion, Dr. Reiss also opined that surgical intervention, as proposed by Dr. Clifford is not reasonable or necessary to treat the claimant's axial back pain. Dr. Reiss recommended an intensive core-strengthening program and potentially a left L5-S1 facet injection. Dr. Reiss's testimony by deposition was consistent with his written report.

19. Dr. Reiss testified that it is his opinion that the claimant has not completed conservative treatment of his symptoms. Dr. Reiss reiterated his opinion that the claimant could benefit from a core-strengthening program. Dr. Reiss also testified that the injections administered by Dr. Clifford have not identified the claimant's pain generator.

20. On November 18, 2019, Dr. Clifford authored a letter in response to Dr. Reiss's IME report. In that letter, Dr. Clifford noted that the claimant has undergone extensive physical therapy. In addition, Dr. Clifford described the claimant's TFESIs as providing "excellent anesthetic and short time therapeutic results." Dr. Clifford also opined that the claimant was a candidate for an anterior lumbar fusion, which would allow the claimant improved function.

21. On December 23, 2019, the claimant returned to Dr. Clifford and reported that following the most recent TFESI he experienced 90 percent improvement of his symptoms for three weeks. On that date, Dr. Clifford noted that although he had recommended either a lumbar fusion or artificial disc replacement, those surgical options were denied by the insurer. Dr. Clifford recommended that the claimant continue core strengthening, stretching, the use of anti-inflammatories, and ice. Finally, Dr. Clifford recommended that the claimant undergo a lumbar computed tomography (CT) scan to determine if a fusion or a disc replacement would be preferable.

22. Dr. Clifford testified at hearing and stated that the claimant's lifting incident on July 8, 2017 was consistent with the claimant's low back symptoms. Dr. Clifford also

testified that surgical intervention would minimize the claimant's low back pain. In his testimony, Dr. Clifford clarified his surgical recommendations for the claimant. Specifically, Dr. Clifford has recommended the claimant undergo either 1) an anterior L5-S1 fusion, or 2) an artificial disc replacement at that level. At hearing, Dr. Clifford learned that the recommended CT scan had been performed and showed no pars defect. Based upon that information, Dr. Clifford stated that he would recommend the artificial disc replacement for the claimant. Finally, Dr. Clifford testified that the recommended surgery is reasonable, necessary, and related to the work injury.

23. The claimant testified that following his injury, he underwent four to six months of chiropractic treatment and six months of physical therapy. In addition, he has been doing a home exercise program focusing on core strengthening since April 2018. The claimant testified that he exercises six days a week doing crunches, planks, and leg lifts.

24. With regard to his current employment (that began in September 2018), the claimant testified that he oversees crews, orders materials, and operates heavy equipment. In comparison to his prior job with the employer, the claimant testified that his current position is less physical. The claimant also testified that when his current position requires more physical duties (such as shoveling or lifting small equipment) he delegates those duties to a member of his crew. The claimant testified that if he was still working for the employer he would be unable to perform all of his duties.

25. The claimant testified that his current symptoms include low back pain that is left of center, with radiating pain into his left buttock. He described the pain as stabbing and shooting at times, with a constant aching. The claimant also testified that because of his low back pain he is unable to engage in various activities. These activities include jogging, coaching his children in wrestling, overnight backpacking, and intimacy with his spouse. In addition, activities that involve slow walking, such as shopping, are painful. However, the claimant admits that he continues to work full-time, without work restrictions.

26. The claimant testified that he wants to undergo surgery. With regard to the two proposed surgeries, the claimant stated that he would defer to Dr. Clifford.

27. The ALJ credits the medical records, the claimant's testimony regarding his symptoms and limitations, and the opinions of Dr. Clifford over the contrary opinions of Dr. Reiss. The ALJ also notes that Dr. Reiss clearly opined that the claimant's current symptoms are "secondary to the work injury combined with deconditioning". The ALJ is persuaded by Dr. Clifford's opinion that the recommended disc replacement surgery will improve the claimant's function. The ALJ finds that the claimant has successfully demonstrated that it is more likely than not that the surgical intervention recommended by Dr. Clifford is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury.

28. The ALJ recognizes that the claimant has been placed at MMI, with no work restrictions, and no permanent impairment. However, no Final Admission of Liability (FAL) has been filed in this case. Therefore, the ALJ finds that the proper analysis is

whether the recommended surgery is reasonable and necessary to cure and relieve the claimant from the effects of the work injury, and not whether it will help maintain him at MMI.

CONCLUSIONS OF LAW

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

2. The ALJ’s factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness’s testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *CJI, Civil 3:16* (2017).

4. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; see *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

5. As found, the claimant has demonstrated, by a preponderance of the evidence that the surgical intervention recommended by Dr. Clifford is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury. As found, the medical records, the claimant’s testimony, and the opinions of Dr. Clifford are credible and persuasive.

ORDER

It is therefore ordered that the respondents shall pay for the lumbar surgery, as recommended by Dr. Clifford, pursuant to the Colorado Medical Fee Schedule.

Dated this 1st day of April 2020.



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

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

ISSUES

- I. Has Claimant shown that orthopedist Lucas King, MD is an Authorized Treatment Provider for Claimant's admitted work injury?
- II. Has Claimant shown that the surgeries performed by Dr. King were reasonable, necessary, and related to Claimant's admitted work injury?
- III. Has Claimant shown that he is entitled to Temporary Partial Disability payments for various periods beginning May 28, 2019, and continuing through September 10, 2019?

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

Testimony from Claimant

1. Claimant graduated high school from Pueblo East in 1989, and his main employment since then has been as a trucker.
2. Claimant also gained experience operating a front-end loader after his surgery 25 years ago. Claimant testified that prior to employment with Respondent, he worked as a heavy equipment loader, which required him to routinely climb inclines of rock and sand eight to ten times a day. Claimant did not have any issues with his knee during this time.
3. Claimant had a prior arthroscopic surgery on his right knee to repair a torn meniscus 25 years ago. However, Claimant testified that in the 6 months prior to March 4th, 2019, he had no pain or problems with his knee.
4. As of March 4, 2019, Claimant worked for Select Staffing, a temporary staffing agency which is owned and operated by Respondent Employbridge. He was earning \$13 per hour at 40 hours per week.
5. Claimant had begun working for Select Staffing just a few weeks earlier. Claimant was training to operate heavy machinery known as a "tugger" (similar to a forklift) for an air conditioning supplier, Trane.
6. On March 4, 2019, Claimant reported to work at 6:00 a.m. (Ex. B, p. 3). Claimant was following his trainer and a "tugger" at approximately 8:00 a.m. Wherever the trainer walked, Claimant followed. Claimant's trainer took him along a path covered with snow and ice.

7. Claimant slipped on this icy path. Claimant was sliding sideways, with weight on his right knee attempting to hold his balance. As Claimant slid on the ice to his right, the ice beneath him changed to snow, abruptly stopping his fall. Claimant's right knee "popped" and he felt immediate pain.
8. Despite the pain, Claimant thought it was temporary and "something simple." He did not immediately report his injury. However, his pain *worsened* through the evening prompting Claimant to report his work-related injury to his employer the following day.
9. Claimant reported to CCOM for evaluation. His original diagnosis was a knee sprain. Claimant was placed on light duty the following day, March 5, 2019. Claimant's light duty continued at Trane through Select Staffing under Respondent Employbridge. He described this light duty as "paperwork, filing, packets for the training department, sitting down."
10. Around the end of March 2019, Employer told Claimant stop working at the Trane location, and eventually sent him to Arc Thrift Stores to continue light duty employment through Select Staffing.
11. According to Arc Thrift Stores, Claimant was employed there through Respondent Employbridge (d/b/a Select Staffing) from April 2, 2019 through September 10, 2019. (Ex. 7). Claimant further submitted a log of work at least partially corroborating these dates. (Ex. 8). This work log prepared by the Arc shows days when Claimant was scheduled to work, if he attended, how long he worked, and contains some notes such as "sent home" or "no work remaining" or even "NC NS" indicating Claimant did not show up for his scheduled shift of modified duty. *Id.*
12. Claimant signed a document provided by Respondents informing Claimant his modified duty at the Arc Thrift Stores would continue to pay Claimant \$13 per hour, and provide Claimant with 40 hours of work per week. (Ex. 4). Also during this time, Respondents filed a General Admission of Liability on May 31, 2019, admitting liability for medical benefits and TTD benefits for this time period. (Ex. 1).
13. Claimant had been working at the Arc since April 2, 2019, but had to take time off work for his knee injury, including having surgery performed on May 19th, 2019 on his right knee by Dr. King. Respondents modified duty offer stated it was effective May 8, 2019, signed by a physician May 13th, 2019, with a start date of May 28th, 2019. *Id.* However, for reasons unclear, Respondents did not sign the modified duty offer.
14. Claimant testified that the date work was available for him at the Arc had gotten mixed up, and he was asked to sign a second modified duty offer with a start date of June 4, 2019. [This second document does not appear in the record]. Nonetheless, Claimant returned to modified duty on June 4th and continued working modified duty

at the Arc through September. Respondent did not pay Claimant TTD the week for 5/28/19 through 6/4/2019. (Ex,1, 2) (showing TTD paid only from 4/22/19 – 5/28/19).

15. Notably, the log (Ex. 8) showing specific dates Claimant was scheduled to work (as well dates Claimant did not attend scheduled work) does not indicate Claimant was scheduled to begin work the week of May 28, 2019 or that Claimant missed a week of work. Conversely, it shows Claimant began work on 6/5/2019, as scheduled.
16. Due to Claimant's continuing treatment and work restrictions, (including requiring Claimant sit 90% of the time) and there simply being not enough work to be done at the Arc, Claimant was sent home early and often, working only 15 to 20 hours per week.
17. Claimant did not resign from his duties at Arc Thrift Stores. Additionally, Arc Thrift Stores did not tell Claimant he could not work there anymore. Select Staffing's contact with the Arc ended on 9/10/2019. Claimant's last day of working at Arc Thrift store was September 10, 2019. Claimant has not worked since. He was placed on TTD.
18. Respondents submitted a second General Admission of Liability September 24, 2019, again admitting liability and medical benefits. This GAL showed TTD payments starting the day after Respondent cancelled Claimant's position with Arc Thrift Stores, September 11, 2019. (Ex. 2). Claimant testified that he continues to receive TTD benefits.
19. Claimant testified that despite being promised \$13 per hour and 40 hours per week while working modified duty at Arc Thrift Stores, he worked much less during that time and did not receive TPD benefits from April 2, 2019, to September 10th, 2019. Additionally, Claimant did not receive TTD for the week of May 28th to June 4th, 2019
20. Claimant was cross-examined about missing work as a "no call, no show" ("NCNS"), but Claimant asserted that he would call Employer and Employer's agent, Brittany R[Redacted], instead of calling the Arc directly. Additionally, Claimant pointed out that his work sheet showed there were several days when he did report to work and did not receive 8 hours of work, including specific notes saying "no work remaining."

Claimant's Medical Treatment

21. Claimant testified that he did not have a limp prior to March 4, 2019 but has had pain, swelling, and noticeable limp since.
22. Claimant's authorized provider was Daniel Olson, M.D. at CCOM. Claimant testified that his knee was "throbbing" and he called Dr. Olson's office. Claimant was told by Dr. Olson's office to go the emergency room for his severe pain without specifying an emergency room.

23. Claimant went to Park West ER for his right knee pain on 3/21/19, whereupon Claimant was noted to be in *severe pain*. (Ex. 11, p. 72) Park West further referred Claimant to a surgeon, Dr. Lucas King, and gave Claimant a referral document to provide his authorized provider, Dr. Olson. The notes show: "has not seen ortho to date. Tried to fu [follow-up] w workmans comp today but they had no appt times x 3 days. *Id* at 70.
24. Upon referral from CCOM, Claimant had undergone an MRI at Open MRI of Pueblo on March 18, 2019. The pertinent Finding was "There is a focal osteochondral defect in the medial femoral condyle measuring 6 x 12 mm. This appears to be *chronic and unstable*. Patellar cartilage was also noted to be "thinned". (Ex. 12, p. 74)(emphasis added).
25. Claimant testified that Dr. Olson's first recommendation for a surgeon was unavailable and because of that, when Claimant returned to Dr. Olson's office. He stated he was referred to Dr. King by Park West, and Dr. Olson agreed with the Park West ER that Claimant should be referred out to see Dr. Lucas King.
26. Claimant then presented to Dr. King on March 26, 2019. At that time, Dr. King was hopeful that surgery could be avoided, and performed a steroid injection, with follow-up in two months. (Ex. 10, p. 31).
27. However, Claimant continued to experience symptoms, and went back to Dr. King on April 9, 2019. At that time, Dr. King noted Claimant's lack of progress, noting specifically the possible need for the chondroplasty and debridement of his medial femoral condyle. Claimant desired to proceed with this surgery, which occurred on 4/22/2019. Surgical notes are not in the record.
28. Claimant's post-surgical follow-up with Dr. King occurred on May 7, 2019. At that time, Claimant was doing well, attending physical therapy, and was wearing a brace. (Ex. 10, p. 35).
29. Claimant's next follow-up with Dr. King was on May 14, 2019. At that time, Claimant was not progressing as hoped, despite attending physical therapy. Dr. King expressed optimism that Claimant could heal with time, and indicated that due to the large chondral defect, he would be treated like an arthritis patient *moving forward*. (Ex. 10, p. 37).
30. Claimant appeared for his next follow-up with Dr. King on May 30, 2019. PA Sloan noted continued pain, swelling, and periodic catching, with the chondral loss identified at the culprit. For the first time, total knee arthroplasty was discussed as a possible remedy, along with a Synvisc injection. (Ex. 10, p. 40).
31. Respondents filed a General Admission of Liability on May 31, 2019, admitting liability for medical benefits and TTD benefits.

32. Claimant then presented on June 13, 2019 for the Synvisc injection, which occurred without incident. (Ex. 10, p. 41). At a follow-up on June 18, 2019, Claimant continued to complain of pain, but he was set for a follow-up in 6 weeks. *Id* at 43.
33. A second MRI was performed on 6/28/2019. In this exam, the significant Findings were: "There is a large full-thickness defect in the cartilage along the lateral aspect of the medial femoral condyle, which measures 12 x 22 mm. Small joint effusion is noted." All other ligaments remained unremarkable. (Ex. 12, p. 75) (emphasis added).
34. Claimant followed up with Dr. King on 7/16/2019. Claimant continued to complain of pain. Dr. King noted, "His *work comp doctor* ordered a new MRI, which showed no new pathology present." (Ex. 10, p. 45 (emphasis added). [pages are then missing from this visit].
35. However, in a follow-up visit on 7/30/2019 with PA Sloan, it was noted that Claimant had attended the joint arthroplasty class as directed. Claimant's symptoms persisted, and he wished to go forward with the knee replacement. (Ex. 10, p. 46). The possibility of a revision due to his age was discussed. *Id*.
36. A follow-up also occurred at Parkview on 7/31/2019 with Rupal Chavda, MD, for Claimant's rheumatoid arthritis, which had been diagnosed in 2013. His last visit had been 8/24/2018, and he was set for a 6-month follow-up. At that time, the focus was on Claimant's *hands*, while it was noted in the file [thus disclosed by Claimant] that he was planning on a TKA [total knee arthroplasty], due to lack of improvement from the arthroscopic procedure. At no point in this visit was RA discussed as a factor in Claimant's *knee* complaints. (Ex. 10, pp. 48-53).
37. Respondents submitted a second General Admission of Liability on September 24, 2019, again admitting liability and medical benefits. (Ex. 2).
38. The next entry from PA Sloan is from 10/24/2019. The right knee TKA had occurred on 10/9/2019. Claimant continued to complain of right knee pain, and his range of motion was limited. Dr. King also saw Claimant. Claimant was admonished that he must get more aggressive with his ROM therapy, or his leg might get stiffer and require a manipulation. (Ex. 10, p. 55).
39. Claimant saw Dr. King on 11/11/2019. Claimant was walking on the TKA, but still complained of pain. He had 10 degrees of extension, 90 degrees of flexion. No signs of infection. Claimant was again he needed to work on his ROM, or a manipulation would be necessary. (Ex. 10, pp. 56-57).
40. Next visit was 12/10/2019 with Dr. King. Range of motion was diminished. Claimant was described as "very pain effective" (?). A manipulation [under anesthesia] was deemed necessary to restore Claimant's ROM. (Ex. 10, p. 59).

41. The next entry was 12/31/2019, at which point Claimant was 15 days' post-procedure [12/16/2019]. By this time, it noted that *Medicaid* had not authorized further physical therapy visits, but Claimant was doing his own exercises. The stated goal was to get Claimant back into physical therapy. (Ex. 10, pp. 61-62).
42. Claimant returned to Dr. King on 1/14/2020. It was noted that Claimant was not attending physical therapy as required, and thus he was not getting the desired results with his ROM. From the notes, it is unclear if it is from simple noncompliance, or a lack of approval by Medicaid. A second manipulation was not considered at this juncture. (Ex. 10, pp. 63-64).
43. Claimant returned to Dr. King on 2/11/2020. This time it was noted that Claimant had been faithfully doing his therapy by exercising at home, but still without much ROM improvement. It was agreed at this visit that a second manipulation was warranted, but accompanied by arthroscopic surgery to remove scar tissue. (Ex. 10, pp. 65-66). No further entries are noted.

Billing by Parkview Medical Center

44. Each of Claimant's visits with Dr. King with Parkview Orthopedics, as noted above, are through Parkview Medical Center letterhead. Beginning at the first visit on 3/26/2019, Claimant's insurance was listed as *Medicaid*. (Ex. 10, p. 30).
45. Parkview then noted his insurer at the next visit [4/9/2019] as "**WC** Gallagher Bassett" (Ex. 10, p. 33) (emphasis added).
46. Parkview continued to list Claimant's insurer as **WC** Gallagher Bassett at every visit up until 10/24/2019 [then also 11/11/2019], then it was changed back to *Medicaid*.
47. Parkview then changed his insurance back to **WC** Gallagher Bassett at his next two visits, 12/31/2020, and 1/14/2020, then the final visit on 2/11/2020 lists Claimant's insurer once again as *Medicaid*.

Claimant's Continued Treatment and Billing

48. Claimant testified that he received medical benefits from Respondents for the initial surgery by Dr. King and physical therapy appointments afterward, but the medical benefits through Respondents ceased for the remainder of his treatment.
49. Claimant continues to attend physical therapy twice a week since this procedure. Claimant has finally seen some improvement in his right knee; however, he still walks with a noticeable limp.

Deposition of Dr. Olson

50. Daniel Olson, M.D., is a Level II Accredited physician that has been licensed to practice medicine since 1981.
51. Claimant went to Dr. Olson's clinic on March 5th, 2019, for treatment of Claimant's March 4th, 2019, work injury. Claimant reported to Dr. Olson's office that he slipped on ice at work and his right knee buckled inward.
52. Dr. Olson examined Claimant on March 19th, 2019 and noted swelling in Claimant's knee. Dr. Olson was also asked about other conditions surrounding Claimant's work-related injury, such as Type III Chondromalacia. and Dr. Olson opined that those conditions were likely there before Claimant injured his knee at work.
53. Dr. Olson again examined Claimant on March 26th, 2019 and noted reduced flexion of the knee.
54. Dr. Olson testified that Claimant's referral to Dr. King "got started" when Claimant went to Parkview ER, [therefore corroborating Claimant's testimony that the ER first recommended Dr. King and that later Dr. Olson agreed Claimant should go see Dr. King].
55. Dr. Olson reviewed operative notes of Dr. King's. He opined that he could not determine how long the defect (an unstable flap of cartilage) had been present; however, Claimant's knee buckling inward was a sufficient event for symptoms to begin if they were asymptomatic before.
- ...I think the way he [Claimant] described it, though, is *he buckled inwardly where the defect is*, and that could certainly apply enough torsion to it. (Transcript, pp. 14-15) (emphasis added).
56. Dr. Olson testified that Claimant was placed on restrictions to mostly sitting jobs as of June 19, 2019. He testified that although Claimant was cleared to work within his restrictions, he was aware Claimant's surgery did not help his symptoms, as his pain continued on.
57. Dr. Olson noted that merely because the MRI showed pathology does not mean that the pathology was actually causing symptoms. He further acknowledged that the chondromalacia "predated" the work injury.
58. Dr. Olson testified that he was not surprised that Claimant did not have relief from the May 19th, 2019 arthroscopic surgery [which was covered by Respondents] because, "[T]here's actually been pretty good studies that doing arthroscopic surgeries on arthritic knees doesn't always work. They seem like they have a fair amount continue to have pain after the surgery." (Transcript, p. 17). Dr. Olson testified that he shared this piece of literature with Claimant.

59. Dr. Olson testified that even though he considered Claimant's total knee replacement "elective" that Claimant did not have any other choice for continued treatment for his painful knee, because a recent MRI showed that the defect on Claimant's knee was larger as a "result of [the May 19th, 2019] surgery" and "not a new problem." He opined that "the *only option* surgically, you know, from Dr. King's perspective would be a total knee [replacement]." (Transcript, p. 23) (emphasis added).

60. Dr. Olson testified that he examined Claimant the morning of this deposition, and that Claimant was not at MMI because he had significant loss of range of motion, including significant extension short lag of 28 degrees, likely has scarring in his knee, continuing knee pain, and would likely need another manipulation under anesthesia. He testified that Claimant has "not made much progress" and "has a horrible limp because of the extension lag."

61. When asked about actual injuries, Dr. Olson testified that,

If he [Claimant] was not seeing any orthopedic specialists or any primary care doctors complaining of this right knee before the incident, then I would say, yes, *the [March 4th, 2019] incident aggravated his previously asymptomatic arthritis to the point where it's symptomatic and compensable.* (Transcript, p. 30) (emphasis added).

62. Dr. Olson stated that, objectively, he could not state whether the unstable flap of cartilage was there before the injury or caused by Claimant's injury because "we're not that good at that stuff." However, he stated "if he had an asymptomatic knee before, and he [had] this incident and now the osteochondral defect either has tears or has become symptomatic, and he doesn't get better, he should get an impairment rating" because "it's an aggravation of a previously underlying condition." (Transcript, p. 31).

63. Respondent's inquired of Dr. Olson on treatment that would be reasonable and necessary:

Q: So if I understand what you're saying, if the osteochondral defect was caused by what occurred on March 4, and since Dr. King elected to remove the osteochondral defect on April 22... and since that procedure, as you predicted, did not cure or relieve [Claimant], then the only procedure left that could be tried was a total knee replacement, which, unfortunately in this case also didn't cure or relieve [Claimant]. Am I understanding you correctly?

A: Yes.

Q: All right. So assuming, hypothetically, that an administrative law judge were to find that the total knee replacement was a direct and proximate

result of the sequelae of the March 4, 2019 industrial injury, currently, based on your evaluation of today, what additional health care treatment do you believe [Claimant] needs?

A: I think he needs a second manipulation under anesthesia. Another possibility would be an arthroscopic release of adhesions and aggressive physical therapy after that procedure to maximize his range of motion.

64. Dr. Olson testified that as of January 29, 2020, Claimant could not stand or walk straight because his knee creates balance issues. Dr. Olson was asked if his opinion has remained the same as Dr. Olson's March 26, 2019, report which indicates Claimant's injury is work-related. Dr. Olson simply answered, "Yes."

Respondent's IME Report and Deposition Testimony of Dr. Ciccone

65. Dr. William Ciccone, MD, performed an IME, which Claimant attended on October 2, 2019. Dr. Ciccone produced one report on October 21st, 2019, and supplemental reports on February 10th and February 24th of 2020. (Ex. D). Dr. Ciccone testified that he does IMEs "two half-days" a month and that yields approximately 8-12 IMEs per month.

66. Dr. Ciccone stated that Claimant told him that his knee was fine before March 4, 2019, that he had no symptoms prior to that date. Dr. Ciccone did not see any medical records indicating otherwise in the 10 years prior to the incident.

67. Dr. Ciccone was asked about the March 4, 2019 incident Claimant had at work, and Dr. Ciccone stated, "It's my opinion that I did not think [Claimant] suffered an injury to his knee on that date."

68. Dr. Ciccone's initial report (10/22/19) begins by expressly stating Claimant was walking at work when he slipped on ice, caught dry ground, "felt a pop at the time of injury", "had pain over the anterior aspect of the knee", and "suffered a twisting injury to his knee." (Ex. D, p. 7). Dr. Ciccone notes that Claimant's knee began swelling that evening. Dr. Ciccone admitted that feeling a pop and pain over the anterior of the knee indicates sensations at the time the injury occurred. [Dr. Ciccone's ultimate opinion in his report, however, is that Claimant did not suffer a work-related injury because "*he did not even have pain any knee pain until late that night. One would expect immediate pain and swelling if significant injury had occurred.*" (Ex. D, p. 16) (emphasis added)].

69. Dr. Ciccone comes to this "no pain at the time of the incident" conclusion despite his own "Review of Records" indicating:

- March 4th, 2019, Report of injury states "right foot slipped in snow, then he caught it, *then he felt pain...*" (Ex. d, p. 10).

- March 12th , 2019, NP Madrid notes “the *pain began March 4, 2019.*” (Ex. D, p. 11).
- March 26th, 2016, Dr. King notes “walking on ice at work when his knee buckled... *He had immediate pain*, mainly over the medial aspect of the knee.” Dr. King’s assessment is *acute* pain in the right knee. (Ex. D, p. 12).
- September 3rd, 2019, Nurse Practitioner Madrid notes “*sharp pain* and right knee swelling” which “*began on March 4th, 2019.*” (Ex, D, p. 14).
- September 29th , 2019, Dr. Olson notes “The *problem began March 4th, 2019.*” (Ex. D, p. 15).

70. Dr. Ciccone does not believe Claimant suffered a work-related injury, he does not believe the total knee replacement surgery was necessary, reasonable (because Claimant is too young at 48 years old), or work-related.

71. In Dr. Ciccone’s February 10, 2020 supplemental report, Dr. Ciccone considers whether Claimant should undergo manipulation under anesthesia. Dr. Ciccone opines “It is unclear from the record if the knee replacement was covered by worker’s compensation. However, to maximize the function of the replacement / *agree that manipulation under anesthesia would be appropriate.* (Ex. D, p. 20) (emphasis added).

72. Dr. Ciccone’s February 24, 2020 supplemental report indicates that he thinks Claimant’s knee was never good to begin with, stating “it does not appear claimant has ever had good knee range of motion” and further states claimant had limited improvement after his manipulation under anesthesia. [Apparently Dr. Ciccone does not believe another arthroscopic procedure is necessary or reasonable.] Dr. Ciccone suggests other factors be considered such as “implant position” and “extensor mechanics.”

73. Dr. Ciccone testified that Claimant’s MRI on March 18, 2019, showed a focal osteochondral defect which he described as “an injury that involves both cartilage and bone within a joint.” He testified, “Osteochondral defects can occur as an acute injury, but can be chronic as well.”

74. However, Dr. Ciccone believed Claimant’s osteochondral “injury” or “defect” was chronic and not acute, since Dr. Ciccone would expect a bone bruise and *Claimant “didn’t even have any knee pain after the injury until later that night.”* (Transcript, p. 12) (emphasis added).

75. Dr. Ciccone opined that Claimant did not injure his knee at work, because his body did not hit the ground. Further, Dr. Ciccone testified that:

....But again, *just by his own acknowledgement, he really had no symptoms at the time,* it just got worse that night. So most of the time when there is an acute injury, you expect acute pain and symptoms, not something that comes along later (Transcript, p. 17) (emphasis added).

76. Dr. Ciccone testified that Claimant's mechanism of injury was not sufficient for it to aggravate or accelerate any pre-existing condition and therefore the total knee replacement was not related. However, under cross-examination, Dr. Ciccone admitted that twisting a knee can cause a need for surgery, but that Claimant's "event" did not cause significant injury to his knee.
77. Dr. Ciccone acknowledged that his own report indicated Claimant had no restrictions following his knee surgery over two decades ago and that Claimant "had no pain in his knee prior to this injury, he had no locking or mechanical symptoms" prior to his March 4, 2019 injury.
78. Dr. Ciccone acknowledged that if Claimant had no pain for years, then he had pain on March 4, 2019 and thereafter, and that Claimant's onset of pain was caused by the slip on the ice. Additionally, Dr. Ciccone admitted that he had no indication that the injury of first report was not accurate wherein Claimant's symptoms as described are immediate.
79. Yet, when asked directly, if Claimant had pain and swelling immediately after the incident, Dr. Ciccone responded, "No, I don't believe that is correct."
80. When asked if the treatment received to date by Claimant was reasonable and necessary, Dr. Ciccone replied "...I do not believe that there was...a need for arthroscopy due to – that was causally related to the work injury. (Transcript, p. 42).
81. Dr. Ciccone disagrees with both Dr. Olson and Dr. King's causation opinions and course of treatment, yet ultimately stated that Dr. King's decision to perform surgery was "not unreasonable." (Transcript, p. 43).

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

1. The purpose of the Workers' Compensation Act ("Act") of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. §8-40-102(1), C.R.S. However, it is the Claimant in a workers' compensation claim who carries the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). Furthermore, the facts in a workers' compensation case

are not to be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. It is axiomatic that a workers' compensation case must be decided on its merits. *Id.*

2. The ALJ's factual findings in a workers' compensation case concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings in this matter as unpersuasive. See *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility of witnesses, the ALJ should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); C.J.I, Civil 3:16 (2007). In this instance, the ALJ finds that Claimant has accurately reported the symptoms he felt to his medical providers, and testified sincerely and credibly at hearing.

Authorized Treating Physician, Generally

4. Employers are liable for authorized treatment reasonably necessary to cure or relieve from the effects of the industrial injury. *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). The statutory authority granting an employer the right to select the treating physician is found in C.R.S. § 8-43-404(5)(a). Once selected the claimant may only change physicians with permission from the insurer or an ALJ. See *Gianetto Oil Co. v. Industrial Claim Appeals Office*, 931 P.2d 570 (Colo. App. 1996); *Sims* 797 P.2d 777.

5. An "authorized treating physician" refers to a physician who is legally authorized to treat the injury. *Quintana v. Turner Construction Company*, W.C. No. 4-486-339 (ICAO November 6, 2003) citing *One Hour Cleaners v. Industrial Claim Appeals Office*, 914 P.2d 501 (Colo. App. 1995). Accordingly, where the employer "directs" the claimant to a particular physician and agrees to pay for the medical expenses incurred by the claimant with a particular physician, the physician is necessarily an "authorized treating physician". *Granger v. Penrose Hospital*, W.C. No. 4-351-885 (ICAO July 20, 1999). Once selected, the ATP may make authorized referrals. These referrals must be for care and treatment needed and related to the industrial injury. *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985); see *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). Claimant may not independently retain additional physicians without permission from the insurer or an ALJ.

6. When an authorized treating physician refers a claimant to another health care provider, the treatment rendered by the referred provider is compensable as part of the legal chain of authorization. See *Mason Jar Restaurant v. Industrial Claim Appeals*

Office, 862 P.2d 1026, 1029 (Colo.App. 1993); Greager v. Industrial Comm'n, 701 P.2d 168 (Colo.App. 1985).

7. "Authorization" refers to the physician's legal status to treat the injury at the Respondents' expense. Popke v. Industrial Claim Appeals Office, 944 P.2d 677 (Colo. App. 1997). If an authorized provider refers a claimant to another provider in the ordinary course of medical treatment, the provider to whom the claimant was referred is considered authorized. Bestway Concrete v. Industrial Claim Appeals Office, 984 P.2d 680 (Colo. App. 1999). The question of whether such a referral has been made is usually one of fact for determination by the ALJ. City of Durango v. Dunagan, 939 P.2d 496 (Colo. App. 1997).

Authorized Treating Physician, As Applied

8. Claimant suffered a compensable work injury on March 4, 2019. Once he realized the seriousness of it, he reported to Employer. As a result of this, he reported to CCOM. His ATP was, and still is, Dr. Olson. Claimant later contacted his authorized provider, Dr. Olson, while in severe pain from his work-related injury. Claimant was told by Dr. Olson's office that if Claimant's knee is in severe pain, he should go to Emergency Room. Claimant, following the instructions of his ATP, did go to the Emergency Room and was provided with a referral to see Dr. King. This supports the chain of authorization as Dr. Olson told Claimant to go to the ER and the ER told Claimant to see Dr. King.

9. Further, Claimant testified that he returned to Dr. Olson's prior to seeing Dr. King. Claimant was told by Dr. Olson that, since Dr. Olson's first recommendation was unavailable, Claimant should go see Dr. King. Hence, Dr. Olson adopted the referral to Dr. King even though Dr. King was initially referred by the Parkview ER. Further, Dr. Olson testified that Claimant's referral to Dr. King "got started" when Claimant went to Parkview ER. A reasonable inference is that Dr. Olson subsequently joined in on Claimant's referral to Dr. King.

10. While it is unclear from the record why Parkview [and by extension, Dr. King's office] thought *WC Gallagher Bassett* was the Insurer (perhaps through Parkview's existing familiarity with Trane?), certainly *Dr. King/Parkview believed this was a Workers Compensation case*, until Respondents denied coverage; they then resorted to Medicaid. The ALJ concludes that Dr. King is an authorized provider based upon the totality of the evidence, with nothing by Respondents in rebuttal.

Reasonable and Necessary Medical Treatment, Generally

11. Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School District #11*, W.C. No.

4-835-556-01 (ICAO Nov. 15, 2012). Our courts have held that in order for a service to be considered a “medical benefit” it must be provided as medical or nursing treatment, or incidental to obtaining such treatment. *Country Squires Kennels v. Tarshis*, 899 P.2d 362 (Colo. App. 1995). A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the claimant’s physical needs. *Bellone v. Industrial Claim Appeals Office*, 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines, Inc.*, W.C. No. 4-517-537, (ICAO, May 31, 2006). A service is incidental to the provision of treatment if it enables the claimant to obtain treatment, or if it is a minor concomitant of necessary medical treatment. *Country Squires Kennels v. Tarshis*, 899 P.2d 362 (Colo. App. 1995); *Karim al Subhi v. King Soopers, Inc.*, W.C. No. 4-597-590, (ICAO, July 11, 2012). The determination of whether services are medically necessary, or incidental to obtaining such service, is a question of fact for the ALJ. *Bellone v. Industrial Claim Appeals Office*, 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines, Inc.*, W.C. No. 4-517-537, (ICAO, May 31, 2006).

Preexisting Medical Conditions, Generally

12. The mere fact that a claimant suffers from a pre-existing condition does not disqualify a claim for compensation or medical benefits if the work-related activities aggravated, accelerated, or combined with the pre-existing condition to produce disability or a need for medical treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). Pain is a typical symptom from the aggravation of a pre-existing condition, and the claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment-related activities and not the underlying pre-existing condition. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949). The claimant must prove by a preponderance of the evidence that his symptoms were proximately caused by an industrial aggravation of a pre-existing condition rather than simply the natural progression of the condition. *Melendez v. Weld County School District #6*, W.C. No. 4-775-869 (ICAO, October 2, 2009).

13. The Supreme Court of Colorado has held that: “The fact of claimant’s pre-existing condition of arthritis and its being a contributing factor to his disability does not preclude payment of compensation.” *Kamp v. Disney*, 110 Colo. 518, 135 P.2d 1019, 1021. In *Spirakoff v. Pluto Coal Mining Co.*, 105 Colo. 552, 100 P.2d 154, 157, we stated, ‘an aggravation of a pre-existing abnormal or diseased condition may be the basis for an award of compensation.’ In still another case we held that the Industrial Commission, where there is a pre-existing disease, should determine, among other things, whether or not such pre-existing condition was aggravated by the injury. *Industrial Commission v. Dorchak*, 97 Colo. 142, 47 P.2d 396. *Merriman v. Industrial Com’n*, 120 Colo. 400, 210 P.2d 448, (1949)

14. As noted in *Seifried v. Industrial Com’n of State of Colo.*, “... if a disability were 95% attributable to a pre-existing, but stable, condition and 5% attributable to an occupational injury, the resulting disability is still compensable if the injury has caused the dormant condition to become disabling.” *Seifried v. Industrial Com’n of State of Colo.*, 736 P.2d 1262, (1986).

Medical Treatment, as Applied

15. Claimant did not have prior knee pain leading up to the injury. He had no problems with functionality of his knee before March 4, 2019. He then slipped on the ice, and felt pain and a “pop” *immediately* with the injury. As is not uncommon, he tried to “shake it off” and continue. However, his pain increased even more that evening, and swelling increased. Claimant’s following treatment have all been to address the continuing pain and swelling that started on March 4, 2019. The ALJ finds that all treatment sought by Claimant is *related* to his industrial injury.

16. Independent medical examinations on behalf of a party are recognized by the courts as a valuable tool in assisting the ALJ in making accurate fact findings and drawing valid conclusions. While acknowledging Dr. Ciccone’s considerable credentials, the ALJ cannot help but note that Dr. Ciccone’s *very own records review* noted that Claimant felt immediate pain when he slipped on the ice, yet he later persisted in concluding, as part of his analysis, that Claimant’s pain only began later. The ALJ finds this reasoning to be overly results-oriented, and thus highly unpersuasive, across the board.

17. While the chondral defect may have preexisted his work injury, the work injury caused his condition to become painfully symptomatic. The ALJ is persuaded by testimony by Dr. Olson and medical decisions made by Dr. King. From the record, it appears Claimant’s first arthroscopic surgery is undisputed as reasonable and necessary. Dr. King, Dr. Olson, and even Respondents IME Dr. Ciccone all believe this was a reasonable course of action.

18. The ALJ finds persuasive Dr. Olson’s testimony that, because the first arthroscopic surgery did not relieve Claimant’s symptoms, that a total knee replacement was the only option left. The ALJ did not find Dr. Ciccone’s opinion that the replacement was unnecessary because Claimant was “too young” persuasive. Claimant found himself in a no-win situation once the otherwise reasonable and necessary first arthroscopic debridement occurred. He was, *from that time forward*, treated like an arthritis patient, since he had effectively become one once his chondral defect was surgically expanded. While Claimant was far from the ideal age for a total knee arthroplasty, he understood the risks, took the required class, and did so in consultation with his ATP orthopedist, with the concurrence of his ATP from CCOM.

19. Dr. King did replace Claimant’s knee and, unfortunately, Claimant’s symptoms persisted. The fact that 20-20 hindsight shows this did not cure and relieve him of his symptoms does not retroactively render it ‘not reasonable and necessary’ at the time it was ordered. It was his best chance at that point in time, and sometimes these procedures don’t yield the expected result. Such was the case here.

20. Dr. Olson and Dr. Ciccone both agreed that a manipulation of the knee under anesthesia would be recommended, reasonable, and appropriate at that time of Claimant’s treatment- this time to address range of motion deficiencies. The ALJ

concur. Claimant had the manipulation done under anesthesia and, again, Claimant's symptoms persisted.

21. Dr. Olson testified that it would now be reasonable to go back in and remove obstructive tissue. Claimant returned to Dr. King in February, 2020, and had scar tissue surrounding the total knee replacement and finally had some symptoms mitigated. Conversely, Dr. Ciccone testified he did not think this procedure was reasonable and other options should have been explored such as "placement" of the knee replacement. The ALJ finds that even if Dr. King decided to evaluate and adjust the position of Claimant's knee replacement, that may well have involved surgery and anesthesia.

22. In summary, the ALJ finds that each of the four surgeries performed to date, and all related physical therapy, home exercise, and medication, were reasonable, necessary, and related to Claimant's work injury for which Respondents have filed a GAL.

Temporary Partial Disability, Generally

23. Section 8-42-106(1), C.R.S., provides for an award of Temporary Partial Disability (TPD) benefits based on the difference between the Claimant's AWW at the time of injury and the earnings during the continuance of the temporary partial disability. In order to receive TPD benefits the claimant must establish that the injury has *caused* the disability and consequent partial wage loss. Section 8-42-103(1), C.R.S.; *Safeway Stores, Inc. v. Husson*, 732 P.2d 1244 (Colo. App. 1986) (temporary partial compensation benefits are designed as a partial substitute for lost wages or impaired earning capacity arising from a compensable injury).

24. Section 8-42-103, C.R.S., provides instruction that Claimant is entitled to temporary benefits such as TTD. To receive temporary disability benefits a claimant must establish a causal connection between the injury and the loss of wages. Section 8-43-103(1)(a), C.R.S. 2002. Once the causal connection is established benefits continue until "the first occurrence of" one of the events listed in § 8-42-105(3)(a)-(d), C.R.S. 2001.

25. Section 8-42-105(3), C.R.S., provides instances when temporary total disability benefits shall cease for a claimant, such as (a) reaching MMI, (b) returning to regular or modified work, (c) a physician has released Claimant to return to regular employment, or (d) the attending physician gives claimant a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment. The respondent must prove that one of the conditions present in § 8-42-105(3)(a)-(d) has occurred. 4-465-221 (2007). KAREN FANTIN, Claimant v. KING SOOPERS, Employer (FINAL ORDER).

26. Respondents have admitted liability for TTD benefits. Those benefits must continue until terminated in accordance with the statute or the applicable rules of procedure, and unilateral terminations are considered unlawful. *Monfort Transportation*

v. Industrial Claim Appeals Office, 942 P.2d 1358 (Colo. App. 1997). This is true because once liability for TTD is determined by admission or order, the burden shifts to the respondents to show grounds for termination and the parties are entitled to have contested issues of fact determined by an ALJ.

27. The ALJ shall determine whether Respondents made a written offer of modified employment within the meaning of § 8-42-105(3)(d)(I). If the ALJ finds there was such an offer, he shall determine whether the claimant refused to begin the employment which terminates his entitlement to temporary disability benefits under § 8-42-105(3)(d)(I).

TPD, as Applied

28. Beginning March 5th, 2019, the day after Claimant's injury, Claimant began modified duty while stationed at Trane through Respondents' employment. Claimant began modified duty April 2, 2019 at the Arc, because Respondents placed him there. Claimant continued modified until April 22, 2019, when he underwent the first surgery.

29. Respondents then prepared a Modified Duty Job Offer on May 8, 2019, which was signed by Dr. Olson on May 13, 2019, with the modified duty to begin on May 28, 2019. Claimant signed the modified duty job offer on May 28, 2019. Claimant did not "refuse" the modified duty, as Claimant actually began working at the Arc on June 5th, 2019. Claimant testified that he contacted the Arc, and was told to come sign a second modified duty offer with a start date of June 5, 2019. This testimony was not refuted; instead it is largely corroborated by the contents of Exhibit 8.

30. The ALJ has examined Exhibit 8. *While the entries are likely inexact, to put it mildly, it is all there is to go on.* The Arc employment log contains dates Claimant worked and dates Claimant failed to attend (indicated by handwritten "NC/NS" or "no call, no show" and an entry of "0" hours worked). Each entry is initialed by an Arc agent. There are no entries for May 28, 2019 through June 4, 2019; such are the dates Respondents assert that Claimant "refused" to accept modified duty and seek termination of temporary benefits as a result. As noted by Claimant, there are no "NC/NS" entries between May 28 and June 4. The reasonable inference, and the one made by the ALJ, is that he was not expected to work between May 28 and June 4; otherwise, he would have been marked as a No Call, No Show. *Claimant is to be credited for this week.*

31. Claimant continued working modified duty at the Arc through September 10, 2019 upon which Respondents chose to cease the modified duty opportunity at the Arc, and placed him on TTD.

32. Exhibit 8 shows that contrary to the modified duty offer promising 40 hours a week, Claimant claims he was not given the opportunity to work full-time. This appears to be partially true. Claimant testified that he was sent home early and often due to no work being available within his restrictions or having to miss some work to attend

physical therapy for his arthroscopic knee surgery. The ALJ finds this to be partially corroborated by Exhibit 8, but not fully. To the extent that each daily logs indicates that Claimant was sent home early due to a lack of work, the ALJ will credit Claimant with an 8-hour day accordingly. *Claimant is to be paid the difference for each such occasion.*

33. There are a number of entries, however, beginning 6/28/19, and ending 8/21/2019, wherein Claimant was listed as NC/NS. There is no accompanying explanation for any of these on this Exhibit. At hearing, Claimant claims he called Employer on these dates- rather than the Arc- since he actually worked for Employer. That seems sensible enough (despite corroboration from Employbridge) - but - *while perhaps that didn't make him an "NC", he was still an "NS"*. He still didn't work those days, and has yet to supply a reason for any of them. The sole exception (and granted by the ALJ), is June 28, 2019, which corresponds with his second MRI date. *Otherwise, Claimant is not entitled to TPD payments for any other NC/NS date, and the ALJ so finds.*

34. The Exhibits indicate that Claimant informed the Arc that he was not able to complete an 8-hour shift, due to his knee pain. That might well have been true. However, Claimant signed the modified duty agreement, and agreed to 8 hour shifts, for which he was to be paid a commensurate wage. Claimant could not, on an ad hoc basis, unilaterally modify the terms in this fashion. His remedy would have been to seek a reduction in hours by his ATP. This was not done. For that reason, unless the log indicates "sent home early-no work" as noted above, *Claimant is not to be credited for any shifts that he left early, or arrived late, of his own accord.*

35. Therefore, Respondents shall pay TPD to Claimant, as modified and outlined above.

ORDER

It is therefore Ordered that:

1. Dr. King is an Authorized Treating Provider.
2. The surgeries as performed by Dr. King (and all associated treatment in connection therewith) were reasonable, necessary, and related to Claimant's admitted work injury. Respondents shall make reimbursement to the appropriate parties.
3. Respondents shall pay TPD payments to Claimant, as modified and noted in the pertinent *Conclusions of Law*.
4. Respondents shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.
5. All matters not determined herein are reserved for future determination.

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

DATED: April 1, 2020

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

- Whether the claimant has demonstrated by a preponderance of the evidence that he sustained an injury arising out of and in the course and scope of his employment with the employer on June 14, 2019.
- If the claimant proves a compensable injury, whether the claimant has demonstrated, by a preponderance of the evidence, that treatment of his low back, including injections, is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury.
- If the claimant proves a compensable injury, whether the claimant has demonstrated, by a preponderance of the evidence, that as a result of his work injury he is entitled to temporary total disability (TTD) benefits from June 18, 2019 and ongoing until terminated by law.
- At hearing, the parties stipulated to an average weekly wage (AWW) of \$850.00.
- The parties also stipulated that beginning on February 5, 2020, the claimant began receiving unemployment benefits in the amount of \$522.00 per week.

FINDINGS OF FACT

1. The employer has a contract with FedEx to deliver packages. On May 29, 2018, the claimant began working for the employer as a delivery driver. The claimant was supervised by the company owner, Mr. S[Redacted].
2. As a driver for the employer, the claimant was expected to hold a valid commercial driver's license (CDL). Therefore, prior to beginning his employment with the employer, the claimant attended a pre-employment Department of Transportation (DOT) physical with Dr. Bruce Lippman. In the medical record of that date, Dr. Lippman noted that the claimant had a "back problem a year ago", but it was resolved. Given that information, Dr. Lippman determined that the claimant would need a lifting restriction of no lifting over 50 to 100 pounds. Despite this restriction, on the DOT Medical Examiner Determination (Federal) form, Dr. Lippman indicated that the claimant met all standards of the appropriate Code of Federal Regulations.¹

¹ 49 CFR 391.41.

3. While working for the employer, the claimant's job duties included driving a FedEx truck and delivering packages to customer locations in Glenwood Spring, Colorado. The packages varied in weight from a few ounces to 150 pounds. These packages are preloaded into the trucks for the drivers by other employees. The claimant testified that he was physically able to perform all aspects of his position.

4. The claimant testified that on Friday, June 14, 2019, he stopped to reorganize the packages in his truck. The claimant further testified that during this reorganization, he lifted a heavy box that was on the floor of the truck and tried to place it on a shelf above shoulder level. While lifting that box the claimant felt a pop and pain in his low back. The claimant testified that the box in question weighed between 40 and 60 pounds.

5. The claimant continued to work his shift on June 14, 2019. However, he testified that he did so in pain. As that was a Friday, the claimant took the weekend to see if his symptoms would improve. The following Monday, the claimant reported the June 14, 2019 lifting incident to his supervisor, Mr. S[Redacted]. On June 18, 2019, Mr. S[Redacted] filed a First Report of Injury or Illness.

Medical treatment prior to June 14, 2019

6. Prior to the June 14, 2019 FedEx lifting incident, the claimant had extensive treatment of his low back. The treatment began after September 12, 2015, when the claimant injured his back while throwing bales of hay at a ranch where he was employed.

7. Following that 2015 injury, the claimant treated with Dr. Glenn Kotz as his authorized treating physician (ATP). During his treatment of the claimant, Dr. Kotz referred the claimant to physical therapy, ordered a lumbar spine magnetic resonance image (MRI), and ultimately referred the claimant to Dr. Dustin Cole.

8. On January 15, 2016, a lumbar spine MRI showed L5-S1 disc herniation contacting the descending right S1 nerve root and encroaching the left S1 nerve root.

9. On March 17, 2016, the claimant was first seen by Dr. Cole. The claimant reported low back pain with left buttock pain. The claimant also reported persistent posterior left low extremity pain and numbness and transient right lower extremity pain and paresthesias. At that time, Dr. Cole opined that the claimant's pain was coming from the L5 disc and referred the claimant to physical therapy. In addition, Dr. Cole recommended that the claimant stop using a soft back brace to help with his core strength. Finally, Dr. Cole recommended a possible L5-S1 interlaminar epidural steroid injection (ESI).

10. The claimant returned to Dr. Cole on April 27, 2016. At that time, the claimant reported improvement in his pain symptoms, even though he had not been attending physical therapy. Dr. Cole opined that the claimant was not experiencing radicular pain, but rather sacroiliac (SI) joint pain. Based upon that opinion, Dr. Cole recommended bilateral SI joint injections.

11. Subsequently, the claimant transferred his treatment to Dr. David Lorah as his ATP. The claimant was first seen by Dr. Lorah on April 29, 2016. On that date, the claimant reported low back pain that radiated into his left lower extremity. Dr. Lorah referred to the MRI findings of a disc herniation at L5-S1. At that time, Dr. Lorah assessed working restrictions of no lifting over 20 pounds.

12. On June 29, 2016, Dr. Cole administered a left SI joint injection. On August 2, 2016, the claimant returned to Dr. Cole and reported no benefit from the injection. Dr. Cole noted that he did not have further injections to offer the claimant. Instead, he recommended the claimant see Dr. Wade Ceola for a neurosurgical consultation.

13. On August 23, 2016, the claimant was seen by Dr. Ceola. In the medical report of that date, Dr. Ceola noted that the MRI showed degenerative disc disease at the L5-S1 level with central and slightly right sided paracentral disc herniation. He opined that the claimant's pain generator was that disc. Dr. Ceola noted that the claimant's surgical options would be a fusion or disc replacement. Given the claimant's young age, Dr. Ceola opined that he would be a good candidate for a disc replacement. However, before proceeding with surgery, Dr. Ceola recommended the claimant undergo a discogram at L4-L5 and L5-S1.

14. The claimant was seen by Dr. Lorah on August 31, 2016. At that time, Dr. Lorah noted Dr. Ceola's recommendation for a discogram, and eventually an artificial disc replacement. In addition, the 20-pound lifting restriction remained in place.

15. On September 13, 2016, the claimant returned to Dr. Cole who recommended an epidural injection to address the claimant's radicular symptoms.

16. On September 30, 2016, the claimant notified Dr. Lorah that he was scheduled to undergo the ESI with Dr. Cole. The claimant reported some improvement in his pain and range of motion. The 20-pound lifting restriction remained in place.

17. On October 5, 2016, Dr. Cole administered a left L5 transforaminal epidural steroid injection (TFESI). On November 1, 2016, the claimant reported to Dr. Cole that he experienced one week of 70 to 80 percent improvement of his symptoms. At that time, Dr. Cole suggested a possible repeat injection.

18. The claimant returned to Dr. Lorah on November 4, 2016 and reported 70 to 80 percent relief of his symptoms following the TFESI. The claimant also reported that it was likely he would have a repeat TFESI. The 20-pound lifting restriction remained in place.

19. On November 30, 2016, Dr. Cole administered the repeat left L5 TFESI.

20. Thereafter on December 5, 2016, the claimant continued to report to Dr. Lorah low back pain with occasional pain radiating into his left buttock and left thigh. The claimant also reported that he had minimal relief from the November 30, 2016 ESI. The 20-pound lifting restriction remained in place. Throughout this time, the claimant continued physical therapy, chiropractic treatment, and acupuncture.

21. On January 1, 2017, the claimant reported continued symptoms to Dr. Lorah. The claimant requested a referral to Dr. Ceola to discuss surgical options. The 20-pound lifting restriction remained in place.

22. On January 17, 2017, the claimant returned to Dr. Cole and reported that the November 30, 2016 TFESI provided 40 percent relief one week after the injection. Dr. Cole noted he had no additional injections to offer the claimant and recommended the claimant follow up with Dr. Ceola.

23. On March 21, 2017, Dr. Giora Hahn administered a L4-L5 and L5-S1 discogram. Dr. Hahn concluded that the claimant L5-S1 was positive and concordant.

24. On April 14, 2017, the claimant returned to Dr. Lorah. At that time, Dr. Lorah noted that the discogram results were "positive and concordant". Dr. Lorah referred the claimant back to Dr. Ceola to discuss surgical options. The 20-pound lifting restriction remained in place.

25. On April 18, 2017, the claimant attended an independent medical examination (IME) with Dr. Michael Rauzzino related to the 2015 injury. Dr. Rauzzino opined that the claimant suffered a work injury that resulted in the L5-S1 disc herniation. Dr. Rauzzino noted that if the claimant's discogram was concordant at L5-S1, he would recommend the claimant undergo either an L5-S1 fusion or an L5-S1 disc replacement.

26. On June 22, 2017, the claimant returned to Dr. Ceola who again opined that the claimant was an excellent candidate for a lumbar disc replacement. On that date, the claimant informed Dr. Ceola that he wanted to consider his options, and would call if he wished to pursue the surgery. The claimant did not undergo the recommended artificial disc replacement surgery.

27. The claimant last treated with Dr. Lorah on July 28, 2017. At that time, Dr. Lorah noted that the claimant would undergo another MRI and then seek treatment with Dr. Ceola. At that final appointment, the 20-pound lifting restriction remained in place.

28. Subsequently, the claimant settled his 2015 claim. No medical provider has placed the claimant at maximum medical improvement (MMI) for that prior injury.

Medical treatment after June 14, 2019

29. The claimant's authorized treating provider (ATP) for the current June 14, 2019 claim has been Grand River Medical Clinic (GRMC). The claimant was first seen at GRMC by Mark Quinn, PAC on June 19, 2019. On that date, the claimant reported low back pain with a numb and tingling sensation down his right leg. The claimant notified Mr. Quinn of his prior L5 disc herniation. The claimant reported that his prior low back symptoms resolved following injections. On June 19, 2019, Mr. Quinn diagnosed a lumbar strain and prescribed pain medication and a muscle relaxer. In addition, Mr. Quinn assessed work restrictions of no lifting, carrying, pushing, or pulling over 20 pounds.

30. On July 3, 2019, Mr. Quinn referred the claimant to physical therapy for four to six weeks. The claimant's first physical therapy appointment was on July 23, 2019 with Stacy Hardee. On that date, the claimant reported six weeks of low back pain with tingling in his bilateral lower extremities. Ms. Hardee noted that the claimant had limited lumbar flexion range of motion, but other trunk range of motion was "unremarkable".

31. On August 1, 2019, the claimant returned to Mr. Quinn and reported that he was continuing physical therapy and his symptoms were better. He denied leg numbness and tingling. Mr. Quinn recommended the claimant continue physical therapy and a home exercise program (HEP).

32. On September 3, 2019, the claimant was seen by Mr. Quinn. Mr. Quinn noted that the claimant's exam was "completely normal" and his range of motion was normal. At that time, Mr. Quinn released the claimant to return to work with a 20-pound lifting restriction. The claimant asked about narcotic pain medications, which Mr. Quinn declined to prescribe.

33. The claimant returned to Mr. Quinn on November 6, 2019. The claimant reported that he was "discharged" from physical therapy because he had full range of motion and was at full strength. However, the claimant continued to report pain. On that date, Mr. Quinn referred the claimant to Dr. Cole for possible injections.

34. On November 14, 2019, the claimant was seen by Dr. Cole. At that time, Dr. Cole referenced his prior treatment of the claimant and the 2016 lumbar spine MRI that showed the L5-S1 disc herniation. With regard to the claimant's current symptoms, Dr. Cole noted that the claimant had midline lumbosacral pain with radiating pain into his bilateral legs down to his feet. Dr. Cole opined that the claimant's pain was primarily discogenic. As the claimant reported that he was pain free prior to the June 14 2019 incident, Dr. Cole further opined that the June 14, 2019 lifting incident was an exacerbation of the claimant's prior symptoms, rather than a new discrete pathology. At the November 14, 2019 appointment, Dr. Cole ordered a lumbar spine MRI.

35. On December 9, 2019, a lumbar spine MRI showed a right paracentral bulging disc or small disc protrusion at the L5-S1 level. The MRI report also noted that the protrusion contacts, but does not displace, the S1 nerve root.

36. On January 1, 2020, the claimant returned to Dr. Cole and continued to report midline lumbosacral pain. On that date, Dr. Cole noted no significant changes from the 2016 MRI. Dr. Cole recommended a left paramedian L4-5 interlaminar ESI. The injection would not be at the L5-S1 level because of "the dearth of epidural fat" at that level.

37. The claimant returned to Mr. Quinn on January 16, 2020 and reported that he was waiting for authorization of the injection recommended by Dr. Cole.

38. The respondents asked Dr. Michael Janssen to review the request for treatment of the claimant's low back symptoms. In a report dated January 22, 2020, Dr. Janssen recommended denial of any treatment of the claimant's low back. In support of

this opinion, Dr. Janssen noted that the claimant's anatomical findings in December 2019 are identical to those from June 2016. In addition, Dr. Janssen noted that after the June 2016 MRI, the claimant was given the opportunity to undergo a disc replacement surgery, which the claimant did not pursue.

39. On January 31, 2020, the claimant attended an IME with Dr. Lawrence Lesnak. In connection with the IME, Dr. Lesnak reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In his IME report, Dr. Lesnak opined that on June 14, 2019, the claimant did not sustain a new injury or a substantial aggravation of his preexisting conditions. In support of this opinion, Dr. Lesnak noted that the claimant's current symptoms are identical to those he had when treating with Dr. Lorah in 2016. In addition, Dr. Lesnak noted that the claimant had a normal exam at the IME, with no abnormalities of his lumbar spine. Dr. Lesnak's testimony at hearing was consistent with his written report.

40. Dr. Lesnak testified that at the IME, the claimant reported that his symptoms included constant diffuse low back pain, right greater than left, with frequent buttock pain that radiated into the claimant's bilateral legs. Dr. Lesnak further testified that these symptoms are very similar to those the claimant reported related to the 2015 injury. Furthermore, the 2016 and 2019 MRI findings are virtually the same. Dr. Lesnak also testified that the claimant had no lumbar spine abnormalities at the IME. In addition, Dr. Lesnak noted that Mr. Quinn noted that on September 3, 2019, the claimant had completely normal range of motion. Dr. Lesnak opined that it is medically improbable that the claimant's 2015 related symptoms, and need for surgery, would have resolved. Dr. Lesnak reiterated his opinion that the claimant did not suffer a new injury on June 14, 2019, nor did the claimant suffer an aggravation of a preexisting condition on that date. In support of this opinion, Dr. Lesnak testified that the claimant's MRI findings were unchanged.

41. The claimant's supervisor, Mr. S[Redacted] testified that on February 18, 2020, he ended the claimant's employment. The claimant was notified by an undated letter that his employment had ended. The letter informed the claimant that his employment was terminated because of the employer's need to fill the claimant's position.

42. The claimant testified that his 2015 injury involved low back symptoms that were primarily left sided. In contrast, the claimant testified that following June 14, 2019, his low back symptoms were more right sided. The claimant also testified that since June 14, 2019, his symptoms continue to include weakness, numbness, and tingling in his low back. In addition, he has sharp low back pain that radiates into his right leg down into his toes. The claimant also testified that he constantly uses Aleve or ibuprofen to address his pain symptoms.

43. The ALJ credits the medical records and the opinions of Dr. Lesnak and finds that the claimant has failed to demonstrate that he suffered an injury at work on June 14, 2019. The ALJ also finds that the claimant has failed to demonstrate that his preexisting low back condition was aggravated or accelerated by his work activities on June 14, 2019. The ALJ notes that the claimant was offered surgical intervention related

to the 2015 injury. However, the claimant did not pursue surgery. The ALJ finds that the claimant's need for medical treatment (including surgery) is not related to his work for the employer, but instead related to his 2015 injury. The ALJ notes that the claimant's symptoms and MRI findings are the same. In addition, at no time was the 20 pound lifting restriction (as assessed by Dr. Lorah) removed. Although Dr. Lippman indicated in his report that the claimant could lift up to 100 pounds, the ALJ is not persuaded that the claimant's prior low back symptoms had resolved.

CONCLUSIONS OF LAW

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

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2018).

4. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with a preexisting disease or infirmity to produce disability or need for treatment." *See H & H Warehouse v. Vicory, supra*.

5. As found, the claimant has failed to demonstrate by a preponderance of the evidence that on June 14, 2019 he suffered an injury arising out of and in the course and scope of his employment with the employer. As found, the claimant has failed to

demonstrate by a preponderance of the evidence that his preexisting low back condition was aggravated or accelerated by his work activities on June 14, 2019. As found, the medical records and the opinions of Dr. Lesnak are credible and persuasive.

ORDER

It is therefore ordered the claimant's claim for workers' compensation benefits related to alleged June 14, 2019 injury is denied and dismissed.

Dated this 7th day of April 2020.



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

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

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| STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 222 South 6th Street, Suite 414, Grand Junction, CO 81501 | <div style="text-align: center;"><input type="checkbox"/> COURT USE ONLY <input type="checkbox"/></div> CASE NUMBER: WC 5-089-703-002 |
| In the Matter of the Workers' Compensation Claim of: [Redacted], Claimant, vs. [Redacted], Employer, and [Redacted], Insurer, Respondents. | |
| FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER | |

On December 18, 2019, a hearing in this matter was held in Durango, Colorado before Administrative Law Judge Cassandra M. Sidanycz. On that date, the claimant was present and represented by [Redacted], Esq. The respondents were represented by [Redacted], Esq.

The following individuals testified on behalf of the respondents on December 18, 2019: Chris [Redacted], Office Manager; Dwayne [Redacted], Collision Repair Manager; and Greg [Redacted], General Manager. On December 18, 2019, the hearing was digitally recorded from 1:05 p.m. to 4:30 p.m. The claimant's exhibits 1 through 31 were admitted into evidence. The respondents' exhibits A through L were admitted into evidence.

The hearing was continued to January 16, 2020 in Durango, Colorado. The hearing was recorded from 8:42 a.m. to 10:07 a.m. On that date, Ray [Redacted], GM Sales Manager with the employer, testified on the claimant's behalf. The claimant was also expected to testify on January 16, 2020. However, the claimant did not appear at the hearing. The claimant did not communicate a reason for his absence. As a result, the ALJ allowed the claimant's attorney the opportunity to request a continuance. The ALJ granted a continuance in an order dated January 28, 2020. Thereafter, the hearing was continued to February 25, 2020. On that date, the parties appeared by telephone and the claimant testified. On February 25, 2020, the hearing was recorded from 8:30 a.m. to 10:32 a.m.

In this order, [Redacted], will be referred to as "the claimant"; [Redacted], will be referred to as "the employer"; and [Redacted], will be referred to as "the insurer". In

addition, the employer and the insurer will be referred to collectively as “the respondents”. Also in this order, “the ALJ” refers to the Administrative Law Judge; “C.R.S.” refers to Colorado Revised Statutes (2018); “OACRP” refers to the Office of Administrative Courts Rules of Procedure, 1 CCR 104-1; and “WCRP” refers to Workers’ Compensation Rules of Procedure, 7 CCR 1101-3.

ISSUES

Whether the respondents have demonstrated, by a preponderance of the evidence, that that claimant was responsible for his termination of employment, therefore allowing the respondents to end payment of temporary total disability (TTD) benefits as of June 21, 2019.

Following the hearing, the parties stipulated that if the claimant is found to have been responsible for his termination of employment, then the claimant’s rate of temporary partial disability (TPD) benefits shall be \$390.03.

PROCEDURAL HISTORY

1. On July 1, 2019, the respondents filed a Petition to Modify, Terminate, or Suspend Compensation. The claimant timely objected to the Petition, and on July 26, 2019 the respondents’ filed an Expedited Application for Hearing.

2. A hearing was initially scheduled for September 19, 2019. On August 26, 2019, the claimant filed an opposed motion to continue the September 19, 2019 hearing. On August 27, 2019, ALJ Mottram granted the claimant’s motion to continue the hearing to October 16, 2019. In addition, ALJ Mottram temporarily granted the respondents’ petition to terminate temporary disability benefits. On September 20, 2019, PALJ Sandberg granted the respondents’ motion to resume payment of temporary partial disability (TPD) benefits, which the claimant was receiving when his employment was terminated.

3. Thereafter, the parties agreed to reschedule the hearing to November 13, 2019, in Durango. However, at the status conference on October 24, 2019, the claimant requested a continuance of the November 13, 2019 hearing date because he was scheduled to receive treatment for his injury on that date. Due to the prior continuances, the respondents withdrew their prior application for hearing, without prejudice, and refiled their application for expedited hearing on October 25, 2019. That application for hearing was set for hearing on December 18, 2019.

4. The respondents have continued to pay TPD pursuant to PALJ Sandberg’s September 20, 2019 order. At the time of his termination, the claimant received \$390.03 per week in TPD benefits. The parties have stipulated that if the claimant is found responsible for termination of his employment, (and the petition to modify temporary disability benefits is granted), the claimant’s TPD should be \$390.03.

FINDINGS OF FACT

5. In March 2011, the claimant was hired to work as a detail technician. At all times material to the issue before the ALJ, the claimant worked as a detail technician in the employer's Collision Repair department. The claimant's job duties included cleaning cars after repairs.

6. In mid-2018, the claimant's co-workers noted that he appeared to be in pain while at work. The employer directed the claimant to seek medical treatment for his symptoms. Although the claimant initially refused, ultimately the claimant attended a medical appointment on September 26, 2018 with Animas Occupational Medicine. The claimant was diagnosed with a left inguinal hernia.

7. The development of the claimant's hernia was deemed a work related injury. The respondents have admitted liability for this work injury. As a result, the respondents have paid the claimant both temporary partial disability (TPD) benefits and temporary total disability (TTD) benefits.

8. The claimant underwent hernia repair surgery on October 11, 2018. After a period of recovery, the claimant returned to modified duty with the employer. On February 19, 2019, Dr. Jonathan Rudolf determined that the claimant was able to work four hours per day, five days a week. The claimant worked under that part-time schedule from February 2019 until his final day of employment on June 20, 2019.

Prior Disciplinary Matters

9. On April 18, 2018, the claimant was disciplined after he wrote on a coworker's vehicle. The warning notice entered into evidence lists the claimant's infractions as improper conduct, property damage, and failure to comply with company policy. In addition, the notice stated that the claimant's "[f]ailure to make appropriate corrections will lead to further discipline, up to and including discharge."

10. The claimant was issued another disciplinary notice on May 11, 2018 after he drove a customer's vehicle off the employer's property without authorization. The infractions listed in that notice were insubordination and violation of company policy. As with the April 2018 notice, the claimant received written notice that "[f]ailure to measurably improve your job performance or any repeat of the infractions described in this notice will likely lead to suspension or discharge."

Employment Terminated

11. The claimant's employment was terminated on June 20, 2019. The claimant's direct supervisor, Dwayne B[Redacted], Collision Repair Manager, testified that he discovered the claimant's work area in disarray on June 19, 2019. Specifically, Mr. B[Redacted] noted that the hoses were laying on the floor, rags used for drying vehicles were strewn on floor, the basin for the eye wash station was broken in half and thrown on the floor, pieces of a broken broom were also on the floor, along with a number of other cleaning materials and canisters. On June 20, 2019, Mr. B[Redacted] took photographs of the condition of the wash bay. Mr. B[Redacted] credibly testified that this was not the normal state of the wash bay, nor was it an acceptable condition for the

claimant's work area. Mr. B[Redacted] reported the condition of the claimant's work area to Greg R[Redacted], General Manager. Mr. R[Redacted] also saw the condition of the wash bay on June 20, 2019. Together Mr. B[Redacted] and Mr. R[Redacted] spoke to the claimant about the wash bay. Mr. B[Redacted] testified that the claimant explained that he had been in a great deal of pain and was frustrated with the status of his medical treatment and he "took it out" on his work area. It was the decision of senior management (including Mr. R[Redacted]) to terminate the claimant's employment.

12. Mr. R[Redacted]'s testimony is consistent with that of Mr. B[Redacted]. In addition, Mr. R[Redacted] testified that he was involved with the final decision to end the claimant's employment. Mr. R[Redacted] further testified that he and the other two owners discussed the claimant's destruction of his work area. Together they determined that the claimant's actions constituted destruction of the employer's property. Mr. R[Redacted] testified that such behavior was not acceptable and could not be tolerated.

13. Chris H[Redacted], Office Manager, also testified. Ms. H[Redacted]'s testimony was consistent with that of both Mr. B[Redacted] and Mr. R[Redacted].

14. Ray S[Redacted], GM Sales Manager testified that he was the claimant's supervisor prior to the claimant working in the Collision Repair department. That period of supervision was more than eight years prior to the claimant's work injury. Mr. S[Redacted] testified that while he supervised the claimant there were instances in which the claimant was not respectful of his coworkers. Mr. S[Redacted] also testified that the claimant struggled with his interaction with his coworkers. Mr. S[Redacted] did not observe improvement in the claimant's behavior.

15. The claimant testified that on June 19, 2019 he left the wash bay in "a mess" because he was experiencing hernia related pain. In addition, he was unable to locate his water blade that he utilizes to dry vehicles. As a result, he used a number of towels to hand dry a vehicle. The claimant explained that is why there were towels littered throughout the wash bay. The claimant also testified that he did not damage the broom or eyewash station. The claimant further testified that when he arrived at work on June 20, 2019, the wash bay was "spotless". The ALJ does not find the claimant's testimony to be credible or persuasive.

16. The ALJ credits the testimony of Mr. B[Redacted], Mr. R[Redacted], and Ms. H[Redacted] over the contradictory testimony of the claimant. The ALJ finds that the claimant exercised control over the termination of his employment when he engaged in behavior that damaged the employer's property on June 19, 2019. The ALJ finds that the claimant was in control of his behavior. Therefore, his actions were volitional in nature. The ALJ finds that the claimant knew, or reasonably should have known, that such behavior was unacceptable and could lead to the loss of his employment. This was not the first time the claimant had engaged in unacceptable behavior at work. In fact, the claimant had been warned about inappropriate behavior prior to the June 19, 2019 incident. For all the foregoing reasons, the ALJ finds that the respondents have demonstrated that it is more likely than not that the claimant is responsible for the termination of his employment.

CONCLUSIONS OF LAW

1. The purpose of the “Workers’ Compensation Act of Colorado” is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S.

2. A claimant in a Workers’ Compensation claim generally has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. However, when the respondents attempt to modify an issue that previously has been determined by an admission, they bear the burden of proof for the modification. Section 8-43-201(1), C.R.S.; see also *Salisbury v. Prowers County School District*, W.C. No. 4-702-144 (ICAO, June 5, 2012); *Barker v. Poudre School District*, W.C. No. 4-750-735 (ICAO, July 8, 2011). Section 8-43-201(1), C.R.S., provides, in pertinent part, that “a party seeking to modify an issue determined by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification.”

3. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers’ Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers’ Compensation case is decided on its merits. Section 8-43-201, *supra*.

4. The ALJ’s factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

5. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness’s testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2018).

6. Sections 8-42-105(4) and 8-42-103(1)(g), C.R.S., contain identical language stating that in cases “where it is determined that a temporarily disabled employee is responsible for termination of employment the resulting wage loss shall not be attributable to the on-the-job injury.” In *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo. App. 2002), the court held that the term “responsible” reintroduced into the Workers’ Compensation Act the concept of “fault” applicable prior to the decision in *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Hence, the concept of “fault” as it is used in the unemployment insurance context is instructive for purposes of the termination statutes. *Kaufman v. Noffsinger Manufacturing*, W.C. No. 4-608-836 (Industrial Claim Appeals Office, April 18, 2005). In that context, “fault” requires

that the claimant must have performed some volitional act or exercised a degree of control over the circumstances resulting in the termination. See *Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1995) *opinion after remand* 908 P.2d 1185 (Colo. App. 1995).

7. Violation of an employer's policy does not necessarily establish the claimant acted volitionally with respect to a discharge from employment. *Gonzales v. Industrial Commission*, 740 P.2d 999 (Colo. 1987). An "incidental violation" is not enough to show that the claimant acted volitionally. *Starr v. Industrial Claim Appeals Office*, 224 P.3d 1056, 1065 (Colo. App. 2009). However, a claimant may act volitionally, and therefore be "responsible" for the purposes of the termination statute, if they are aware of what the employer requires and deliberately fails to perform accordingly. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008). This is true even if the claimant is not explicitly warned that failure to comply with the employer's expectations may result in termination. See *Pabst v. Industrial Claim Appeals Office*, 833 P.2d 64 (Colo. App. 1992) (claimant disqualified from unemployment benefits after discharge for unsatisfactory performance when aware of expectations, even if not explicitly warned that job was in jeopardy). Ultimately, the question of whether the claimant was responsible for the termination is one of fact for determination by the ALJ. *Apex Transportation, Inc. v. Industrial Claim Appeals Office*, 321 P.3d 630, 632 (Colo. App. 2014).

8. As found, the respondents have demonstrated by a preponderance of the evidence that the claimant committed a volitional act that resulted in his termination of employment. As found, the ALJ credits the testimony of Mr. B[Redacted], Mr. R[Redacted], and Ms. H[Redacted] over the contradictory testimony of the claimant regarding the June 19, 2019 wash bay incident.

ORDER

It is therefore ordered:

1. The claimant is responsible for his June 20, 2019 termination of employment and all related lost wages.

2. The respondents are entitled to reduce the claimant's temporary disability benefits by the amount of wage loss for which the claimant is responsible.

Dated this 9th day of April 2020.



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
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**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-109-330-001**

ISSUES

- Did Respondents prove Claimant's wage loss was not caused by a work-related disability, thereby permitting withdrawal of the admission of liability for temporary disability benefits?
- Did Respondents prove Claimant's indemnity benefits should be reduced by 50% for willful violation of a safety rule?
- Did Claimant prove by a preponderance of the evidence Respondents are liable for medical benefits for treatment of myasthenia gravis?
- Did Claimant prove physical therapy, occupational therapy, and speech therapy are reasonably necessary to cure and relieve the effects of her work accident?
- The parties stipulated to an average weekly wage (AWW) of \$2,025.50.

FINDINGS OF FACT

1. Claimant worked for Employer as a sales executive. Her job involved frequent travel throughout Colorado, Kansas, Nebraska, and Wyoming.

2. On May 7, 2019, Claimant was returning from a work-related appointment in Breckenridge when she was involved in a motor vehicle accident. The accident occurred on Highway 24 in South Park, approximately five miles East of Hartsel, slightly east of Elkhorn Road. Even though the road in that location is relatively straight, it covers mild rolling hills.

3. The accident occurred at approximately 11:30 AM. The roadway was covered with several inches of fresh hail from a rainstorm that had passed overhead shortly before. According to Respondents' meteorology expert, the strongest cell passed over the accident site sometime between 11:11 AM and 11:24 AM. Rain had passed over the highway between Hartsel and the accident site, so the roadway was damp and/or wet for several miles before the crash.

4. Claimant was using her cruise control and traveling the posted speed limit of 65 m.p.h. at the time of the accident. Claimant perceived the road as damp, and she does not recall activating her windshield wipers. Claimant perceived areas of mixed clouds and sun at the edge of the storm ahead of her. She was surprised by the sudden appearance of accumulated hail on the roadway, and immediately lost traction and began to spin. She overcorrected, lost control and rolled the vehicle twice.

5. Despite extensive damage to the vehicle, Claimant remained conscious and crawled out of the vehicle. She was shaken and sore, but otherwise escaped without serious injuries.

6. Colorado State Patrol Trooper Benjamin Evans arrived at the scene at 1:03 PM. Claimant completed a Driver's Statement on which she stated, "Had cruise on 65 mph – road was damp then turned into complete ice," Trooper Evans' report described the accident at "A crash due to sudden hail-covered roadway." Although he opined Claimant was driving too fast for conditions, he did not issue a citation.

7. Claimant declined medical attention and went home to rest. After a few hours, she felt "stiffness" in her neck and upper back and noticed "diamond flickers" in her right eye. The next morning, she noticed her right eye was drooping, so she went to the DaVita Urgent Care Clinic.

8. Claimant was evaluated by Dr. Robi Baptist at DaVita on May 8, 2019. Claimant reported a headache, back pain, left arm pain, generalized achiness, and a "drooping" right eyelid. Dr. Baptist ordered a CT scan, which came back normal. Dr. Baptist assumed Claimant suffered a mild head injury. She diagnosed 3rd cranial nerve palsy and referred Claimant to a neurologist.

9. Claimant returned to work on May 9, 2019, but had a headache, difficulty concentrating, and double vision. These issues made it difficult for her to read and prevented her from driving. Claimant continued working the next week, but she could not travel because of her vision. She also developed slurred speech and difficulty chewing. Employer paid Claimant's regular wage despite her limitations.

10. On June 3, 2019, Claimant was admitted to the Memorial Hospital for progressive neurological symptoms including right eye ptosis, headache, slurred speech, lethargy, neck pain, incontinence, oral dysphasia, photophobia, and phonophobia. She was examined by neurologist Dr. Amita Singh on June 4, who opined her symptoms were likely related to a head injury. Claimant was discharged on June 6 to a rehabilitation hospital.

11. Claimant was admitted to Memorial Hospital on July 4, 2019 because she was having problems swallowing, which had caused her to lose 25 pounds in a month. She developed aspiration pneumonia and was admitted to the ICU, where she was intubated, sedated, and placed on a ventilator.

12. On July 10, 2019, Claimant was evaluated by Dr. Jonathan O'Neil, a neurologist with experience diagnosing and treating neuromuscular disorders including myasthenia gravis ("MG"). Dr. O'Neil noted progressive worsening of neurological symptoms after the May 7, 2019 MVA. He thought her symptoms may be from a neuromuscular disorder such as MG instead of a head injury as assumed by previous providers.

13. MG is an autoimmune neuromuscular disease caused by antibodies binding to acetylcholine receptors in the neuromuscular junction, which prevents normal muscle

activation. MG is frequently associated with thymic disorders such as thymoma (tumor of the thymus) or thymic hyperplasia (enlargement of the thymus).

14. Test results and Claimant's response to treatments ultimately confirmed the diagnosis of MG.

15. A CT scan had identified a suspected thymoma, a likely source of the MG. Claimant underwent surgery on August 21, 2019 to remove the tumor. The surgeon did not find thymoma but instead found thymic hyperplasia.

16. Dr. Bruce Morgenstern, a neurologist, performed a record review for Respondents on August 29, 2019. He opined Claimant's progressive neurological symptoms of fluctuating ptosis, diplopia, dysarthria, and dysphasia, were not consistent with a head injury, and were consistent with a fluctuating neuromuscular disorder such as MG. He opined the coincidental occurrence of the motor vehicle accident had distracted Claimant's physicians from the true diagnosis and led them to incorrectly focus on the presumed TBI. He did not have the August 21 surgical report, and opined the (suspected) thymoma was the unequivocal cause of her MG. He reviewed current medical literature and found no persuasive evidence of a link between MG and trauma. He noted a 2009 case study by Lane, et. al, regarding a patient who developed symptoms of MG within minutes of a minor trauma to the cheek and neck. He opined this study did not apply to Claimant because he was under the mistaken impression she manifested no MG symptoms until two weeks after the accident. He stated, "if this unlikely explanation were valid, one would expect [Claimant's] myasthenic symptoms to similarly present within minutes of her trauma." He opined the MG was "unequivocally caused by her radiographically proven thymoma," so there was no need to look for an alternate cause.

17. Dr. Morgenstern issued a supplemental report on September 5 after reviewing Dr. Baptist's May 8, 2019 report documenting right eye ptosis the day after the MVA. He agreed the ptosis reflected the first manifestation of MG, but maintained it was not related to the accident. He opined this was "a simply temporal correlation, not an etiology," and reiterated the "incontrovertible relationship" of the MG to the (presumed) thymoma.

18. On December 6, 2019, Dr. O'Neil issued a report addressing causation of the MG. He opined,

[Claimant's] Myasthenia Gravis was made symptomatic by the MVA that occurred on 5/7/19. My opinion is based on the fact that [Claimant] was asymptomatic prior to the accident and subsequently had symptoms consistent with Myasthenia Gravis possibly as early as the day after the accident. She, subsequently, was found to have elevated acetylcholine receptor antibodies, confirming the diagnosis. The literature supports this temporal relationship with the development of Myasthenia Gravis after traumatic events, such as [Claimant's].

19. Dr. O'Neil noted the August 21 surgery showed thymic hyperplasia but no evidence of a thymoma. He cited the 2009 case study by Lane, et. al. documenting the onset of seropositive MG in a previously asymptomatic patient within minutes of a chest trauma. The authors of that study speculated that "the remote effects of the auto inflammation secondary to tissue microtrauma led to a sudden increase in muscle permeability and great exposure of receptors to antibody, with resulting acute impairment of neuromuscular transmission." They also suggested "trauma might have resulted in increased antibody production by remnants thymic tissue, leading to a chronic disease." Dr. O'Neil opined Claimant's situation similar to the patient referenced in the case study. He also cited a 2012 study by Peterson, et. al., regarding a patient who developed MG 2 months after a motor vehicle accident involving a serious chest injury. He also cited information from Johns Hopkins University and the Mayo Clinic that MG symptoms and myasthenic crisis can be aggravated or triggered by stress. He believes the MVA "was a significant stress, emotionally and physically, that likely led to the precipitation and unmasking of an underlying, previously quiescent Myasthenia Gravis."

20. Dr. John Raschbacher performed a record review for Respondents on December 30, 2019. He agreed with Dr. Morgenstern that Claimant's MG is not related to the MVA. He opined,

MG is an autoimmune disease caused by production of antibodies. It is not likely, medically, that an auto accident would likely cause the body to produce antibodies. In fact, it is very unlikely. In particular, if a ptosis from the MVA were already present on 5-8-19 from the MG, one would have to postulate that in less than one day's time, the MVA caused the production of antibodies and that they affected the target tissue or organ. This appears to be very unlikely. . . . The fact that [Claimant] already had a ptosis on the day after the MVA indicates that the likelihood is that she was in fact already developing MG by the time she had the MVA.

21. Dr. O'Neil testified in a deposition on January 14, 2020 to elaborate on the opinions expressed in his report. He reiterated his belief the MVA "unmasked" and exacerbated Claimant's previously asymptomatic MG. He opined stress is a "major exacerbator of myasthenia gravis . . . when they get stressed, their myasthenia gravis either gets unmasked or their symptoms worsen." Dr. O'Neil cited no published studies or other literature to support his opinion regarding the effects of "stress" on MG.

22. Dr. Morgenstern testified for Respondents at hearing. He conceded his previous attribution of MG to the thymoma was a mistake, because the surgery proved she did not have a thymoma. He disagreed with Dr. O'Neil's theory of causation and opined there is no persuasive epidemiological evidence associating MG with trauma. He opined the existence of ptosis on May 8, 2019 proves the condition was pre-existing, and not caused by the accident. He explained,

So that day, she had a droopy eyelid. We know it wasn't caused by trauma. Retrospectively, there is no question that that droopy eyelid represents myasthenia gravis. But in addition, we talked about the origin of myasthenia.

Myasthenia is due to antibodies. . . . The antibodies don't come immediately. It takes 7 to 10 days to make antibodies. That is why when you get a vaccination for the flu or something, you are not immediately protected the moment you walked out of the doctor's office. It takes a while for those antibodies to – for the certain lymphocytes to look at the protein [and] say, oh, this is in a good protein, we need to fight it, process it, multiply, and generate antibodies against it. The process takes at least sort of within a week, plus or minus. So we know if she had ptosis the next day after the car accident, those antibodies had been there for a while.

23. Dr. Morgenstern opined stress does not trigger MG and there is no textbook or peer-reviewed article that supports a stress-related theory of causation. He agreed stress can affect an MG patient's perception of their symptoms, but opined there is no epidemiologic evidence stress can trigger MG or cause otherwise asymptomatic MG to manifest.

24. Dr. Morgenstern's hearing testimony was credible and persuasive. His opinions largely dovetail with those expressed by Dr. Raschbacher, which are also credible and persuasive. Respondents proved the May 7, 2019 accident did not cause, aggravate, exacerbate, or accelerate Claimant's diagnosis of MG.

25. Considering this finding, Claimant's request for general medical benefits related to MG is moot.

26. Respondents admitted liability for TTD benefits commencing June 6, 2019, based on the assumption Claimant's progressive neurological symptoms were probably related to a head injury or other sequelae of the MVA. Claimant has been off work since June 6, 2019 because of symptoms and limitations attributable to MG.

27. Claimant has been treating with Dr. Timothy Sandell since August 2019, whom the parties agree is the primary ATP. Dr. Sandell has never assigned any work restrictions for any medical condition other than from MG. On October 14, 2019, Dr. Sandell opined, "I have still not placed her at MMI as relates to the motor vehicle accident. When she is released from the care of the neurologist, I will address any work restrictions necessary as relates to the motor vehicle accident." He also opined, "I am unaware of any trauma-induced myasthenia gravis. However, I have minimal experience in this area and would have to defer to someone with more expertise. Dr. Morgenstern has already opined that there is not a connection between the two. I will continue to see her and treat symptoms as related to the motor vehicle accident specifically. . . . In the meantime, she is restricted from a neurology standpoint from returning to work." Claimant's job involves sedentary to light-level activities. There is no persuasive evidence of any medical limitations apart from the effects of MG that would disable her from her regular work.

28. Respondent proved Claimant was not entitled to TTD benefits commencing June 6, 2019, because her disability and associated wage loss was not proximately caused by the work accident.

29. Respondent proved Claimant received an overpayment of TTD benefits paid since June 6, 2019.

30. Employer had various rules relating to driving, one of which was to “Honor all posted traffic signs and obey all state and local laws.” Respondents allege Claimant “willfully” violated this safety rule by failing to disengage cruise control and slow down before reaching the hail-covered portion of the roadway.

31. Respondents failed to prove Claimant willfully violated a safety rule. Even if the cited “rule” is sufficiently specific to satisfy the requirements of the statute, Claimant did not willfully violate it. Claimant’s testimony she was suddenly caught off guard by the hail is credible. At most, her failure to reduce speed was the result of carelessness or oversight, not “willfulness.”

32. Claimant has ongoing back and neck pain attributable to the MVA. On October 14, 2019, Dr. Sandell stated, “I will continue to see her and treat symptoms as related to the motor vehicle accident specifically. I anticipate she will need some physical therapy to address some of the spine complaints. . . . I have referred her for cervical, thoracic, and lumbar spine stabilization for 10-12 visits. I am prescribing the physical therapy as treatment specifically for the [motor] vehicle accident [separate] from the neurological disorder.”

33. Dr. Sandell’s referral to PT to treat residual symptoms from musculoskeletal injuries suffered in the May 7, 2019 MVA is reasonable, and his opinions on the topic are credible and persuasive.

34. Claimant failed to prove occupational or speech therapy are related to the MVA. There is no persuasive evidence Claimant requires occupational or speech therapy for her musculoskeletal symptoms or another other condition related to the work accident. Rather, OT and speech therapy were recommended to treat the effects of the nonwork-related MG.

CONCLUSIONS OF LAW

A. Respondents proved Claimant’s myasthenia gravis was not proximately caused, aggravated or accelerated by the May 7, 2019 accident.

Respondents seek to withdraw their admission for TTD under the theory that Claimant’s disability and resulting wage loss was not proximately caused by the work accident. Respondents agree Claimant was disabled and suffered a wage loss, but argue her wage loss was caused by a personal medical condition instead of the work accident.

Section 8-43-201(1) provides that the party seeking to modify an issue determined by a general admission bears the burden of proof for any such modification by a preponderance of the evidence. In the present context, the practical effect of this requirement is that Respondents must prove the MG is not related to the work accident.

The existence of a pre-existing condition does not preclude a claim for medical benefits if an industrial injury aggravated, accelerated, or combined with the pre-existing condition to produce the need for medical treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). The ultimate question is whether the need for treatment was the proximate result of an industrial aggravation or merely the direct and natural consequence of the pre-existing condition. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Carlson v. Joslins Dry Goods Company*, W.C. No. 4-177-843 (March 31, 2000).

As found, Respondents proved MG is not causally related to the May 7, 2019 MVA. MG is an autoimmune disorder caused when the patient's body mistakenly attacks and blocks acetylcholine receptors in the neuromuscular junction. Most cases are related to thymic abnormalities, either thymomas or (as here) thymic hyperplasia. The mere fact that one event precedes another does not automatically make the first event causative of the second. The development and expression of antibodies in Claimant's body was not related to the MVA, and the manifestation of symptoms shortly after the accident was probably just a coincidence. Admittedly, the fluid nature of Dr. Morgenstern's opinions detracts somewhat from their persuasiveness. But, the ALJ ultimately finds two factors dispositive. First, Dr. Morgenstern and Dr. Raschbacher persuasively explained it takes several days for the antibodies responsible for MG take to develop, meaning they were almost certainly present before the accident. Second, there is no persuasive evidence of a biologically plausible mechanism by which generalized "trauma" or "stress" associated with the MVA would trigger or accelerate rapid expression of antibodies, thereby causing MG to become symptomatic overnight. The Reed case study cited by Dr. O'Neil merely "speculated" as to a mechanism by which trauma "might" have caused MG to manifest. Ultimately, the Reed case study amounts to a single anecdote, and is simply too thin a reed upon which to rest a decision regarding general or specific causation. Similarly, the authors of the Peterson case study postulated direct trauma to the patient's thymic remnants "might" have precipitated the condition or exacerbated subclinical disease by injecting thymic tissue directly into the bloodstream. But they also conceded the apparent temporal relationship "may be purely coincidental, and more likely than not, it is." Moreover, the patient in the Peterson study suffered a serious chest trauma that fractured his sternum, whereas there is no persuasive evidence of a significant trauma to Claimant's chest. In any event, the authors also referenced a study of 50 patients with direct trauma to their sternum, none of whom developed MG. As Dr. Morgenstern pointed out, no other published literature even suggests trauma as a potential cause of MG. Although Dr. O'Neil stated stress is a "known" trigger or exacerbator of MG, he cited no specific literature to support that point. By contrast, Dr. Morgenstern unequivocally opined that no such literature exists. The balance of persuasive evidence shows Claimant's MG is probably not related to the MVA.

B. Respondents may withdraw their admission for TTD benefits.

A claimant is entitled to TTD benefits if the injury caused a disability, the disability caused the claimant to leave work, the claimant missed more than three regular working days, and suffered an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Entitlement to TTD is not dependent on formal work restrictions from a

treating physician, and eligibility may be established with any competent evidence, including lay testimony. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). An injury need not be the *sole* cause of the wage loss, and a claimant is entitled to TTD if a work-related injury contributes “to some degree” to a temporary wage loss. *PDM Molding, supra*. Because Respondents have the burden of proof to withdraw the admission for TTD, Respondents must show that Claimant’s injury did not contribute in any degree to her wage loss.

As found, Respondents proved that the work accident did not cause a disability, did not cause Claimant to leave work, and did not cause or contribute to a wage loss. Claimant could not work because of her MG and treatment for it. The musculoskeletal injuries she suffered in the accident were relatively mild and would not have prevented her from working in the absence of MG. Claimant had no formal work restrictions for conditions other than MG, and there is no other persuasive evidence of any other reason she could not have performed her regular job. Respondent proved Claimant was not entitled to TTD in the first instance.

C. The TTD previously paid under the GAL is an overpayment

Section 8-40-201(15.5) defines an “overpayment” as:

[M]oney received by a claimant that exceeds the amount that should have been paid, or which the claimant was not entitled to receive, or which results in duplicate benefits because of offsets that reduce disability or death benefits payable under said articles. For an overpayment to result, it is not necessary that the overpayment exist at the time the claimant received disability or death benefits under said articles.

Claimant argues admitted TTD can only be terminated prospectively absent fraud or wrongdoing on the claimant’s part. Therefore, Claimant reasons benefits paid pursuant to an admission cannot be an overpayment. Although that was the law at one time,¹ statutory amendments in 1997 regarding overpayments changed that rule. See *Simpson v. Industrial Claim Appeals Office*, 219 P.3d 354 (Colo. App. 2009), *rev’d in part on unrelated grounds*, 232 P.3d 777 (Colo. 2010). The ICAO’s analysis in *Josue v. Anheuser-Busch, Inc.*, W.C. No. 4-954-217-04 (June 17, 2016) is persuasive and dispositive of this issue. In *Josue*, the respondents had admitted for TTD based on a medical procedure that was later determined by an ALJ to be unrelated to the work accident. Citing *Simpson, supra*, the Panel held the respondents were entitled to retroactive relief from the GAL, and benefits previously paid were an overpayment, notwithstanding prior caselaw limiting respondents to prospective relief only.

The situation in Claimant’s case is not appreciably different than that in *Josue*. Accordingly, the ALJ agrees with Respondents the TTD benefits paid since June 6, 2019 are an overpayment.

¹ *Kraus v. Artcraft Sign Company*, 710 P.2d 480 (Colo. 1985).

D. Respondents failed to prove Claimant willfully violated a safety rule

Section 8-42-112(1)(b) provides for a fifty percent reduction of indemnity benefits “where injury results from the employee’s willful failure to obey any reasonable rule adopted by the employer for the safety of the employee.” A safety rule need not be formally adopted or reduced to writing to be effective. *Bennett Properties Co. v. Industrial Commission*, 437 P.2d 548 (Colo. 1968). The term “willful” means “with deliberate intent,” and mere “carelessness, negligence, forgetfulness, remissness or oversight” does not satisfy the statutory standard. *Id.* The respondents do not have to present evidence about the claimant’s state of mind or prove he had the rule “in mind” when he did the prohibited act. Rather, a “willful” violation may be inferred from evidence the claimant knew the safety rule and did the prohibited act. *Id.* The respondents have the burden to prove the requisite elements for the penalty, including the existence of a safety rule, the willfulness of the claimant’s conduct, and that violation of the safety rule caused the injury. *Lori’s Family Dining, Inc. v. Industrial Claim Appeals Office*, 907 P.2d 715 (Colo. App. 1995).

Respondents identify the safety rule in question as “Honor all posted traffic signs and obey all state and local laws.” Claimant was traveling at the posted speed limit at the time of the accident, so there is no argument she failed to “honor all posted traffic signs.” The question is whether she willfully failed to “obey all state and local laws.”²

Section 42-4-1101(3) provides, “No driver of a vehicle shall fail to decrease the speed of such vehicle from an otherwise lawful speed to a reasonable and prudent speed when a special hazard exists . . . by reason of weather or highway conditions.” The question thus becomes whether Claimant “willfully” exceeded the maximum “prudent” speed at the time of her accident. Deciding the appropriate speed for changing weather conditions is very much a judgment call. The individual’s ability to make that determination in real time depends to a large extent on their perception and experience. The specific maximum “prudent” speed for the circumstances will likely be more apparent to an experienced State Patrol officer or an accident reconstruction expert than a typical driver. There is no persuasive evidence Claimant was ever trained on proper speed during inclement weather, or that she was familiar with the provisions of the Colorado Driver Handbook cited by Respondents’ expert.³ Nor is there any persuasive evidence of the specific speed that would have been “safe” for the conditions, much less that Claimant knew what it was. The ALJ does not accept Respondents supposition that Claimant has some heightened “expertise” in this matter simply because she “grew up in Minnesota.” In any event, the persuasive evidence shows Claimant was caught off guard by the

² It is questionable whether the broad and generalized directive to “obey all state and local laws” qualifies as a “safety rule” within the meaning of the statute. There are many “state and local laws” that do not directly relate to safety. While following all laws would undoubtedly protect a worker’s safety in certain circumstances, that is not the type of “rule” contemplated by statute. See e.g., *Garcia v. Rio Grande County*, W.C. No. 4-993-780 (March 3, 1992). Nevertheless, it is unnecessary to make a definitive determination in this regard, because, as explained below, Claimant’s conduct was not “willful.”

³ The ALJ notes the Driver Handbook specifically states, “It is not a book of laws and should not be used as a basis for any claims or legal actions.”

amount of hail on the road and lost traction without warning. Respondents failed to prove the accident resulted from Claimant's "willful" failure to obey a safety rule.

E. Physical therapy, occupational therapy, and speech therapy

The respondents are liable for medical treatment reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101. The mere occurrence of a compensable injury does not compel the ALJ to approve all requested treatment. Even if the respondents admit liability for an accident, they retain the right to dispute the reasonable necessity or relatedness of any treatment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). Where the respondents dispute the claimant's entitlement to medical benefits, the claimant must prove the treatment is reasonably necessary and causally related to the industrial accident. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). The claimant must prove entitlement to medical benefits by a preponderance of the evidence. *Page v. Clark*, 592 P.2d 792 (Colo. 1979).

As found, the PT recommended by Dr. Sandell to treat musculoskeletal symptoms in Claimant's back and neck is reasonably necessary and related to the MVA. However, while occupational therapy and speech therapy may be reasonably necessary, it is not related to the MVA.

ORDER

It is therefore ordered that:

1. Respondents' request to withdraw their admission for TTD commencing June 6, 2019 is granted.
2. TTD benefits paid since June 6, 2019 are an overpayment. Respondents may credit the overpayment against any future indemnity benefits owed on this claim. Recovery of any remaining overpayment after credits is reserved for future determination, if necessary.
3. Respondent's request to reduce indemnity benefits by 50% based on willful violation of a safety rule is denied and dismissed.
4. Insurer shall cover the physical therapy recommended by Dr. Sandell to treat Claimant's neck and back symptoms.
5. Claimant's request for medical treatment related to myasthenia gravis, including occupational and speech therapy is denied and dismissed.
6. All issues not decided herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or

service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: <http://www.colorado.gov/dpa/oac/forms-WC.htm>. **In addition, it is requested that you send a courtesy copy of your Petition to Review to the Colorado Springs OAC office via email at oac-csp@state.co.us**

DATED: April 12, 2020

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he sustained a compensable head injury or mental impairment during the course and scope of his employment with Employer on May 8, 2018.
2. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive authorized, reasonable, necessary and related medical treatment designed to cure or relieve the effects of a work-related injury.

FINDINGS OF FACT

1. Claimant is a 35-year-old former police officer for Employer. Claimant explained that on May 8, 2018 he and two other officers were attempting to control a combative suspect. However, the officers were unsuccessful in subduing the individual. Claimant testified that he then "had the opportunity while the suspect's back was to me to do a diving, leaping bear-hug tackle and that successfully brought us to the ground." Claimant contends he suffered a head injury on May 8, 2018 while tackling the suspect by striking his head on the individual or the ground. Claimant also sustained scrapes on his elbows and knees during the altercation. Immediately after the incident Claimant returned to the police department and completed a report that did not include any mention of a head injury.
2. On May 10, 2018 Claimant suffered an episode at work in which he fell backward onto his buttocks. Claimant was transported by ambulance and admitted to the hospital for possible seizures. The paramedic report reflects that Claimant collapsed at the station but noted no seizure activity.
3. Claimant suffered a prior "fainting episode" at work in November of 2016. Without any precipitating event, Claimant collapsed with apparent seizures. He was eventually diagnosed with psychogenic pseudo-seizures following the incident and placed on light/desk duty while receiving treatment for the condition. Claimant eventually returned to full duty in August of 2016 but was directed to continue with psychological counseling for the next six months.
4. After the May 10, 2018 seizure episode, Claimant was admitted to Rose Medical Center where he was originally evaluated by Michael Schwartz, M.D. He reported that he was unconscious for approximately three minutes. When he awoke, he was confused and had noticeable right-sided weakness. Claimant was having trouble answering questions, had noticeable dysphagia and exhibited slurred speech. He also complained of a headache and blurred vision.

5. The records reveal that Claimant disclosed multiple grand-mal seizures eight months earlier but was not taking any medications. He reported short-term memory loss or confusion on at least four occasions in the last few days. Furthermore, Claimant mentioned a history of PTSD related to his war time experiences while serving in the Air Force in Afghanistan and a traumatic brain injury or TBI secondary to a blast in 2006. Claimant mentioned the physical altercation at work two days earlier.

6. Dr. Schwarz activated a stroke alert due to possible residual right upper extremity weakness. However, Claimant's EEG was normal, there was no evidence of additional seizure activity and no neuroanatomical lesions on any imaging studies. A head CT and brain MRI conducted on May 10, 2018 were also normal. Dr. Schwarz noted that Claimant reported some anxiety that may have been triggered due to a recent altercation at work. On May 11, 2018 neurologist Koi Pham, M.D. determined that the May 10, 2018 incident was a "stroke mimic" due to a migraine.

7. At discharge from Rose Medical Center Claimant's neurological examination was normal. Dr. Schwartz determined Claimant could be suffering from conversion disorder or another psychosomatic manifestation of emotional and social stressors in the setting of a recent violent encounter. He predicated his opinion on Claimant's waxing/waning neurologic symptoms. Claimant also had no objective signs of a head injury during his hospitalization. He specifically had no documented bumps, scrapes, or lacerations around the head or face. Claimant also had a normal EEG, CT scan and brain MRI.

8. Claimant subsequently visited neurologist Michael Pearlman, M.D., Ph.D. on May 15, 2018. He had undergone treatment with Dr. Pearlman since 2016. Dr. Pearlman noted that Claimant had "recently passed out and hit his head on the way down; suffered a concussion." He remarked that Claimant was experiencing severe PTSD and panic attacks with flashbacks of an episode in Iraq. Dr. Pearlman's impression was identical to Claimant's prior visit on February 16, 2018 except that he included a diagnosis of post-concussive syndrome related to the May 8, 2018 incident.

9. On June 18, 2018 Claimant returned to Dr. Pearlman for an evaluation. Dr. Pearlman remarked that Claimant's migraines and headaches were back to baseline. He was thus ready to return to work with no restrictions. Claimant subsequently underwent a repeat MRI without contrast that was normal.

10. Claimant was evaluated at the Marcus Institute from August 20-22, 2018 for a sleep study. Prior to the May 8, 2018 incident Claimant primarily worked a night shift. He reported always feeling tired during the day, restless sleep and loud snoring. Claimant noted recurring combat-related nightmares since leaving the military that had worsened in 2016 and again in 2018. Claimant was diagnosed with PTSD and major depressive disorder. Providers recommended therapy for PTSD, depression and anger management. They also specified that Claimant should not return to law enforcement due to his history of psychological trauma and severe PTSD. Moreover, Claimant demonstrated significant stress responses and low frustration tolerance that impaired his

performance and higher level functioning. Claimant's symptoms also produced significant deficits in daily tasks.

11. On August 28, 2018 Claimant again visited Dr. Pearlman. Dr. Pearlman commented that Claimant's "recent experience at the Marcus Institute seemed to trigger his PTSD even more than the concussion in May 2018." Dr. Pearlman recommended the inpatient Head Strong program for additional treatment. He also prescribed Trokendi for migraine, seizures and mood swings. Dr. Pearlman continued to diagnose Claimant with post-concussion syndrome related to the May 8, 2018 incident.

12. Claimant underwent inpatient treatment at the VA from October 4, 2018 through November 12, 2018 for his military-connected PTSD and Gulf War Syndrome. While receiving treatment at the VA, Claimant suffered a non-epileptic seizure that caused another admission to Rose Medical Center Emergency Department. Providers again diagnosed Claimant with non-epileptic seizures and instructed him to follow-up with his primary care physician.

13. At the request of Employer's Chief of Police William H[Redacted], Claimant was referred to Stanley H. Ginsburg, M.D. for a fitness-for-duty evaluation. Dr. Ginsburg initially evaluated Claimant on November 1, 2018. Claimant told Dr. Ginsburg that he was attempting to take down a violent suspect with no help, hit his head on the ground and probably lost consciousness. After reviewing limited medical records and interviewing Claimant, Dr. Ginsburg concluded that he was not fit for duty as a patrol officer given his history of pseudo-seizures and behavioral issues. Dr. Ginsburg asked to see additional records from the VA, the Deputy City Manager, Dr. Pearlman, Good Samaritan Hospital, Swedish Medical, Denver Health and the Marcus Institute because they had not been available for review.

14. Dr. Ginsburg subsequently reviewed records from Good Samaritan, Dr. Pearlman, Denver Health and the Marcus Institute. He thus completed a supplemental report on January 18, 2019. Dr. Ginsburg did not change his opinion and maintained that Claimant was only capable of returning to desk work as a police officer. He wrote Claimant "had very significant problems as a result of his active duty in the Mideast with injuries suffered as noted." Claimant disputed Dr. Ginsburg's determination and obtained a letter from Dr. Pearlman stating that he was fit for duty.

15. Claimant was not permitted to return to work and was subsequently evaluated for disability through the Fire and Police Pension Association (FPPA). Claimant underwent evaluations with Robert E. Kleinman, M.D., Ronald S. Murray, M.D., Marc M. Trihaft, M.D. and Annu Ramaswamy, M.D. They all concluded that Claimant had a permanent occupational disability.

16. Dr. Kleinman evaluated Claimant on June 20, 2019 and noted that he had a service-connected disability of PTSD. He stated that it was difficult to determine the extent of Claimant's PTSD without review of the VA records. Based on the limited records, Dr. Kleinman determined that Claimant had PTSD with sequelae of a traumatic brain injury prior to his work for Employer. He remarked that the May 8, 2018 incident had

worsened Claimant's symptoms. Dr. Kleinman summarized that Claimant had a permanent occupational disability with cognitive impairment and post-concussive syndrome as well as PTSD caused by his military service that was exacerbated by the May 8, 2018 altercation.

17. On June 20, 2019 Claimant underwent an evaluation with Ronald S. Murray, M.D. After reviewing Claimant's medical records and performing a physical examination, Dr. Murray concluded that Claimant satisfied "the definition for permanent occupational disability secondary to complications of a work-related close head injury." He explained that, because of the complications from the May 8, 2018 closed head injury, Claimant was no longer able to fulfill his duties as a police officer.

18. On July 11, 2019 Claimant was evaluated by Marc M. Trieft, M.D. Claimant reported that on May 8, 2018 he hit his head and face on the pavement. He immediately felt dazed and confused. Claimant subsequently reported short-term memory loss and rage attacks with emotional lability. After examining Claimant and reviewing medical records, Dr. Trieft also concluded that Claimant had a permanent occupational disability. He specifically remarked that Claimant suffered a head injury during the May 8, 2018 altercation that caused an exacerbation of his PTSD.

19. On July 28, 2019 Annu Ramaswamy, M.D. conducted Claimant's final FPPA evaluation. Claimant told Dr. Ramaswamy that he did not feel capable of performing the duties of a police officer and had been terminated on March 1, 2019. Dr. Ramaswamy noted that Claimant had a history of PTSD and post-concussive symptoms prior to the May 2018 work incident. Claimant also had a history of seizures and pseudo-seizures. Nevertheless, Dr. Ramaswamy remarked that Claimant had been able to perform his duties as a police officer for about two years. Dr. Ramaswamy concluded that Claimant suffered a mild traumatic brain injury in May 2018. He summarized that the concussion aggravated Claimant's pre-existing headaches "as well as aggravated the PTSD/post-concussive symptomatology." Dr. Ramaswamy concluded that Claimant had a permanent occupational injury and was thus unable to perform his job duties as a police officer.

20. On August 21, 2019 Claimant underwent an independent medical examination with Eric Hammerberg, M.D. Dr. Hammerberg reviewed several medical records including the fitness-for-duty examination by Dr. Ginsburg and the complete records from the VA that had not been reviewed by any other provider. He also considered the written incident reports from other officers involved in the altercation. Dr. Hammerberg diagnosed Claimant with PTSD and non-epileptic seizures. After reviewing the medical records and performing a physical examination Dr. Hammerberg noted that there was no documentation that Claimant suffered any significant physical injury in the May 8, 2018 incident. He explained that Claimant had likely experienced a significant psychological trauma during the May 8, 2018 altercation. In Claimant's words, the incident opened a "floodgate" of emotions, including extreme anxiety and anger. Dr. Hammerberg reasoned that the altercation triggered a conversion symptomatology, consisting of dissociation, psychogenic unresponsiveness and non-epileptic seizures caused by pre-existing PTSD. Dr. Hammerberg determined that Claimant suffered pre-existing

symptoms that were unrelated to the May 8, 2018 injury. Claimant sustained only minor abrasions to the upper extremity as a result of the altercation.

21. On December 23, 2019 Dr. Kleinman completed a supplemental report and record review after receiving the VA records and Dr. Hammerberg's report. Dr. Kleinman diagnosed Claimant with PTSD and functional neurological conversion disorder. He explained that both of the diagnoses preceded the May 8, 2018 incident. Dr. Kleinman specifically commented that Claimant's cognitive complaints were documented in the VA records in 2017 and had been related to PTSD rather than a TBI. After reviewing Claimant's symptoms in the context of the additional records, he concluded that Claimant did not suffer a TBI on May 8, 2018. Instead, Dr. Kleinman reasoned that Claimant had suffered "a brief surge in symptoms that all predated the injury." He did not determine that Claimant had sustained a permanent aggravation of his pre-existing condition but rather had returned to his baseline as documented in the VA records.

22. Claimant testified at the hearing in this matter. He explained that he was involved in an arrest on the evening of May 8, 2018 with a combative suspect. After attempts to subdue the suspect with a taser and pepper spray were unsuccessful, Claimant tackled the perpetrator and believed he struck his head. Claimant stated he immediately felt dazed, confused and had a headache that worsened through the night. He remarked that he told a fellow officer his head was hurting. Claimant completed a written report of the May 8, 2018 altercation that detailed the events that occurred leading to the arrest of the suspect. The report also recorded Claimant's injuries to his "left elbow and thumb in the form of lacerations. I declined medical treatment from paramedics while at the Police Station and was told my injuries should heal." Although Claimant testified that he had hit his head and had a worsening headache throughout the evening, he did not mention either in his report.

23. Several other officers involved in the May 8, 2018 altercation also completed incident reports. The individuals included Officers W[Redacted], Gonzales, Moore and Gillis as well as supervising officer sergeant B[Redacted]. The report of Officer Gonzales described the take down as "sliding down the side of a vehicle parked in the parking lot" rather than an abrupt fall to the ground as described by Claimant. Officer Gonzales assisted Officer W[Redacted] and Claimant in restraining the suspect. None of the reports documented that Claimant struck his head or had any evidence of a head injury. However, the reports of both Officer W[Redacted] and Sergeant B[Redacted] noted that Officer W[Redacted], who had tackled the suspect between two vehicles, had a bump on the right side of his head.

24. On February 10, 2020 Chief William H[Redacted] testified through a post-hearing evidentiary deposition in this matter. He explained that Claimant worked as a solo officer for approximately six months and then suffered a non-work related seizure in November 2016. The seizures were eventually diagnosed as psychogenic and Chief H[Redacted] requested a fitness-for-duty examination from a psychologist. Claimant was not initially cleared to return to duty. However, he was eventually permitted to return to duty in August of 2017 with considerations that included treatment for six months. With respect to the May 8, 2018 incident, Chief H[Redacted] explained that officers are trained

to document all injuries in written reports. Documentation is not only important for Workers' Compensation purposes but also to the severity of charges against the perpetrator. However, none of the written reports pertaining to the May 8, 2018 incident specified that Claimant suffered any kind of head injury. In fact, Claimant's own written report and Workers' Compensation form did not document any head injuries on May 8, 2018.

25. On February 10, 2020 Lieutenant Jamie D[Redacted] testified through a post-hearing evidentiary deposition in this matter. Lt. D[Redacted] was present on May 10, 2018 and confirmed that Claimant never lost consciousness while in the station. He explained that he had weekly conversations with Claimant after he left work in May of 2018 and did not notice any changes in his attitude or behavior. Lt. D[Redacted] commented that the reports of the May 8, 2018 incident did not reflect that Claimant had suffered a head injury. In fact, Officer W[Redacted] came up from behind the suspect and tackled him to the ground during the altercation.

26. Claimant has failed to establish that it is more probably true than not that he sustained a compensable head injury or mental impairment during the course and scope of his employment with Employer on May 8, 2018. Although Claimant was involved in a traumatic incident helping to take down a suspect resisting arrest on May 8, 2018, the evidence does not demonstrate that he sustained a compensable injury. Instead, the record reflects that Claimant suffered only minor cuts and bruises that did not require medical treatment. The persuasive medical opinions demonstrate that Claimant's other symptoms are related to his pre-existing PTSD and conversion disorder and did not cause a compensable mental impairment.

27. The record reveals that Claimant suffers PTSD, post-concussive symptoms and other psychological trauma as a result of his military experience prior to the May 8, 2018 work related incident. Claimant also has a history of seizures and pseudo-seizures. In November of 2016 while at work without any precipitating event, Claimant collapsed. He was eventually diagnosed with psychogenic pseudo-seizures and placed on light/desk duty while receiving treatment for the condition. Claimant returned to full duty in August of 2016. Furthermore, two days after the May 8, 2018 altercation Claimant suffered a seizure prior to his work shift. At Claimant's discharge from Rose Medical Center Dr. Schwartz noted that Claimant was suffering from a conversion disorder or other psychosomatic manifestation of emotional and social stressors in the setting of a recent violent encounter. He based his opinion on Claimant's waxing/waning neurologic symptoms.

28. The record demonstrates that it is unlikely Claimant suffered a head injury during the May 8, 2018 altercation. Initially, Claimant's own written report and Workers' Compensation form did not document any head injuries on May 8, 2018. Claimant also had no objective signs of a head injury during his hospitalization at Rose Medical Center after the May 10, 2018 seizure. He specifically had no documented bumps, scrapes or lacerations around the head or face. He also had a normal EEG, CT scan and brain MRI. Furthermore, Chief H[Redacted] explained that officers are trained to document all injuries in written reports. Documentation is not only important for Workers' Compensation

purposes but also to the severity of charges against the perpetrator. However, none of the written reports pertaining to the May 8, 2018 incident specify that Claimant suffered any kind of head injury. Moreover, Lt. D[Redacted] commented that the reports of the May 8, 2018 incident did not reflect Claimant suffered a head injury. In fact, Officer W[Redacted] came up from behind the suspect and tackled him to the ground during the altercation. Finally, none of the reports of officers involved in the May 8, 2018 altercation documented that Claimant struck his head or had any evidence of a head injury. Instead,, the reports of both Officer W[Redacted] and Sergeant B[Redacted] noted that Officer W[Redacted], who had tackled the suspect between two vehicles, had a bump on the right side of his head. Accordingly, the record reflects that Claimant did not likely suffer a head injury as a result of the May 8, 2018 incident. He sustained only minor cuts and bruises that did not require medical treatment.

29. The persuasive medical opinions demonstrate that Claimant's psychological symptoms are related to his pre-existing PTSD and conversion disorder instead of the May 8, 2018 incident. After reviewing the medical records and performing a physical examination Dr. Hammerberg noted that there was no documentation that Claimant suffered any significant physical injury in the May 8, 2018 incident. He explained that Claimant had likely experienced a significant psychological trauma during the altercation. Dr. Hammerberg reasoned that the event triggered a conversion symptomatology that consisted of dissociation, psychogenic unresponsiveness and non-epileptic seizures caused by pre-existing PTSD. He concluded that Claimant's symptoms existed prior to the May 8, 2018 altercation and were not related to the incident. Furthermore, in Dr. Kleinman's supplemental report after receiving the VA records and Dr. Hammerberg's report, he diagnosed Claimant with PTSD and functional neurological conversion disorder. He explained that both of the diagnoses preceded the May 8, 2018 incident. Dr. Kleinman specifically commented that Claimant's cognitive complaints were documented in the VA records in 2017 and had been related to PTSD rather than a TBI. After reviewing Claimant's symptoms in the context of the additional records, he concluded that Claimant did not suffer a TBI on May 8, 2018. Instead, Dr. Kleinman reasoned that Claimant suffered "a brief surge in symptoms that all predated the injury." He did not determine that Claimant had sustained a permanent aggravation of his pre-existing condition but instead had returned to his baseline as documented in the VA records.

30. Drs. Murray, Trieft and Ramaswamy conducted FPPA evaluations and concluded that Claimant had a permanent occupational disability. However, the evaluations were designed to determine whether Claimant could perform his duties as a police officer and did not constitute a causality assessment about whether Claimant suffered a compensable injury during the May 8, 2018 altercation. The opinions of Drs. Hammerberg and Kleinman are based upon a review of more complete and thorough information and do not rely as heavily on Claimant's subjective reports. Specifically, Dr. Hammerberg reviewed Claimant's complete records from the VA, Swedish Medical Center and Good Samaritan detailing his extensive history with PTSD and psychogenic pseudo seizures. Similarly, Dr. Kleinman reviewed Dr. Hammerberg's report as well as the extensive records from the VA detailing Claimant's PTSD and associated physical symptoms in the absence of any medically documented TBI. Accordingly, their opinions

that Claimant's symptoms constitute the sequelae of his pre-existing PTSD and conversion disorder are persuasive and supported by Employer's records that do not reflect Claimant suffered a head injury on May 8, 2018.

31. Notably, both Drs. Kleinman and Hammerberg believed Claimant may have sustained a temporary exacerbation of his underlying PTSD and conversion disorder but did not sustain any permanent aggravation. Dr. Triehaft noted the exacerbation might have more lasting effects. If Claimant is alleging an injury in the form of an aggravation of his pre-existing mental condition, he must prove that he meets the statutory requirements for a mental impairment claim under §8-41-301, C.R.S. Whether the original mental impairment statute or its amended version effective July 1, 2018 applies, Claimant did not suffer a mental impairment as a result of the May 8, 2018 incident. Initially, as a patrol officer, arresting and taking down a suspect would be within Claimant's usual work experiences. Moreover, Claimant did not present any evidence that he suffered PTSD because he repeatedly visually witnessed serious bodily injury, or the immediate aftermath of serious bodily injury, while working for Employer. Although Claimant's medical records are replete with examples of witnessing serious bodily injury including death during his combat-related military service, there is no evidence that Claimant witnessed traumatic serious bodily injury and death as part of his work duties for Employer. Claimant has thus failed to establish that he suffered a psychologically traumatic event pursuant to §8-41-301, C.R.S. Accordingly, Claimant's claim that he suffered a compensable injury at work on May 8, 2018 is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. See *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and

bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. For a claim to be compensable under the Act, a claimant has the burden of proving that she suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson*, W.C. No. 4-589-645 (ICAO, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.*, 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner*, 12 P.3d at 846.

5. Section 8-41-301(2)(a), C.R.S. imposes additional evidentiary requirements regarding mental impairment claims. The section provides, in relevant part:

A claim of mental impairment must be proven by evidence supported by the testimony of a licensed physician or psychologist. For purposes of this subsection (2), “mental impairment” means a recognized, permanent disability arising from an accidental injury arising out of and in the course of employment when the accidental injury involves no physical injury and consists of a psychologically traumatic event that is generally outside of a worker's usual experience and would evoke significant symptoms of distress in a worker in similar circumstances. A mental impairment shall not be considered to arise out of and in the course of employment if it results from a disciplinary action, work evaluation, job transfer, lay-off, demotion, promotion, termination, retirement, or similar action taken in good faith by the employer.

The definition of “mental impairment” consists of two clauses that each contains three elements. The first clause requires a claimant to prove the injury consists of: “1) a recognized, permanent disability that, 2) arises from an accidental injury involving no physical injury, and 3) arises out of the course and scope of employment. *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023, 1030 (Colo. 2004). The second clause requires the claimant to prove the injury is: “1) a psychologically traumatic event, 2) generally outside a worker's usual experience, and 3) that would evoke significant symptoms of distress in a similarly situated worker.” *Id.*

6. Effective July 1, 2018, §8-41-301, C.R.S. was amended by House Bill 17-1229. The amendments broadened the category of compensable mental impairment injuries to include PTSD arising from events “within a worker’s usual experience” where “the worker repeatedly visually witnesses serious bodily injury, or the immediate aftermath of serious bodily injury, of one or more people as the result of the intentional act of another person or an accident.” §8-41-301(3)(b)(II)(C), C.R.S.; see *Montoya v. Fremont County Sheriff’s Office*, W.C. No. 5-084-877 (ICAO, Oct. 16, 2019). Additionally, the PTSD is not required to evoke symptoms of distress in a worker in similar circumstances. *Id.*

7. As found, Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable head injury or mental impairment during the course and scope of his employment with Employer on May 8, 2018. Although Claimant was involved in a traumatic incident helping to take down a suspect resisting arrest on May 8, 2018, the evidence does not demonstrate that he sustained a compensable injury. Instead, the record reflects that Claimant suffered only minor cuts and bruises that did not require medical treatment. The persuasive medical opinions demonstrate that Claimant's other symptoms are related to his pre-existing PTSD and conversion disorder and did not cause a compensable mental impairment.

8. As found, the record reveals that Claimant suffers PTSD, post-concussive symptoms and other psychological trauma as a result of his military experience prior to the May 8, 2018 work related incident. Claimant also has a history of seizures and pseudo-seizures. In November of 2016 while at work without any precipitating event, Claimant collapsed. He was eventually diagnosed with psychogenic pseudo-seizures and placed on light/desk duty while receiving treatment for the condition. Claimant returned to full duty in August of 2016. Furthermore, two days after the May 8, 2018 altercation Claimant suffered a seizure prior to his work shift. At Claimant's discharge from Rose Medical Center Dr. Schwartz noted that Claimant was suffering from a conversion disorder or other psychosomatic manifestation of emotional and social stressors in the setting of a recent violent encounter. He based his opinion on Claimant's waxing/waning neurologic symptoms.

9. As found, the record demonstrates that it is unlikely Claimant suffered a head injury during the May 8, 2018 altercation. Initially, Claimant's own written report and Workers' Compensation form did not document any head injuries on May 8, 2018. Claimant also had no objective signs of a head injury during his hospitalization at Rose Medical Center after the May 10, 2018 seizure. He specifically had no documented bumps, scrapes or lacerations around the head or face. He also had a normal EEG, CT scan and brain MRI. Furthermore, Chief H[Redacted] explained that officers are trained to document all injuries in written reports. Documentation is not only important for Workers' Compensation purposes but also to the severity of charges against the perpetrator. However, none of the written reports pertaining to the May 8, 2018 incident specify that Claimant suffered any kind of head injury. Moreover, Lt. D[Redacted] commented that the reports of the May 8, 2018 incident did not reflect Claimant suffered a head injury. In fact, Officer W[Redacted] came up from behind the suspect and tackled him to the ground during the altercation. Finally, none of the reports of officers involved in the May 8, 2018 altercation documented that Claimant struck his head or had any evidence of a head injury. Instead, the reports of both Officer W[Redacted] and Sergeant B[Redacted] noted that Officer W[Redacted], who had tackled the suspect between two vehicles, had a bump on the right side of his head. Accordingly, the record reflects that Claimant did not likely suffer a head injury as a result of the May 8, 2018 incident. He sustained only minor cuts and bruises that did not require medical treatment.

10. As found, the persuasive medical opinions demonstrate that Claimant's psychological symptoms are related to his pre-existing PTSD and conversion disorder instead of the May 8, 2018 incident. After reviewing the medical records and performing

a physical examination Dr. Hammerberg noted that there was no documentation that Claimant suffered any significant physical injury in the May 8, 2018 incident. He explained that Claimant had likely experienced a significant psychological trauma during the altercation. Dr. Hammerberg reasoned that the event triggered a conversion symptomatology that consisted of dissociation, psychogenic unresponsiveness and non-epileptic seizures caused by pre-existing PTSD. He concluded that Claimant's symptoms existed prior to the May 8, 2018 altercation and were not related to the incident. Furthermore, in Dr. Kleinman's supplemental report after receiving the VA records and Dr. Hammerberg's report, he diagnosed Claimant with PTSD and functional neurological conversion disorder. He explained that both of the diagnoses preceded the May 8, 2018 incident. Dr. Kleinman specifically commented that Claimant's cognitive complaints were documented in the VA records in 2017 and had been related to PTSD rather than a TBI. After reviewing Claimant's symptoms in the context of the additional records, he concluded that Claimant did not suffer a TBI on May 8, 2018. Instead, Dr. Kleinman reasoned that Claimant suffered "a brief surge in symptoms that all predated the injury." He did not determine that Claimant had sustained a permanent aggravation of his pre-existing condition but instead had returned to his baseline as documented in the VA records.

11. As found, Drs. Murray, Trieft and Ramaswamy conducted FPPA evaluations and concluded that Claimant had a permanent occupational disability. However, the evaluations were designed to determine whether Claimant could perform his duties as a police officer and did not constitute a causality assessment about whether Claimant suffered a compensable injury during the May 8, 2018 altercation. The opinions of Drs. Hammerberg and Kleinman are based upon a review of more complete and thorough information and do not rely as heavily on Claimant's subjective reports. Specifically, Dr. Hammerberg reviewed Claimant's complete records from the VA, Swedish Medical Center and Good Samaritan detailing his extensive history with PTSD and psychogenic pseudo seizures. Similarly, Dr. Kleinman reviewed Dr. Hammerberg's report as well as the extensive records from the VA detailing Claimant's PTSD and associated physical symptoms in the absence of any medically documented TBI. Accordingly, their opinions that Claimant's symptoms constitute the sequelae of his pre-existing PTSD and conversion disorder are persuasive and supported by Employer's records that do not reflect Claimant suffered a head injury on May 8, 2018.

12. As found, notably, both Drs. Kleinman and Hammerberg believed Claimant may have sustained a temporary exacerbation of his underlying PTSD and conversion disorder but did not sustain any permanent aggravation. Dr. Trieft noted the exacerbation might have more lasting effects. If Claimant is alleging an injury in the form of an aggravation of his pre-existing mental condition, he must prove that he meets the statutory requirements for a mental impairment claim under §8-41-301, C.R.S. Whether the original mental impairment statute or its amended version effective July 1, 2018 applies, Claimant did not suffer a mental impairment as a result of the May 8, 2018 incident. Initially, as a patrol officer, arresting and taking down a suspect would be within Claimant's usual work experiences. Moreover, Claimant did not present any evidence that he suffered PTSD because he repeatedly visually witnessed serious bodily injury, or the immediate aftermath of serious bodily injury, while working for Employer. Although

Claimant's medical records are replete with examples of witnessing serious bodily injury including death during his combat-related military service, there is no evidence that Claimant witnessed traumatic serious bodily injury and death as part of his work duties for Employer. Claimant has thus failed to establish that he suffered a psychologically traumatic event pursuant to §8-41-301, C.R.S. Accordingly, Claimant's claim that he suffered a compensable injury at work on May 8, 2018 is denied and dismissed.

ORDER

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

Claimant's claim for Workers' Compensation benefits is denied and dismissed.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at <http://www.colorado.gov/dpa/oac/forms-WC.htm>.*

DATED: April 14, 2020.

DIGITAL SIGNATURE:


Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-110-804-001**

ISSUES

- Did Claimant prove she suffered a compensable injury on June 22, 2019?
- If Claimant proved a compensable injury, did she prove right hip problems, including a probable labral tear, are causally related to the accident?
- Did Claimant prove entitlement to a closed period of TTD from June 23, 2019 through July 28, 2019?
- The parties stipulated to an average weekly wage of \$592.03.

FINDINGS OF FACT

1. Claimant works for Employer as a customer service clerk. She alleges an injury to her right hip on June 22, 2019, while working as a cashier in the fuel center. The incident was captured by the surveillance cameras in the cashier kiosk. At 8:23 AM, Claimant bent down to pick up some money she had inadvertently knocked to the floor. When she stood up, she tripped on a stool behind her and lost her balance. She lurched backward and twisted, catching herself on an adjacent counter to prevent falling to the ground. Claimant's demeanor, postures, and movements after the incident were consistent with severe pain. A few minutes later she called a coworker for help. The coworker offered physical support because Claimant could barely walk. Emergency personnel were summoned, and she was transported to Good Samaritan Medical Center emergency department.

2. Claimant's case is complicated by an extensive preinjury history of back problems. She underwent three low back surgeries since 2015, including an L4-S1 fusion in February 2019. She also had a C5-6 fusion in April 2019. Claimant missed work because of the surgeries from February 24, 2019 through June 15, 2019. She returned to work the week of June 16, 2019.

3. Both fusion surgeries were performed by Dr. Andrew Bauer. Dr. Bauer's last note before the work accident is dated June 7, 2019. Claimant's neck was doing well and her main complaint was severe muscle spasm in her low back. The spasms only happened at night and "she's good all day as long as she's moving." She was prescribed Soma and advised to follow up in August for lumbar x-rays.

4. On June 21, 2019 (the day before the incident in the fuel kiosk), Claimant was seen at the Good Samaritan Medical Center emergency department for an "acute exacerbation of her chronic back pain." She described three previous episodes of "similar flares." She reported 8/10 "throbbing achy sharp pain" in her right lower back. Examination showed tenderness of the right paraspinal muscles. Claimant was diagnosed with "muscle spasm" and given Toradol, dexamethasone, morphine, Dilaudid,

valium, and lidocaine. She was feeling “much better” within a few hours and was discharged with prescriptions for Percocet and a muscle relaxer.

5. Claimant was still having back pain when she reported to work the next morning (June 22). She clocked in and immediately went to the fuel center to relieve her coworker, Kim P[Redacted]. Ms. P[Redacted] later completed a written statement describing her observation of Claimant before the incident, in which she wrote,

[Claimant] limped in the kiosk slowly – as I asked if she was OK . . . she stated she was hurting very badly and wasn’t sure if she should even be working, due to her pain level. . . . As she was leaning on the counter, I asked if she wanted me to leave the stool out in case she needed it to sit, lean on, rest a leg on – she said yes, leave it, thank you!

6. In her post-hearing deposition, Ms. P[Redacted] explained she normally would have put the stool away but left it out that day because Claimant was hurting.

7. The video from surveillance CAM 5 shows Claimant walking from the store to the fuel center from 8:13:04 AM to 8:13:23. The ALJ viewed that segment of video several times and did not perceive a definitive limp. At most, her gait appears somewhat stiff. Nor did she walk with an obvious limp when she entered the kiosk a few moments later at 8:13:38 on CAM 1. But her movements inside the kiosk appear consistent with some level of pain, and the ALJ credits Ms. P[Redacted]’s testimony she left the stool out so Claimant would have some support.

8. Claimant was taken to the emergency room by ambulance after the accident. She reported,

severe bilateral lumbar spasm type pain radiating into the bilateral buttocks. It developed at work approximately 1 hour prior to arrival after a bending and twisting injury. Patient stumbled over an object and tried to catch herself. . . She was evaluated in the ED for similar spasms yesterday and was treated with IV Toradol, Decadron, morphine, Dilaudid, and lidocaine. She was discharged with prescriptions for Percocet and Robaxin but has not yet filled them.

Claimant could not walk because of severe pain. Physical examination showed moderate midline tenderness of the lower lumbar spine, mild bilateral lumbar paraspinous tenderness, and limited range of motion. After consulting with Dr. Bauer and the attending hospitalist, Claimant was admitted to the hospital for pain control and to get a lumbar MRI.

9. Dr. Bauer evaluated Claimant in the hospital the evening of June 22. He stated, “luckily her MRI is quite reassuring with regards to her previous surgery, that her hardware appears intact and there are no signs of obvious infection.” Lower extremity motion was significantly limited by pain. She had pain to palpation over the lateral paraspinous muscles, greater on the left, and severe pain with palpation of the left and right SI joint. FABER test was “strongly positive” for SI joint pain, but she did not appear to have pain with internal and external rotation of the hip. Dr. Bauer opined, “I have a

suspicion that a lot of her pain may be coming from the SI joints as her testing for the SI joint was quite provocative and reproduced her pain.” He recommended anti-inflammatories and muscle relaxers, physical therapy, and the diagnostic SI joint injection.

10. Claimant’s pain gradually improved over the next 2 days, and she was discharged from the hospital on June 24, 2019.

11. Employer referred Claimant to SCL Health, and she was initially evaluated by PA-C Tara Clemens on June 25, 2019. Claimant’s pain diagram shows pain across the lower back and buttocks, wrapping around both hips into the bilateral groin areas. Physical examination showed decreased range of motion, tenderness, and pain around the low back. Her legs were weak, and more painful with testing on the right than the left. Ms. Clemens diagnosed SI joint inflammation and acute bilateral low back pain without sciatica. She gave Claimant work restrictions of 5 pounds lifting, alternate sitting, standing, and walking as needed, and limited her to 2 hours shifts.

12. Claimant returned to SCL Health the next day (June 26) and saw Dr. Dean Prok. She again reported pain across the low back, in both hips and bilateral groin areas. She said, “the right side is slightly worse.” She was having difficulty sitting, standing, and walking. Examination showed very limited movement of her legs because of pain. She described “severe pain in the right greater than left low back areas diffusely that is causing her to be careful today.” Dr. Prok deferred most of the examination because she was in so much pain. Dr. Prok referred Claimant to follow up with Dr. Bauer and to Dr. Nicholas Olsen for a physical medicine consul. He also took Claimant off work.

13. Claimant saw PA-C Jolene Hammond in Dr. Bauer’s office on June 28, 2019. Physical examination showed extreme tenderness to palpation of the right SI joint. Provocative SI maneuvers including thigh thrust, compression, and FABER were positive. Ms. Hammond noted, “Her symptoms seem more associated with SI joint dysfunction at this time as it she did have a lumbar MRI that did not show any other issues in her hardware looks great as well.” She opined, “I think the fall probably inflamed a lot of muscles, etc. around her spine and will most likely calm down with time, heat, ice, etc.” Ms. Hammond referred Claimant for a diagnostic right SI joint injection with lidocaine only, because she previously had a bad reaction to steroids.

14. Dr. Chavda performed a right SI joint injection on July 8, 2019. Claimant later reported the injection temporarily reduced her pain from 7/10 to 3/10, which indicates at least a component of her pain was probably related to the SI joint.

15. Claimant’s initial evaluation with Dr. Olsen was on July 11, 2019. Claimant told Dr. Olsen “after this [June 22] event, she developed marked pain in her right buttock and hip.” Her pain diagram showed aching pain in the right buttock, hip and groin. Sitting, walking, and laying on her right side increased her pain. They discussed her prior back surgeries, and Claimant indicated the prior symptoms were “distinct and separate from the pain she experienced on 6/22/19.” On examination, Dr. Olsen observed an antalgic gait on the right. Internal and external rotation of the right hip increased her pain. She had no pain on the left side. Femoral thrust, Patrick’s (FABER), and femoral acetabular

impingement tests were positive on the right. Palpation of the bilateral SI joints revealed mild tenderness, but iliac compression test and Gaenslen's maneuver were equivocal on the right. Dr. Olsen commented, "she reports greater symptoms stemming from her right hip." Dr. Olsen opined,

[Claimant's] examination suggests a potential injury to her right hip. Per her report, she underwent MRI imaging which did not identify a reinjury or defect to her prior surgical site. To the degree she had some relief from the lidocaine SI joint injection, this does not appear to be her primary pain generator and is more likely related to her spinal complaints. I have recommended she undergo an MRI arthrogram of her right hip to screen for a possible labral tear.

16. Claimant returned to Dr. Prok on July 15, 2019. Most of her pain was in the right hip area. Examination showed decreased right hip range of motion and diffuse pain around the right hip. She also reported soreness between the back and gluteal area around to the front of the groin. Dr. Prok continued Claimant's off work status and agreed with Dr. Olsen's recommendation for imaging of the right hip.

17. The right hip MRI arthrogram was completed on July 22, 2019. It showed a questionable small labral tear and a "cam" morphology of the femoral head, consistent with femoroacetabular impingement.

18. Claimant followed up with Dr. Olsen on July 25, 2019. He reviewed the MRI films and agreed it showed a possible labral tear. Claimant explained the lidocaine included with the arthrogram dye injection gave her almost six hours of "complete relief of her pain." Claimant's gait was significantly antalgic on the right, and she was ambulating with a crotch. She continued to have significant tenderness with femoral thrust and Patrick maneuver on the right side. Dr. Olsen referred Claimant to Dr. Brian White, an orthopedic surgeon, "to review her films and determine whether there are significant findings to warrant additional treatment."

19. Claimant saw Dr. White's PA-C, Shawn Karns, on August 22, 2019. Claimant described pain "deep in the groin" ever since the work accident. She reported her right hip "bothers her with everything she does. . . . [P]rior to this incident she had no issues with her hip whatsoever." Examination of the right hip showed decreased range of motion and "pinching" with extreme flexion. Anterior impingement maneuver on the right recreated her typical pain. FABER test was negative for SI joint pain. Mr. Karns reviewed the MR arthrogram and noted an "obvious labral tear [and] CAM morphology over the femoral neck." He opined the significant relief Claimant received from the lidocaine injection to the hip "confirm[s] the hip joint is the source of her pain." He diagnosed right hip femoral acetabular impingement and a labral tear. He recommended Claimant start with conservative treatment, including therapy, and opined she is a candidate for right hip surgery if conservative treatment fails.

20. Dr. John Burris performed an IME for Respondent on August 27, 2019. She complained of symptoms localized to her right hip. Her low back was asymptomatic, and

examination of Claimant's back was normal. Dr. Burris found decreased right hip range of motion, pain with internal and external rotation, and a positive FADIR test. He opined the femoroacetabular impingement was due to a congenital abnormality (cam morphology) and labral tears commonly occur in the context of impingement with no specific mechanism. He opined the forces of the accident "are not sufficient to cause, accelerate, or contribute in any meaningful manner to her pre-existing right hip condition."

21. Dr. Burris testified that Claimant's prior back flares "could have been" caused by her hip instead, and her symptoms at the emergency room on June 21 were an "atypical presentation" of a labral tear. He "guessed" the medications Claimant received at the ER on June 21 temporarily relieved her pain, but it returned the next morning when the medication wore off.

22. Claimant was off work because of the injury from June 23, 2019 through July 28, 2019. Claimant proved her wage loss during that closed period of disability was causally related to the June 22, 2019 work accident.

CONCLUSIONS OF LAW

A. Compensability

To receive compensation or medical benefits, a claimant must prove she is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo. App. 2001). The claimant must prove that an injury directly and proximately caused the condition for which she seeks benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). A pre-existing condition does not disqualify a claim for compensation if a work accident aggravates, accelerates, or combines with the underlying condition to cause disability or a need for treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). An injury need not be dramatic or serious to support a finding of compensability. Even a "minor strain" or a "temporary exacerbation" of a pre-existing condition can be a sufficient basis for a compensable claim if it was caused by a claimant's work activities and caused her to seek medical treatment. *E.g.*, *Garcia v. Express Personnel*, W.C. No. 4-587-458 (August 24, 2004); *Conry v. City of Aurora*, W.C. No. 4-195-130 (April 17, 1996). There is no requirement that an injury cause any objective structural damage change to the claimant's underlying anatomy. A purely symptomatic aggravation can suffice for a compensable claim if it causes the claimant to seek treatment they otherwise would not have pursued but for the accident. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Dietrich v. Estes Express Lines*, W.C. No. 4-921-616-03 (September 9, 2016).

Claimant had significant preexisting low back problems necessitating three surgeries and needed emergency treatment for back spasms the day before the accident. She was still in pain immediately before the accident, as evidenced by her demeanor on the video and statements to Ms. P[Redacted]. But the video footage objectively shows a significant worsening of pain immediately after stumbling and falling backward. Her body

carriage and postures after the incident were consistent with severe pain making even basic movements difficult. She could not continue working and requested assistance. The pain flare that sent Claimant to the hospital on June 22, 2019 was precipitated by the stumbling incident, which establishes a compensable injury.

B. Causal relationship of the right hip

The question of what, if any, treatment Respondent should cover beyond the emergent hospitalization is more difficult to answer. The solution comes into focus once we dispense with the expectation or assumption that all of Claimant's symptoms must be attributable to a single cause. Her symptoms after the accident were probably multifactorial. The persuasive evidence shows the work accident probably temporarily aggravated Claimant's preexisting low back pain *and* caused temporary SI joint strains *and* caused or aggravated¹ a right hip labral tear. This explanation harmonizes several pieces of seemingly conflicting evidence, including documented bilateral low back and buttock pain in the emergency department, Dr. Bauer's exam findings suggesting an SI joint problem, Claimant's repeated description of pain in the right hip and right groin, and her positive response to an SI joint injection and a right hip injection. When Claimant arrived at the emergency room on June 22, the ER personnel naturally assumed she was having more back spasms, since she complained of back pain and was in the ER for back spasms only the day before. But Dr. Bauer determined something else was going on and her symptoms were not simply a continuation of the prior back issues. His examination pointed to SI joint dysfunction, which is consistent with the report of pain across her low back and buttocks. When Claimant saw Dr. Prok a few days later, she emphasized her back and hips. By the time she saw Dr. Olsen, she was primarily focused on her right hip and groin. The initial combination of back flare, SI joint strains and hip pain probably made it difficult for Claimant to precisely differentiate her pain. As the back flare subsided and the SI joint strains resolved, she was left with the right hip pain as the main issue.

Admittedly, there are no documented complaints of right hip pain in the records from the June 22 hospital admission. But those records only contain summaries written by other of what Claimant reported. The ALJ has given significant weight to Claimant's pain diagrams, because they reflect her first-hand description of symptoms, not filtered through any third party. Claimant's pain diagrams repeatedly show pain in the right hip and right groin (the classic symptom of a labral tear). The most incongruous piece of data is probably Dr. Bauer's note she had no pain with internal and external rotation of the hip, although it is unclear how much he was able to move the hip, because her leg movement was so limited by pain. In any event, Claimant reported right hip pain at her initial ATP appointment on June 25, and there is no persuasive evidence of any intervening event that could have caused a hip injury after she was released from the hospital on June 24.

Dr. Burris' testimony that Claimant's symptoms at the ER on June 21 were the manifestation of an undiagnosed hip problem is too speculative to be persuasive. There

¹ As Dr. Burris noted, the forces involved in the June 22 accident were relatively minor, and not likely to cause a labral tear. Moreover, Claimant's cam morphology is commonly associated with degenerative labral tears. Thus, it is more likely she aggravated a preexisting but asymptomatic tear. But from a compensability standpoint, the distinction is meaningless.

is no mention of any hip pain on June 21, and no exam finding suggestive of a hip problem. Furthermore, Dr. Burris' arguments are internally inconsistent, because on the one hand he speculated her June 21 ER visit was due to labral tear, but also argued the records from the June 22 hospitalization were inconsistent with a labral tear.

There is no doubt Claimant had significant preexisting back problems. But on balance, the persuasive evidence supports her testimony something changed after the work accident on June 22. The totality of evidence shows the work accident either caused or (more likely) aggravated a pre-existing labral tear.

B. TTD from June 23, 2019 through July 28, 2019

A claimant is entitled to TTD benefits if the injury causes a disability, the disability causes the claimant to leave work, and the claimant misses more than three regular working days. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The claimant must establish a causal connection between a work-related injury and the subsequent wage loss to obtain TTD benefits. *Id.*

As found, Claimant proved her wage loss from June 23 through July 28, 2019 was causally related to the work accident.

ORDER

It is therefore ordered that:

1. Claimant's claim for an injury on June 22, 2019 is compensable.
2. Respondent shall cover reasonably necessary treatment from authorized providers to cure and relieve the effects of Claimant's compensable injury, including the June 22, 2019 hospitalization at Good Samaritan Medical Center, Dr. Prok and his referrals, and treatment for the right hip.
3. Claimant's AWW is \$592.03 per the parties' stipulation, with a corresponding TTD rate of \$394.69.
4. Respondent shall pay Claimant TTD benefits from June 23, 2019 through July 28, 2019, at the weekly rate of \$394.69.
5. Respondent shall pay Claimant statutory interest of 8% per annum on all indemnity benefits not paid when due.
6. All issues not decided herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the

certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: <http://www.colorado.gov/dpa/oac/forms-WC.htm>.

DATED: April 16, 2020

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

- I. Whether Respondents proved by a preponderance of the evidence that they should be permitted to withdraw their admission of liability for post-MMI medical maintenance care.
- II. If Respondents have not proved entitlement to withdraw their admission, whether Claimant proved by a preponderance of the evidence that she may receive ongoing maintenance medical treatment at Colorado Pain Clinic.
- III. Respondents' request that this claim be closed.

STIPULATIONS

At the hearing, Respondents' counsel specified Claimant is authorized to treat at CROM (Colorado Rehabilitation and Occupational Medicine). Claimant's counsel argued no such authorization had been extended before the date of the hearing, and that Respondents' alleged failure to authorize any more maintenance care resulted Claimant being permitted to select the treating medical provider, and she selected Colorado Pain Clinic. After the hearing, Respondents' counsel advised Claimant's counsel that Claimant is in fact authorized to receive maintenance medical care at Colorado Pain Clinic.¹ Thus, the ALJ finds the issue is moot and will not address it further in this Order. Rather, the ALJ will simply address whether Respondents may withdraw their admission of liability for maintenance care, whether Claimant has a right to continue receiving this care, and whether the case should be closed.

FINDINGS OF FACT

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

1. Employer is a distributor of wine and spirits. Claimant works in Employer's warehouse. She credibly testified the job is physical; that she is "constantly lifting boxes and moving them from one area to the next." She estimated the boxes weigh from 5 to 45 pounds. She moves boxes of liquor and wine and is on her feet during her entire shift.

¹ Along with her position statement, Claimant's counsel provided the ALJ with an email from Respondents' counsel dated February 26, 2020 confirming that "...Your client is authorized to treat at Colorado Pain Clinic." At the end of hearing the ALJ requested the parties advise him if this issue has been resolved, and it has been.

2. Claimant sustained admitted industrial injuries in June 2014. She received conservative treatment from Dr. Nelson, who placed her at MMI with no impairment on July 23, 2014. (*Ex. 5, pp. 154 - 156*)
3. Dr. Thomas Higginbotham performed a DIME in February 2015. He determined Claimant had not reached MMI, and that she required "...a second orthopedic consult for relatedness, reasonableness, and necessity for treatment of both hips." He issued an advisory impairment rating of 17% for both hips and the low back. (*Ex. 5, p. 157*)
4. Claimant received further evaluation and treatment, and ultimately underwent left hip surgery with Dr. White in January 2016, to include left femoral osteoplasty, with acetabular Ganz osteotomy. (*Ex. 5, p. 161*)
5. Claimant came under the care of physiatrist Dr. Joseph Fillmore on February 22, 2016. (*Ex. 5, p. 163*)
6. While recovering from surgery, Claimant tripped and fell on March 8, 2016, fracturing her left distal radius and ulnar styloid. (*Id. at 163*) She underwent surgery with Dr. Sachar for this on March 22, 2016. (*Id. at 164*)
7. On August 1, 2016, Claimant underwent surgery to her right hip with Dr. White, including arthroscopy with femoral osteoplasty and acetabular rim trimming and reconstruction. (*Id. at 166*)
8. Dr. Fillmore ultimately placed Claimant at MMI on October 10, 2017 and made recommendations for post-MMI maintenance care; "...she should be afforded followup visits as needed with her orthopedic surgeons and should be reevaluated should she have further problems. I would recommend today for followup visits over the next 6 months for medication management if needed." (*Ex. 1, p. 60*) Dr. Fillmore issued a 19% whole-person impairment rating based on impairment of the left wrist, right hip, left hip, and lumbar spine. (*Ex. 1, pp. 62-67*)
9. Claimant underwent a follow-up DIME with Dr. Higginbotham on March 26, 2018. He agreed she had reached MMI, and he issued a 24% whole-person rating for the bilateral hip, low back, and wrist injuries. (*Ex. 5, p. 177*) Dr. Higginbotham recommended maintenance care; "...Chronic pain management is recommended under her present treating physiatrist, Dr. Fillmore. It is recommended that chronic pain management be revisited every 6 months. Treatment in accordance to Rule 17, Exhibit 9, Chronic Pain Disorder Medical Treatment Guidelines was recommended. Consideration of hardware removal in the future was recommended and may be necessary." (*Id.*)
10. Respondents filed a Final Admission of Liability on June 12, 2018, admitting to the impairment rating he issued, and to post-MMI medical maintenance treatment pursuant to his recommendations. (*Ex. 4*)
11. Claimant continued seeing Dr. Fillmore for maintenance care, including prescription medications. On November 1, 2018 he noted, "...Her pain ranges from a 4 to a 7. Her pain still impacts her function. She has been back to work for 2 months. MT [massage therapy] and chiro have been helpful. Her hips have

stabilized. She feels the treatment is helping to make her transition..." (Ex. 1, p. 45) He referred her for chiropractic treatment and massage therapy. (Id. at 43, 44)

12. Chiropractic treatment is provided by Dr. Keith Graves. On January 14, 2019 he reported, "...The patient has not had any treatment for 4 weeks. She has increased pain over the past 2 weeks. She states that her work is in the busy season and she has been performing more physical demanding tasks at work with lifting and carrying. With rest and compliance with home exercise protocols her pain has slightly and temporarily improves." (Ex. 2, p. 104)
13. On April 9, 2019 Dr. Fillmore recommended myofascial release and chiropractic treatment, as well as a 12-month gym membership. (Ex. 1, pp. 33-35)
14. On May 30, 2019 Dr. Fillmore noted, "...Pain 3/10. Ranges from a 3 to an 8 and appears related to work. Meds help 90%. C/O mostly back pain ..." (Ex. 1, p. 20) He renewed prescriptions for cyclobenzaprine, Wellbutrin, Percocet, and Ibuprofen. (Id. at 22)
15. Claimant was seen by Sandra Do, PT, at Manual Therapy Associates on June 14, 2019. Ms. Do reported, "...Currently bilateral low back pain. Varies left to right. Energy level is really low...Able to complete regular work schedule. Standing more than 10' [hours] increases low back pain...Pain wakes her up in 1-2 hours then takes some motrin and Percocet. Also taking a muscle relaxer before bed. Sees Dr. Joseph Fillmore physiatrist every couple of months to manage medication. Dr. Graves, D.C. who does exercise instruction, dry needling and adjustments..." (Ex. 3, p. 143)
16. Dr. Fillmore prescribed 12 more sessions of massage therapy on July 2, 2019. (Ex. 1, p. 18)
17. On July 26, 2019 Ms. Do noted, "...low back pain persists...states she stretches at least 1 time per day. Often 2-3 times per day. Has not had much time to focus on strengthening exercises with heavy work schedule..." (Ex. 3, p. 122) Ms. Do reported, "...Noted improving segmental mobility in lower thoracic facets as well as lumbar facets bilaterally...Psoas, and paraspinals and hips are improved." (Id.)
18. Dr. Fillmore saw Claimant on August 5, 2019 and reported, "...Working a lot including weekends. Muscle relaxant is not working. Needs a refill of meds. Pain is a 3. Meds help 90%. Going to myofascial massage which has started to help. Going 1x per week..." (Ex. 1, p. 130)
19. On September 6, 2019 Ms. Do reported, "...low back pain persists. Tight bilateral LBP, straight across. Feeling it refer into hips. Gets some relief with piriformis stretch in sitting. Pain takes longer to set in than it used to. Worse with bending..." (Ex. 3, p. 110) Claimant had 15 sessions with Ms. Do in 2019 and she credibly testified the treatment was "very beneficial."
20. On October 28, 2019 Dr. Fillmore noted, "...She has 5 more chiropractic visits. She wants therapeutic massage more intense than her previous provider. Functioning is the same. Working days now. Pain ranges from a 3 to a 4. Pain

average is a 3. Meds help 90%. Weaning off her Cymbalta. Pain still keeps her awake. 'I want to get better...'" (Ex. 1, pg. 8) He renewed prescriptions for ibuprofen and Percocet (*Id. at 11*) and he wrote a referral for 12 more sessions of neuromuscular massage. (*Id. at 6*) He also noted Claimant requested cognitive therapy "...as she reports was recommended by her primary care doctor." (*Id. at 8*) Dr. Fillmore declined to recommend it because "...It was not part of the maintenance program." (*Id. at 10*)

21. Dr. Graves saw Claimant on November 18, 2019 and he noted, "...The patient states that she has had progressive increased pain and muscle spasms throughout her lumbosacral junction and pelvis with full-duty work activities at her warehouse job, which now requires her to standing [sic] for long periods of time. On today's presentation her lumbar spinal/lumbosacral junction complaints are still significantly flared-up." (Ex. 2, p. 69) Dr. Graves added, "...I am still concerned that the patient's condition will digress without additional manual treatment, due to her continued labor intensive workloads with her warehouse job. That being said, the patient has exceeded workers compensation treatment guidelines and she is no longer making additional functional levels of improvement with my care." (*Id. at 73*) Claimant saw Dr. Graves 7 times in 2019.
22. On December 16, 2019 Dr. Fillmore wrote to Claimant and stated, "Shalon, as suggested we recommend that you seek care from another pain physician that could perhaps have a different treatment plan for you. You could see some of the physicians below, depending on your work comp carrier or preference." Dr. Fillmore provided the addresses and phone numbers for CROM, Colorado Pain, and MD Pain. (Ex. 1, pg. 5) Dr. Fillmore's practice manager emailed the letter to Claimant the same day. (*Id. at 4*)
23. Claimant testified she researched the issue and wishes to see Colorado Pain because of the level of experience she believes they can bring to the table. She testified it is also the closer of the three providers to her home.
24. Dr. Fillmore wrote to Respondents' counsel on January 31, 2020 and noted, "...While passive treatment can be a helpful supplement to an active exercise program, it generally provides only temporary relief at best and can foster dependence. I, therefore, do not agree with continued passive treatment modalities. Rather, the patient should pursue an active exercise program independently. Medication management has been continued at approximately 2-3 month intervals. She was given one Percocet 10/325 mg. each day along with ibuprofen 800 mg. three times a day at her last visit in October of 2019. She had tapered and discontinued the rest of her medications on her own. Going forward, I believe continued medication [sic, medication] management, not to exceed on Percocet 10/325 mg. and the ibuprofen is reasonable considering the physical nature of her employment. This should be re-evaluated every 3-6 months for continued efficacy." (Ex. 1, pp. 2, 3)
25. Claimant credibly testified the post-MMI treatment she received has been very beneficial. She explained that when she has pain flare-up and cannot take care of it through stretching or exercising, seeing a chiropractor who provides a

combination of dry-needling and manipulation to “put things back into alignment” helps her. She testified chiropractic and myofascial release/massage have been the most beneficial forms of maintenance treatment. Claimant explained she typically wakes up in pain after 1-2 hours of sleep at night. She then takes Percocet and ibuprofen, prescribed by Fillmore,² so she can sleep. She dislikes taking medications and does so only when needed.

26. Claimant credibly testified the lack of maintenance care since last seeing chiropractor Dr. Graves on November 18, 2019 has caused her to be “in a lot more pain and had a lot more flare-ups” of her low back. She performs exercises at home and stretches throughout the day. But her self-care program is not as effective without the professional medical treatment she formerly received. Claimant credibly testified she wishes to receive ongoing maintenance care because she continues to have trouble with chronic pain.
27. The ALJ finds Claimant has proved a probable need for medical treatment to relieve the effects of her industrial injuries. The persuasive evidence shows Claimant’s ongoing symptoms are causally related to her admitted work injuries, and she is reasonably likely to require future treatment to manage her symptoms. At a minimum, Claimant’s continuing need for medical evaluations and regular use of over the counter and prescription medications supports an award of post-MMI medical benefits. Respondents have failed to prove they should be permitted to withdraw their admission of liability for post-MMI treatment.

CONCLUSIONS OF LAW

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

General Provisions

The purpose of the Workers’ Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is what leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers’ compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers’ compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ’s factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or

² The last time Dr. Fillmore met with Claimant, on October 28, 2019, he prescribed 1 tablet of Percocet to be taken 1 time per day, and ibuprofen to be taken 3 times per day as needed. (Ex. 1, pg. 10).

every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered “to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence.” See *Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency, or inconsistency of the witness’s testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers’ compensation case is decided on its merits. C.R.S. § 8-43-201.

- I. **Whether Respondents proved by a preponderance of the evidence that they should be permitted to withdraw their admission of liability for post-MMI medical maintenance care.**
- II. **If Respondents have not proved entitlement to withdraw their admission, whether Claimant proved by a preponderance of the evidence that she may receive ongoing maintenance medical treatment at Colorado Pain Clinic.**

Medical Benefits after MMI

Respondents are liable for authorized medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101(1)(a); *Sims v. Indus. Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Medical benefits may extend beyond MMI if a claimant requires treatment to relieve symptoms or prevent deterioration of their condition. *Grover v. Indus. Commission*, 759 P.2d 705 (Colo. 1988). If the claimant establishes the probability of a need for future treatment, she is entitled to a general award of medical benefits after MMI, subject to the respondents’ right to dispute causation or reasonable necessity of any particular treatment. *Hanna v. Print Expeditors, Inc.*, 77 P.3d 863 (Colo. App. 2003). A claimant need not be receiving treatment at the time of MMI or prove a particular course of treatment has been prescribed to obtain a general award of Grover medical benefits. *Miller v. Saint Thomas Moore Hospital*, W.C. No. 4-218-075 (September 1, 2000). Proof of a current or future need for “any” form of treatment will suffice for an award of post-MMI benefits. *Stollmeyer v. Indus. Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995). The

claimant must prove entitlement to post-MMI medical benefits by a preponderance of the evidence. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997).

Claimant established that she needs to undergo regular medical evaluations by a physician. It is through these regular medical evaluations that specific medications and medical treatment can be prescribed to maintain Claimant at MMI and prevent her condition from deteriorating. The medications might include pain relieving over-the-counter medications such as ibuprofen as well as controlled substances such as Percocet that require a prescription. The treatment might also include additional active and passive modalities. Again, this will be up to the physician to determine what is appropriate maintenance medical treatment at each evaluation. As stated above, maintenance medical benefits are in the form of a general award. This is because although future medical treatment is found to be reasonable and necessary, the exact type of treatment that will be prescribed at any given time might be indeterminable at the time of the award.

Moreover, Claimant's regular use of over-the-counter (OTC) ibuprofen (not to mention the prescribed Percocet) provides a legally sufficient basis for a general award of medical benefits after MMI. The ICAO has repeatedly held that OTC medications are a permissible form of *Grover* benefits. E.g., *Guillotte v. Pinnacle Glass Company*, W.C. No. 4-443-875 (November 20, 2001) ("the fact [a] medication is available without a prescription does not vitiate its compensability or nullify the award of *Grover*-style medical benefits."); *Mann v. Ridge Erection Company*, W.C. No. 4-225-122 (April 4, 1996) (no distinction between "over the counter" medications and prescribed medications for purposes of *Grover* benefits); *Ashton-Moore v. Nextel Communications, Inc.*, W.C. No. 4-431-951 (September 12, 2002) (recommendation to use OTC anti-inflammatories "as necessary for pain" can support a *Grover* award).

As found, Claimant established by a preponderance of the evidence a probable need for future treatment to relieve the effects of her industrial injuries. As a threshold matter, Claimant proved a sufficient causal nexus between her ongoing symptoms and the work accident. She sustained injuries that required surgeries to both hips. Her hip and low back symptoms have persisted, and she continues to require maintenance medical treatment. The fact that Dr. Fillmore no longer wishes to treat Claimant is inconsequential to her ongoing need for treatment, and as discussed above Respondents have authorized Colorado Pain Clinic to provide more maintenance treatment.

Withdrawal of Admission for Post-MMI Treatment

Respondents are seeking to withdraw their admission for post-MMI medical treatment. By filing a final admission of liability and admitting for maintenance medical treatment Respondents have "admitted that the claimant has sustained the burden of proving entitlement to benefits." *City of Brighton v. Rodriguez*, 318 P.3d 496, 507 (Colo. 2014). If Respondents seek to withdraw the admission of liability, they must prove by a preponderance of the evidence that Claimant requires no additional post-MMI treatment. See § 8-43-201(1) ("a party seeking to modify an issue determined by a general or final admission ... shall bear the burden of proof for any such modification."). As found, Respondents failed to prove a basis to withdraw their admission of liability for

post-MMI treatment. The persuasive evidence shows Claimant continues to require post-MMI treatment. Post-MMI treatment was appropriately admitted and shall remain so.

III. Respondents' request that this claim be closed.

a. Respondents request to "close" Claimant's claim for lack of prosecution under § 8-43-207(1)(n).

Respondents requested the ALJ to "close" Claimant's claim for lack of prosecution. Based on the prior findings and conclusions determining Claimant is still entitled to maintenance medical treatment, as well as the arguments asserted by each party at hearing and their respective proposed order, the ALJ finds Respondents' request is misplaced, moot or both.

Respondents contend the ALJ has jurisdiction to close Claimant's claim for lack of prosecution under § 8-43-207(1)(n). Claimant, on the other hand, contends the ALJ lacks jurisdiction to close her claim for lack of prosecution because that authority rests solely with the Director in WCRP 7.

Pursuant to § 8-43-207(1)(n), an ALJ has the authority to:

Dismiss all issues in the case except as to resolved issues and except as to benefits already received, upon thirty days notice to all the parties, for failure to prosecute the case unless good cause is shown why such issues should not be dismissed. For purposes of this paragraph (n), it shall be deemed a failure to prosecute if there has been no activity by the parties in the case for a period of at least six months.

The ALJ, however, does not find this statute to be applicable to the facts here for many reasons. First, under this statute, the ALJ only has the authority to "dismiss all issues in the case except as to resolved issues and except as to benefits already received." Here, the issue of maintenance medical benefits has already been resolved pursuant to Respondents' FAL where they admitted liability for maintenance medical treatment. As a result, there is nothing for Claimant to prosecute over her general award of maintenance medical treatment. For that reason, the ALJ cannot dismiss Claimant's general award for maintenance medical benefits.

Second, as required by this statute, this court was neither asked to issue a thirty-day show cause order, nor issued one sua sponte, stating certain issues would be dismissed for failure to prosecute if Claimant failed to show good cause why the issues identified should not be dismissed based on a failure to prosecute. Respondents' exhibits do contain Claimant's June 10, 2019, application for an expedited hearing. Attached to the application is an April 19, 2019, prescription from Dr. Fillmore for Claimant to have 6 visits of chiropractic treatment. But that application was not before

this ALJ and might have been withdrawn. That said, at the February 25, 2020, hearing held by this ALJ, Claimant was not seeking a specific medical benefit and Respondents were not seeking to deny a specific medical benefit. Respondents were, however, seeking to withdraw their FAL as it relates to maintenance medical treatment, which would lead to the blanket denial of all maintenance medical treatment. Thus, the obligation to prosecute the termination of Claimant's maintenance medical treatment was on Respondents.

Third, in the end, Respondents agree the closure issue for failure to prosecute is misplaced, moot or both. In their proposed order, Respondents state the following:

Claimant has not shown good cause why her case should not be closed for failure to prosecute. However, because the claim is closed by FAL it shall remain closed on that basis. The failure to prosecute issue does not need to be addressed. Claimant has not initiated legal action since objecting to the FAL. Claimant is defending against Respondents attempt to close the claim.

As a result, the ALJ finds and concludes Respondents have failed to establish that any issue relating to Claimant's claim should be dismissed for lack of prosecution pursuant to § 8-43-207(1)(n).

- b. Case closure pursuant to § 8-43-203(2)(b)(II)(A) is not an independent claim or remedy, but an affirmative defense.

Respondents have also asked this court to close Claimant's case pursuant to § 8-43-203(2)(b)(II)(A). But case closure under § 8-43-203(2)(b)(II)(A) is neither an independent claim nor a remedy, but an affirmative defense. As a result, Respondents cannot transmute this procedure based affirmative defense into an independent claim or remedy merely by asserting it as one. This defense can be used only to defend against a claim for a specific benefit or category of benefits that has been closed procedurally under this statute.

Section 8-43-203(2)(b)(II)(A) provides that a claimant's failure to object to a final admission of liability and request a hearing on any disputed issues that are ripe for hearing or request a DIME within 30 days will lead to automatic closure of the claim over all admitted liability. The automatic closure of issues raised in an uncontested FAL is "part of a statutory scheme designed to promote, encourage, and ensure prompt payment of compensation to an injured worker without the necessity of a formal administrative determination in cases not presenting a legitimate controversy." *Leeway v. Indus. Claim Appeals Office*, 178 P.3d 1254 (Colo. App. 2007). Once a case has automatically closed by operation of the statute, the issues resolved by the FAL are not subject to further litigation unless they are reopened under § 8-43-303, C.R.S. *Berg v. Indus. Claim Appeals Office*, 128 P.3d 270 (Colo. App. 2005).

Claimant has not raised an issue to which the affirmative defense of case closure can be asserted. Respondents admitted liability for maintenance medical benefits in their final admission of liability. As a result, the issue of maintenance medical benefits was resolved and Claimant's maintenance medical benefits cannot be procedurally closed or terminated under this statute.

The ALJ thus finds and concludes Respondents' request to close Claimant's case pursuant to § 8-43-203(2)(b)(II)(A) is also misplaced and is not a defense to any claim asserted by Claimant.

ORDER

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

1. Respondents' request to withdraw their admission of liability for post-MMI medical maintenance care is denied and dismissed.
2. Respondents shall continue to authorize and pay for reasonably necessary medical treatment after MMI from authorized providers, including Colorado Pain Care, to relieve the effects of Claimant's injury or prevent deterioration of her condition.
3. Respondents' request for closure of this claim is denied and dismissed.
4. All matters not determined herein are reserved for future determination.

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

DATED: April 20, 2020.

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-114-540-001**

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that he suffered a compensable back injury during the course and scope of his employment with Employer on August 1, 2019.

2. If Claimant has established a compensable injury, whether he has proven by a preponderance of the evidence that he is entitled to receive reasonable, necessary and related medical treatment including payment of an August 7, 2019 St. Joseph Hospital Emergency Room bill.

FINDINGS OF FACT

1. Claimant worked for Employer as a Tech Foreman. His job duties primarily involved changing street light poles and underground electrical vaults.

2. Claimant testified that on August 1, 2019 he was working with crewmembers David D[Redacted] and Ryan W[Redacted]. Mr. D[Redacted] was assigned to operate the digger truck. The vehicle was used to lift and set telephone poles. When Mr. D[Redacted] parked the truck, Claimant believed it was in the incorrect location. He told Mr. D[Redacted] to move the digger truck "to get better power off the ground." Claimant explained that Mr. D[Redacted] became upset with the request. A verbal argument ensued. After Mr. D[Redacted] remarked that he was done working for the day, Claimant told him to move away from the equipment. Claimant stated he would enter the truck and load it onto the trailer.

3. Claimant explained that when he got into the digger truck, Mr. D[Redacted] also entered the vehicle to raise the outriggers. Claimant asked Mr. D[Redacted] to move away. Claimant then attempted to get down from the truck, but slipped and injured his back. Claimant detailed that he slipped on hydraulic oil that was coming out of a hose. He fell and struck his back on the steel edge of the vehicle. Claimant explained that Mr. D[Redacted] subsequently pushed him, but the shove did not cause any additional back symptoms. Claimant again told Mr. D[Redacted] to get away from the truck and Mr. D[Redacted] replied, "go ahead and hit me."

4. Claimant remarked that he then contacted Employer's General Manager Curtis T[Redacted] and reported his back injury. Mr. T[Redacted] responded that he did not want to hear about it. Claimant noted he also spoke with Union Representative Chris B[Redacted] about appropriate action.

5. Because of the altercation, Employer directed Claimant and Mr. D[Redacted] to go home and take off the following day to cool down. They were instructed

to return to work on Monday, August 5, 2019. Claimant did not contact Employer on August 2, 2019 to report his back injury.

6. On Monday August 5, 2019 Employer terminated both Claimant and Mr. D[Redacted] from employment as a result of the August 1, 2019 altercation. Claimant was terminated for creating a hostile work environment and his termination notice specified that he was “not eligible for re-hire.”

7. On January 6, 2020 the parties conducted the pre-hearing evidentiary deposition of Mr. D[Redacted]. Mr. D[Redacted] also testified in rebuttal at the hearing in this matter. He detailed his August 1, 2019 verbal altercation with Claimant. Mr. D[Redacted] specified that both men were swearing at each other and the incident became confrontational. He remarked that he contacted the union, spoke to Mr. B[Redacted] and reported the altercation. Mr. D[Redacted] advised Mr. B[Redacted] he would not work in a hostile environment. He explained that he never saw Claimant slip on oil and denied pushing Claimant during the August 1, 2019 altercation. In fact, Mr. D[Redacted] detailed that there was no hydraulic oil leak on the digger truck because the hoses are positioned below the turret where he sits and he did not notice any oil. He commented that, if oil had been leaking, the truck would have been unsafe and created a safety hazard that required mechanics to repair.

8. Mr. T[Redacted] completed a written statement and testified at the hearing in this matter. He remarked that he received a call about a verbal altercation between Claimant and Mr. D[Redacted] on August 1, 2019. Claimant explained that the altercation involved the position of a truck. Mr. T[Redacted] advised that the men should be separated and act like adults. Claimant did not report that he had fallen off the digger truck and struck his back or otherwise been injured. In fact, Mr. T[Redacted] noted that Claimant never mentioned the injuries during conversations on August 1, August 2, or August 5, 2019. Finally, while conducting an investigation of the incident, Mr. T[Redacted] remarked that no employees mentioned Claimant had slipped on oil or been pushed by a co-worker on August 1, 2019.

9. Mr. T[Redacted]’s written statement described the circumstances surrounding Claimant’s August 5, 2019 termination from employment. After Claimant’s termination, Employer asked him to turn in work packets and other miscellaneous items. Claimant waited for his termination slip and final check in his personal vehicle. At about 8:45 a.m. Mr. T[Redacted] was notified that Claimant’s check was ready and by 9:00 a.m. Claimant received his termination. Mr. T[Redacted] explained that he later received a call from Claimant at around 3:00 p.m. Claimant reported that he had “hurt himself while in the yard waiting for his check.”

10. Mr. T[Redacted] detailed in his testimony that Claimant was terminated for creating a hostile work environment and was not eligible for re-hire because he had previous incidents with other employees. On the afternoon of the termination Mr. T[Redacted] received a telephone call from Claimant stating that he had injured himself. Because Mr. T[Redacted] had not previously been informed of any injury, he assumed Claimant was reporting that he had injured himself in the parking lot while waiting for his

check earlier in the day. Notably, Claimant did not inform Mr. T[Redacted] during the call that he had slipped on hydraulic oil on the digger truck and injured his back.

11. Ryan W[Redacted] completed a written statement and testified at the hearing in this matter. He worked for Employer as a Groundman. Mr. W[Redacted] explained that on August 1, 2019 his crew was assigned to work on a street light. He was in a truck with Mr. D[Redacted]. When they stopped at the jobsite Claimant began yelling at Mr. D[Redacted] for parking in the wrong spot. Mr. W[Redacted] noted the two men began swearing at each other and the argument became heated. He began picking up his tools and packing the truck because he did not want to work in a hostile environment. Mr. W[Redacted] testified that he did not see Claimant slip and fall off the digger truck or strike his back. He also did not observe any leaking hydraulic oil.

12. Former Union Representative for Employer Mr. B[Redacted] testified at the hearing in this matter. He explained that he spoke with Claimant about his altercation with Mr. D[Redacted]. At no time during this discussion did Claimant advise Mr. B[Redacted] that he had injured his back in any fashion on August 1, 2019.

13. On August 7, 2019 Claimant visited the St. Joseph Hospital Emergency Room for an evaluation. Claimant reported lower back pain after a fall seven days earlier. He specifically explained that “he slipped and his coworker thought he was going to run into him so he pushed him causing him to fall landing on his lower back.” After reviewing Claimant’s medical history and conducting a physical examination, the Emergency Room medical provider diagnosed Claimant with a strain of the thoracic back region.

14. Claimant completed a Workers’ Claim for Compensation regarding the August 1, 2019 injury. The form specified that Claimant injured his back when he “slipped on some oil while being pushed by a coworker.” Claimant noted that he reported the back injury to Mr. T[Redacted] on August 6, 2019.

15. Claimant has failed to demonstrate that it is more probably true than not that he suffered a compensable lower back injury during the course and scope of his employment with Employer on August 1, 2019. Initially, Claimant testified that he slipped on hydraulic oil while getting down from a digger truck at a jobsite on August 1, 2019. He fell in the truck and hit his back on the steel edge of the vehicle. Claimant explained that Mr. D[Redacted] subsequently pushed him, but the shove did not cause any additional back symptoms.

16. Mr. D[Redacted] detailed his August 1, 2019 verbal altercation with Claimant. He explained that he never saw Claimant slip on oil and denied pushing Claimant. In fact, Mr. D[Redacted] detailed that there was no hydraulic oil leak from a hose on the digger truck. He remarked that the hoses are positioned below the turret where he sits and he did not notice any leaking oil. Mr. D[Redacted] commented that leaking oil would have constituted a safety hazard requiring the intervention of a mechanic. Mr. W[Redacted] similarly testified that he did not see Claimant slip and fall off the digger truck or strike his back on August 1, 2019. He also did not observe any leaking hydraulic oil. Moreover, Mr. T[Redacted] explained that he received a call about a verbal

altercation between Claimant and Mr. D[Redacted] on August 1, 2019. Claimant remarked that the altercation involved the position of a truck. However, he did not report that he had fallen off the digger truck and struck his back or otherwise been injured. In fact, Mr. T[Redacted] noted that Claimant never mentioned any injuries during conversations on August 1, August 2 or August 5, 2019. After conducting an investigation of the incident, Mr. T[Redacted] determined that no employees mentioned that Claimant had slipped on oil or been pushed by a co-worker on August 1, 2019. Finally, Mr. B[Redacted] explained that he spoke with Claimant about his altercation with Mr. D[Redacted]. At no time during this discussion did Claimant advise Mr. B[Redacted] that he had injured his back in any fashion on August 1, 2019.

17. The record reveals that Claimant did not report any back injury to Employer until after he had been terminated on August 5, 2019. Mr. T[Redacted] described that Claimant received his termination slip and final check at about 9:00 a.m. on August 5, 2019 after waiting in his personal vehicle. He explained that he later received a call from Claimant at around 3:00 p.m. In a written statement he noted Claimant reported that he had “hurt himself while in the yard waiting for his check.”

18. The record also reflects that Claimant attributed his back injury to being pushed by a coworker. On August 7, 2019 Claimant visited the St. Joseph Hospital Emergency Room and reported lower back pain after a fall seven days earlier. He specifically explained that “he slipped and his coworker thought he was going to run into him so he pushed him causing him to fall landing on his lower back.” Similarly, Claimant completed a Workers’ Claim for Compensation and specifies that he injured his back when he “slipped on some oil while being pushed by a coworker.”

19. The totality of the evidence thus reflects that it is unlikely Claimant slipped and fell on leaking hydraulic oil from a digger truck on August 1, 2019. Claimant’s crewmembers did not notice any leaking hydraulic oil or observe any fall. Moreover, Claimant did not report any fall to Employer until after he was terminated on August 5, 2019. Finally, because Claimant’s description of the August 1, 2019 incident in the medical record and Workers’ Claim for Compensation suggest that he injured his back after being pushed by a coworker, they are inconsistent with his hearing testimony. Accordingly, Claimant’s request for Workers’ compensation benefits is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the “Workers’ Compensation Act of Colorado” (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers’ Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers’ Compensation case are not interpreted liberally in favor of either the

rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. See *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson*, W.C. No. 4-589-645 (ICAO, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.*, 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner*, 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). *Soto-Carrion v. C & T Plumbing, Inc.*, W.C. No. 4-650-711 (ICAO, Feb. 15, 2007); *David Mailand v. PSC Industrial Outsourcing LP*, W.C. No. 4-898-391-01, (ICAO, Aug. 25, 2014). When a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *Cotts v. Exempla, Inc.*, W.C. No. 4-606-563 (ICAO, Aug. 18, 2005).

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. See *Cotts v. Exempla, Inc.*, W.C. No. 4-606-563 (ICAO, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. See *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAO, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs*, W.C. No. 4-745-712 (ICAO, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity.

The panel in *Scully* noted that “correlation is not causation,” and merely because a coincidental correlation exists between the claimant’s work and his symptoms does not mean there is a causal connection between the claimant’s injury and work activities.

7. As found, Claimant has failed to demonstrate by a preponderance of the evidence that he suffered a compensable lower back injury during the course and scope of his employment with Employer on August 1, 2019. Initially, Claimant testified that he slipped on hydraulic oil while getting down from a digger truck at a jobsite on August 1, 2019. He fell in the truck and hit his back on the steel edge of the vehicle. Claimant explained that Mr. D[Redacted] subsequently pushed him, but the shove did not cause any additional back symptoms.

8. As found, Mr. D[Redacted] detailed his August 1, 2019 verbal altercation with Claimant. He explained that he never saw Claimant slip on oil and denied pushing Claimant. In fact, Mr. D[Redacted] detailed that there was no hydraulic oil leak from a hose on the digger truck. He remarked that the hoses are positioned below the turret where he sits and he did not notice any leaking oil. Mr. D[Redacted] commented that leaking oil would have constituted a safety hazard requiring the intervention of a mechanic. Mr. W[Redacted] similarly testified that he did not see Claimant slip and fall off the digger truck or strike his back on August 1, 2019. He also did not observe any leaking hydraulic oil. Moreover, Mr. T[Redacted] explained that he received a call about a verbal altercation between Claimant and Mr. D[Redacted] on August 1, 2019. Claimant remarked that the altercation involved the position of a truck. However, he did not report that he had fallen off the digger truck and struck his back or otherwise been injured. In fact, Mr. T[Redacted] noted that Claimant never mentioned any injuries during conversations on August 1, August 2 or August 5, 2019. After conducting an investigation of the incident, Mr. T[Redacted] determined that no employees mentioned that Claimant had slipped on oil or been pushed by a co-worker on August 1, 2019. Finally, Mr. B[Redacted] explained that he spoke with Claimant about his altercation with Mr. D[Redacted]. At no time during this discussion did Claimant advise Mr. B[Redacted] that he had injured his back in any fashion on August 1, 2019.

9. As found, the record reveals that Claimant did not report any back injury to Employer until after he had been terminated on August 5, 2019. Mr. T[Redacted] described that Claimant received his termination slip and final check at about 9:00 a.m. on August 5, 2019 after waiting in his personal vehicle. He explained that he later received a call from Claimant at around 3:00 p.m. In a written statement he noted Claimant reported that he had “hurt himself while in the yard waiting for his check.”

10. As found, the record also reflects that Claimant attributed his back injury to being pushed by a coworker. On August 7, 2019 Claimant visited the St. Joseph Hospital Emergency Room and reported lower back pain after a fall seven days earlier. He specifically explained that “he slipped and his coworker thought he was going to run into him so he pushed him causing him to fall landing on his lower back.” Similarly, Claimant completed a Workers’ Claim for Compensation and specifies that he injured his back when he “slipped on some oil while being pushed by a coworker.”

11. As found, the totality of the evidence thus reflects that it is unlikely Claimant slipped and fell on leaking hydraulic oil from a digger truck on August 1, 2019. Claimant's crewmembers did not notice any leaking hydraulic oil or observe any fall. Moreover, Claimant did not report any fall to Employer until after he was terminated on August 5, 2019. Finally, because Claimant's description of the August 1, 2019 incident in the medical record and Workers' Claim for Compensation suggest that he injured his back after being pushed by a coworker, they are inconsistent with his hearing testimony. Accordingly, Claimant's request for Workers' compensation benefits is denied and dismissed.

ORDER

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

Claimant's claim for Workers' Compensation benefits is denied and dismissed.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at <http://www.colorado.gov/dpa/oac/forms-WC.htm>.*

DATED: April 23, 2020.

DIGITAL SIGNATURE:


Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-113-130-002**

ISSUES

- Did Claimant prove compensable injuries because of a fall on July 18, 2019?
- Was [Redacted] insured for workers' compensation liability relating to Claimant's accident?
- Is [Statutory Employer Redacted] liable for workers' compensation benefits as the statutory employer?

FINDINGS OF FACT

1. On July 18, 2019, Claimant suffered severe injuries when he fell at least 40 feet from a scaffold while working for [Redacted Employer].

2. [Redacted] is an exterior finishing contractor based in O'Fallon, Missouri.

3. [Statutory Employer Redacted] is a general contractor specializing in commercial construction. [Statutory Employer Redacted] served as the general contractor on a four-story Home2 Suites by Hilton project in Southwest Colorado Springs. In approximately November 2018, [Statutory Employer Redacted] subcontracted with [to complete Exterior Insulation and Finish Systems (EFIS) and stone veneer on the project. [Redacted] started work in November 2018 without a formal contract. NCG made [Redacted] stop working on November 30, 2018 after receiving a Certificate of Insurance that did not meet [Statutory Employer Redacted] 's minimum requirements. In early December 2018, [Statutory Employer Redacted] sent a formal subcontractor agreement and detailed information regarding its insurance requirements. The contract described the project as "Ground up construction of a 4-story, 74,477 square-foot Home2 Suites hotel." The contract obligated [Redacted] to supply all scaffolding, man lifts, and hoisting to complete all EFIS on the project. [Redacted] signed the contract on January 11, 2019 and resumed work on January 19, 2019.

4. On January 29, 2019, [Redacted] retained an insurance broker, Sean W[Redacted], to help it procure a workers' compensation policy. [Redacted] informed Mr. W[Redacted] it had a project lined up in Colorado but did not give details such as the start date or a specific description of the work. Mr. W[Redacted] did not know [Redacted] had already started work on the project.

5. On behalf of [Redacted Employer], Mr. W[Redacted] completed an online application for a workers' compensation policy with Y[Redacted Insurer]. The online application included several underwriting questions designed to ensure the work is within Y[Redacted Insurer]' "risk appetite." The applicant must verify it meets the eligibility requirements before Y[Redacted Insurer] will issue a policy.

6. One eligibility requirement is the applicant performs “[n]o work on exterior buildings or structures over 2 stories in height.” Mr. W[Redacted] selected “yes” to indicate [Redacted] met the eligibility requirements.

7. After completing the online application, Mr. W[Redacted] experienced technical issues and could not issue the policy. Mr. W[Redacted] contacted a Y[Redacted Insurer] underwriter, Mike P[Redacted], for assistance. Mr. P[Redacted] requested that [Redacted] complete and sign an ACORD form as part of the application process.

8. Mr. W[Redacted] completed the ACORD form on [Redacted Employer]’s behalf. Mr. W[Redacted] input “N,” meaning “no,” to the question if “[a]ny work [is] performed underground or above 15 feet?”

9. Mr. W[Redacted] transmitted the ACORD form to [Redacted Employer]’s owner, Chad Lawson, for his review and signature. Mr. W[Redacted] sent the ACORD form to Mr. Lawson to “review to make sure things are correct and make any corrections[.]” Mr. Lawson made no corrections to the application.

10. On or about February 4, 2019, Mr. Lawson and Mr. W[Redacted] signed the ACORD form, affirming that a “reasonable inquiry has been made to obtain the answers to the questions on this application” and representing “that the answers are true, correct and complete to the best of [their] knowledge.”

11. Relying on [Redacted Employer]’s representations in the online application and ACORD form, Y[Redacted Insurer] issued workers compensation and employers liability policy no. UB-1N931421-19-42-G to [Redacted Employer] with effective dates from February 1, 2019 to February 1, 2020. The policy issue date is February 4, 2019.

12. Y[Redacted Insurer] did not know [Redacted Employer] was performing work above 15 feet or two stories when it issued the policy. Had [Redacted Employer] disclosed that information during the application process, Y[Redacted Insurer] would not have issued the policy.

13. Mr. W[Redacted] has selected Missouri as the location for primary coverage under the workers’ compensation policy, and the application gave no indication [Redacted Employer] had work in Colorado. But Mr. W[Redacted] also requested “other states” coverage under the policy because he understood [Redacted Employer] planned to work a job in Colorado.

14. Section 3.A on the Policy Information Page states it provides coverage for workers’ compensation claims under Missouri law. Section 3.C addresses “OTHER STATES INSURANCE,” and specifies coverage for injuries in the other listed states is governed by Part Three of the policy. Colorado is included under Section 3.C.

15. Part Three of the policy describes the conditions for coverage in Section 3.C states as:

OTHER STATES INSURANCE

A. How This Insurance Applies

1. This other states insurance applies only if one or more states are shown in Item 3.C. of the Information Page.
2. If you *begin* work in any one of those states *after the effective date of this policy* and are not insured or are not self-insured for such work, all provisions of the policy will apply as though that state were listed in Item 3.A. of the Information Page.
4. If you *have work on the effective date* of this policy in any state not listed in Item 3.A. of the Information Page, coverage will not be afforded for that state unless we are notified within thirty days.

B. Notice

Tell us at once if you begin work in any state listed in Item 3.C. of the Information Page.

(Bold in original, emphasis in italics added).

16. Mr. W[Redacted] contacted Mr. P[Redacted] on February 5, 2019 to verify the policy included Section 3.C Other States coverage because he understood [Redacted Employer] planned to start work in Colorado. Mr. W[Redacted] did not know, and therefore did not inform Mr. P[Redacted] (or anyone else at Y[Redacted Insurer]) that [Redacted Employer] was already working in Colorado when the policy was issued.

17. [Redacted Employer] hired Claimant in April 2019. Claimant was living in Texas at the time and moved to Colorado to work on the Home2 project.

18. [Redacted Employer] had installed a 42-foot high scaffold system around the hotel building to work on the EFIS. On July 18, 2019, Claimant was on the scaffold performing exterior work at the fourth-floor level. He fell approximately 40 feet and suffered multiple serious injuries.

19. Claimant was transported by American Medical Response (AMR) EMTs to UCHealth Memorial Hospital. He was hospitalized for nearly two months and was discharged on September 12, 2019.

20. Claimant returned to Texas after being discharged from Memorial Hospital. He established care with New Horizon Medical in Brownsville, Texas on October 1, 2019.

21. Claimant proved he suffered a compensable injury on July 18, 2019.

22. Y[Redacted Insurer] proved [Redacted Employer]'s workers' compensation policy does not cover Claimant's injuries because (1) [Redacted Employer] failed to disclose material information it had contracted to perform work at heights above 15 feet or 2 stories, and (2) because it was already working in Colorado when the policy was

issued but failed to notify Y[Redacted Insurer] within 30 days as required by Part Three § A.4 of the policy.

23. [Statutory Employer Redacted] is liable for workers' compensation benefits as the statutory employer because [Redacted Employer] did not have workers' compensation insurance coverage for his injuries.

CONCLUSIONS OF LAW

A. Compensability

To receive compensation or medical benefits, a claimant must prove he is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo. App. 2001). As found, Claimant proved he suffered a compensable injury on July 18, 2019.

B. [Redacted Employer]'s Y[Redacted Insurer] insurance policy does not cover Claimant's injuries

Y[Redacted Insurer] proved two independent reasons the policy issued to [Redacted Employer] does not cover Claimant's accident. First, [Redacted Employer] failed to disclose that it was performing work over 15 feet or two stories in height. An insurance policy is void if coverage was obtained by material misrepresentations or omissions in the application. To avoid coverage under a policy, the insurer must prove (1) the applicant made a false statement of fact or concealed a fact in his application for insurance; (2) the applicant knowingly made the false statement or knowingly concealed the fact; (3) the false statement or the concealed fact materially affected either the acceptance of the risk or the hazard assumed by the insurer; (4) the insurer was ignorant of the false statement of fact or concealment of fact and is not chargeable with knowledge of the fact; and (5) the insurer relied, to its detriment, on the false statement of fact or concealment of fact in issuing the policy. *Hollinger v. Mutual Benefit Life Insurance Company*, 560 P.2d 824 (Colo. 1977); *State Compensation Insurance Fund v. Industrial Commission*, 737 P.2d 1116 (Colo. App. 1987).

All the required elements set forth in *Hollinger* are present in this case. When it completed and signed the application, [Redacted Employer] knew the project involved work above two stories, because it had already worked on the hotel and the subcontractor agreement expressly described the project as a "4-story . . . hotel." Y[Redacted Insurer] would not have issued the policy if [Redacted Employer] had disclosed it had work above 15 feet or two stories in height. Such activity exceeded Y[Redacted Insurer]' "risk appetite," and Y[Redacted Insurer] would have automatically declined [Redacted Employer]'s application had the true facts been revealed. Failing to disclose the expected work heights was "material" because it was essential to issuance of the policy. Y[Redacted Insurer] did not know of the concealed fact, and there is no persuasive evidence of any circumstance by which Y[Redacted Insurer] could fairly be deemed "chargeable with knowledge of the fact."

Second, the policy does not cover injuries in Colorado because [Redacted Employer] failed to disclose it was already working in Colorado on the application or within 30 days of the policy issue date. An insurer's liability is measured by the terms of the policy, not the liability of the insured. *State Compensation Insurance Fund v. Dean*, 689 P.2d 1146 (Colo. App. 1984). Under the terms of the policy, coverage for injuries in Colorado is governed by Part Three. [Redacted Employer]'s situation falls within § A.4, because it already had work in Colorado on the effective date of the policy. There is no persuasive evidence [Redacted Employer] or anyone acting on its behalf notified Y[Redacted Insurer] of the Colorado project within 30 days of February 4, 2019. Mr. W[Redacted]'s verbal statement to Mr. P[Redacted] on February 5 was insufficient, because he only told Mr. P[Redacted] [Redacted Employer] *planned* to work in Colorado, not that it was *already* doing so. Mr. P[Redacted] reasonably took no further action at that point other than verify the policy included the "Other States" provision, under which [Redacted Employer] would automatically be covered under § A.2 for work in Colorado commencing in the future.

C. [Statutory Employer Redacted] is liable for Claimant's injuries as the statutory employer

A general contractor in Colorado is considered the "statutory employer" of its subcontractors' employees. Section 8-41-401(1)(A)(I), C.R.S. provides that,

Any person, company, or corporation operating or engaged in or conducting any business by leasing or contracting out any part or all of the work thereof to any lessee, sublessee, contractor, or subcontractor, irrespective of the number of employees engaged in such work, shall be construed to be an employer as defined in articles 40 to 47 of this title and shall be liable as provided in said articles to pay compensation for injury or death resulting therefrom to said lessees, sublessees, contractors, and subcontractors and their employees or employees' dependents

The statutory employer is immune from workers' compensation claims by its subcontractor if the subcontractor "before commencing such work, insures and keeps insured its liability for [workers'] compensation [benefits]." Section 8-41-401(2), C.R.S. This prevents employers from avoiding liability for workers' compensation claims by farming out their work to uninsured independent contractors. *Finlay v. Storage Technology Corp.*, 764 P.2d 62 (Colo. 1988). The statutory employer is liable to the employees of an uninsured subcontractor regardless of whether it knew or should have known the subcontractor was uninsured, or whether the subcontractor had previously provided a certificate of insurance. E.g., *Hernandez v. MDR Roofing, Inc.*, W.C. No. 4-850-627-03 (September 20, 2013); *Flores v. Needham Roofing, Inc.*, W.C. No. 4-892-164-04 (August 21, 2014). The statutory employer scheme reflects a legislative policy that the risk of errors regarding the existence or validity of a subcontractor's insurance should fall on the general contractor rather than the injured worker.

Here, [Statutory Employer Redacted] was the general contractor for the Home2 project and [Redacted Employer] was its subcontractor. Neither [Statutory Employer

Redacted] nor [Redacted Employer] has argued or suggested [Statutory Employer Redacted] would not be the statutory employer if [Redacted Employer] is deemed uninsured. Rather, [Statutory Employer Redacted] focused its efforts on trying to show [Redacted Employer] was insured for workers' compensation liability.

As found, [Redacted Employer]'s workers' compensation policy does not cover Claimant's injuries. [Redacted Employer] is therefore uninsured for this claim. [Statutory Employer Redacted] and its workers' compensation carrier, X[Redacted]Insurance Company, are liable for any benefits due Claimant under the Act.

ORDER

It is therefore ordered that:

1. Claimant's claim for injuries suffered on July 18, 2019 is compensable.
2. Y[Redacted Insurer] proved the workers' compensation policy issued to [Redacted] does not cover Claimant's injuries.
3. The claim against Y[Redacted Insurer] for workers' compensation benefits relating to Claimant's July 18, 2019 accident is denied and dismissed.
4. [Statutory Employer Redacted] Group is Claimant's statutory employer for the July 18, 2019 accident.
5. [Statutory Employer Redacted] Group's insurer, X[Redacted]Insurance Company, shall cover all reasonably necessary medical treatment from authorized providers to cure and relieve the effects of Claimant's compensable injury, including, but not limited to, emergency transport by AMR and treatment at UCHHealth Memorial Hospital from July 18, 2019 through September 12, 2019.
6. All issues not decided herein are reserved for future determination.

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

review form at: <http://www.colorado.gov/dpa/oac/forms-WC.htm>. In addition, it is requested that you send a courtesy copy of your Petition to Review to the Colorado Springs OAC office via email at oac-csp@state.co.us

DATED: April 22, 2020

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

➤ Whether claimant has proven by a preponderance of the evidence that the L5-S1 disc replacement surgery recommended by Dr. Clifford is reasonable medical treatment necessary to cure and relieve the claimant from the effects of her admitted industrial injury?

FINDINGS OF FACT

1. Claimant was employed with employer as a home maintenance attendant. Claimant's job duties included taking care of the home duties of clients, including steadying a patient, helping the patient into and out of the shower. Claimant testified that on October 31, 2018 she was helping a client out of the shower when the client became off balance and claimant tried to catch the client so the client would not fall. Claimant testified that she caught the client leaning forward and felt severe back pain.

2. Claimant testified at hearing that she had a prior back injury while working for employer. Claimant testified she treated for the back injury with Dr. Pulsipher and was released from care after approximately one month. Claimant's medical care for that prior injury included a magnetic resonance image ("MRI") scan on August 18, 2017 which demonstrated L5-S1 degenerative disc changes with a small focal central disc bulge with annular tear.

3. Claimant was initially sought medical treatment following the October 31, 2018 work injury with Physicians' Assistant ("PA") Polsley with Cedar Points Health Family Practice on November 1, 2018. Claimant complained of midline low back pain with some radiating symptoms into her gluteus muscle on her right side. PA Polsley diagnosed claimant with a strain of the lumbar region, provided claimant with work restrictions and referred claimant for physical therapy.

4. Claimant returned to PA Polsley on November 15, 2018 and noted that her back pain was persisting without any improvement. PA Polsley noted that the radiating symptoms were now down to her mid posterior thigh. PA Polsley recommended an MRI of the lumbar spine.

5. The MRI was performed on November 28, 2018. The MRI demonstrated a central bulge at L5-S1 with annular tear. Mild degenerative change at the L4-5 facet joints with small synovial cyst off the superior lateral right facet joint. Minimal interval changes from the August 18, 2017 MRI were noted.

6. Claimant returned to PA Polsley on December 3, 2018. PA Polsley noted claimant's MRI results and noted that claimant complained that the prolonged sitting when she is driving for her job, it seemed to worsen her back pain. PA Polsley noted

that claimant's sciatic pain remained unchanged. Claimant was diagnosed with acute bilateral low back pain with bilateral sciatica as well as lumbago with sciatica on the left and right side.

7. Claimant returned to Cedar Point health on December 10, 2018 and was evaluated by Dr. Shelton. Claimant complained of increasing back pain to a level of 9 out of 10. Claimant complained of pain mostly across her lower back with little to any radiation. Dr. Shelton noted claimant believed she was worsening and found little relief with her therapy so far. Dr. Shelton referred claimant to Dr. Olson and recommended anti-inflammatories.

8. Claimant was evaluated by PA Bell with Dr. Clifford's office on December 31, 2018. PA Bell noted claimant's accident history of having an acute onset of low back pain when she tried to catch and stabilize a client and had a tearing pain in her low back. PA Bell noted claimant complained of bilateral upper and lower extremity numbness since the accident. PA Bell obtained x-rays of claimant's lumbar spine and performed a physical examination. PA Bell recommended claimant continue physical therapy and consider injection therapy, including a right sided L5-S1, S1-S2 transforaminal epidural steroid injection ("ESI").

9. Claimant underwent the right L5-S1, S1-S2 transforaminal epidural steroid injections on January 17, 2019 under the auspices of Dr. Clifford. Claimant returned to Dr. Clifford on March 4, 2019 and reported that she had good relief of the pain following the injections for three weeks, before her pain returned. Claimant reported her pain was about 50% as severe as it was before the injection and that it was aggravated by standing for long periods of time or bending.

10. Claimant returned to Dr. Clifford on March 25, 2019. Dr. Clifford again noted that claimant had 3 to 4 weeks of good pain relief after her January 17 injections. Claimant reported that she was experiencing pain primarily in her low back with radiating pain down the posterior aspect of both legs. Dr. Clifford opined that claimant may need surgical intervention to address the stenosis and disc degeneration at the L5-S1 level and but noted that claimant should continue non-operative treatment before considering surgical intervention.

11. Claimant underwent a second right L5-S1, S1-S2 transforaminal ESI under the auspices of Dr. Clifford on April 17, 2019. Claimant returned to Dr. Clifford's office on May 6, 2019 and was evaluated by PA Ousley. PA Ousley noted that claimant had slight improvement with the second injection but continued to complain of significant pain in her legs radiating into both legs.

12. Claimant returned to Dr. Clifford on June 3, 2019. Dr. Clifford noted claimant only had slight improvement with the second injection. Claimant complained to Dr. Clifford of significant pain in her back radiating into both legs. Dr. Clifford recommended a repeat ESI. Dr. Clifford noted that from a surgical standpoint, if a year went by from claimant's injury, and she still had very little improvement, Dr. Clifford

would consider either disc replacement surgery at the L5-S1 level or possibly anterior lumbar interbody fusion at the L5-S1 level.

13. Claimant underwent another bilateral L5-S1 transforaminal ESI on June 12, 2019. Claimant reported initially after the ESI that she had excellent leg pain relief.

14. Claimant returned to Dr. Clifford's office on July 8, 2019 and was evaluated by PA Bell. Claimant reported that the third ESI provided her with very short relief, unlike her first injection which provided her with relief for one month. Claimant reported her primary symptoms as low back and posterior thigh pain with occasional pain radiating below her knees. PA Bell noted that due to claimant's young age, they felt that claimant's superior option would be the artificial disk replacement surgery.

15. Respondents obtained a physicians' advisory opinion from Dr. Ogsbury on July 9, 2019. Dr. Ogsbury opined in his report claimant's findings on MRI when compared to the August 2017 MRI were quite consistent. Dr. Ogsbury opined that all pain generators were not adequately defined and treated. Dr. Ogsbury recommended against approving the requested L5-S1 artificial disk replacement surgery.

16. Respondents thereafter denied the request for surgery.

17. Respondents obtained an IME of claimant with Dr. Messenbaugh on October 3, 2019. Dr. Messenbaugh reviewed claimant's medical records, obtained a medical history from claimant and performed a physical examination in connection with his IME. Dr. Messenbaugh noted claimant reported pain of 10/10 that was present 90% of the time with her least amount of pain being 8/10 5% of the time.

18. Dr. Messenbaugh noted that following claimant's 2017 injury, she was capable of returning to unrestricted work. Dr. Messenbaugh opined that claimant's extreme subjective, diffuse, nonanatomic symptoms of 8 to 10 out of 10 low back pain, with aching, stabbing, numbness, and burning sensations involving her low back, bilateral anterior and posterior thighs and posterior calves are quite inconsistent with claimant's two MRI findings and her repeated physical examinations. Dr. Messenbaugh opined that claimant sustained some degree of myofascial strain and sprain in the October 31, 2018 injury. Dr. Messenbaugh further opined, however, that the injury did not result in a lumbar disc herniation, annular tear or nerve root compression. Dr. Messenbaugh opined that there had been no consistent objective tests performed on claimant that would confirm that her symptoms were specifically and singularly the result of pathology noted at the L5-S1 level. Dr. Messenbaugh opined that claimant was not a reasonable candidate for any lumbar spine surgery.

19. Dr. Clifford responded to the IME report from Dr. Messenbaugh on or about October 31, 2019 and noted that claimant had reported excellent pain relief after her first injection. Dr. Clifford opined that the total disc replacement surgery provided excellent results in greater than 80% of the patients with degenerative disc disease.

20. Dr. Messenbaugh issued an addendum to his report on December 13, 2019. Dr. Messenbaugh reviewed additional records including the October 31, 2018

report from Dr. Clifford and noted that his opinion regarding the surgery was not changed.

21. Claimant underwent an electromyogram (“EMG”) on December 30, 2019. The EMG was performed by Dr. Hehmann, and was reportedly normal. Dr. Hehmann noted that there was no evidence of denervation on EMG.

22. Respondents obtained video surveillance of claimant on multiple occasions. The video surveillance taken on September 1, 2019 demonstrates claimant walking, bending and assisting in holding a piece of wood while another person cuts the wood. Claimant bends over at the waist while holding the wood and steps over a pet gate. The surveillance from September 10, 2019 demonstrated claimant walking. Claimant testified at hearing that the surveillance demonstrated claimant on pretty good days. While claimant is not performing strenuous activity in the video surveillance, the ALJ notes that the surveillance is in conflict with claimant’s reported pain levels as reported to her treating physicians and Dr. Messenbaugh.

23. Claimant testified at hearing that in anticipation of the surgery, she has quit smoking. Claimant testified that she has discussed the risks of the surgery with Dr. Clifford and still wants to have the surgery.

24. Dr. Messenbaugh testified at hearing in this case consistent with his IME report. Dr. Messenbaugh testified that claimant has no neurological deficit that would indicate that surgery was necessary. Dr. Messenbaugh testified that claimant’s subjective complaints are greater than the objective findings. Dr. Messenbaugh testified that he reviewed the video surveillance of claimant. Dr. Messenbaugh testified that in the September 1, 2019 video, claimant does not appear to be someone who needs surgery. Dr. Messenbaugh testified that the negative EMG supported his opinion that the disc replacement surgery could make claimant worse if it were performed.

25. The ALJ finds the testimony and opinions expressed by Dr. Messenbaugh to be credible in this case. The ALJ notes that claimant’s reported pain levels to her treating physicians and in her testimony at hearing are not substantiated by claimant’s actions in the surveillance video.

26. The ALJ credits the testimony of Dr. Messenbaugh along with the medical records entered into evidence in this case and finds that claimant does not have a neurological deficit that would indicate that surgery is necessary in this case. The ALJ credits Dr. Messenbaugh’s testimony regarding the normal EMG and the diffuse nature of claimant’s reports of pain which make it difficult to identify a pain generator in this case as being credible and persuasive regarding the reasonableness and necessity of the proposed surgery.

27. The ALJ finds and concludes based on the evidence presented at hearing, including the testimony of claimant and Dr. Messenbaugh, that claimant has failed to establish that it is more probable than not that the recommended L5-S1 disc

replacement surgery is reasonable medical treatment necessary to cure and relieve claimant from the effects of the work injury.

CONCLUSIONS OF LAW

1. The purpose of the “Workers’ Compensation Act of Colorado” is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers’ Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers’ Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers’ Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it “aggravates accelerates or combines with “a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra*.

4. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

5. The ALJ credits the medical records and the opinions expressed by Dr. Messenbaugh and finds that claimant has failed to demonstrate by a preponderance of the evidence that the recommended L5-S1 disc replacement surgery is reasonable and necessary to cure and relieve the effects of claimant’s work injury.

ORDER

It is therefore ordered that:

1. Claimant's request for an Order requiring respondents to pay for the L5-S1 total disc replacement surgery recommended by Dr. Clifford is denied and dismissed.
2. All matters not determined herein are reserved for future determination.

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

DATED: April 27, 2020



Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

Whether the claimant has demonstrated, by a preponderance of the evidence, that the left total knee replacement recommended by Dr. Rhonda Parker is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted July 29, 2019 work injury.

FINDINGS OF FACT

1. The claimant began working for the employer on April 17, 2019. The claimant typically worked from 6:00 p.m. to 10:00 p.m. stocking the employer's store. On July 29, 2019, the claimant was engaging in this stocking related activity. Specifically, he was using a pallet jack to move pallets of various items to the proper location in the store. Many of these pallets contained heavy tile and flooring. The claimant testified that throughout his shift on July 29, 2019, his left knee became sore.

2. The claimant further testified that this left knee pain developed gradually over the course of that shift, but became intolerable during the night. The claimant notified the employer of his knee pain and he was referred for medical treatment with Peak Professionals.

3. In the interim, the claimant was seen in the emergency department (ED) at Montrose Memorial Hospital on July 30, 2019 by Dr. David Dreitlein. The claimant reported to Dr. Dreitlein that he had constant pain in his left knee that he described as moderate and sharp. The claimant also reported he had experienced this pain since the day before. An x-ray of the claimant's left knee was read as normal. Dr. Dreitlein diagnosed a left knee sprain and recommended the use of crutches and physical therapy. Dr. Dreitlein also instructed the claimant to follow up with his workers' compensation doctor.

4. The claimant's authorized treating provider (ATP) for this claim is Dr. Stephen Adams with Peak Professionals. The claimant was first seen at Peak Professionals on August 2, 2019 by Susan Dockins, FNP. On that date, the claimant described his mechanism of injury as including a twisting motion in his knees while moving and lifting pallets at work. The claimant reported that he had increased swelling in his left knee since receiving treatment in the ED. Ms. Dockins diagnosed a sprain of the claimant's left collateral ligament and referred him to physical therapy. In addition, Ms. Dockins ordered a magnetic resonance image (MRI) of the claimant's left knee. On that same date, Ms. Dockins aspirated 60cc of yellowish liquid from the claimant's left knee.

5. On August 3, 2019, the claimant returned to Ms. Dockins and they discussed that the aspirated fluid was positive for urate crystals, which is indicative of gout. Ms. Dockins opined that the claimant was experiencing a gout attack, that was precipitated by the left knee sprain.

6. On August 5, 2019, the claimant was seen at Peak Professionals by Dr. Adams. On that date, Dr. Adams noted that the claimant experienced increased pain and swelling after his knee pain initially began at work. Dr. Adams agreed that physical therapy and an MRI should be pursued.

7. On August 20, 2019, an MRI for the claimant's left knee was performed. The MRI showed a prior anterior cruciate ligament (ACL) graft that was severely degenerated. In addition, there was severe medial compartment arthrosis, and advanced arthrosis in the lateral aspect patellofemoral compartment. Finally, the radiologist noted hypertrophied synovium or loose bodies in the meniscofemoral recess of the lateral joint which were causing chronic scalloping of the bone.

8. The claimant testified that many years ago, he underwent surgical repair of his left ACL. The medical records indicate that this surgery was performed in 1992. The claimant testified that following the surgery he did not experience left knee pain until July 29, 2019.

9. As recommended by Dr. Adams and Ms. Dockins, the claimant attended physical therapy. The claimant was seen by Aaron Coon, DPT with Rocky Mountain Therapy Services. The claimant testified that physical therapy was helpful in reducing some of his left knee pain. However, the claimant's last physical therapy appointment was on September 26, 2019. On October 1, 2019, Mr. Coon recommended additional physical therapy treatment for the claimant. However, additional physical therapy was not authorized by the respondent.

10. On August 24, 2019, the claimant returned to Ms. Dockins. At that time, Ms. Dockins made a referral to Western Slope Orthopaedics for consultation.

11. On September 12, 2019, the claimant was seen by Dr. Rhonda Parker at Western Slope Orthopaedics. At that time, the claimant reported clicking, popping, and instability in his left knee. Dr. Parker noted that the MRI showed tears of both the medial and lateral menisci, and a lengthening of the ACL. Dr. Parker diagnosed post traumatic osteoarthritis of the left knee and recommended the claimant undergo a left knee arthroplasty (replacement).

12. On September 12, 2019, Dr. Parker submitted a request for authorization for the recommended surgery.

13. On September 25, 2019, Dr. Sean Lager reviewed the request for surgery. In his report, Dr. Lager opined that due to the condition of the claimant's left knee, a total knee replacement would be medically reasonable and necessary. Dr. Lager did not state an opinion as to whether the claimant's need for surgery was work related.

14. On September 26, 2016, Dr. Marc Steinmetz reviewed the claimant's medical records. In his report of that date, Dr. Steinmetz opined that the recommended knee replacement surgery was not reasonable, necessary, or related to the July 29, 2019 incident. Dr. Steinmetz further opined that the claimant's left knee symptoms were the progression of his pre-existing degenerative arthritis, that was accelerated by gout.

15. On December 17, 2019, the claimant attended an independent medical examination with Dr. Steinmetz. In connection with the IME, Dr. Steinmetz reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In his IME report, Dr. Steinmetz opined that the claimant's left knee symptoms are not work related. It is the opinion of Dr. Steinmetz that the claimant's symptoms are "due to a progression of his pre-existing degenerative arthritis, which have been accelerated and exacerbated and precipitated by his non-work related gout." Dr. Steinmetz's testimony was consistent with his written report.

16. Dr. Steinmetz testified that all of the claimant's left knee symptoms are caused by the end stage arthritis in that knee. Dr. Steinmetz further testified that in his opinion, the claimant became intolerant of his work activities because of the end stage arthritis in his left knee. Dr. Steinmetz reiterated his opinion that the left total knee replacement is not reasonable, necessary, or related to the claimant's work. In support of this opinion, Dr. Steinmetz noted that the MRI shows no injury to the claimant's left knee.

17. On February 20, 2020, Dr. Parker responded to a number of questions posed to her by the claimant's attorney. In her response, Dr. Parker opined that the claimant suffered a new injury to his left knee on July 29, 2019 when he was pulling pallets at work. Dr. Parker recognized the claimant's long standing degenerative left knee condition, and his "gouty arthritis". Dr. Parker opined that the claimant's work duties exacerbated the condition of his left knee, leading to increased pain and the need for treatment. Dr. Parker stated that a left total knee arthroplasty is reasonable and necessary to relieve the claimant's left knee symptoms. She further opined that the claimant's need for surgery is related to the exacerbation caused by his work activities.

18. The claimant testified that he has experienced gout since he was 35 years old. At the time of the hearing, the claimant was 62 years old. This gout is typically in the claimant's hands, and occasionally in his feet. Prior to July 29, 2019, the claimant had never experienced gout in his left knee. Medical records entered into evidence show that the claimant received gout related treatment in April 2019, for his left foot. There was no gout in his left knee at that time.

19. The claimant's current symptoms include left knee pain that he rates as three to four out of ten. However, he will experience swelling and increased pain of six or seven out of ten, if he is up and using his knee. The claimant testified that since October 2019, his only left knee treatment has been home exercises, ice, and ibuprofen.

20. The ALJ credits the medical records, the claimant's testimony regarding his symptoms, and the opinions of Dr. Parker over the contrary opinions of Dr. Steinmetz. Accordingly, the ALJ finds that the claimant has demonstrated that it is more likely than not that the claimant's need for a left total knee replacement is related to the admitted work injury. The ALJ finds that the claimant's work duties on July 29, 2019 accelerated and exacerbated the preexisting degenerative condition of his left knee. This acceleration and exacerbation has necessitated medical treatment, including surgery. The ALJ further finds that the claimant has demonstrated that it is more likely than not that the surgery is reasonable and necessary medical treatment of the claimant's left knee condition.

CONCLUSIONS OF LAW

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

2. The ALJ’s factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness’s testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

4. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

5. The existence of a pre-existing medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it “aggravates accelerates or combines with a preexisting disease or infirmity to produce disability or need for treatment.” *See H & H Warehouse v. Vicory, supra*.

6. As found, the claimant has successfully demonstrated, by a preponderance of the evidence, that the recommended left total knee replacement is reasonable medical treatment necessary to cure and relieve the claimant from the effect of the July 29, 2019 work injury. As found, the claimant has successfully demonstrated by a preponderance of the evidence that his work duties on July 29, 2019 aggravated and accelerated the preexisting degenerative condition of his left knee, necessitating medical treatment,

including the recommended surgery. As found, the medical records, the claimant's testimony, and the opinions of Dr. Parker are credible and persuasive.

ORDER

It is therefore ordered that the respondent shall pay for the recommended left total knee replacement, pursuant to the Colorado Medical Fee Schedule.

Dated this 29th day of April 2020.



Cassandra M. Sidanycz

Administrative Law Judge

Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

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

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-009-754**

ISSUES

- I. Whether Respondents provided clear and convincing evidence to overcome the opinion of DIME physician Hugh Macaulay, M.D. on permanent medical impairment.
- II. Determination of Claimant's average weekly wage ("AWW").

STIPULATIONS

The parties stipulated at hearing that Claimant is entitled to a general award of maintenance medical benefits.

FINDINGS OF FACT

1. Claimant is a 50-year-old male who works for Employer as a mechanic. Claimant began his employment with Employer in September 2002. On January 1, 2013, Employer relocated Claimant's position to a warehouse in Westminster, Colorado that had been vacant for several years. Claimant began developing rashes and respiratory symptoms after relocating to the new warehouse.

2. Claimant has a prior history of asthma. In February 2011, Claimant was seen by his primary care physician at Kaiser Permanent with complaints of a cough over the last two weeks, noting everyone at work was ill. Claimant provided a history of asthma as a child with no problems for many years. Claimant was diagnosed with bronchitis, and intermittent asthma with acute exacerbation. Claimant testified at hearing that he didn't really recall the incident in 2011 or any ongoing problems prior to 2013. Claimant testified that he did not use an inhaler during the time period prior to moving to the new building in 2013. No medical records were admitted into evidence indicating Claimant was actively suffering from respiratory issues leading up to 2013.

3. Claimant filed a workers' compensation claim on February 12, 2016 alleging he sustained an occupational disease with a date of onset of January 26, 2016.

4. Claimant began treatment with authorized provider Concentra on March 15, 2016. Lloyd Thurston, D.O. assessed Claimant with bronchitis with bronchospasm and dermatitis and referred Claimant for a dermatology evaluation and to National Jewish Health for a pulmonary evaluation. He released Claimant to return to regular work.

5. On April 5, 2016, Respondents filed a General Admission of Liability admitting for medical benefits.

6. On April 13, 2016, Claimant saw Carol Alonso, M.D. for a dermatology evaluation. She diagnosed Claimant with dermatitis and prescribed Doxycycline.

7. Claimant first presented to Karin Pacheco, M.D. at National Jewish Health on May 16, 2016. Claimant discussed his medical condition in detail, alleging that his symptoms began on January 17, 2013 and were continuing. Claimant alleged his condition was a result of detritus in the ventilation system of the warehouse including pigeon feces. Regarding his pre-existing history, Dr. Pacheco noted Claimant was born prematurely and spent the first six months of his life in an oxygen tent, he was diagnosed with asthma as a child, and he smoked approximately a half-pack of cigarettes a day from ages 14 - 45, quitting in October 2015. Claimant underwent a pulmonary function test and allergen testing. Dr. Pacheco's assessment was asthma, chronic recurrent dermatitis, and intermittent rhinitis. She noted that, although Claimant has a history of prematurity and presence of asthma as a child, he was not treated with any inhalers until after developing respiratory symptoms following Employer's move into a new building. Regarding the cause of Claimant's condition, Dr. Pacheco wrote,

The patient's initial history is suggestive of bronchopulmonary dysplasia related to prematurity, and it is possible that the patient's asthma is related to this early life exposure.

His symptoms related to work in the [Employer] building are more difficult to characterize. The patient may have simply experienced an exacerbation of his asthma in a generally dirty workplace. Another consideration is whether the patient has developed hypersensitivity pneumonitis from intermittently high exposures to dead pigeons, their feathers and their feces.

Respondents' Exhibit H, p. 54.

8. On May 27, 2016, Claimant underwent additional allergen testing and a CT scan of the chest at National Jewish Health. Claimant tested negative to dove droppings, pigeon serum, and pigeon droppings, indicating no immune response to those allergens. The CT scan was performed that revealed small and large airway disease with bronchial wall trapping. It was noted in the CT interpretive report that this condition may be from asthma or other causes of bronchial inflammation.

9. Dr. Pacheco reexamined Claimant on June 8, 2016, and discussed Claimant's May 16, 2016 pulmonary function test, CT scan, and allergen test results in her medical notes. She noted that Claimant's evaluation demonstrated the presence of asthma and allergic sensitization to both seasonal and perennial aeroallergens, with no signs of hypersensitivity pneumonitis based on lung function testing, dove and pigeon precipitins, and chest CT. Dr. Pacheco instructed Claimant to monitor his peak flow rates to identify any work-related pattern.

10. Claimant returned to Dr. Pacheco on July 11, 2016. Dr. Pacheco noted Claimant's peak flow rates did not reflect particular symptoms associated with a specific job at work

or specific work location. She further noted Claimant was one of several workers referred from Employer for work-related respiratory symptoms and rashes. Dr. Pacheco discussed the potential causes of Claimant's condition, noting,

Of concern is whether the patient's symptoms are associated with exposure to the dead pigeons in the building that were present when initially moving in, or possibly related to the swamp coolers that have not been well maintained until recently.

The patient's asthma is also related to the probable diagnosis of bronchopleural dysplasia related to extreme prematurity. The patient has smoked cigarettes, about one half pack per day between the ages of 15 and 45 before quitting in 10/2015. In addition, the patient is sensitized to numerous trees, grasses, weeds, cockroach, dust mites, cat, dog, and several molds. It is possible that a component of the patient's symptoms relate to exposure to both seasonal allergens, and the presence of three dogs in the home. It is notable that the patient's work area is located directly under one ventilation unit connected to a swamp cooler present on the roof. It is possible that sensitization to either mold or dust mites that may grown in a humid environment relate to the patient's symptoms at work. However, it has been difficult to demonstrate a clearcut association of the patient's respiratory symptoms or lung function with the workplace or with improvement away from work.

Respondents' Exhibit H, p. 77.

11. At a follow-up evaluation with Dr. Pacheco on August 24, 2016, Claimant reported fewer respiratory symptoms at work after Employer conducted a second cleaning of the ventilation system. Dr. Pacheco noted that, although Claimant's peak flow rate was below the lower range of what was predicted, the peak flow data did not show a work-related pattern and there did not appear to be a work-related component. She continued to monitor Claimant.

12. Claimant returned to Dr. Pacheco on January 25, 2017, reporting no respiratory symptoms. Dr. Pacheco opined she could not tell whether Claimant's improvement was due to the end of allergy season or the fact that there had been some renovation of the workplace, including the swamp coolers. She wrote, "It remains unclear if there are still exposures in the workplace that could be triggering his symptoms, and I would like to follow the patient to make sure he does not worsen." She instructed Claimant to return for a follow-up evaluation in three months.

13. When Claimant returned to Dr. Pacheco on April 10, 2017, he reported having some days with respiratory issues. Claimant's peak flows were within the lower range of normal predicted values. Dr. Pacheco noted Claimant "has asthma, in part related to his extreme prematurity. There does not appear to be a work-related pattern to his peak flows, and indeed, he does not use his asthma medications when he was no symptoms."

14. On October 25, 2017, Claimant reported to Dr. Pacheco continuing to have occasional rashes and an episodic cough, which had started to recur. Dr. Pacheco was unsure why Claimant's asthma had worsened, noting seasonal weeds may have triggered the fall season exacerbation. Dr. Pacheco reviewed an investigation report regarding the air quality of the Westminster warehouse and made recommendations for remediation in the warehouse, including cleaning out the swamp cooler and maintaining a routine maintenance schedule of the swamp cooler, fixing the floor drains so that they drain on a daily basis, periodic inspection of the insulation for mold, and installation of effective ventilation.

15. Claimant returned to Dr. Pacheco on February 1, 2018. He reported that his symptoms greatly improved over the holiday when he was away from work and was not reporting any respiratory or skin symptoms related to his work place at the time. Dr. Pacheco noted that a SAMMS conference had been held, wherein she was advised that Employer hired hygienist companies to investigate the cleanliness of the warehouse and that many of her recommendations had been put in place. Specifically, the swamp coolers had been installed and maintained on the roof and had been fitted with aspen scented pads, the floor drains were draining properly, much of the moldy insulation had been removed, water fountains in the service bay had been removed, and nightly cleaning was implemented in the areas in question.

16. Claimant presented to John Burriss, M.D. at Concentra Medical Centers on March 14, 2018 for a further evaluation of his symptoms. Dr. Burriss noted Claimant had no complaints, and that his respiratory symptoms only occurred in the evenings when he returned home from work. He noted that, per Dr. Pacheco's notes, it was unclear that Claimant's rash or asthma were associated with his workplace exposures. He opined Claimant had reached maximum medical improvement ("MMI") and deferred to Dr. Pacheco regarding whether an impairment rating is applicable.

17. Dr. Pacheco reexamined Claimant on August 23, 2018 and opined Claimant had reached MMI as of that date. She noted Claimant was doing well with no particular problems or symptoms at work currently. Dr. Pacheco noted a full pulmonary function test with lung volumes was obtained on September 21, 2018.¹ She compared the test results to Claimant's May 16, 2016 results, noting Claimant currently had more hyperinflation with more limited airflow and reduced diffusion capacity.

18. Dr. Pacheco discussed the effects of Claimant's workplace exposure on his condition, stating,

There was significant contamination of the swamp coolers with bird remains, black effluent in the floor drains under the garage area where he worked, and areas of black mold contamination of the insulation. Over time, these occupational hazards have been cleared. The swamp coolers have been extensively cleaned and fitted with new pads. Although previously

¹ Dr. Pacheco dictated the medical note on October 3, 2018.

there was a barn like odor associated with their use, currently, there is no odor in the garage. The mold contaminated insulation appears to have been completely removed. The floor drains are now serviced, and standing water is not allowed to site for days at a time as before.

Therefore, I do not associate the patient's current symptoms or lung function tests with damage from workplace exposures, since the patient's symptoms and lung function are worse in the context of a cleaned up work environment. Part of the problem has been that the patient continues to use his medications on a perceived as needed basis, rather than routinely as is recommended for inhaled steroids for treatment of asthma.

19. Dr. Pacheco assigned Claimant an impairment rating for his asthma. In determining the impairment rating, Dr. Pacheco used the American Thoracic Society ("ATS") Guidelines for the Evaluation of Impairment/Disability in Asthma and then translated the ATS rating to a rating under the AMA Guides. Based on Claimant's September 21, 2018 test results, Dr. Pacheco determined Claimant fell under Class 3 impairment. She ultimately assigned Claimant a 25% whole person impairment, with the following explanation:

I considered the fact that the patient would actually require more medications based on NIH guidelines, and I assigned him a final 35% whole person impairment. The patient's skin rash on the face is due to rosacea, which is not work-related. The dyshidrotic eczema on his hands, but this does not appear to interfere with activities of daily living. Therefore, I did not assess any other impairment other than that associated with asthma. Given the fact that the patient's lung function is worse in the context of an improved workplace, I cannot attribute all the patient's current asthma impairment to his workplace. I therefore assigned the patient a 25% whole person impairment for asthma aggravated by workplace conditions at [Employer].

Respondents' Exhibit H, p. 103.

20. Dr. Pacheco recommended maintenance treatment in the form of inhaled steroids, inhaled bronchodilators, annual pulmonary function testing, and two visits per year for asthma.

21. At the request of Respondents, Robert W. Watson Jr., M.D. performed a medical record review and issued a report dated January 1, 2019. Dr. Watson noted Claimant has a longstanding history of seasonal and perennial allergic rhinitis and asthma. He concluded that, although Claimant suffered an exacerbation of his asthma due to workplace exposure, there was no permanent aggravation. Dr. Watson noted Dr. Pacheco's repeatedly questioned the relatedness of Claimant's ongoing asthma symptoms to his workplace and ultimately opined she could not equate the ongoing symptoms to the workplace. Dr. Pacheco further noted multiple pulmonary function tests taken over the course of Claimant's treatment showed his FVC, FEV-1 and FEV-1/FVC

ratio had all remained stable. Dr. Watson opined that an impairment rating is not indicated due to Dr. Pacheco's conclusion that Claimant's current asthma is unrelated to the workplace. He further noted that the impairment rating assessed by Dr. Pacheco is invalid, based on her use of the ATS Guidelines. Dr. Watson explained that the determination of an impairment rating is limited to the criteria set forth in the AMA Guides.

22. Dr. Macaulay performed a DIME on March 19, 2019 and issued a DIME report on April 8, 2019. Dr. Macaulay took an extensive history from Claimant, performed a physical examination, and reviewed medical records including, *inter alia*, Dr. Pacheco's records dated October 5, 2016 through August 23, 2018, Dr. Watson's January 1, 2019 report, seven pulmonary function tests dated May 16, 2016 through August 23, 2018, blood studies, and Claimant's chest CT scan. Claimant reported to Dr. Macaulay that, prior to his onset of symptoms in 2013, he had not experienced similar episodes in the past. Dr. Macaulay noted that while all of Claimant's providers and independent medical examiners agreed Claimant has asthma/reactive airway disease, a "disagreement" existed with respect to the cause of Claimant's condition. He concluded Dr. Pacheco believed Claimant's condition was aggravated by the industrial exposure, while Dr. Watson believed there was no change in Claimant's underlying condition and no permanent aggravation.

23. Dr. Macaulay specifically discussed the opinions of Drs. Pacheco and Watson, stating,

Both Drs. Pacheco and Watson have done thorough reviews of [Claimant's] condition. Dr. Pacheco and her report of 10/5/16 on page 5 notes that

The patient gives a history of prematurity requiring intensive treatment as an infant, along with the presence of asthma as a child. However, the patient was not treated with any inhalers until after the developed respiratory symptoms following the move to [Employer location] and 1/1/13 to the building it currently occupies.

At the time of the impairment rating done by Dr. Pacheco on 8/23/18, she noted on page 3

Therefore, I do not associate the patient's current symptoms are long function tests with damage from the workplace exposures since the patient's symptoms and long function are worse in the context of a cleanup work environment.

On page 5 of her impairment rating, she notes

I cannot attribute all the patient's current asthma impairment to his workplace. I therefore signed the patient a 25% whole

person impairment for asthma aggravated by workplace conditions at [Employer].

Dr. Pacheco opined that [Claimant] had sustained pulmonary injury as a result of his workplace exposure resulting in impairment. Thus, I think that the statement noted in two paragraphs above “therefore, I do not associate...” Should read “Therefore I do associate...” The awarding of impairment indicates an injury secondary to work exposure.

(emphasis not added) Respondents Exhibit K, p. 134.

24. Dr. Macaulay opined Dr. Watson’s conclusion that Claimant’s current asthma is not related to the workplace was predicated on what Dr. Macaulay referred to as a “misstatement” by Dr. Pacheco.

25. Regarding the existence of permanent impairment, Dr. Macaulay opined Claimant suffered a worsening of his pre-existing condition as, prior to the industrial exposure, Claimant was asymptomatic and did not require the use of inhalers and now does. He further noted that the pulmonary function tests of May 16, 2016, July 11, 2016, August 24, 2016, January 25, 2017, October 25, 2017, February 1, 2018 and August 23, 2018 showed impairment of pulmonary function. He noted Claimant continues with expiratory symptoms.

26. Dr. Macaulay assessed permanent impairment based on Claimant’s pulmonary function test of August 23, 2018,² using the criteria set for in Table 8, page 125 of the AMA Guides. Dr. Macaulay opined Claimant fell under Class II of respiratory impairment and issued a 20% whole person impairment rating. He did not assign any rating for Claimant’s skin condition. Dr. Macaulay recommended continued use of inhalers, twice yearly follow-ups with Dr. Pacheco, and annual flu shots as maintenance treatment.

27. Dr. Watson testified by post-hearing deposition as an expert in occupational medicine. Dr. Watson testified that he was not an expert in occupational asthma and was relying on, and interpreting the opinions of, Dr. Pacheco as contained in her medical records to come to the conclusion that Claimant did not sustain permanent impairment as a result of his occupational exposure. Dr. Watson testified that Dr. Pacheco concluded Claimant had a flare-up of occupational asthma, but that she could no longer attribute Claimant’s symptoms to the occupational asthma. Dr. Watson explained that to assign permanent impairment, there must be objective criteria. He testified that, based on Dr. Pacheco’s statements in her impairment rating report, Claimant did not meet the objective criteria. Dr. Watson testified that Dr. Macaulay erred by concluding that Dr. Pacheco’s statement should read differently than what it actually does. He explained that Dr. Pacheco’s statement in her impairment rating on the last paragraph on page 3 of her

² As the record does not indicate a separate pulmonary function test was actually conducted on August 23, 2018, the ALJ infers that Dr. Macaulay’s reference to an August 23, 2018 pulmonary function test refers to the September 21, 2018 test referenced in Dr. Pacheco’s August 23, 2018 report, dictated by Dr. Pacheco on October 3, 2018.

report is consistent with her prior statements in the medical notes regarding causation. Dr. Watson reiterated that Dr. Pacheco incorrectly used ATS Guidelines in making her determination on impairment, as examiners are required to use the AMA Guides in assessing permanent impairment.

28. Dr. Watson opined Dr. Macaulay erred in his interpretation of Dr. Pacheco's conclusions regarding causation. Dr. Watson did not otherwise disagree with the methodology used by Dr. Macaulay in issuing a 20% whole person rating under Table 8 of the AMA Guides. He acknowledged that, if Claimant's current condition was causally-related to the industrial exposure, Claimant would meet the criteria for a permanent impairment rating. He further agreed that, if Claimant's current condition was work-related, his test results would place him under Class II respiratory impairment under the AMA Guides. He explained that the AMA Guides outline a range of impairment for each class of respiratory impairment, and it is up to the examiner to determine where a patient falls within that range.

29. Claimant testified that he has a history of allergies, childhood asthma, and smoking. He testified he quit smoking in approximately 2014. Claimant further testified that, prior to the industrial exposure, he did not have a history of rashes or respiratory symptoms like those he experienced after the industrial exposure. Claimant testified he continues to use an inhaler and to have respiratory symptoms, which are increased during the work week while working and improve over the weekend when he is off of work. Claimant acknowledged there were multiple remediation efforts made by Employer than improved the work facility.

30. Claimant's testimony is found credible and persuasive.

31. The ALJ finds the opinion of Dr. Macaulay, as supported by the medical records, more credible and persuasive than the opinion of Dr. Watson.

32. Respondents failed to prove it is highly probable Dr. Macaulay's DIME opinion on permanent impairment is incorrect.

33. Around the date of onset of Claimant's occupational disease, Claimant was earning a flat-rate of \$24.50, plus additional rates for longevity, group leader bonus, and certifications. As of October 1, 2016, the flat rate increased to \$26.50. Claimant testified his total weekly pay varied based on the amount of work available. Employer's pay records (Respondents Exhibit N) from pay period ending January 15, 2015 to May 31, 2019 reflect Claimant's pay varied. Claimant was paid on a biweekly basis. Claimant's 2015 W-2 Wage and Tax Statement (Claimant Exhibit 7) reflects that Claimant earned gross wages of \$84,297.29 in the 12 months preceding January 2016.

34. The ALJ finds that a fair approximation of Claimant's wage loss and diminished earning capacity is an AWW of \$1,756.19, which is \$84,297.29 divided by 24 divided by two. This represents the total amount earned by Claimant in the 12 months preceding the

onset of the occupational disease divided by the number of pay periods during those 12 months, divided by two.

35. Evidence and inferences contrary to these findings were not credible and persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Overcoming the DIME on Impairment

The finding of a DIME physician concerning the claimant's medical impairment rating shall be overcome only by clear and convincing evidence. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995); *Lafont v. WellBridge D/B/A Colorado Athletic Club* W.C. No. 4-914-378-02 (ICAO, June 25, 2015).

As a matter of diagnosis the assessment of permanent medical impairment inherently requires the DIME physician to identify and evaluate all losses that result from the injury. *Mosley v. Industrial Claim Appeals Office*, 78 P.3d 1150 (Colo. App. 2003); *Sharpton v. Prospect Airport Services* W.C. No. 4-941-721-03 (ICAO, Nov. 29, 2016). Consequently, a DIME physician's finding that a causal relationship does or does not exist between an injury and a particular impairment must be overcome by clear and convincing evidence. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998); *Watier-Yerkman v. Da Vita, Inc.* W.C. No. 4-882-517-02 (ICAO Jan. 12, 2015); Compare *In re Yeutter*, 2019 COA 53 ¶ 21 (determining that a DIME physician's opinion carries presumptive weight only with respect to MMI and impairment). The rating physician's determination concerning the cause or causes of impairment should include an assessment of data collected during a clinical evaluation and the mere existence of impairment does not create a presumption of contribution by a factor with which the impairment is often associated. *Wackenhut Corp. v. Industrial Claim Appeals Office*, 17 P.3d 202 (Colo. App. 2000).

The questions of whether the DIME physician properly applied the *AMA Guides*, and ultimately whether the rating was overcome by clear and convincing evidence present questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office*, 17 P.3d 202 (Colo. App. 2000); *Paredes v. ABM Industries* W.C. No. 4-862-312-02 (ICAO, Apr. 14, 2014). A mere difference of opinion between physicians does not necessarily rise to the level of clear and convincing evidence. See *Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-36 (ICAO, Mar. 22, 2000); *Licata v. Wholly Cannoli Café* W.C. No. 4-863-323-04 (ICAO, July 26, 2016).

Respondents argue Dr. Macaulay's opinion on impairment is incorrect, as Dr. Macaulay ignored Dr. Pacheco's well-documented history and incorrectly determined Dr. Pacheco made a typographical error in her impairment rating report.

Dr. Macaulay determined Dr. Pacheco made a misstatement in her impairment report when she wrote, "Therefore, I do not associate the patient's current symptoms or lung function tests with damage from workplace exposures, since the patient's symptoms and lung function are worse in the context of a cleaned up work environment." In reading Dr. Pacheco's statement in context with the preceding paragraph in her impairment report, the ALJ is persuaded it is unlikely Dr. Pacheco's statement is a misstatement or typographical error. The preceding paragraph discusses the remediation efforts taken by

Employer to address the workplace conditions. Dr. Pacheco's statement could reasonably be interpreted to mean that she believed the current workplace conditions were not actively causing Claimant's current symptoms. That the industrial exposures were remediated and Claimant continues to suffer from symptoms is not dispositive that the original industrial exposure did not permanently aggravate Claimant's pre-existing condition and cause some permanent impairment.

More importantly, Dr. Macaulay did not solely rely on this perceived "misstatement" in making his conclusions regarding impairment. As noted in his DIME report, Dr. Macaulay reviewed Dr. Pacheco's medical records from her first evaluation of Claimant through the date of the impairment report, as well as Dr. Watson's report, in which Dr. Watson details his interpretation of Dr. Pacheco's notes. In specifically addressing causation, Dr. Macaulay not only referenced the perceived "misstatement," but other aspects of Dr. Pacheco's notes to support his interpretation of Dr. Pacheco's ultimate conclusions.

As noted by Dr. Macaulay, Dr. Pacheco's did assign Claimant an impairment rating. Her assignment of an impairment rating and her explanation for doing so further supports Dr. Macaulay's interpretation. Dr. Pacheco noted that she believed Claimant's whole person impairment was 35%, but that she could not "attribute *all* the patient's current asthma impairment to his workplace" (emphasis added). The inclusion of the word "all" in the statement indicates Dr. Pacheco considered some portion of Claimant's current impairment to be related to the industrial exposure. She then specifically stated that she assigned 25% whole person impairment "for asthma *aggravated by workplace conditions*" (emphasis added). Thus, although Dr. Pacheco's records do contain seemingly conflicting statements and could be subject to differing interpretations, there is insufficient evidence establishing it is highly probable Dr. Macaulay's interpretation of Dr. Pacheco's records, and thus his ultimate opinion on causation and impairment, is incorrect.

Furthermore, Dr. Macaulay's DIME report indicates that, in addition to his interpretation of Dr. Pacheco's conclusions, he took other factors into consideration in reaching his opinion on causation and impairment. Dr. Macaulay noted Claimant was asymptomatic and did not use an inhaler prior to the industrial exposure and that Claimant now continues with respiratory symptoms. While a 2011 Kaiser medical record notes Claimant presented with complaints of a cough, had a childhood history of asthma, and was prescribed an inhaler, there are no subsequent medical records were admitted at hearing indicating that, leading up to the industrial exposure, Claimant was suffering from symptoms and required the use of the inhaler. Dr. Pacheco's medical records repeatedly reference Claimant's pre-existing condition and Dr. Watson's report references the 2011 Kaiser medical record. As noted, Dr. Macaulay reviewed those reports and thus was aware of such factors.

Dr. Macaulay also reviewed the objective pulmonary function test data, upon which he based the impairment rating using the AMA Guides. Dr. Watson acknowledged that, if

Claimant did suffer permanent aggravation, the objective test data qualified him for Class II respiratory impairment under the AMA Guides. No errors were identified with respect to Dr. Macaulay's methodology and application of the AMA Guides. While differences of opinion exist on causation, based on the totality of the evidence, Respondents failed to meet the higher burden of proof to establish Dr. Macaulay's opinion on permanent impairment is highly probably incorrect.

AWW

Section 8-42-102(2) requires the ALJ to base the claimant's Average Weekly Wage (AWW) on his or her earnings at the time of injury. However, under certain circumstances the ALJ may determine the claimant's AWW from earnings received on a date other than the date of injury. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Specifically, §8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp.*, *supra*. Where the claimant's earnings increase periodically after the date of injury the ALJ may elect to apply § 8-42-102(3) and determine that fairness requires the AWW to be calculated based upon the claimant's earnings during a given period of disability, not the earnings on the date of the injury. *Campbell v. IBM Corp.*, *supra*.

Claimant was paid a flat-rate and his total weekly pay varied based on the amount of work available. As found, a fair approximation of Claimant's wage loss and diminished earning capacity is an AWW of \$1,756.19, which represents the total amount earned by Claimant in the 12 months preceding the onset of the occupational disease divided by the number of pay periods during those 12 months, divided by two.

ORDER

1. Respondents failed to overcome Dr. Macaulay's DIME opinion on permanent impairment by clear and convincing evidence. Claimant's sustained 20% whole person impairment.
2. Respondents shall pay permanent partial disability benefits to Claimant based upon a whole person impairment rating of 20%.
3. Respondents shall pay for medical maintenance treatment that is reasonable, necessary and causally related.
4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the

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

DATED: May 1, 2020

A handwritten signature in black ink, appearing to read 'Kara Cayce', written over a horizontal line.

Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

- Did Claimant prove he suffered a compensable hernia injury on April 25, 2019?
- If Claimant proved a compensable injury, did he prove a bilateral hernia repair surgery recommended by Dr. Robert Macdonald is reasonably necessary to cure and relieve the effects of the injury?

STIPULATIONS

The parties stipulated to an average weekly wage (AWW) of \$2,073.95. The parties also stipulated Claimant is entitled to TTD benefits commencing June 15, 2019 if the claim is compensable.

FINDINGS OF FACT

1. Claimant has been diagnosed with bilateral inguinal hernias, most symptomatic on the right. The dispute involves whether one or both hernias were caused by his work activities on April 25, 2019.

2. Claimant works for Employer as a switchgear technician. His duties include servicing large industrial circuit breakers. Although job did not involve much heavy lifting, it required frequent forceful pushing and pulling of large circuit breakers and torquing bolts.

3. Outside of work, Claimant enjoyed outdoor sports, including trail running and biking. In January 2020, Claimant started training for a marathon.

4. During the week of April 22, 2019, Claimant's crew traveled to Cheyenne, Wyoming for a multi-day project. Claimant worked full shifts on Tuesday and Wednesday, and also went on a multi-mile run each day after work for his marathon preparation.

5. On Thursday, April 25, 2019, Claimant and two co-workers moved two 200-pound circuit breakers by hand. Claimant was on the rear left side of the breaker, another coworker was on the rear right side, and the third coworker was on the front. They lifted each breaker approximately one foot off the ground and held it for three to five seconds before setting it into position. Claimant felt no symptoms in his groin or abdomen during the activity or during the remainder of his shift.

6. Claimant returned to his hotel room after work and changed into his running clothes. He walked approximately 10 minutes to the Greenway recreation path and started his run around 3:30-4:00 PM. Early in the run, Claimant felt a burning sensation and pain in his right groin. The pain progressed and about four miles into the run it was so severe he had to stop and walk back to his hotel room.

7. In his hotel room, Claimant noticed a bulge in his right groin. He Googled symptoms of a hernia and called his roommate, who is a physician. Claimant did not immediately connect the hernia to his work until after speaking with his roommate, who suggested the connection.

8. Claimant went to work the next day (Friday) and reported a hernia injury from lifting the breakers the day before. The crew completed light tasks and paperwork before returning to Denver in the afternoon.

9. Employer referred Claimant to Denver Aviation and Occupational Medicine, where he saw Dr. Nazia Javed on April 29, 2019. Dr. Javed's report described the breaker-lifting episode, but incorrectly states Claimant felt right groin pain during the activity and then "throughout the day." Dr. Javed put Claimant on a five-pound lifting restriction and referred him for an abdominal ultrasound.

10. The ultrasound was completed on April 29, 2019. It showed a direct right inguinal hernia with bowel protrusion.

11. After reviewing the ultrasound report, Dr. Javed referred Claimant to Dr. Robert Macdonald for a surgical evaluation.

12. Claimant saw Dr. Macdonald on May 7, 2019. Dr. Macdonald noted "an uncomfortable right inguinal hernia," and "an inguinal hernia on the left side that is only mildly tender." He suggested Claimant have both hernias repaired.

13. Respondents filed a Notice of Contest on June 14, 2019.

14. Employer accommodated Claimant's work restrictions through June 14, 2019. Claimant has been off work since June 15, 2019. He filed for and received short- and long-term disability benefits.

15. Claimant saw Dr. Lawrence Lesnak for an IME at Respondents' request on January 20, 2020. Dr. Lesnak noted Claimant experienced "no symptoms whatsoever" while lifting on April 25 and only developed symptoms after he went for a run 4 to 5 hours later. He opined had Claimant suffered an acute hernia while lifting at work he would have experienced pain or discomfort and probable swelling in the groin immediately, or at least "within minutes." Dr. Lesnak also noted Dr. Macdonald found bilateral small inguinal hernias, which typically reflects a congenital condition. He concluded Claimant did not suffer an acute hernia at work on April 25, 2019.

16. On February 13, 2020, Dr. Macdonald issued a report addressing Dr. Lesnak's conclusions. Dr. Macdonald opined,

The April 25, 2019 lifting event could have resulted in the patient's discovery of a painful hernia on the right side. Whether it definitely caused it I can't say. It is not uncommon for patients to report discomfort and a bulge (hernia) a day or more after heavy exertion (lifting, etc.), even though no pain occurred during the lifting activity.

17. Dr. Macdonald noted patients in his practice reported hernias associated with heavy lifting “far more often than running.” He concluded,

I have no medical evidence to agree or disagree with Dr. Lesnak’s report. I don’t know if the patient’s hernia occurred because of the lifting or not. It simply may have, and it represents a typical presentation. The occurrence of symptoms hours after the event does not sway me as to the cause.

18. Regarding his surgical recommendation, Dr. Macdonald explained,

It’s advisable to repair hernias when they are painful, as the natural history of symptomatic hernias is that pain tends to persist, and hernias often enlarge with time. In general, I do not recommend repair of asymptomatic small hernias unless I’m repairing a symptomatic hernia on the opposite side. In such situations, during a laparoscopic operation, it’s a very simple matter to address both hernias concomitantly. I give the patient a choice because not all asymptomatic hernias become symptomatic. It just represents an opportune time to repair.

19. Dr. Lesnak testified at hearing consistent with his report. He conceded lifting is a more common cause of hernias than running but maintained the evidence is insufficient to connect Claimant’s hernia to lifting the breakers. He reiterated the lack of symptoms for several hours after lifting the breakers is inconsistent with an acute hernia. He explained the presence of bilateral hernias is consistent with a pre-existing congenital condition. He opined Claimant’s symptomatic right-sided inguinal hernia probably reflects an aggravation of his pre-existing, congenital condition. He testified running could have aggravated the condition but lifting at work did not.

20. Claimant failed to prove lifting breakers on April 25, 2019 probably caused or aggravated his hernias.

CONCLUSIONS OF LAW

To receive compensation or medical benefits, a claimant must prove he is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo. App. 2001). The claimant must prove that an injury directly and proximately caused the condition for which he seeks benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). A pre-existing condition does not disqualify a claim for compensation if a work accident aggravates, accelerates, or combines with the underlying condition to cause disability or a need for treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). The claimant must prove entitlement to benefits by a preponderance of the evidence. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). A preponderance of the evidence means “the existence of the contested fact is more probable than its nonexistence.” *Id.* at 800.

As found, Claimant failed to prove lifting breakers on April 25, 2019 probably caused or aggravated his hernias. The presence of *bilateral* hernias, including the asymptomatic or minimally symptomatic left-sided hernia, is particularly significant. The ALJ agrees with Dr. Lesnak that Claimant's hernias were probably pre-existing and probably not caused by lifting on April 25.

Of course, the claim is compensable if Claimant's work aggravated a pre-existing condition. But the persuasive evidence does not show lifting the breakers probably aggravated his hernia. Although heavy lifting is a more probable cause of hernias than running, Claimant experienced no symptoms until several hours after lifting the breakers. The onset of symptoms occurred when Claimant was running. Developing symptoms during an activity is not dispositive but at least suggests a causal relationship. The onset of symptoms while running, an activity that Dr. Macdonald and Dr. Lesnak agree *can* cause or aggravate a hernia, would support an inference running was causative. Similarly, the absence of any symptoms "whatsoever" for several hours supports an inference lifting the breakers did not aggravate Claimant's hernia. Considering these factors together, the ALJ concludes the run after work on April 29 was at least equally likely to be causative as lifting at work earlier in the day.

An injury sustained during his run is not compensable notwithstanding that Claimant was in travel status at the time. Ordinarily, travelling employees remain continuously in the course and scope of employment so long as they are not engaged in a personal deviation. *Employer's Liability Insurance Corp. v. Industrial Commission*, 363 P.2d 646 (Colo. 1961); *Phillips Contracting, Inc. v. Hirst*, 905 P.2d 9 (Colo. App. 1995). But Claimant's after-work runs were personal deviations as a matter of law under the "recreational activity" exception codified in § 8-40-301(1). See, e.g., *Kendrick v. United Airlines*, W.C. No. 4-991-007-01 (November 15, 2016), *aff'd Kendrick v. Industrial Claim Appeals Office*, 16CA2048 (Colo. App. August 3, 2017) (NSOP); *McLachlan v. Center for Spinal Disorders*, W.C. No. 4-789-747 (July 2, 2010).

Claimant has the burden of proof in this matter. Respondents do not have to prove an alternate, nonwork-related cause to defend the claim. Ultimately the ALJ agrees with Dr. Lesnak's conclusion the evidence is insufficient to establish lifting at work as the probable cause of Claimant's symptomatic hernia. Because a non-compensable cause is at least equally likely as the alleged work-related cause, Claimant failed to carry his burden to prove causation by a preponderance of the evidence.

ORDER

It is therefore ordered that:

1. Claimant's claim for workers' compensation benefits is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or

service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: <http://www.colorado.gov/dpa/oac/forms-WC.htm> **In addition, please send a courtesy copy of your Petition to Review to the Colorado Springs OAC office.**

DATED: May 1, 2020

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

- Did Claimant prove C4-C7 diagnostic facet injections recommended by Dr. Sacha are reasonably necessary and related to her admitted injury?

FINDINGS OF FACT

1. Claimant suffered an admitted injury on December 5, 2016, when she slipped and fell onto her right side.

2. She was initially seen at the Parker Adventist Hospital emergency department with complaints of right rib pain, right elbow pain, and left hand pain.

3. Employer referred Claimant to Concentra Medical Centers for authorized treatment. Her initial evaluation at Concentra took place on December 6, 2016. At her second visit on December 9, 2016, Claimant complained of neck pain. Physical examination showed cervical paraspinal tenderness from C1 to C7, limited cervical flexion and extension, and bilateral trapezius and rhomboid tenderness. She was diagnosed with a cervical strain.

4. Claimant participated in physical therapy for approximately two months without significant improvement.

5. Claimant started seeing Dr. John Sacha, a physical medicine and rehabilitation specialist, on February 22, 2017. Claimant complained of right shoulder pain radiating into the arm, neck pain, and trapezius pain. Physical examination showed a positive Hawkins test and Neer test, right shoulder crepitus with motion, and minimal right-sided cervical tenderness. Dr. Sacha diagnosed right shoulder impingement with a possible rotator cuff or a labral tear. He opined her neck complaints were probably referred from the shoulder. He recommended a right shoulder MRI arthrogram.

6. The right shoulder MRI was completed on March 21, 2017. It showed mild supraspinatus tendinosis with a partial-thickness tear of the distal insertion, and chronic mild degenerative changes.

7. Dr. Sacha performed a right shoulder steroid injection on April 4, 2017, which was not helpful.

8. On April 27, 2017, Claimant saw Dr. Mark Failing for a surgical consultation regarding the right shoulder. She reported right shoulder pain and neck pain. He injected the right shoulder with anesthetic, which relieved her shoulder pain, but did not help the neck pain. Dr. Failing diagnosed right shoulder girdle pain and right rotator cuff tendinosis. He did not recommend surgery.

9. On May 3, 2017, Dr. Sacha noted Claimant's positive diagnostic response to the shoulder injection administered by Dr. Failinger confirmed shoulder impingement as the source of her pain. He declared Claimant at MMI with a 12% upper extremity impairment related to the right shoulder. He recommended "maintenance care," primarily medications and a gym membership.

10. Concentra affirmed Dr. Sacha's MMI determination and impairment rating on May 18, 2017. Claimant's final diagnoses were right shoulder impingement and cervical myofascial pain.

11. Claimant saw Dr. John Douthit for a Division IME on September 25, 2017. Dr. Douthit was impressed with "much overlay of pain behavior, with volitional guarding, which shrouded the authenticity of the clinical exam." Dr. Douthit agreed Claimant was at MMI and assigned a 6% upper extremity impairment based on right shoulder range of motion. He further opined, "I do not think there is evidence that she sustained injury to her cervical spine [] and these appeared to be factitious complaints." He recommended no maintenance care because "my impression is that this is a functional pain syndrome which by definition is not organic and does not respond to conventional therapies or drugs."

12. Claimant continued to follow up with Dr. Sacha regularly for post-MMI treatment. Dr. Sacha's records reflect repeated flares of right shoulder pain radiating into the neck and trapezius. His examination on January 9, 2018 documented no cervical segmental dysfunction.

13. On February 12, 2018, Dr. Sacha wrote to Respondent's counsel outlining his expectation for future post-MMI treatment. Dr. Sacha replied,

[E]xpected maintenance for this patient is 12 months of maintenance care with two or three follow-ups, medications during that time frame, and being allowed to keep the inferential unit. It is unlikely other care beyond that is reasonable or necessary. She is certainly not a candidate for any further interventional care or surgical care.

14. On April 9, 2018, Respondent filed an Amended FAL admitting for a 4% whole person impairment for the right shoulder and reasonable, necessary, and related medical benefits after MMI.

15. Dr. Sacha administered at least two more right shoulder injections in 2018, each time noting a good diagnostic response of "100% temporary relief." He also continued to document soft tissue paracervical findings.

16. In late 2018, Dr. Sacha administered trigger point injections of the bilateral cervical paraspinal muscles, with only transient improvement.

17. On April 4, 2019, Dr. Sacha again addressed expected future treatment in anticipation of an upcoming settlement conference,

I recommend . . . medications for 12 months further and then should be transitioned to her private insurance, a couple of follow-ups in that time frame, a gym pass for 12 months for a neck strengthening and conditioning program, and 16 visits of massage therapy approximately one to two per month over that time frame.

Dr. Sacha reaffirmed the longstanding diagnoses of shoulder impingement and “myofascial pain.”

18. Claimant followed up with Dr. Sacha on May 7, 2019. She was “requesting more aggressive care for this, especially for the neck and parascapular pain.” Claimant had obtained a cervical MRI on her own in April 2019, that showed straightening of the cervical lordosis (suggesting muscle spasm), mild degenerative disc disease, and facet spondylosis, consistent with a lower cervical facet syndrome. Examination of her neck showed cervical paraspinal muscle spasm, pain with extension and extension with rotation, and segmental dysfunction in the mid-to lower cervical spine. This report is the first documented instance of segmental dysfunction in the record. Dr. Sacha added a new diagnosis of “secondary cervical facet syndrome.” He recommended “one-time bilateral C4 to C7 facet injections. This will be for diagnosis and treatment.”

19. Dr. Eddie Sassoon performed a Rule 16 peer review on June 27, 2019. He opined,

[T]here is no conclusive evidence provided that the pain is facet mediated at the three proposed levels. While an MRI was mentioned and appears to suggest some degree of facet arthropathy, levels were not provided and the report was not provided for this review. CO guidelines do support a one-time diagnostic facet injection not to exceed two levels. Therefore, based on lack of sufficient documentation to support this request and a request for three levels, my recommendation is for non-certification.

20. On August 23, 2019, Dr. Sacha opined cervical facet injections were appropriate because Claimant’s cervical facet syndrome was worsening secondary to her shoulder problem.

21. Claimant saw Dr. Michael Striplin for an IME at Respondent’s request on January 9, 2020. Dr. Striplin opined cervical facet syndrome reflects specific spinal pathology, distinct from Claimant’s shoulder injury. Dr. Striplin agreed with Dr. Douthit Claimant suffered no injury to her cervical spine. He opined cervical facet syndrome is not related to her December 5, 2016 work injury.

22. Dr. Sacha testified via deposition on January 31, 2020. He explained that medial branch blocks are the “gold standard” for diagnosing cervical facet dysfunction. But he did not recommend MBBs because Claimant is not interested in radiofrequency ablation (rhizotomy). He opined facet injections are “the second-best diagnostic procedure for facet syndrome,” and may also provide therapeutic benefit. He opined Claimant may have had cervical facet syndrome “this whole time” since her injury.

23. Dr. Striplin testified at hearing to elaborate on the opinions expressed in his report. He explained cervical facet syndrome is intrinsic to the cervical spine and reflects some dysfunction or abnormality of the spine itself. He opined Claimant suffered no specific cervical spine injury in December 2016. He believes the documented neck pain throughout the claim represents referred pain from the right shoulder. Dr. Striplin opined facet injections would not affect neck pain referred from Claimant's shoulder. He persuasively opined facet injections are not reasonably necessary to diagnose or treat any injury-related condition.

24. The ALJ credits Dr. Striplin's opinions that cervical facet injections are not causally related to Claimant's admitted injury. The requested facet injections have no reasonable prospect of diagnosing or treating any work-related condition. The ALJ also credits Dr. Sassoon's opinion that three levels of facet injections are outside the MTGs, and no persuasive evidence was presented to justify departing from the MTGs.

25. Claimant failed to prove C4-C7 facet injections recommended by Dr. Sacha are reasonably necessary to diagnose or relieve the effects of her admitted injury.

CONCLUSIONS OF LAW

Respondents are liable for authorized medical treatment reasonably needed to cure or relieve the employee from the effects of the injury. Section 8-42-101(1)(a); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Medical benefits may extend beyond MMI if a claimant requires treatment to relieve symptoms or prevent deterioration of their condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Even if the respondents admit liability for post-MMI treatment, they retain the right to dispute the reasonable necessity or relatedness of any particular treatment. *Hanna v. Print Expeditors Inc.*, 77 P.3d 863 (Colo. App. 2003). The mere occurrence of a compensable injury does not compel the ALJ to approve all requested treatment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). Where the respondents dispute the claimant's entitlement to medical benefits, the claimant must prove the treatment is reasonably necessary and causally related to the industrial accident. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). The claimant must prove entitlement to medical benefits by a preponderance of the evidence. *Page v. Clark*, 592 P.2d 792 (Colo. 1979).

The Director has adopted Medical Treatment Guidelines (MTGs) to advance the statutory mandate to assure quick and efficient delivery of medical benefits to injured workers at a reasonable cost to employers. WCRP 17, Exhibit 8 addresses cervical spine injuries. As the arbiter of disputes regarding medical treatment, the ALJ may consider the MTGs as an evidentiary tool but is not bound by them when determining whether requested treatment is reasonably necessary or injury-related. Section 8-43-201(3); *Logiudice v. Siemens Westinghouse*, W.C. No. 4-665-873 (January 25, 2011). According to the cervical spine MTGs, "Facet injections have very limited therapeutic or diagnostic use." Section (E)(2)(b)(iv)(C). The MTGs also provide, "Because facet injections are not likely to produce long-term benefit by themselves and are not the most accurate diagnostic tool, they should not be performed at more than two levels, neither unilaterally

nor bilaterally. . . . There is insufficient evidence to support the use of therapeutic cervical facet injections.” Section (F)(3)(d)(iii).

As a threshold matter, Respondent argues Claimant cannot seek treatment for her neck because she did not challenge the DIME’s impairment determination. The ALJ disagrees. The DIME’s opinion regarding treatment after MMI is not entitled to any special weight, and is simply another medical opinion for the ALJ to consider when evaluating the preponderance of the evidence. See *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Story v. Industrial Claim Appeals Office*, 910 P.2d 80 (Colo. App. 1995). Similarly, the DIME’s causation determination regarding MMI or impairment are not dispositive or entitled to special weight on whether *Grover*-type treatment is related to the industrial accident. *Yeutter v. Industrial Claim Appeals Office*, ___ P.3d ___, 2019 COA 53, 18CA0498 (Colo. App. 2019). Thus, the Claimant may pursue post-MMI medical treatment for her cervical spine even though the DIME determined she has no cervical spine impairment.

As found, Claimant failed to prove C4-C7 facet injections are reasonably needed to diagnose or treat her industrial injury. Diagnostic procedures are compensable if they have a reasonable prospect of diagnosing or defining a claimant’s condition so as to suggest a course of further treatment. *Walker v. Life Care Centers of America*, W.C. No. 4-953-461-02 (March 30, 2017). But there must still be a reasonable causal nexus to the work injury. As Dr. Sacha explained, the cervical facet injections are solely to determine whether Claimant has facet-mediated pain. Even if the result is positive, it will not result in compensable treatment because cervical facet dysfunction is not causally related to the December 2016 accident. Claimant did not injure her cervical *spine* on December 5, 2016; her neck symptoms are solely the result of soft tissue problems. Claimant’s neck pain is primarily referred myofascial pain from her right shoulder. It is also reasonable to conclude she suffered a mild cervical soft tissue strain based on the mechanism of injury and clinical findings documented throughout the claim. Neither condition represents a structural injury to the spine itself. There is no persuasive indication or suggestion of facet-mediated pain until Dr. Sacha’s May 7, 2019 report, almost two- and one-half years after the accident. After reviewing all the evidence, the ALJ concludes Claimant failed to prove facet injections have a reasonable prospect of diagnosing or defining her injury-related condition and suggesting a course of injury-related treatment.

Additionally, the ALJ credits Dr. Sassoon’s opinion there is insufficient justification for disregarding the provisions of the MTGs limiting facet injections to two levels. Although the MTGs are not binding, they reflect the Division’s synthesis of the available epidemiological evidence regarding various treatment modalities. Absent a persuasive explanation regarding the efficacy of three-level injections, the ALJ sees no reason to deviate from the MTGs.

ORDER

It is therefore ordered that:

1. Claimant's request for C4-C7 cervical facet injections is denied and dismissed.

2. All issues not decided herein, that are not otherwise closed by operation of law, are reserved for future determination.

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

DATED: May 4, 2020

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-095-589-001**

ISSUES

1. Whether Respondents have demonstrated by a preponderance of the evidence that they are entitled to terminate Claimant's medical and Temporary Total Disability (TTD) benefits based on an intervening event in the form of a right rotator cuff tear that occurred on March 2, 2019.

2. Whether Respondents have proven by a preponderance of the evidence that they are entitled to recover an overpayment of TTD benefits from Claimant beginning March 2, 2019.

STIPULATION

The parties agreed that Claimant earned an Average Weekly Wage (AWW) of \$1,564.77.

FINDINGS OF FACT

1. Claimant worked for Employer as an Equipment Maintenance Technician. His job duties primarily involved performing maintenance and minor repairs.

2. On October 2, 2018 Claimant suffered an admitted industrial injury to his right shoulder. In the course of performing his job duties, Claimant was tightening the 13/16" retaining nut of a high pressure fan spray nozzle. He experienced a sharp, burning ache and a pinch in his right shoulder.

3. Claimant subsequently continued to perform his regular job duties. However, based on the failure of conservative treatment, Claimant underwent open right rotator cuff repair and subacromial decompression surgery on December 26, 2018 with Authorized Treating Physician (ATP) Garth C. Nelson, M.D.

4. Claimant has an extensive history of right shoulder problems and surgeries. In 2009 Claimant slipped in the snow and caught himself with his right arm. He suffered a rotator cuff tear and underwent surgical repair. Claimant reported that he completely healed and resumed his regular activities. In 2013 Claimant was involved in a bicycle accident and fell over the handlebars. He re-tore his rotator cuff and again underwent surgical repair. Claimant reported that he recovered and resumed his normal activities. In 2015 Claimant became caught up in his shirt while dressing. He experienced immediate pain and heard a snapping sound in his right shoulder. Claimant again underwent right shoulder surgery and resumed his regular work activities.

5. After his December 26, 2018 right shoulder surgery Claimant reported continued progress. By January 10, 2018 Claimant told PA-C Emily Lebow at UC Health that he experienced 50% improvement. In a followed-up visit with PA-C Lebow on February 28, 2019 Claimant reported 70% functional recovery.

6. On March 2, 2019 Claimant had been recovering for approximately 9.5 weeks. He attempted to enter his car with about one-half inch of snow on the ground and drive to a store for groceries. Claimant testified he could not drive while wearing his sling because there was not enough room between the seat and the steering wheel. He detailed that he wore a sling and holster with a belt fastened around his waist to hold his arm against his body. As Claimant entered his car, he removed his immobilizer splint, lost his balance and abducted both shoulders in an attempt to regain his balance. He experienced immediate pain as well as a “pop and pinch” in his right shoulder. A subsequent MRI revealed a repeat right rotator cuff tear.

7. On April 9, 2019 Claimant visited Dr. Nelson for a right shoulder evaluation. Dr. Nelson had not only performed Claimant’s December 26, 2018 rotator cuff repair, but also conducted Claimant’s right shoulder surgeries in 2013 and 2015. Dr. Nelson noted that on March 2, 2019 Claimant had suffered a right supraspinatus re-tear from an “involuntary jerk of arm from startle reflex.” He recommended a repeat right rotator cuff repair. Dr. Nelson explained that Claimant’s need for “right revision rotator cuff suture repair directly relates to the original Work Comp rotator cuff injury as an unexpected sequel postoperative complication.” He summarized that Claimant’s rotator cuff tear would not have occurred in the absence of his October 2, 2018 industrial injury.

8. On May 31, 2019 Claimant underwent an independent medical examination with John J. Raschbacher, M.D. Dr. Raschbacher reviewed Claimant’s medical records and conducted a physical examination. He addressed whether the March 2, 2019 slipping incident was related to the October 2, 2019 admitted industrial injury. He reasoned that Claimant’s March 2, 2019 right rotator cuff tear was “separate from and not a result of the [October 2, 2019] work-related injury.” Dr. Raschbacher explained that Claimant would likely have sustained a recurrent right rotator cuff tear from the March 2, 2019 fall absent any injury on October 2, 2018. He specified that Claimant had a prior history of right rotator cuff tears and the March 2, 2019 incident “in and of itself is quite sufficient in terms of mechanism of injury to tear a rotator cuff, whether that cuff had previously been torn or not.” Dr. Raschbacher summarized that the March 2, 2019 event was “entirely unrelated” to the October 2, 2018 work injury because Claimant had been “healing well and progressing” prior to the non-work accident.

9. On June 25, 2019 Dr. Nelson issued a report after reviewing Dr. Raschbacher’s independent medical examination. He disagreed with Dr. Raschbacher’s analysis because a “cuff is vulnerable to re-tear in the first several months postop with much less force than a normal cuff.” Dr. Nelson recommended Claimant not delay rotator cuff surgery to avoid atrophy and a poorer outcome.

10. On July 1, 2019 Claimant visited ATP Kimberly L. Siegel, M.D. for an examination. After reviewing Dr. Raschbacher’s independent medical examination, Dr. Siegel determined that Dr. Nelson’s request for right rotator cuff revision surgery was likely related to Claimant’s October 2, 2018 industrial injury. She explained that quickly abducting his right shoulder would not have torn Claimant’s right rotator cuff if he had not had rotator cuff repair surgery on December 26, 2018. Dr. Siegel specified that quickly abducting a shoulder is not a mechanism that would cause a rotator cuff tear “unless the rotator cuff were already very susceptible to a tear.” She remarked that Dr. Raschbacher

erroneously noted that Claimant slipped and fell on March 2, 2019. Dr. Seigel explained that Claimant slipped but did not fall because he was able to regain his balance.

11. On July 10, 2019 Claimant underwent a right rotator cuff repair with Dr. Nelson. Dr. Nelson specified that he would keep Claimant's arm in a sling for three months after the procedure and would "be less aggressive with gentle passive motion at this time." He commented that it would be eight months before Claimant could even do something "semi-strenuous with the right shoulder" because his healing potential was lower based on multiple revisions.

12. On September 3, 2019 Dr. Raschbacher issued an addendum to his May 31, 2019 independent medical examination after reviewing additional records. He maintained that Claimant's March 2, 2019 right rotator cuff tear was not related to his October 2, 2018 work accident. He commented that the March 2, 2019 incident constituted an intervening event and any medical treatment was not work-related.

13. On January 10, 2020 Claimant underwent an independent medical examination with Sander Orent, M.D. He reviewed Claimant's medical history and performed a physical examination. Dr. Orent disagreed with Dr. Raschbacher's analysis and explained that the March 2, 2019 slipping incident was "clearly the cause of the rotator cuff injury." He acknowledged that the mechanism of injury would not likely tear a healthy rotator cuff. However, he noted that Claimant has undergone multiple right rotator cuff surgeries and the December 26, 2018 procedure weakened his rotator cuff. Dr. Orent detailed that the healing of a rotator cuff produces scar tissue that is "never as strong as native tissue." Claimant's right shoulder was particularly susceptible to injury because he was still in the acute postoperative period from his surgery. Claimant's right shoulder was thus in a "weakened state" as a result of the December 26, 2018 rotator cuff repair.

14. On January 21, 2020 Claimant underwent a second independent medical examination with Dr. Raschbacher. Dr. Raschbacher noted that Claimant injured his right shoulder in July 2013 while he was putting on his jacket in the absence of a slip, trip, fall or sudden abduction of the arms. He reasoned that, because the normal activity of putting on a jacket produced a rotator cuff tear, a startled response and abduction of the arms on March 2, 2019 "could have happened completely in the absence of his surgery on that rotator cuff in December." Dr. Raschbacher thus determined the March 2, 2019 incident constituted an intervening event.

15. Dr. Raschbacher testified at the hearing in this matter. He maintained that Claimant's March 2, 2019 slipping incident was not related to the October 2, 2018 industrial injury. Dr. Raschbacher explained that the mechanism of injury was a common cause of rotator cuff tears and the March 2, 2019 incident was separate and distinct from the October 2, 2018 work injury. He summarized that the March 2, 2019 incident constituted an intervening event that severed the causal connection with Claimant's industrial injury.

16. Dr. Raschbacher remarked that after the March 2, 2019 incident Claimant required physical activity restrictions. In fact, he returned to the same restrictions assigned before October 2018. Dr. Raschbacher explained that, if the March 2, 2019

incident had not occurred, Claimant would have continued his work restrictions but would have returned to work sooner. Dr. Raschbacher commented that Claimant essentially defeated the purpose of the December 26, 2018 surgery because he had a new tear and required treatment.

17. Dr. Orent testified at the hearing in this matter. He maintained that Claimant's right shoulder was in a weakened condition and thus susceptible to injury as a result of the December 26, 2018 rotator cuff repair. Claimant would not have torn his right rotator cuff on March 2, 2019 if he had not suffered an industrial injury on October 2, 2018. Therefore, Claimant's July 10, 2019 surgery was causally related to his October 2, 2018 work-related injury.

18. Respondents have failed to demonstrate that it is more probably true than not that they are entitled to terminate Claimant's medical and TTD benefits based on an intervening event in the form of a right rotator cuff tear that occurred on March 2, 2019. Initially, Claimant suffered an admitted industrial injury to his right shoulder on October 2, 2018. He subsequently underwent open right rotator cuff repair and subacromial decompression surgery on December 26, 2018. However, on March 2, 2019 Claimant again tore his right rotator cuff while he was attempting to enter his car to shop for groceries. Claimant specifically removed his immobilizer splint, lost his balance and abducted both shoulders in an attempt to regain his balance. Respondents contend that the March 2, 2019 non-industrial accident constituted an intervening event that severed the causal connection with Claimant's October 2, 2018 work injury. However, despite Claimant's extensive history of right shoulder rotator cuff tears and surgeries, the persuasive medical evidence demonstrates that the March 2, 2019 incident was causally related to Claimant's admitted industrial injury.

19. Dr. Orent persuasively maintained that Claimant's right shoulder was in a weakened condition as a result of the December 26, 2018 rotator cuff repair and thus susceptible to injury. Claimant would not have torn his right rotator cuff on March 2, 2019 if he had not suffered an industrial injury on October 2, 2018. Dr. Orent acknowledged that the mechanism of injury on March 2, 2019 would not likely have torn a healthy rotator cuff. However, he noted that Claimant has undergone multiple right rotator cuff surgeries and the December 26, 2018 procedure weakened his rotator cuff. Dr. Orent detailed that the healing of a rotator cuff produces scar tissue that is "never as strong as native tissue." Claimant's right shoulder was particularly susceptible to injury because he was still in the acute postoperative period from his surgery. Claimant's right shoulder was thus in a "weakened state" as a result of the December 26, 2018 rotator cuff repair. Therefore, Claimant's July 10, 2019 surgery was causally related to his October 2, 2018 work-related injury. Similarly, Dr. Siegel determined that Dr. Nelson's request for right rotator cuff revision surgery was likely related to Claimant's October 2, 2018 industrial injury. She explained that quickly abducting his right shoulder would not have torn Claimant's right rotator cuff if he had not undergone rotator cuff repair surgery on December 26, 2018. Dr. Siegel specified that quickly abducting a shoulder is not a mechanism that would cause a rotator cuff tear "unless the rotator cuff were already very susceptible to a tear."

20. In contrast, Dr. Raschbacher maintained that Claimant's March 2, 2019 slipping incident was not related to the October 2, 2018 industrial injury. He explained

that the mechanism of injury was a common cause of rotator cuff tears and the March 2, 2019 incident was separate and distinct from the October 2, 2018 work injury. Dr. Raschbacher noted that Claimant injured his right shoulder in July 2013 while he was putting on his jacket in the absence of a slip, trip, fall or sudden abduction of the arms. He reasoned that, because the normal activity of putting on a jacket produced a rotator cuff tear, a startled response and abduction of the arms on March 2, 2019 could have happened in the absence of the December 26, 2018 surgery. Dr. Raschbacher summarized that the March 2, 2019 incident constituted an intervening event that severed the causal connection with Claimant's industrial injury.

21. Despite Dr. Raschbacher's opinion, the record reveals that the March 2, 2019 accident did not sever the causal connection with Claimant's October 2, 2018 rotator cuff tear. Instead, Claimant's industrial injury and surgery left his right rotator cuff in a weakened condition susceptible to additional injury. Notably, Dr Nelson explained that he disagreed with Dr. Raschbacher's analysis because a "cuff is vulnerable to re-tear in the first several months postop with much less force than a normal cuff." He summarized that Claimant's rotator cuff tear would not have occurred in the absence of his October 2, 2018 industrial injury. Claimant's October 2, 2018 work accident left his right shoulder in a weakened condition and the weakened condition proximately caused his March 2, 2019 right rotator cuff tear. Accordingly, the March 2, 2019 injury constitutes a compensable consequence of Claimant's original industrial injury. Respondents' request to terminate Claimant's medical and TTD benefits based on an intervening event is thus denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. See *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and

bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson*, W.C. No. 4-589-645 (ICAO), Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.*, 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner*, 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). If an industrial injury leaves the body in a weakened condition and the weakened condition proximately causes a new injury, the new injury is a compensable consequence of the original industrial injury. *Price Mine Service, Inc. v. Industrial Claim Appeals Office*, 64 P.3d 936 (Colo. App. 2003); *Lanuto v. Amerigas Propane, Inc.*, W.C. No. 4-818-912, (ICAO, July 20, 2011). The preceding principle constitutes the “chain of causation analysis” and provides that a subsequent injury is compensable if the “weakened condition played a causative role” in the new injury. *In Re Fessler*, W.C. No. 4-654-034 (ICAO, Dec. 19, 2007). Finally, an industrial injury is the “proximate cause” of a subsequent disability if it is the “necessary precondition or trigger of the disability.” *Subsequent Injury Fund v. State Compensation Insurance Authority*, 768 P.2d 751 (Colo. App. 1988); see *Martinez v. City of Colorado Springs*, W.C. No. 5-073-295-002 (ICAO, Sept. 12, 2019).

6. However, the new injury is not compensable “merely because the later accident might or would not have happened if the employee had retained all his former powers.” *In Re Chavez*, W.C. No. 4-499-370 (ICAO, Jan. 23, 2004). Respondents are only liable for the “direct and natural” consequences of the work related injury. *Reynal v. Home Depot USA, Inc.*, No. 4-585-674-05 (ICAO, Dec. 10, 2012). No compensability exists if the disability and need for treatment are the direct result of an independent intervening cause. *Owens v. Industrial Claim Appeals Office*, 49 P.3d 1187 (Colo. App. 2002); *Merrill v. Pulte Mortgage Corporation*, W.C. No. 4-635-705-02, (ICAO May 10, 2013). The question of whether the claimant met the burden of proof to establish a compensable injury is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000).

7. As found, Respondents have failed to demonstrate by a preponderance of the evidence that they are entitled to terminate Claimant’s medical and TTD benefits based on an intervening event in the form of a right rotator cuff tear that occurred on March 2, 2019. Initially, Claimant suffered an admitted industrial injury to his right shoulder on October 2, 2018. He subsequently underwent open right rotator cuff repair and subacromial decompression surgery on December 26, 2018. However, on March 2, 2019

Claimant again tore his right rotator cuff while he was attempting to enter his car to shop for groceries. Claimant specifically removed his immobilizer splint, lost his balance and abducted both shoulders in an attempt to regain his balance. Respondents contend that the March 2, 2019 non-industrial accident constituted an intervening event that severed the causal connection with Claimant's October 2, 2018 work injury. However, despite Claimant's extensive history of right shoulder rotator cuff tears and surgeries, the persuasive medical evidence demonstrates that the March 2, 2019 incident was causally related to Claimant's admitted industrial injury.

8. As found, Dr. Orent persuasively maintained that Claimant's right shoulder was in a weakened condition as a result of the December 26, 2018 rotator cuff repair and thus susceptible to injury. Claimant would not have torn his right rotator cuff on March 2, 2019 if he had not suffered an industrial injury on October 2, 2018. Dr. Orent acknowledged that the mechanism of injury on March 2, 2019 would not likely have torn a healthy rotator cuff. However, he noted that Claimant has undergone multiple right rotator cuff surgeries and the December 26, 2018 procedure weakened his rotator cuff. Dr. Orent detailed that the healing of a rotator cuff produces scar tissue that is "never as strong as native tissue." Claimant's right shoulder was particularly susceptible to injury because he was still in the acute postoperative period from his surgery. Claimant's right shoulder was thus in a "weakened state" as a result of the December 26, 2018 rotator cuff repair. Therefore, Claimant's July 10, 2019 surgery was causally related to his October 2, 2018 work-related injury. Similarly, Dr. Siegel determined that Dr. Nelson's request for right rotator cuff revision surgery was likely related to Claimant's October 2, 2018 industrial injury. She explained that quickly abducting his right shoulder would not have torn Claimant's right rotator cuff if he had not undergone rotator cuff repair surgery on December 26, 2018. Dr. Siegel specified that quickly abducting a shoulder is not a mechanism that would cause a rotator cuff tear "unless the rotator cuff were already very susceptible to a tear."

9. As found, in contrast, Dr. Raschbacher maintained that Claimant's March 2, 2019 slipping incident was not related to the October 2, 2018 industrial injury. He explained that the mechanism of injury was a common cause of rotator cuff tears and the March 2, 2019 incident was separate and distinct from the October 2, 2018 work injury. Dr. Raschbacher noted that Claimant injured his right shoulder in July 2013 while he was putting on his jacket in the absence of a slip, trip, fall or sudden abduction of the arms. He reasoned that, because the normal activity of putting on a jacket produced a rotator cuff tear, a startled response and abduction of the arms on March 2, 2019 could have happened in the absence of the December 26, 2018 surgery. Dr. Raschbacher summarized that the March 2, 2019 incident constituted an intervening event that severed the causal connection with Claimant's industrial injury.

10. As found, despite Dr. Raschbacher's opinion, the record reveals that the March 2, 2019 accident did not sever the causal connection with Claimant's October 2, 2018 rotator cuff tear. Instead, Claimant's industrial injury and surgery left his right rotator cuff in a weakened condition susceptible to additional injury. Notably, Dr. Nelson explained that he disagreed with Dr. Raschbacher's analysis because a "cuff is vulnerable to re-tear in the first several months postop with much less force than a normal cuff." He summarized that Claimant's rotator cuff tear would not have occurred in the absence of

his October 2, 2018 industrial injury. Claimant's October 2, 2018 work accident left his right shoulder in a weakened condition and the weakened condition proximately caused his March 2, 2019 right rotator cuff tear. Accordingly, the March 2, 2019 injury constitutes a compensable consequence of Claimant's original industrial injury. Respondents' request to terminate Claimant's medical and TTD benefits based on an intervening event is thus denied and dismissed.

ORDER

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

1. Respondents' request to terminate Claimant's medical and TTD benefits based on an intervening event is denied and dismissed.
2. Claimant earned an AWW of \$1,564.77.
3. Any issues not resolved in this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at <http://www.colorado.gov/dpa/oac/forms-WC.htm>.*

DATED: May 5, 2020.

DIGITAL SIGNATURE:


Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Determination of Division Independent Medical Examination (DIME) physician Dr. Reichhardt's opinion on maximum medical improvement (MMI).
2. Determination of whether either party has overcome the DIME physician's opinion on MMI by clear and convincing evidence.

FINDINGS OF FACT

1. Claimant is a 58-year-old female who was employed by Employer as an operator.
2. On January 15, 2018, Claimant sustained an admitted compensable work related injury to her right shoulder and right wrist after slipping on ice while scraping her car in Employer's parking lot.
3. Claimant was initially referred to physical therapy. On February 13, 2018, therapist Barbara Walden evaluated Claimant noting it was the sixth therapy visit. PT Walden noted a diagnosis of right shoulder sprain and right wrist sprain. PT Walden noted that Claimant had an inappropriate angry response and that Claimant was angry that no one had figured out what was going on. PT Walden noted increased range of motion and function. See Exhibit 12.
4. On February 16, 2018, Claimant underwent an MRI of her right shoulder. The findings included thinning of the supraspinatus footprint at the supraspinatus-infraspinatus confluence with bursal and articular sided fraying and suspected focal rent, moderate fluid in the sub acromial sub deltoid bursa, an intra substance delaminating tear of the infraspinatus extending medially toward the myotendinous junction, moderate tendinopathy of the supraspinatus and mild tendinopathy of the infraspinatus, mild biceps tendinopathy, and degeneration of the superior labrum. The impression by McKinley Lawson, M.D. was marked thinning of the rotator cuff at the supraspinatus-infraspinatus confluence with articular and bursal sided fraying and suspected perforation, intra substance delaminating tear of the infraspinatus, infraspinatus and supraspinatus tendinopathy, hypertrophic degenerative change of the AC joint, and mild intrascapular biceps tendinopathy. See Exhibits 2, 3.
5. On February 16, 2018, Claimant also underwent an MRI of her right wrist. The impression provided by Dr. Lawson was partial tear of the TFCC at the foveal and ulnar styloid attachments with some concomitant irregularity of the ulnar collateral ligament with no fracture or dislocation. See Exhibit 3.

6. On April 17, 2018, Ryan Hartman, M.D. performed right shoulder surgery on Claimant. Dr. Hartman performed a right shoulder arthroscopic rotator cuff repair of a 2.8 cm tear with a combination of margin convergence and double row suture anchor technique. Dr. Hartman performed superior labral debridement and subacromial decompression including bursectomy and acromioplasty. The post operative diagnoses included right shoulder full thickness rotator cuff tear, right shoulder chronic impingement with subacromial bursitis and type II acromion, and right shoulder superior labral fraying with intact biceps labral anchor and stable biceps tendon. See Exhibit 1.

7. On April 24, 2018, Dr. Hartman referred Claimant to physical therapy with instructions to undergo physical therapy one to three times per week then two to four times per month. Dr. Hartman provided instructions of rotator cuff repair protocol. The protocol noted that early passive range of motion was encouraged to prevent shoulder stiffness and that most patients would be in a sling for 6 weeks except for therapy, home exercises, and showering. See Exhibit 4.

8. On May 16, 2018, Neal Tah, M.D. evaluated Claimant. He noted that Claimant had temporary restrictions of no use of the right arm and requirement to wear immobilizing sling while at work, could only lift 7 pounds with the left arm, and had to do sedentary work only. Dr. Tah discussed treatment plans and indicated that Claimant was being followed by a neurologist after a non work related concussion. Dr. Tach discussed that Claimant had an exacerbation of depression and he planned to refer her to psych for further evaluation. Dr. Tah recommended Claimant continue physical therapy for right shoulder rehabilitation. See Exhibit 11.

9. On August 20, 2018, Dr. Tah evaluated Claimant. He noted work restrictions of maximum lift with right arm of 10 pounds near the body with no lifting away from the body or overhead. He noted that Claimant was making good progress with her right shoulder through physical therapy, that she still had some wrist discomfort and numbness in her right 4th and 5th digits, and that she would have Dr. Peterson evaluate her wrist. Dr. Tah recommended continued physical therapy and massage therapy. See Exhibit 14.

10. On January 24, 2019, Dr. Raschbacher evaluated Claimant. Dr. Raschbacher opined that it was fairly clear that medically Claimant had plateaued. Dr. Raschbacher noted that Claimant had been released quite some time ago for work and had been found to be at MMI by other physicians quite some time ago. Dr. Raschbacher opined that it was quite unlikely that further application of medical resources would substantively change Claimant's overall complaints or level of function. Dr. Raschbacher opined that Claimant had been playing racquetball yet indicated she was not comfortable going back into work. Dr. Raschbacher opined that Claimant's work restrictions were likely more restrictive than what could be supported objectively, and he scheduled a functional capacity evaluation to assist in determination of appropriate restrictions. Dr. Raschbacher opined that Claimant had significant psychological problems that predated this claim and opined that there was no psychological basis for an impairment due to the January 15, 2018 injury. Dr. Raschbacher noted that Claimant was also under care for a

non-work related motor vehicle accident. Dr. Raschbacher performed a physical examination and opined that Claimant's impairment of the shoulder and wrist amounted to a 5% upper extremity impairment. He noted that the functional capacity evaluation would be done as medical maintenance and that work restrictions might be updated at that time after review. See Exhibit A.

11. On February 11, 2019, Respondents filed a final admission of liability (FAL) admitting to a 5% upper extremity impairment rating consistent with Dr. Rachbacher's January 24, 2019 report. Respondents listed a maximum medical improvement (MMI) date of January 24, 2019. See Exhibit A.

12. On June 13, 2019, Greg Reichhardt, M.D. performed a Division Independent Medical Evaluation (DIME). Claimant reported that she was injured on January 15, 2018 when she slipped and fell while scraping ice off her windshield at work. Claimant reported that she had immediate right wrist pain and right shoulder weakness. Claimant reported that she had a motor vehicle accident three weeks before her fall at work and that she felt worsened by her fall. Claimant reported that she underwent surgery and physical therapy but did not feel the therapy was done appropriately. Claimant reported that she had done physical therapy through her private doctor after she was discharged by workers' compensation providers and that she had completed sixty or more sessions. Claimant also reported that she was doing home exercises every other day. Claimant reported that she had been playing tennis, racquetball, and swimming. Claimant reported depression, anxiety, and suicidal thoughts and related it to feeling mistreated by multiple providers. Dr. Reichhardt reviewed medical records and performed a physical examination. He noted that Claimant had not had a psychological evaluation and that Claimant was voicing suicidal thoughts and required further evaluation. Claimant reported the suicidal thoughts were in part related to the work injury although she admitted there were other non-work related stressors as well. Dr. Reichhardt opined that Claimant was not at MMI. He indicated that she needed to be evaluated under workers' compensation and potentially concurrently outside workers' compensation by a psychologist and a psychiatrist. Dr. Reichhardt opined that it would be helpful to have pre-injury psychological records to determine whether there was a work related component and that it was not clear whether there was any work related component to Claimant's psych condition. Dr. Reichhardt opined that no further physical therapy was indicated. He opined that a follow up with Dr. Hartman was recommended to see if an MRI or MRI arthrogram were recommended and to get his opinion on continued participation in racquetball and tennis. Dr. Reichhardt opined that after any work-related aspect of the psychiatric condition is addressed and if no further surgery is indicated by Dr. Hartman, then Claimant would be at MMI. Dr. Reichhardt opined that if Claimant refused to see the psychologist and psychiatrist, she would be at MMI. Dr. Reichhardt opined that Claimant had a 10% upper extremity impairment rating. See Exhibit C.

13. On June 19, 2019, Claimant underwent a right shoulder MRI. The impression was moderate right shoulder supraspinatus and infraspinatus tendinopathy with partial-thickness supraspinatus bursal sided tearing and intermediate to high grade

undersurface infraspinatus tearing with a component of medial delamination. No full thickness extension was seen. The impression also included subscapularis insertional tendinopathy with intrasubstance insertional tearing with resultant medial subluxation of the biceps tendon from the bicipital groove. It found long head biceps tendinopathy and subacromial subdeltoid bursitis. See Exhibit 3.

14. On July 19, 2019, orthopedist Adam Seidl, M.D. evaluated Claimant. Claimant reported that she fell at work in January of 2018 and eventually underwent arthroscopy with rotator cuff repair and subacromial decompression to fix a supraspinatus tear shown by MRI. Claimant reported that since surgery, she had persistent pain and discomfort in her shoulder that limited her from activities. Claimant reported weakness and pain and that she was worried her surgery did not fully treat her injury. Dr. Seidl reviewed a right shoulder post surgical MRI. Dr. Seidl opined that the MRI showed standard post surgical changes without discrete re-tear and opined that the teres minor and infraspinatus appeared intact. Dr. Seidl opined that there were no new tears or clear pathology on the MRI that would contribute to her pain and he showed her the MRI that demonstrated her rotator cuff repair was intact and well healed. Dr. Seidl opined that it was unclear why Claimant had been unable to gain strength and unclear why she had persistent pain. Dr. Seidl opined that surgical intervention was not indicated and that there would be nothing to repair. See Exhibit D.

15 On August 16, 2019, Dr. Seidl evaluated Claimant. He opined that he did not see a structural cause of Claimant's reported weakness. Claimant requested an MRI arthrogram and he agreed to order one. See Exhibit D.

16. On August 23, 2019, Claimant underwent a right shoulder MRI arthrogram. The impression was superior cuff tendinosis with no full thickness tear identified. The findings included diffuse degenerative tearing and fraying of the labrum, no substantial rotator cuff muscular atrophy, and persistent postsurgical appearance of prior superior cuff repair of the supraspinatus and infraspinatus. The findings included moderate supraspinatus and infraspinatus tendinosis with partial thickness articular sided tearing of the undersurface at the junction of the supraspinatus and infraspinatus tendons, which was opined as maybe being post surgical. See Exhibit 3.

17. On August 28, 2019, Claimant was scheduled for a psychiatric evaluation with Robert Kleinman, M.D. Claimant did not show up for the evaluation. See Exhibit E.

18. On August 29, 2019, Dr. Seidl evaluated Claimant. He noted that Claimant underwent a rotator cuff repair surgery, reported that she never recovered, and complained of significant pain and weakness of the shoulder. Claimant reported her main goal was to return to tennis and pickleball. Dr. Seidl noted that at the last visit, Claimant was adamant that she had a tear of her infraspinatus that was not fixed during the last shoulder surgery despite an MRI and that she wanted an MRI arthrogram. Dr. Seidl noted that an MRI arthrogram was performed and reviewed with Claimant. Dr. Seidl opined that the recent MRI arthrogram showed no new high grade partial thickness or full thickness tears of the infraspinatus or supraspinatus. Dr. Seidl noted that he had a long discussion

with Claimant and Claimant's social worker and opined that he did not have a solution for her problem of pain and weakness. Dr. Seidl noted Claimant was fixated on her belief that her infraspinatus was not fixed, but he opined that the MRI confirms that Claimant's infraspinatus is intact and does not need further surgery. See Exhibit D.

19. On September 17, 2019, John Burriss, M.D. performed an independent medical evaluation. Claimant reported that she developed right shoulder and right wrist pain after a slip and fall at work January 15, 2018. Dr. Burriss noted that Claimant was a poor historian with a tangential thought process that avoided direct responses. He noted that Claimant spent much of the interview perseverating on her dissatisfaction with her providers and care reporting her care had been delayed, caused emotion distress, and that she felt dehumanized. Claimant reported that the right shoulder surgery she underwent provided was not beneficial and that she continued to have weakness and believed there was something structurally wrong with her shoulder. Claimant reported that second opinions had not provided her explanation for her weakness and that she was frustrated she had no answers. Claimant also reported continued problems with her right wrist and that surgery was now recommended for her wrist. Claimant reported pain at a 4/10 and that the pain varied between 0-8/10 and was a 0 when she didn't think about it. Claimant reported that she had not worked since February 2018 and that if she lifted a 2 pound weight over her head, her arm was crooked. Dr. Burriss reviewed medical records and performed a physical examination. Dr. Burriss noted that during medical treatment, Claimant had a falling out at UC health WC clinic and Workwell WC clinic before transferring to midtown WC clinic. He noted that Claimant had extensive treatment including extensive post surgery rehabilitation and massage. Dr. Burriss opined that despite the extensive treatment, Claimant continued to have subjective complaints of pain in the right shoulder and wrist that were out of proportion to objective findings. Dr. Burriss opined that the examination he performed was consistent with numerous examinations in the medical records with a benign exam with psychosomatic overlay, inconsistencies, and no objective findings. See Exhibit F.

20. Dr. Burriss noted that Claimant had undergone a DIME with Dr. Reichhardt with recommendations of psychiatric/psychologic evaluation and follow up regarding her right shoulder. Dr. Burriss noted that Claimant saw Dr. Seidl consistent with the DIME opinion and there were no further recommendations for her right shoulder. Dr. Burriss also noted that Claimant was scheduled for a psychiatric appointment with Dr. Kleinman but did not show up. Dr. Burriss opined that Claimant was at MMI pursuant to the DIME conditions. Dr. Burriss also reviewed a recent request for right wrist surgery to remove an occult ganglion cyst but Dr. Burriss opined that there was no reasonable expectation Claimant would benefit from surgical intervention. He noted the vague/diffuse nature of her complaints, the significant inconsistencies and psychosomatic overlay identified by multiple providers, lack of correlating findings on MRI, lack of response to appropriate treatment including a nondiagnostic response to a dorsal wrist injection, and lack of appropriate response at the shoulder after surgery. See Exhibit F.

21. DIME physician Dr. Reichhardt testified by deposition. Dr. Reichhardt reviewed medical records from an orthopedic follow up visit with Dr. Seidl that occurred

after the DIME. He opined, after review, that Claimant did not need further orthopedic care for her right shoulder. Dr. Reichhardt testified that he considered frozen shoulder as a possible diagnosis, but opined that Claimant's examination and overall presentation was not consistent with frozen shoulder. Dr. Reichhardt testified that Claimant's shoulder range of motion was better than what would be expected with adhesive capsulitis, and that her rotator cuff external rotation was normal. Dr. Reichhardt noted that at an examination with Dr. Lesnak, Claimant had normal range of motion so it was again unlikely she had adhesive capsulitis. He also noted her early recovery making adhesive capsulitis unlikely related to her work injury. Dr. Reichhardt noted that Claimant did not show up for the psychiatric evaluation with Dr. Kleinman and opined that Claimant would be at MMI as of the date of the missed psychiatric evaluation. Dr. Reichhardt opined that it would be appropriate for Claimant to have an evaluation with a psychiatrist to determine whether or not any of her psych issues were related to the work injury. He also opined that it would be appropriate, after a psychological evaluation, for Claimant to see Dr. Peterson and to resolve psych issues before proceeding with right wrist surgery. Dr. Reichhardt opined that his permanent impairment rating of 10% of the right upper extremity remained the same and that he could not, at this time, assess a psychological impairment as he didn't see consistent reports of psychological issues related to the work injury in the medical records. He testified that without a psychological evaluation he was unable to provide a medically probable psychological or psychiatric diagnosis related to the work accident. Dr. Reichhardt testified that there was no further treatment indicated for Claimant's work related injury other than continuation with an independent active exercise program.

22. In February of 2009, Claimant was evaluated by Pamela Rodden, Ph.D, for purposes of psychological testing. Dr. Rodden noted a mental health history of suicidal thoughts starting in 1997 and several different past mental health disorder diagnoses but without standard psychological testing. Dr. Rodden administered a battery of psychological tests and noted Claimant's responses. Dr. Rodden noted that the validity of the test results was limited by Claimant's honesty and self-awareness. Dr. Rodden noted a prior Axis I diagnosis of major depression, recurrent and an Axis II diagnosis of personality disorder, NOS with borderline and narcissistic features from the year 2000. Dr. Rodden opined that testing did not indicate the presences of any behaviors suggesting any such diagnosis presently. Dr. Rodden also noted that in 2003, Claimant had a diagnosis of Axis I mood disorder possibly recurrent major depression or bipolar disorder with a history of psychosis and recurrent suicidal ideation or schizoaffective disorder, adjustment disorder with mixed features-severe as well as an Axis II diagnosis of mixed personality disorder with borderline, impulsive, and narcissistic features. Dr. Rodden opined that at this February 2009 assessment, there were no personality disorders or mental health disorders identified based on Claimant's responses to testing. Dr. Rodden opined that Claimant did not appear to be, at the present time, potentially harmful to patients who might be under her care and Dr. Rodden supported reinstatement of Claimant's nursing license. See Exhibit 15.

23. Dr. Burris testified at hearing. He opined that Claimant was at MMI and that she had undergone comprehensive care for her injury, including physical therapy that

exceeded the guidelines for her diagnosis. He noted that the surgeon had released Claimant from care and that on his examination of Claimant, she looked good with good range of motion despite some self-limitation and some inconsistencies. Dr. Burris testified that the provocative testing to check the integrity of the rotator cuff repair was all normal. Dr. Burris testified that he reviewed DIME physician Dr. Raschbacher's deposition testimony where Dr. Raschbacher changed his mind and opined that Claimant was at MMI with a 10% impairment rating and Dr. Burris testified he agreed with the deposition opinion. Dr. Raschbacher testified that Claimant did not need surgery on her right wrist and that Claimant had no pain in the area after her fall and had no relief from a diagnostic injection, so surgery was not necessary. Dr. Burris testified that although Claimant believes she is not at MMI because she needs more physical therapy, Claimant had over 100 sessions of physical therapy already when a normal course is 12-24 sessions. Dr. Burris also testified that Claimant appeared fixated on the infraspinatus, but noted that it had been determined by orthopedic surgeon to be not in need of repair. Dr. Burris noted Claimant's long history of mental illness and opined that there was no work related psych component.

24. Claimant also testified at hearing. She testified that she fell quickly, abruptly, and laterally on January 15, 2018 when scraping her car and that she thought it was just her wrist at first but by the next morning she could hardly get dressed. Claimant testified she was angry because the next day it was still icy. Claimant testified that she disagrees with a determination of MMI because she is still currently in therapy. Claimant testified that she was very strong before the injury and played racquetball where she was rated in the top 14 in the state and that she had been strong her whole life. Claimant testified that she is in mental anguish now because she can't participate in sports and because she has received substandard care. Claimant testified that the physical therapist was not following orders and that she was not getting strength back and was stuck and frustrated because she didn't get care. Claimant testified that she disagrees with being placed at MMI because she wants hope that she will still get better. Claimant testified that the operating report doesn't discuss the infraspinatus and that photos of surgery showed only supraspinatus. She testified that she did not go to a neuropsych evaluation because she didn't get notice properly but testified she hasn't had a welfare check in years. Claimant testified that she has adhesive capsulitis and needs more physical therapy before she can be at MMI.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. See § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. See § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Overcoming the DIME physician's opinion on MMI

MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." Section 8-40-201(11.5), C.R.S. A DIME physician's finding that a party has or has not reached MMI is binding on the parties unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(III), C.R.S.; *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000); *Kamakele v. Boulder Toyota-Scion*, W.C. No. 4-732-992 (ICAO, Apr. 26, 2010).

MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office*, 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office*, 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007); *Powell v. Aurora Public Schools* W.C. No. 4-974-718-03 (ICAO, Mar. 15, 2017). A finding that the claimant needs additional medical treatment (including surgery) to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office*, 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office*, 794 P.2d 1090 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.*, W.C. No.

4-320-606 (ICAO, Mar. 2, 2000). Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining the claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Abeyta v. WW Construction Management*, W.C. No. 4-356-512 (ICAO, May 20, 2004);

The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, *supra*. "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998); *Lafont v. WellBridge D/B/A Colorado Athletic Club* W.C. No. 4-914-378-02 (ICAO, June 25, 2015). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc.*, W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.*, W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); *see Shultz v. Anheuser Busch, Inc.*, W.C. No. 4-380-560 (ICAO, Nov. 17, 2000). Rather it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Oates v. Vortex Industries*, WC 4-712-812 (ICAO, Nov. 21, 2008); *Licata v. Wholly Cannoli Café* W.C. No. 4-863-323-04 (ICAP, July 26, 2016).

When a DIME physician issues conflicting or ambiguous opinions concerning MMI, the ALJ may resolve the inconsistency as a matter of fact so as to determine the DIME physician's true opinion. *MGM Supply Co. v. Industrial Claim Appeals Office*, 62 P.3d 1001 (Colo. App. 2002); *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000); *Licata v. Wholly Cannoli Café* W.C. No. 4-863-323-04 (ICAO, July 26, 2016). An ALJ may consider the DIME physician's deposition testimony as part of his opinion for purposes of determining the DIME physician's opinion. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office*, 984 P.2d 656, 659 (Colo. App. 1998); *Gagnon v. Westward Dough Operating Co. D/B/A Krispy Kreme* W.C. No. 4-971-646-03 (ICAO, Feb. 6, 2018).

As found above, in his DIME report, Dr. Reichhardt opined that Claimant was not at MMI and that Claimant needed a psych evaluation. Dr. Reichhardt was unsure whether there were work related psych issues and he opined that it would be helpful to review the pre-injury psych records. Dr. Reichhardt also opined that Claimant was not at MMI because she needed a follow up evaluation with her orthopedic surgeon to see if a new MRI, MRI arthrogram, or any surgery were recommended. His DIME report concluded that if the orthopedic surgeon indicated nothing further was necessary, and if the work related aspects of Claimant's psych issues were addressed, Claimant would be at MMI. Dr. Reichhardt opined that if Claimant refused to see a psychologist or psychiatrist, Claimant would be at MMI. Dr. Reichhardt opined that no further physical therapy was indicated.

During deposition testimony, Dr. Reichhardt opined that Claimant was at MMI and that there was no further treatment indicated for her work injury other than continued independent exercises. Dr. Reichhardt noted that Claimant was evaluated by an orthopedic surgeon after his DIME report and that the doctor, Dr. Seidl, opined that Claimant did not need further orthopedic care. Dr. Reichhardt also opined that Claimant missed a psychiatric evaluation with Dr. Kleinman. Dr. Reichhardt opined that he could not assess a psychological impairment and opined there were not consistent reports of psychological issues related to the work injury.

The ALJ notes that DIME physician Dr. Reichhardt provided an opinion in his DIME report that Claimant needed a psych evaluation and a follow up with the orthopedic surgeon before Dr. Reichhardt could find her at MMI. Dr. Reichhardt was unsure whether psych components were work related. Dr. Reichhardt was also unsure whether there was something more going on in Claimant's right shoulder that the orthopedist would have recommendations for. During his deposition, Dr. Reichhardt changed his opinion. He opined Claimant was at MMI. Dr. Reichhardt noted that the orthopedist had no further treatment recommendations for the right shoulder and that there were not consistent reports of psychological issues that related to the work injury. He therefore opined that Claimant was at maximum medical improvement.

The ALJ concludes that the DIME physician's true opinion is that Claimant reached MMI on August 28, 2019 with a 10% upper extremity impairment. Dr. Reichhardt's determination involved his assessment that psych components are not causally related to the industrial injury. Claimant's physical impairment as a result of her injury is stable and no further treatment is reasonably expected to improve her condition. Dr. Reichhardt reviewed the treatment records and orthopedic records before coming to his opinion. No further medical treatment, including surgery, will reduce Claimant's pain or improve her function nor are there additional diagnostics (that have not already been completed) that can offer a reasonable prospect for defining Claimant's condition or suggesting further treatment.

Claimant has failed to overcome, by clear and convincing evidence, DIME physician Dr. Reichhardt's opinion. Claimant is at MMI with a 10% upper extremity impairment. Claimant has failed to establish that Dr. Reichhardt was highly probably incorrect nor has she shown by unmistakable evidence or evidence free from serious or substantial doubt that Dr. Reichhardt is incorrect. Claimant argues that she is not at MMI because physical therapy is still helping her, yet even when he initially opined Claimant was not at MMI, Dr. Reichhardt recommended against further physical therapy. Claimant argues that she has been misdiagnosed and mistreated by a variety of providers. Claimant alleges she has adhesive capsulitis, yet providers document inconsistencies with that diagnosis. DIME physician Dr. Reichhardt testified that her examination and treatment history was inconsistent with that diagnosis.

Claimant has failed to meet her burden to overcome the opinion of DIME physician Dr. Reichhardt by clear and convincing evidence. Although Claimant testified to and pointed out that her current providers may have different opinions, the mere difference of

medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. The weight of the medical evidence and the overall opinions by various providers supports a determination that Claimant is at MMI with a 10% upper extremity permanent impairment rating.

ORDER

It is therefore ordered that:

1. Division Independent Medical Examination (DIME) physician Dr. Reichhardt's true opinion is that Claimant is at MMI with a PPD rating of 10% upper extremity.
2. Claimant has failed to overcome the DIME physician's opinion on MMI by clear and convincing evidence. Claimant reached MMI on August 28, 2019 and has a 10% right upper extremity impairment.
3. All issues not decided herein are reserved for future determination.

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

DATED: May 6, 2020

/s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

➤ Whether respondent has demonstrated by a preponderance of the evidence that claimant's temporary partial disability benefits should be suspended based on an intervening event?

FINDINGS OF FACT

1. Claimant is employed with employer as an assistant grocery manager. Claimant sustained a compensable work injury on July 1, 2017 when she was pushing a bookshelf and felt a pop in her right knee. Claimant sustained a second injury that same day when a co-worker kicked out claimant's right knee causing her knee to buckle.

2. Claimant came under the care of Dr. McClellan for her work injury. Dr. McClellan treated claimant conservatively and provided claimant with work restrictions that included no lifting more than 10 pounds and no walking or standing greater than 2 hours per day as of July 5, 2017.

3. Claimant underwent a magnetic resonance image ("MRI") of the hip and was diagnosed with a labral tear. Claimant subsequently underwent an arthroscopy on October 25, 2017 and the primary finding was synovitis.

4. Claimant provided the work restrictions to employer and was originally taken off of work and provided with temporary total disability benefits beginning July 27, 2017. Employer subsequently provided claimant with modified work within her restrictions, and limited claimant to 30 hours of work per week. As a result of the modified duty, claimant was provided with temporary partial disability ("TPD") benefits in the amount of \$166.00 per week (\$232 every two weeks). Respondent transitioned claimant to TPD benefits effective January 15, 2018. The temporary disability benefits paid to claimant are reflected in a general admission of liability ("GAL") dated June 21, 2018 and entered into evidence at hearing.

5. Claimant's work restrictions would periodically change minimally during the time in which she was receiving TPD benefits. As of September 4, 2018, claimant was still limited to no lifting, carrying, pushing or pulling over 10 pounds with limitations on walking and sitting of no more than 3 hours.

6. During this period of time, claimant became pregnant. Claimant also developed the onset of low back pain. A repeat MRI was recommended but claimant testified she could not have the MRI accomplished until after the first trimester of her pregnancy. Claimant testified that once she was past the first trimester of pregnancy where the MRI could be performed safely, the MRI was denied.

7. Claimant applied for family leave from employer on November 8, 2018. The leave claimant elected was related to her pregnancy and offered by employer and not related to her work injury. Claimant testified at hearing that she left work on the advice of her mid wife who told claimant if she wanted to take leave, she could. Claimant testified that the due date for her baby was November 29, 2018.

8. After claimant took leave for her pregnancy, respondent filed a petition to suspend temporary disability benefits on December 6, 2018. Claimant objected to the petition to terminate and respondent sought a hearing on whether employer could terminate claimant's ongoing temporary partial disability benefits.

9. At hearing, respondent argued that the earnings for claimant would have been reduced to \$0 once claimant elected to take leave for the birth of her child, regardless of the work injury. Respondent argued that the leave claimant sought represented an intervening event sufficient to terminate claimant's ongoing receipt of temporary disability benefits as the wage loss was related to the family leave, and not the work injury as of November 8, 2018 when claimant stopped working due to her pregnancy.

10. The ALJ agrees that the basis for the wage loss after November 8, 2018 is related to claimant's maternity leave, and not the work injury. In fact, claimant does not appear to dispute this fact. However, the Colorado Workers' Compensation Act does not provide that temporary disability benefits can be cut off under these circumstances. The Act specifically provides that benefits continue until either claimant is placed at maximum medical improvement ("MMI"), or is released to return to work by a treating physician in a modified duty position, a position is offered to the claimant in writing, and claimant does not return to work.

11. As argued by claimant, claimant's temporary disability benefits would have continued whether she was taking the leave for her pregnancy or not until a statutory cut off for the temporary disability benefits occurred. While there was an interruption in claimant's treatment for her work injury in order for claimant to give birth to her child, the extent to which the interruption delayed claimant reaching MMI is speculation.

12. Insofar as the Act does not allow for TPD benefits to be suspended under the circumstances in this case, respondent's request for an Order suspending receipt of TPD benefits while claimant is on leave is denied.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page*

v. Clark, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2017).

3. Section 8-42-106(2), C.R.S., provides in pertinent part:

Temporary partial disability shall continue until the first occurrence of either of the following: (a) The employee reached maximum medical improvement; or (b)(I) The attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment.

4. While the ALJ agrees that the claimant's total wage loss was related in this case to the election to undergo leave related to claimant's pregnancy and not related to the work injury, the ALJ finds that the Act does not allow for temporary disability benefits to be suspended in this case based on the election of the claimant to take family leave offered by employer.

5. Due to the fact that respondent has failed to establish a statutory basis for the suspension of TPD benefits, the request to suspend benefits is hereby denied.

ORDER

It is therefore ordered:

1. Respondent's request for an Order suspending claimant's TPD benefits due to an intervening event is denied.

2. All matters not determined here are reserved for future determination.

Dated May 7, 2019



Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

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

ISSUES

- I. Whether Respondents overcame Dr. Caroline Gellrick's DIME opinion on whole person impairment by clear and convincing evidence and on scheduled impairment by the preponderance of the evidence.
- II. Whether Claimant proved by a preponderance of the evidence she is entitled to a general award of maintenance medical benefits.
- III. Whether Claimant proved by a preponderance of the evidence she is entitled to reimbursement for out-of-pocket expenses for medical treatment related to the work injury.

FINDINGS OF FACT

1. Claimant is a 41-year-old woman who worked for Employer as a store manager.
2. Claimant sustained an admitted industrial injury to her low back on August 10, 2015 when lifting boxes.
3. On August 11, 2015, Claimant presented to her primary care physician, James Williams, M.D., with complaints of severe low back pain radiating down the left leg. Dr. Williams assess Claimant with back pain and left sciatica, prescribed her medication, and removed Claimant from work.
4. Claimant subsequently underwent a lumbar MRI on September 4, 2015, which revealed a L4-5 large disc extrusion and severe thecal sac narrowing, as well as multilevel mild facet osteoarthritis.
5. Claimant continued to treat with Dr. Williams and continued to report low back and left leg symptoms. She continued on restrictions and medication.
6. April 8, 2016, John Raschbacher, M.D. performed an independent medical examination ("IME") at the request of Respondents. Dr. Raschbacher noted Claimant's September 4, 2015 lumbar MRI showed a large disc extrusion at L4-5. He diagnosed Claimant with lumbar disc disease, herniated disc. Dr. Raschbacher, however, opined that Claimant's subjective complaints were not substantiated by the MRI findings, and her presentation was not physiologic. He felt Claimant had fairly remarkable pain behaviors and noted he was unable to explain her degree of symptomatology and presentation based on the radiographic findings. Dr. Raschbacher recommended Claimant undergo a repeat lumbar MRI and a bilateral lower extremity EMG/NCS.

7. Claimant underwent a repeat lumbar MRI on June 22, 2016, which was compared to the September 4, 2015 MRI. The radiologist's impression was: resolved disc extrusion and central stenosis at L4-5, and unchanged mild lateral recess and foraminal narrowing at L4-5 and right L5-S1.

8. On August 10, 2016, John Hughes, M.D. performed an IME at Claimant's request. On examination, Dr. Hughes noted decreased lumbar range of motion and diffusely diminished sensation in the left lower leg and give-way weakness. His assessment was (1) a lumbar spine sprain/strain with development of an L4-5 disc extrusion, resolved, and (2) persistence of facet joint arthropathy, secondary to the sprain and resolved disc extrusion. He opined that Claimant had not reached maximum medical improvement ("MMI") and recommended a left lower extremity EMG/NCS to assess for radiculopathy. Dr. Hughes offered a provisional combined whole person impairment rating of 19%, consisting of 7% impairment under Table 53 II-C of the AMA Guides and 13% for deficits in lumbar range of motion.

9. The parties went to hearing before ALJ Michelle Jones on the issues of compensability and medical treatment. On October 27, 2016, ALJ Michelle Jones issued an order finding Claimant sustained a compensable injury on August 10, 2015 and that Claimant is entitled to reasonable and necessary medical treatment. Respondents filed a General Admission of Liability on December 2, 2016 admitting for medical benefits for Claimant's low back pursuant to ALJ Jones' order.

10. Claimant testified at the present hearing she had paid for treatment for the work injury out-of-pocket. She testified that after the hearing with ALJ Jones, she submitted her out-of-pocket expenses to Respondents for reimbursement but never recouped those costs. Claimant's Exhibits 15-17 detail some of the out-of-pocket expenses incurred by Claimant, including office visits with Dr. Williams, medications prescribed by Dr. Williams, MRIs. Certain expenses identified in Claimant's Exhibits 15-17 appear to be for testing procedures unrelated to the work injury.

11. Claimant subsequently began treating with Kristin D. Mason, M.D. as her primary authorized treating physician. Claimant first saw Dr. Mason on December 22, 2016. Claimant reported pain varying from a 5-10/10, with current pain a 9/10, and numbness in what Dr. Mason noted conformed to an L5 distribution. On examination, Dr. Mason noted very consistently reduced sensation in the left L5 distribution and diffuse weakness in the left lower extremity but more pronounced for the L5 myotome. The slump test was strongly positive on the left and flexion and extension was quite limited. Dr. Mason's assessment was, in relevant part: (1) status post large disk extrusion L4-5 with some degree of resolution but ongoing left L5 radiculopathy and significant axial back pain, and (2) depression with prominent irritability. She prescribed Claimant medication, and referred Claimant for flexion/extension x-rays, an EMG/NCS, and a psychologic evaluation with Lupe Ledezma, Ph.D.

12. Claimant underwent an EMG/NCS of her left lower extremity on January 19, 2017, conducted by Dr. Mason. The EMG/NCS revealed mild, chronic left L5 radiculopathy.

13. Claimant presented to Dr. Ledezma on January 20, 2017 for initial evaluation. Dr. Ledezma noted Claimant had strong physiological and psychological reactions to pain with strong psychological overlay to her presentation. She further noted there was no indication Claimant was intentionally trying to exaggerate or distort her symptoms. Dr. Ledezma diagnosed Claimant with depression and recommended Claimant begin psychotherapy and anti-depressant medication. Claimant continued treating with Dr. Ledezma until at least May 21, 2018.

14. At a follow-up evaluation with Dr. Mason on February 9, 2017, Dr. Mason noted flexion/extension x-rays had been obtained and did not show any instability. Dr. Mason noted that the disc extrusion had receded, but Claimant continued to experience ongoing radiculopathy. Claimant continued treating with Dr. Mason, who prescribed medications and physical therapy, which she noted in various medical notes were, at various times, not authorized by Respondents. On July 27, 2017, Dr. Mason referred Claimant to Nicholas Olsen, M.D. for evaluation for possible injections.

15. Claimant presented to Dr. Olsen on August 10, 2017. Dr. Olsen reviewed the flexion/extension x-rays and noted that the x-rays did not show evidence of instability, but did show degenerative facet arthropathy, most marked at L4-5 and L5-S1. Dr. Olsen opined that Claimant potentially had two pain generators both of a facetogenic component as well as possible discogenic component. He proposed Claimant undergo a lumbar facet injection at bilateral L4-5 and L5-S1 levels, which Claimant underwent on September 26, 2017.

16. Claimant returned to Dr. Olsen on October 2, 2017 reporting approximately three days of pain relief after the injection with pain levels subsequently returning to 8/10. Dr. Olsen reviewed the lumbar MRIs and noted it was clear the disc extrusion resolved as of the June 22, 2016 MRI study. He further noted facet arthropathy at bilateral L4-5 and L5-S1. He opined Claimant benefitted "enough" from the facet injection to warrant a possible rhizotomy, but first recommended Claimant undergo medial branch blocks.

17. Dr. Raschbacher performed a review of additional medical records and issued a report on October 10, 2017. He opined that there was no documentation on physical examination of anything that would be suggestive of a facet origin. He noted Claimant's L4-5 extrusion had resolved, Claimant's functional status had not improved, and thus opined that no further treatment, including facet injections, was likely to change her status. Dr. Raschbacher opined Claimant had likely reached MMI.

18. On January 19, 2018, Dr. Raschbacher performed an additional medical record review. He opined that medial branch blocks were not reasonable, necessary or related to Claimant's August 10, 2015 work injury. He noted that Claimant's presumptive pain

generator was a large disc extrusion, which had resolved. Dr. Raschbacher opined that facet joint was not mentioned early on in the course of treatment and evaluation and Claimant did not have any clinical findings that were clearly suggestive of facet joint issues.

19. Respondents denied the request for medial branch blocks. At a follow-up evaluation by Dr. Mason on January 11, 2018, Dr. Mason noted Claimant's progression had been slow because it had been very difficult to get any treatment authorized by Respondents. She opined Claimant had a diagnostic response to the intra-articular facet injections and agreed Claimant was a candidate for medial branch blocks.

20. Claimant continued to see Dr. Mason, who continued to note positive slump test on the left, limited range of motion for extension and flexion, continued weakness of the left EHL, and sensory loss in the left L5 distribution.

21. Claimant eventually underwent a 24-month DIME, performed by X.J. Ethan Moses, M.D. on June 27, 2018. On physical examination, Dr. Moses noted diminished sensation to light touch in the entire left lower extremity and limited lumbar range of motion. His assessment was: (1) low back sprain with residual facetogenic back pain, (2) lumbar disc herniation, resolved on MRI, and (3) chronic L5 radiculopathy. Dr. Moses opined Claimant was not at MMI and required additional physical therapy, and psychotherapeutic services. He further opined that Claimant was a candidate for medical branch blocks and, if those blocks were diagnostic, a rhizotomy. He noted that Claimant had a diagnostic response to the bilateral L4-5 and L5-S1 facet injections, his physical exam was indicative of facetogenic pain, as were both of her MRIs. Dr. Moses specifically stated, "Even though the lumbar disc herniation is resolved, the dessication (*sic*) of the disc as a result of the herniation often causes facetogenic back pain. This is a generally accepted principle regarding the origins of facetogenic back pain." (Claimant Exhibit 10, p. 228).

22. Claimant returned to Dr. Mason on July 19, 2018, at which time Dr. Mason referred Claimant for a medial branch blockade, additional physical therapy, and additional sessions with Dr. Ledezma.

23. Claimant underwent the medial branch blockade on August 7, 2018. Claimant reported an increase in pain after the blockade and was determined to have a negative response to the medial branch block.

24. Claimant continued to see Dr. Mason, who continued to, on physical examination, note ongoing left L5 sensory dysfunction and limitations of lumbar range of motion. Dr. Mason ultimately placed Claimant at MMI at her January 24, 2019 evaluation. On physical examination, Dr. Mason again noted some L5 sensory deficit and limitations of range of motion. Her final assessment was: History of large L4-5 extrusion with chronic left L5 radiculopathy despite remission of the disc, and depression. As maintenance treatment, Dr. Mason recommended medication, further

sessions with Dr. Ledezma, a pool pass, and a functional capacity evaluation ("FCE"). She recommended 10-pound lifting restrictions.

25. On March 28, 2019, Claimant attended a maintenance evaluation with Dr. Mason. Claimant reported increased leg symptoms. Dr. Mason noted that, although Claimant's disc herniation had receded, Claimant was likely left with some nerve damage to the L5 nerve root. On examination Dr. Mason noted Claimant continued to have mild weakness in the L5 myotome, as well as sensory deficit, and a positive slump test on the left. Range of motion remained limited.

26. Caroline Gellrick, M.D. performed a DIME on May 16, 2019. Dr. Gellrick reviewed medical records dating back to August 11, 2015, including the IME reports of Drs. Raschbacher and Hughes, and Dr. Moses' June 27, 2018 DIME. She included a comprehensive review of the medical records noting findings, diagnoses and course of treatment. She noted Dr. Raschbacher, in his initial IME report, found Claimant's pain behaviors fairly remarkable, which he found precluded the use of subjective complaints as a very good basis upon which to proceed. Claimant reported continued low back and left leg pain, as well as arm pain she indicated began three months prior. Claimant rated her pain at 9/10, which Dr. Gellrick noted did not conform to Claimant's activity when observed in the waiting room or exam room. On physical examination, Dr. Gellrick noted neurosensory decreased in the left lower extremity as compared to the right and 4/5 strength testing on the left compared to 5/5 on the right. Lumbar range of motion, measured using dual inclinometers, was limited. Dr. Gellrick noted she found the lumbar range of motion measurements valid.

27. Dr. Gellrick listed the following diagnoses, in relevant part:

S/P Work Comp injury 08/10/15 resulting in:

1. Lumbar strain, disc protrusion L4-5, severe thecal narrowing with multilevel facet OA on MRI 09/04/14.

A. Facetogenic lumbar pain with positive Spurling's today on exam.

B. Repeat lumbar MRI 06/22/16, resolved disc extrusion with mild lateral recess and foraminal narrowing L4-5 and L5-S1.

C. EMG/NCS; chronic L5 radiculopathy left.

D. S/P MBB nondiagnostic.

E. Lack of authorization for finishing up physical therapy, pool therapy, FCE recommended with Dr. Olsen and Dr. Moses.

28. Dr. Gellrick also diagnosed Claimant with Reactive Adjustment Disorder manifest as depression, noting further counseling with Dr. Ledezma was needed as maintenance. She agreed Claimant reached MMI as of January 24, 2019.

29. Claimant Dr. Gellrick assigned a final combined 18% whole person impairment rating. Dr. Gellrick assigned 7% whole person impairment under Table 53 II-C of the AMA Guides for the original disc herniation at L4-5 and 9% whole person impairment for deficits in lumbar range of motion. She further assigned a 10% lower extremity impairment for neurologic L5 radiculopathy, which converts to 4% whole person impairment.

30. Dr. Gellrick did not assign any psychiatric impairment, opining that Claimant reported being much improved as of the date of her examination. She noted that, with maintenance psychological treatment, Claimant would have no residual psychiatric impairment rating. Dr. Gellrick opined that Claimant's arm complaints, which developed three months prior to her examination, were unrelated to Claimant's original work injury.

31. Dr. Gellrick recommended extensive maintenance care for Claimant, including at least another 6 to 8 sessions of pool therapy and land therapy, maintenance medication for six to 12 months, and another trial of facet injections and repeat radiology studies, if deemed necessary by Drs. Mason and Olsen.

32. Respondents filed an Application for Hearing seeking to overcome Dr. Gellrick's opinion on impairment, as well as the need for medical maintenance treatment. Claimant filed a Response to Application for Hearing seeking to uphold the DIME opinion of Dr. Gellrick, reimbursement for out-of-pocket expenses, interest owed on payments due, and medical maintenance benefits.

33. Claimant returned to Dr. Mason for follow-up maintenance appointments on June 27, 2019 and October 14, 2019. Dr. Mason noted she reviewed Dr. Gellrick's DIME report. Dr. Mason did not note any perceived issues or disagreements with Dr. Gellrick's report. She referred Claimant for further aquatic therapy based on Dr. Gellrick's recommendations.

34. On September 17, 2019, Dr. Raschbacher performed a second IME at the request of Respondents. Dr. Raschbacher reviewed additional medical records, including Dr. Gellrick's DIME report. On examination, Dr. Raschbacher noted give-way weakness at the left knee and poor effort with manual muscle testing. Claimant reported being circumferentially numb at the left lower extremity at the thigh and the leg. Range of motion was limited. Dr. Raschbacher opined Claimant's circumferential numbness and limited range of motion were nonphysiologic and Claimant presented with significant pain behaviors. He concluded that Claimant had a herniated disc with complete resolution, and that her current diagnosis is low back pain and left lower extremity pain.

35. Dr. Raschbacher further opined that Dr. Gellrick erred by assigning impairment on the basis of Claimant's subjective complaints without substantial objective support. He noted Claimant has had the same pain complaints for the past four years and Claimant was likely at MMI prior to January 24, 2019. Dr. Raschbacher opined Claimant should not be assigned a rating for range of motion. He noted that he could offer a rating based on Table 53 II-C of the AMA Guides for the prior disc herniation, but that would require six months of symptomatology and we do not know when the disc herniation actually resolved. He opined that he would not offer an impairment rating until such time as a repeat EMG was performed to verify the presence or absence of any nerve root findings.

36. On December 5, 2019, Dr. Mason issued a letter disagreeing with Dr. Raschbacher's prior recommendation for a bilateral lower extremity EMG/NCS. Dr. Mason noted that she is board certified in electrodiagnostic medicine and did not feel there was any clinical indication for a repeat EMG/NCS. She explained that EMGs are only 70% sensitive for radiculopathy and tends to be less helpful in patients that have only sensory symptoms. She further explained that Claimant's disc had receded, so there was no clinical utility in conducting another EMG.

37. On December 18, 2019, Gary Zuehlsdorff, M.D. performed an IME at Claimant's request. On examination, Dr. Zuehlsdorff noted limited range of motion, no give away weakness, and 4/5 strength in the left lower extremity compared to the right. Dr. Zuehlsdorff's impression was, in relevant part, "low back pain syndrome with left lower leg probable radiculopathy consistent with most likely the L5 distribution with symptomatic pain, dysesthesias, and slight weakness by history and exam." He agreed Claimant reached MMI on January 24, 2019.

38. Dr. Zuehlsdorff agreed with Dr. Gellrick's assignment of impairment for the low back and left lower extremity radiculopathy, but opined he would add a rating for psychiatric impairment, as Claimant reported to him that her psychiatric condition had worsened. Dr. Zuehlsdorff assigned 11% whole person impairment for loss of range of motion, 7% whole person impairment under Table 53 II-C, 5% lower extremity neurologic impairment (which converts to 2% whole person), and 3% psychiatric impairment, for a total combined whole person impairment rating of 21%.

39. In support of Dr. Gellrick's opinion, Dr. Zuehlsdorff noted that multiple providers, IMEs and responses to treatments had been concurrent with the diagnoses as documented by Dr. Gellrick. He opined that, while Dr. Gellrick did find some nonphysiologic findings, "she did not utilize that as a final determinate of ultimate causality or applicability." He further noted he did not find such pain behaviors or subjective/objective non-correlates in his review. As maintenance treatment, Dr. Zuehlsdorff recommended follow-up evaluations with Drs. Mason and Ledezma, consideration of further pool therapy and land therapy, and a gym pass.

40. Dr. Raschbacher testified by evidentiary deposition as a Level II accredited expert in occupational medicine. Dr. Raschbacher testified that the pain generator, a

herniated disc, had resolved; thus, Claimant's continued and essentially unchanged subjective complaints did not make sense. Dr. Raschbacher testified that there was nothing pushing on Claimant's nerve root to cause Claimant's alleged left lower extremity symptoms. He explained that Claimant's reported circumferential numbness was non-dermatomal and not consistent with a radiculopathy, or nerve root at the spine. Dr. Raschbacher testified that he noted pain behaviors on his most recent physical examination of Claimant. He explained that Claimant's range of motion could not be explained with objective findings and was not consistent with anatomic disruption. There was no medical reason that Claimant would have very limited range of motion, particularly with the herniated disc resolved. He testified that, on straight leg testing, Claimant complained of pain with her legs barely moving, for which he explained there was no medical reason. Dr. Raschbacher opined that Claimant's physical exam findings were abnormal without a medical or objective explanation, particularly in light of MRI findings establishing the resolution of the disc herniation.

41. Dr. Raschbacher testified to various perceived issues with Dr. Gellrick's DIME report. He testified that Dr. Gellrick diagnosed Claimant with facetogenic lumbar pain when there are no facts to support that diagnosis, and that Dr. Gellrick diagnosed Claimant with a disc protrusion and lumbar strain as if those diagnoses were still present. He explained that Dr. Gellrick diagnosed Claimant with chronic L5 radiculopathy when there was no medical basis for radiculopathy to be present at the time.

42. Dr. Raschbacher opined that Dr. Gellrick erred by assigning an impairment rating based on subjective complaints without objective findings. He explained that the AMA Guides and Impairment Rating Tips provide that an impairment rating should be based on objective findings that correlate with subjective complaints. Dr. Raschbacher testified that, although Dr. Gellrick's range of motion measurements were valid, they did not make sense medically, considering the pain generator had resolved. He testified that this reasoning also applied to Claimant's lower extremity complaints. He explained that, although Claimant's initial radicular symptoms were caused by the herniated disc, the herniated disc had since resolved. Dr. Raschbacher further took issue with Dr. Gellrick noting that Claimant's subjective pain rating did not conform with Claimant's activity observed in the waiting room, yet nonetheless assigning an impairment rating based on subjective complaints.

43. Dr. Raschbacher testified that Claimant should receive a 7% whole person impairment rating under Table 53 II-C of the AMA Guides for the nonsurgical, symptomatic disc. He opined Claimant did not sustain any range of motion or psychological impairment. He recommended a repeat EMG of Claimant's lumbar spine to determine whether there was any nerve root impingement or to determine if a different level of the spine was involved.

44. Dr. Raschbacher further testified that Claimant did not require medical maintenance treatment nor restrictions. He reiterated that Claimant continues to report essentially the same level of pain despite the original pathology resolving, undergoing

treatment, and the passage of time. He opined that Claimant could receive significant medical resources, including pool therapy, and her subjective complaints would not likely change.

45. Dr. Zuehlsdorff testified at hearing on behalf of Claimant as a Level II accredited expert in internal medicine and occupational medicine. Dr. Zuehlsdorff testified consistent with his IME report. He explained that, as a result of the work injury, Claimant had a disc extrusion, lumbar sprain, and aggravated facet syndrome. Dr. Zuehlsdorff opined that Claimant's L5 radiculopathy is related to the work injury. He testified that the EMG evidenced mild, chronic left L5 radiculopathy. Dr. Zuehlsdorff explained that, although the disc extrusion receded, Claimant continues to experience the effects of the prior disc protrusion. He testified that, even in the absence of disc protrusion, chronic damage could result in numbness. He further testified that there remains an objective basis for Claimant's limited range of motion even in light of the resolved disc extrusion.

46. Dr. Zuehlsdorff continued to opine Claimant sustained a 21% combined whole person impairment, as he detailed in his IME report. Regarding alleged pain behaviors, Dr. Zuehlsdorff noted pain behaviors do not necessarily invalidate a physical exam, and noted he did not observe any pain behaviors on his examination of Claimant. He opined there were no issues with Dr. Gellrick's range of motion measurements or conclusions, and that the impairment ratings and treatment plans Drs. Hughes, Gellrick and Moses were appropriate.

47. Claimant credibly testified at hearing. She testified that her pain ratings have been fairly consistent for last three years. She further testified that treatment did assist with her symptoms, although treatment was not consistent due to delays in authorization or denials of treatment.

48. The ALJ finds the DIME opinion of Dr. Gellrick, as well as the opinions of Drs. Mason, Olsen, Hughes, Moses and Zuehlsdorff, more credible and persuasive than the opinion of Dr. Raschbacher.

49. Respondents failed to prove it is highly probable Dr. Gellrick's DIME opinion on whole person impairment is incorrect.

50. Respondents failed to prove it is more probable than not Dr. Gellrick's DIME opinion on scheduled impairment is incorrect.

51. Claimant proved by a preponderance of the evidence she is entitled to a general award of maintenance medical benefits.

52. Claimant proved by a preponderance of the evidence she is entitled to reimbursement for reasonable, necessary and related out-of-pocket medical expenses.

53. Evidence and inferences contrary to these findings were not credible and persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Overcoming the DIME on Permanent Impairment

The finding of a DIME physician concerning the claimant's non-scheduled medical impairment rating shall be overcome only by clear and convincing evidence. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*,

914 P.2d 411 (Colo. App. 1995); *Lafont v. WellBridge D/B/A Colorado Athletic Club* W.C. No. 4-914-378-02 (ICAO, June 25, 2015).

As a matter of diagnosis the assessment of permanent medical impairment inherently requires the DIME physician to identify and evaluate all losses that result from the injury. *Mosley v. Industrial Claim Appeals Office*, 78 P.3d 1150 (Colo. App. 2003); *Sharpton v. Prospect Airport Services* W.C. No. 4-941-721-03 (ICAO, Nov. 29, 2016). Consequently, a DIME physician's finding that a causal relationship does or does not exist between an injury and a particular impairment must be overcome by clear and convincing evidence. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998); *Watier-Yerkman v. Da Vita, Inc.* W.C. No. 4-882-517-02 (ICAO Jan. 12, 2015); Compare *In re Yeutter*, 2019 COA 53 ¶ 21 (determining that a DIME physician's opinion carries presumptive weight only with respect to MMI and impairment). The rating physician's determination concerning the cause or causes of impairment should include an assessment of data collected during a clinical evaluation and the mere existence of impairment does not create a presumption of contribution by a factor with which the impairment is often associated. *Wackenhut Corp. v. Industrial Claim Appeals Office*, 17 P.3d 202 (Colo. App. 2000).

The questions of whether the DIME physician properly applied the AMA Guides, and ultimately whether the rating was overcome by clear and convincing evidence present questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office*, 17 P.3d 202 (Colo. App. 2000); *Paredes v. ABM Industries* W.C. No. 4-862-312-02 (ICAO, Apr. 14, 2014). A mere difference of opinion between physicians does not necessarily rise to the level of clear and convincing evidence. See *Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-36 (ICAO, Mar. 22, 2000); *Licata v. Wholly Cannoli Café* W.C. No. 4-863-323-04 (ICAO, July 26, 2016).

The increased burden of proof required by the DIME procedures is not applicable to scheduled injuries. Section 8-42-107(8)(a), C.R.S. states that "when an injury results in permanent medical impairment not set forth in the schedule in subsection (2) of this section, the employee shall be limited to medical impairment benefits calculated as provided in this subsection (8)." Therefore, the procedures set forth in §8-42-107(8)(c), C.R.S., which provide that the DIME findings must be overcome by clear and convincing evidence, are applicable only to non-scheduled injuries. The court of appeals has explained that scheduled and non-scheduled impairments are treated differently under the Act for purposes of determining permanent disability benefits. Specifically, the procedures of § 8-42-107(8)(c), C.R.S. only apply to non-scheduled impairments. *Delaney v. Industrial Claim Appeals Office*, 30 P.3d 691, 693 (Colo. App. 2000); *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998); *Gagnon v. Westward Dough Operating CO. D/B/A Krispy Kreme* W.C. No. 4-971-646-03 (ICAO, Feb. 6, 2018).

A party disputing the impairment rating of a scheduled injury bears the burden of proof by a preponderance of the evidence. *Maestas v. American Furniture Warehouse*,

W.C. No. 4-662-369 (June 5, 2007); *Ortiz v. Ingersoll-Rand Co.*, W.C. No. 4-981-218-04 (January 25, 2018); *Gagnon v. Westward Dough Operating CO. D/B/A Krispy Kreme*, *supra*. A “preponderance of the evidence” is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark*, 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.*, 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.*, W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. Also see *Ortiz v. Principi*, 274 F.3d 1361 (D.C. Cir. 2001). “Preponderance” means “the existence of a contested fact is more probable than its nonexistence.” *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984).

As found, Respondents failed to overcome Dr. Gellrick’s DIME opinion on whole person impairment and scheduled impairment. Respondents argue Dr. Gellrick erred by solely assigning impairment based on Claimant’s subjective complaints and nonphysiologic findings, with no objective medical basis. Respondents rely on Dr. Raschbacher’s opinion, which is essentially based on the premise that Claimant’s disc extrusion was the sole pain generator and, thus, resolution of the herniated disc should have resulted in resolution of all symptoms. It is undisputed Claimant’s herniated disc resolved, as evidenced by the June 22, 2016 MRI. This was clearly noted by each provider and IME physician, including Dr. Gellrick. Dr. Gellrick, however, determined that the work injury resulted in additional diagnoses, including facetogenic lumbar pain and chronic L5 radiculopathy.

While Dr. Raschbacher opined there is no factual basis for Dr. Gellrick’s diagnosis of work-related facetogenic pain, the medical records indicate otherwise. Dr. Hughes diagnosed Claimant with persistent facet joint arthropathy secondary to the lumbar sprain and disc extrusion. Dr. Olsen opined Claimant potentially had two pain generators – facetogenic and discogenic – for which he recommended facet injections and the results of which were considered diagnostic. Dr. Moses opined the work injury resulted in a low back strain with residual facetogenic pain, as indicated on physical exam and MRI. He included a clear explanation regarding the casual link between the receded herniated disc and Claimant’s facetogenic pain, noting it is a generally accepted principle that desiccation of a herniated disc often causes facetogenic back pain. Thus, Dr. Gellrick’s diagnosis of facetogenic lumbar pain is supported by the medical records and opinions of multiple other physicians. Moreover, although the disc extrusion has resolved, there remains an objective basis for Claimant’s limited range of motion, as testified to by Dr. Zuehlsdorff.

Respondents further argue there is no objective medical basis for Claimant’s lower extremity complaints and Dr. Gellrick’s assignment of a scheduled impairment rating. In support of this contention, Dr. Raschbacher reiterated the fact that the disc extrusion resolved and nothing is pressing on Claimant’s nerve. Again, the medical records and opinions of Drs. Mason, Hughes, Moses and Zuehlsdorff support Dr. Gellrick’s lower extremity diagnosis and impairment. Subsequent to the resolution of the disc herniation, documented exam findings consistently note diminished sensation in an L5 distribution, weakness and numbness. The January 19, 2017 EMG provided objective evidence of mild, chronic L5 radiculopathy. Dr. Mason specifically noted that, despite the rescission of the extruded disc, Claimant likely sustained nerve damage to

the L5 nerve root and continued to experience ongoing radiculopathy. Drs. Moses and Zuehlsdorff agreed Claimant suffered chronic L5 radiculopathy resulting from the work injury. Dr. Zuehlsdorff credibly testified at hearing that, although the extrusion receded, the herniation did result in chronic damage to the nerve, which could serve as a basis for Claimant's symptoms.

Although Dr. Gellrick noted, but did not discuss, the difference in Claimant's reported pain levels and observed presentation at her examination, there is substantial credible and persuasive evidence establishing she did not solely rely on Claimant's subjective complaints in reaching her conclusions. Having performed a comprehensive medical records review, which included the IME reports of Dr. Raschbacher, Dr. Gellrick was aware of Dr. Raschbacher's perceived concerns regarding pain behaviors and nonphysiologic findings. She nonetheless determined Claimant sustained permanent impairment, indicating Dr. Gellrick deemed there to be adequate objective evidence to do so per the AMA Guides. Dr. Gellrick's DIME report supports her analysis and conclusions.

Respondents do not allege issues with the validity of Dr. Gellrick's measurements or her calculations. The impairment rating issued by Dr. Gellrick are in line with those assessed by Drs. Hughes and Zuehlsdorff. Although Dr. Raschbacher opined Claimant should not receive a rating for lumbar range of motion deficits or lower extremity symptoms, he did acknowledge Claimant meets the criteria for an impairment rating under Table 53 II-C of the AMA Guides. As discussed above, the contention that there is no objective medical basis supporting Dr. Gellrick's opinion is unpersuasive in light of consistently noted exam findings, EMG results, and the corroborating opinions of Drs. Mason, Olsen, Hughes, Moses and Zuehlsdorff. To the extent Dr. Raschbacher disagrees with the impairment rating assessed by Dr. Gellrick, such disagreement is a mere difference of opinion. Based on the totality of the credible and persuasive evidence, Respondents failed to prove, both by a preponderance of the evidence and by clear and convincing evidence, that Dr. Gellrick's erred in her DIME opinion on impairment.

Medical Maintenance Benefits

The need for medical treatment may extend beyond the point of MMI where claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Hanna v. Print Expeditors Inc.*, 77 P.3d 863, 865 (Colo. App. 2003); *Hobirk v. Colorado Springs School District #11*, W.C. No. 4-835-556-01 (ICAO, Nov. 15, 2012). An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that the claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1999); *Hastings v. Excel Electric*, W. C. No. 4-471-818 (ICAO, May 16, 2002). The claimant must prove entitlement to *Grover* medical benefits by a preponderance of the evidence. *Lerner v. Wal-Mart Stores, Inc.*, 865 P.2d 915 (Colo. App. 1993); *Mitchem v. Donut Haus*, W.C. No. 4-785-078-03 (ICAO, Dec. 28, 2015).

An award of *Grover* medical benefits should be general in nature. *Hanna v. Print Expeditors Inc.*, 77 P.3d 863 (Colo. App. 2003); *Anderson v. SOS Staffing Services*, W.C. No. 4-543-730, (ICAO, July 14, 2006). A DIME physician's opinion on the need for medical maintenance benefits is entitled to no special weight. *Yeutter v. Industrial Claim Appeals Office and CBW Automation, Inc.*, No. 18CA0498 (Colo. App. 4-11-19).

As found, Claimant proved it is more likely than not she is entitled to an award of maintenance medical benefits. Claimant sustained permanent impairment and continues to experience back and lower extremity symptoms as a result of the work injury. Dr. Gellrick recommended extensive maintenance care of multiple modalities. While Dr. Gellrick's DIME opinion has no presumptive weight on the issue of maintenance medical treatment, the ALJ considers Dr. Gellrick's opinion among the totality of the evidence. Claimant's ATP, Dr. Mason, also recommended maintenance medical treatment for Claimant, as did Dr. Zuehlsdorff. The totality of the credible and persuasive evidence establishes future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of Claimant's condition. Respondents retain the right to challenge the compensability, reasonableness, and necessity of specific maintenance treatments. *Hanna v. Print Expeditors Inc.*, 77 P.3d 863 (Colo. App. 2003); *Oldani v. Hartford Financial Services*, W.C. No. 4-614-319-07, (ICAO, Mar. 9, 2015).

Reimbursement of Medical Expenses

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School District #11*, W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012).

Sections 8-42-101(6), C.R.S. provides:

(a) If an employer receives notice of injury and the employer or, if insured, the employer's insurance carrier, after notice of the injury, fails to furnish reasonable and necessary medical treatment to the injured worker for a claim that is admitted or found to be compensable, the employer or carrier shall reimburse the claimant, or any insurer or governmental program that pays for related medical treatment, for the costs of reasonable and necessary treatment that was provided. An employer, insurer, carrier, or provider may not recover the cost of care from a claimant where the employer or carrier has furnished medical treatment except in the case of fraud.

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

employer's insurance carrier, shall reimburse the claimant for the full amount paid. The employer or carrier is entitled to reimbursement from the medical providers for the amount in excess of the amount specified in the worker's compensation fee schedule.

WCRP Rule 16-11(F) provides,

An injured worker shall never be required to directly pay for admitted or ordered medical benefits covered under the Workers' Compensation Act. In the event the injured worker has directly paid for medical services that are then admitted or ordered under the Workers' Compensation Act, the payer shall reimburse the injured worker for the amounts actually paid for authorized services within 30 days after receipt of the bill. If the actual costs exceed the maximum fee allowed by the Medical Fee Schedule, the payer may seek a refund from the medical provider for the difference between the amount charged to the injured worker and the maximum fee. Each request for a refund shall indicate the service provided and the date of service(s) involved.

Claimant has proven by a preponderance of the evidence she is entitled to reimbursement for out-of-pocket medical expenses paid related to the work injury. ALJ Jones found Claimant sustained a compensable injury and was entitled to reasonable, necessary and related medical treatment. Respondents filed a GAL pursuant to ALJ Jones' order. Drs. Mason, Olsen, Moses, Hughes, Gellrick and Zuehlsdorff have opined Claimant suffered low back and lower extremity symptoms as a result of the work injury. Claimant credibly testified she paid for treatment related to the work injury out-of-pocket. Such expenses include, but are not limited to, medications, evaluations and imaging studies, which were reasonable, necessary and related to the work injury.

ORDER

1. Respondents failed to overcome Dr. Gellrick's DIME opinion on whole person and scheduled impairment. Respondents shall pay permanent partial disability benefits based upon the medical impairment rating issued by Dr. Gellrick.
2. Respondents shall reimburse Claimant for reasonable and necessary out-of-pocket expense paid by Claimant related to the work injury.
3. Respondents shall pay for reasonable, necessary and related maintenance medical treatment.
4. The Insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.
5. All matters not determined herein are reserved for future determination.

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

DATED: May 11, 2020

A handwritten signature in black ink, appearing to read 'Kara Cayce', written over a horizontal line.

Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

➤ Whether claimant has proven by a preponderance of the evidence that the sacroiliac ("SI") joint fusion surgery recommended by Dr. Clifford is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury?

FINDINGS OF FACT

1. Claimant was employed with employer as a cosmetology instructor. Claimant sustained an admitted injury with employer on May 22, 2018 when she slipped on water and fell on to her right side, landing on her right arm, right hip and low back.

2. Claimant was referred to WorkPartners for medical treatment by employer. Claimant was initially examined by Physicians' Assistant ("PA") Herrera on May 22, 2018. Claimant reported a consistent accident history with complaints of pain located in the lumbar spine area that was constant. PA Herrera also noted pain in to the right hip and right ankle. PA Herrera noted a prior accident history that included a significant car accident about 12 years ago that a C2 fracture, sternum fracture, rib fracture and right ankle fracture. PA Herrera diagnosed claimant with low back pain, pain in the right hip, pain in the right ankle and joints of the right foot and pain in the thoracic spine. PA Herrera opined that claimant had exacerbated her right lower back and hip injury, but did not suspect an acute fracture or disc herniation.

3. Claimant returned to PA Herrera on June 1, 2018. Claimant reported that her neck was doing better, but her back was still giving her some problems with stiffness and pain with prolonged sitting and standing. PA Herrera provided claimant with some stretches and instructed her to return in 2 weeks.

4. Claimant was next evaluated by PA Herrera on June 18, 2018. Claimant reported an increase in her low back pain after standing on the floor for greater than 2 hours. Claimant reported that with certain movements like bending, she will feel a shocking pain in the middle of her lower back. PA Herrera noted that claimant had been treating with her primary care physician for low back pain for the past six years. PA Herrera prescribed claimant Celebrex and referred claimant for physical therapy.

5. Claimant's prior history of low back and hip pain included treatment with Dr. Rodriguez. Claimant was prescribed oxycodone for her low back pain in 2015 along with an epidural steroid injection ("ESI"). Claimant had x-rays of the low back in 2017. Claimant was examined by Dr. Rodriguez on May 19, 2018 with reports for low back pain with discomfort most prominent in the mid lumbar spine.

6. Claimant returned to PA Herrera on July 17, 2018 with complaints of increased symptoms in her lower back. PA Herrera noted claimant had not yet begun

physical therapy. Claimant eventually began her physical therapy on July 23, 2018. The therapist noted claimant was complaining of high levels of central low back pain.

7. Claimant again returned to PA Herrera on August 14, 2018. Claimant reported to PA Herrera that she had some improvement in her daytime pain with the use of Celebrex. PA Herrera noted that claimant had a high amount of degenerative changes in her lumbar spine as noted on the x-ray at the L5-S1 level. PA Herrera recommended claimant undergo a magnetic resonance image ("MRI") of the lumbar spine.

8. Claimant was examined by Dr. Fay with WorkPartners on August 31, 2018. Dr. Fay noted claimant did not have sciatic notch tenderness bilaterally. Dr. Fay noted claimant did have tenderness over her right SI joint. Dr. Fay referred claimant for an MRI of the lumbar spine.

9. The MRI was performed on September 7, 2018. The MRI demonstrated severe disc space height loss with minimal spinal canal narrowing second to a disc bulge and mild to moderate right and moderate left neural foraminal narrowing secondary to facet arthropathy at the L5-S1 level.

10. Claimant returned to PA Herrera on September 11, 2018. PA Herrera reviewed the results of the MRI and noted no acute findings. PA Herrera recommended claimant continue the Celebrex and physical therapy. Claimant again returned to PA Herrera on October 4, 2018. Claimant reported her back pain was a little worse with the weather changes. PA Herrera noted claimant was not completing the physical therapy and opined that claimant was approaching maximum medical improvement ("MMI").

11. Claimant was examined by Dr. Fay on November 1, 2018. Claimant reported that she had increased symptoms and some days she could not get out of bed. Dr. Fay recommended claimant be evaluated by Dr. Lewis for pain management.

12. Claimant was examined by Dr. Lewis on December 5, 2018. Dr. Lewis noted claimant had advanced degenerative changes at L5-S1 and recommended a right L4-5 epidural steroid injection along with the left L5-S1 epidural steroid injection. Claimant underwent the right sided injection on January 10, 2019. Claimant reported to Dr. Fay on January 14, 2019 that the injection resolved her right leg pain with 99% improvement. By January 17, 2019, claimant was reporting improvement of 60% of her pain.

13. Claimant underwent the left sided injection on January 29, 2019.

14. Claimant returned to Dr. Fay on February 4, 2019 and reported 50% improvement with the recent injections. Dr. Fay noted that the injections had improved claimant's pain significantly and recommended claimant discuss a possible rhizotomy. Dr. Fay recommended chiropractic visits for claimant's somatic dysfunction.

15. Claimant returned to Dr. Fay on March 4, 2019. Dr. Fay noted that claimant reported significant improvement following the injections, but not for long. Dr. Fay referred claimant to Dr. Tice for a surgical consultation.

16. Claimant was examined by PA Scruton in Dr. Tice's office on April 2, 2019. PA Scruton noted claimant reported a history of a prior motor vehicle accident in 2006. Claimant reported a history of chiefly right sided low back pain that radiated down the posterolateral aspect of the right lower extremity but not past the knee. PA Scruton recommended diagnostic injection of the right SI joint, potentially with steroid for therapeutic effect. PA Scruton further recommended considering an electromyogram and nerve conduction velocity (EMG/NCV) study of the lower extremity and a sacroiliac stabilizing belt if there was a diagnostically positive injection. PA Scruton also recommended considering a radiofrequency ablation neurotomy if claimant did not receive therapeutic effect with the steroid injection or SI belt.

17. Claimant returned to Dr. Lewis for a right SI joint injection on April 16, 2019. Claimant reported to Dr. Fay on April 17, 2019 and reported that the injection completely resolved her pain for about 8 hours, before the pain gradually returned. Dr. Fay referred claimant to Dr. Carris for treatment of her adjustment disorder and recommended that claimant follow up with Dr. Clifford and/or Dr. Tice.

18. Claimant returned to PA Scruton on April 23, 2019. PA Scruton noted claimant's report of having 100% pain relief for 6-7 hours after the injection. Claimant also reported that she may be getting worse over time. PA Scruton noted that claimant had not experienced a therapeutic result with the intraarticular steroid injection and spoke with claimant about trying the SI belt as a form of conservative treatment. PA Scruton noted that if claimant did not improve with the SI belt, he would recommend radiofrequency ablation neurotomy.

19. Respondents obtained a Physician Advisor report from Dr. McCranie on May 2, 2019 that recommended denying the radiofrequency ablation procedure due to the fact that medial branch blocks had not yet been performed.

20. Claimant returned to Dr. Fay on May 8, 2019. Dr. Fay noted the denial of the radiofrequency ablation procedure and recommended claimant follow up with Dr. Lewis. Claimant was referred for additional massage therapy appointments and referred to Dr. Clifford, an orthopedic surgeon, for evaluation and treatment.

21. Respondents obtained an independent medical evaluation ("IME") of claimant with Dr. Bernton on May 14, 2019. Dr. Bernton reviewed claimant's medical records, obtained a medical history and performed a physical examination in connection with his IME. Dr. Bernton noted claimant's prior history of back pain and left hip complaints. Dr. Bernton noted claimant was evaluated three days prior to her work injury with reports of low back pain in the mid lumbar spine. Dr. Bernton opined that claimant's work injury, a slip and fall, would not result in long term or permanent exacerbation of her pre-existing pain levels.

22. Dr. Bernton opined that claimant's examination was consistent with the pain generator being the right SI joint and public symphysis, but opined that this was related to claimant's pre-existing condition, and not her work related slip and fall injury. Dr. Bernton further opined that a SI joint fusion would be not be appropriate treatment or consistent with the medical treatment guidelines. Dr. Bernton instead recommended repeat SI joint injections, medial branch blocks and a possible SI rhizotomy. Dr. Bernton opined that none of these treatments would be related to claimant's work injury, however.

23. PA Scruton evaluated claimant on May 22, 2019. PA Scruton noted claimant's pain response following the injection and reviewed the report from Dr. McCranie. PA Scruton noted that they would request authorization for a right L4 through S3 medial branch block testing and if diagnostically positive, seek authorization for radiofrequency ablation neurotomy.

24. Claimant was examined by Dr. Clifford on June 17, 2019. Dr. Clifford noted claimant reported 100% relief following the injections from Dr. Lewis on January 10, January 29 and April 16, 2019. Dr. Clifford stressed to claimant the importance of weight loss and recommended claimant utilize conservative treatment including core strengthening, stretching, anti-inflammatories and using ice daily. Dr. Clifford mentioned claimant would benefit from undergoing a right SI joint fusion. Dr. Clifford recommended that prior to surgery, claimant should repeat the right SI joint injection for diagnostic purposes. Dr. Clifford noted that he was recommending focusing on the SI joint as he did not believe claimant's pain was associated with levels higher in her lumbar.

25. Claimant underwent a right L4-S3 diagnostic blockade of the innervations to the right SI joints (L4 medial branch, L5 dorsal ramus and the posterior lateral banches of the S1, S2 and S3 foramina on the right) under the auspices of Dr. Lewis on June 18, 2019.

26. Claimant returned to Dr. Fay on June 20, 2019 and reported that the medial branch blocks caused right leg numbness, but claimant could still feel the pain as well. Dr. Fay recommended claimant return to Dr. Clifford for the right SI joint fusion.

27. Claimant returned to PA Scruton on June 27, 2019. PA Scruton reviewed claimant's pain log from after the medical branch block testing and noted at best a peak of 50% improvement in her pain before quickly weaning back. PA Scruton noted that this result was not amenable to a second medial branch block test or radiofrequency ablation neurotomy. PA Scruton recommended a confirmatory diagnostic only injection of her right SI joint.

28. Claimant was examined by PA Herrera on July 8, 2019. PA Herrera noted that claimant's medial branch blocks with Dr. Lewis had not provided her with help for her pain and noted that claimant had discussed with Dr. Clifford an SI joint fusion surgery. PA Herrera noted that fusions of the SI joint were not generally recommended

to treat joint dysfunction, but also noted that there is new technology and advancements/physician training that has been yielding better outcomes.

29. Claimant was examined by Dr. Fay on July 18, 2019. Dr. Fay noted she had reviewed the IME report from Dr. Bernton and concurred with his assessment that claimant was at maximum medical improvement (“MMI”) in October 2018 and that her claimant should be closed. Dr. Fay opined that claimant had not disclosed that she was seeing her primary care physician in Denver and that she was receiving prescriptions from him. Dr. Fay opined that claimant had no work restrictions or permanent impairment as a result of the injury.

30. Claimant returned to Dr. Fay on July 25, 2019. Dr. Fay noted that she had concurred with Dr. Bernton that claimant was at maximum medical improvement (“MMI”) in October 2018. However, after reviewing her notes more carefully, Dr. Fay opined that there was a greater than 50% probability that claimant’s SI joint dysfunction and pain which claimant was experiencing was related to her injury in May 2018. Dr. Fay opined that claimant’s claim should remain open until such time as she is at MMI as related to the SI joint dysfunction.

31. Claimant returned to Dr. Clifford on September 18, 2019. Dr. Clifford noted claimant was unable to get the right SI joint injection as recommended. Dr. Clifford again recommended claimant proceed with the injection and, if successful, claimant would be a candidate for right SI joint fusion. Claimant subsequently underwent the SI joint injection under the auspices of Dr. Clifford on October 9, 2019. Claimant reported 100% relief of back pain following the injection.

32. Claimant returned to Dr. Fay on October 17, 2019. Claimant reported to Dr. Fay that following her SI joint injection, she had 100% pain relief for 3 hours. Dr. Fay again recommended claimant’s case remain open until she is at MMI as related to the SI joint dysfunction.

33. Claimant returned to Dr. Clifford on November 4, 2019. Dr. Clifford reported claimant had 100% back pain relief for 4 hours following her injection. Dr. Clifford recommended that claimant lose weight prior to the surgery, but recommended proceeding with the right SI joint fusion surgery.

34. Claimant returned to Dr. Fay on November 19, 2019. Dr. Fay noted Dr. Clifford was recommending claimant proceed with the fusion and noted that claimant needed to lose an additional 12 pounds prior to the surgery.

35. Dr. Bernton performed an additional medical records review and issued a second IME report dated March 18, 2020. Dr. Bernton reviewed the results of claimant’s medial branch blocks and additional SI joint injections. Dr. Bernton opined that the recommended SI joint fusion was not reasonable medical treatment as it was not recommended by the Colorado Medical Treatment Guidelines. Dr. Bernton again opined that claimant’s right SI joint pain generator was not related to her work injury.

36. Dr. Fay testified at hearing in this matter. Dr. Fay noted that it was her opinion that claimant's SI joint pain and dysfunction was related to her work injury. Dr. Fay testified that while she initially agreed with Dr. Bernton's opinion with regard to claimant being at MMI, she no longer holds this opinion. Dr. Fay further testified that it was her opinion that claimant's SI joint is the primary pain generator. Dr. Fay opined that the SI joint fusion surgery was reasonable medical treatment necessary to cure and relieve the claimant from the effects of her work injury.

37. Dr. Clifford testified at hearing in this matter. Dr. Clifford testified that he was recommending a right SI joint fusion and that the goal of that procedure was to fuse the SI joint. Dr. Clifford testified that he has performed this procedure approximately 40 times and that he has seen improvement in approximately 90% of the surgeries he has performed. Dr. Clifford opined that the problems with the SI joint were related to claimant's May 22, 2018 work injury. Dr. Clifford testified on cross examination that he was not aware of claimant's 2006 motor vehicle accident and did not review the medical records from Dr. Rodriguez.

38. Dr. Bernton testified at hearing in this matter consistent with his IME reports. Dr. Bernton testified that it was his opinion that claimant's occupational injury was not the cause of her pain. Dr. Bernton opined that claimant has chronic lumbar pain that is related to degenerative changes in the lumbar spine. Dr. Bernton testified that claimant had advanced degenerative changes at the L5-S1 level which was likely causing much of claimant's pain.

39. Claimant testified at hearing in this matter. Claimant testified that prior to her work injury, she had lower lumbar symptoms that felt like her lumbar spine was being squeezed. Claimant testified that her symptoms after the work injury were different than her low back symptoms prior to the work injury. Claimant testified she now has pain just right of the tailbone which she described as an aching constant pain, with some groin and buttock pain.

40. The ALJ credits the opinions and testimony of Dr. Fay and Dr. Clifford and finds that claimant has demonstrated that it is more probable than not that the recommended right SI joint fusion surgery recommended by Dr. Clifford is reasonable medical treatment necessary to cure and relieve claimant from the effects of her work injury. The ALJ notes that while claimant had a prior history of low back complaints, the medical records demonstrate that it is more likely true than not that the work injury on May 22, 2018 caused new symptoms related to the SI joint dysfunction that is intended to be addressed by the proposed right SI joint fusion surgery. The ALJ credits the opinions expressed by Dr. Fay and Dr. Clifford in their reports and testimony in reaching this factual finding.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-

102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

3. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; see *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

4. As found, claimant has demonstrated by a preponderance of the evidence that the right SI joint fusion surgery recommended by Dr. Clifford is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury. As found, the opinions expressed by Dr. Fay and Dr. Clifford are determined to be credible and persuasive in reaching this finding of fact.

ORDER

It is therefore ordered that:

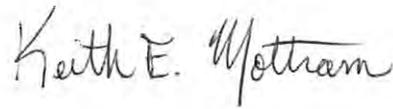
1. Respondents shall pay for the reasonable medical treatment necessary to cure and relieve claimant from the effects of the work injury including the right SI joint fusion surgery recommended by Dr. Clifford, pursuant to the Colorado Medical Fee Schedule.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed

it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: <http://www.colorado.gov/dpa/oac/forms-WC.htm>. . **In addition, it is recommended that you send a copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.**

DATED: May 12, 2020



Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-119-301-001**

ISSUES

- Did Claimant prove he suffered a compensable injury arising out of and in the course and scope of his employment on September 7, 2019?
- Did Claimant prove entitlement to reasonably necessary medical benefits?
- What is Claimant's average weekly wage (AWW)?
- Did Claimant prove entitlement to temporary total disability (TTD) benefits commencing September 7, 2019?
- Did Claimant prove Employer should be penalized for failure to admit or deny liability?
- Is Employer required to pay an additional 25% to the Colorado Uninsured Employer Fund?

FINDINGS OF FACT

1. Employer hired Claimant in August 2019 to tear off and re-cover a 1500 square foot roof on a customer's home. Employer told Claimant it was a "simple" one-layer job.

2. Employer agreed to pay Claimant \$35 "per square" to tear off and replace the roof. A "square" is 100 square feet of roof, so there were 15 "squares" in the 1500 square foot roof. Claimant estimated it would have taken two weeks to complete the job had it been a single-layer roof as anticipated.

3. When he got on the roof and started the job, Claimant realized there were four layers of existing roof to tear off.

4. Employer was supposed to supply the materials for the project and stock them on the roof. Employer also told Claimant he would provide a worker to help with the project. Employer provided a helper the first day, but after that Claimant was left to finish the job by himself.

5. Claimant worked on the project for a couple of days but his progress was stymied by weather. Then a representative from Regional Building came and shut the project down because Employer had not pulled a permit.

6. Two days later, Employer called and informed Claimant he had secured the building permit and work could resume.

7. Employer stopped responding to Claimant's calls after that. The homeowners also tried to reach Employer without success. They had paid Employer \$3,200 for materials, but he had not brought materials to the job site. Repeated heavy rains were causing leaking into the home, so Claimant used his personal funds to buy materials to cover the roof. The homeowners then gave Claimant additional money so he could purchase the materials needed to finish the job.

8. Claimant purchased the materials and loaded them onto the roof by himself because Employer provided no one to help him. Throughout the project, Claimant struggled to move roofing materials and complete repeated trips up and down the ladder. He developed progressively worsening low back and leg pain during the project as a direct and proximate result of the physically demanding work. The lack of help during the project probably contributed to Claimant's injury.

9. Employer appeared at the job site on September 7, 2019, when Claimant was almost finished with the project. Claimant informed Employer he could not keep working because of his severe low back and leg pain. Employer took over work on the project.

10. Claimant filed a Workers' Claim for Compensation form on September 20, 2019. He mailed a copy to Employer.

11. On October 15, 2019, Employer appeared at Claimant's home and berated him for filing a workers' compensation claim. He told Claimant, "You are not getting anything." Employer never paid Claimant for his work on the project.

12. Employer never referred Claimant to a physician for treatment.

13. In December 2010, Claimant sought treatment for his back pain at the VA Rocky Mountain Regional Medical Center. He underwent x-rays on December 10, 2019, but the results are not in the record. Claimant was referred for a lumbar MRI and a physical medicine evaluation before he could have a surgical consultation.

14. Claimant proved he was performing services for pay for Employer when he was injured. There is no persuasive evidence he was free from direction and control or customarily engaged in an independent trade or business related to the service provided.

15. Claimant proved he suffered an injury to his low back arising out of and occurring within the course and scope of his employment for Employer.

16. The right to select a physician passed to Claimant and he selected the VA Medical Center.

17. Under the terms of hire, Claimant would have been paid \$525 for the roof project. Claimant estimated it would have taken two weeks to complete the project. Claimant's AWW is \$262.50 ($\$525 \div 2 = \262.50). This equates to a weekly TTD rate of \$175 and a daily rate of \$25.

18. Claimant proved he is entitled to TTD benefits commencing September 8, 2019 and ongoing. Claimant stopped work on September 7, 2019 because of the effects of the work injury. Claimant has not returned to work, has not been released to full duties, and has not been put at MMI.

19. The total past-due TTD is \$6,200 through the date of this decision. The total accrued statutory interest is \$161.58 through the date of this decision. TTD will continue to accrue at the rate of \$175 per week until terminated by law. Interest will continue to accrue at the rate of \$1.39 per day until the past-due TTD is paid in full.

20. Employer must pay an additional \$1,550 to the Colorado Uninsured Employer Fund because it was uninsured at the time of Claimant's injury ($\$6,200 \times 25\% = \$1,550$).

21. Employer knew Claimant had to stop working because of the injury on September 7, 2019. Employer was required to formally admit or deny liability no later than Monday, October 7, 2019. Employer never filed an admission of liability or notice of contest with the Division of Workers' Compensation.

22. Employer should be penalized \$25 per day, from October 7, 2019 through the date of this decision (May 12, 2020), for failing to admit or deny liability.

CONCLUSIONS OF LAW

A. Compensability

To receive compensation or medical benefits, a claimant must prove he is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1), C.R.S.; *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo. App. 2001).

An individual who performs services for another in exchange for compensation shall be deemed an employee unless such individual is free from direction and control in the performance of the service and is customarily engaged in an independent trade, occupation, profession, or business related to the service performed. Section 8-41-202(2)(a), C.R.S. If the claimant establishes he performed services for pay, the burden shifts to the employer to prove the claimant was an independent contractor. *Stampados v. Colorado D & S Enterprises*, 833 P.2d 815 (Colo. App. 1992); *Almanza v. W.Y.B. d/b/a What's Your Beef*, W.C. No. 4-489-774 (April 16, 2002).

As found, Claimant proved he suffered a compensable injury to his low back arising out of and in the course of his employment on September 7, 2019. The injury resulted from repeated lifting and carrying of heavy roofing materials by himself during the project. The onset of disability occurred on September 7, 2019 when he could no longer continue working. There is no persuasive evidence Claimant was free from direction and control in the performance of service to Employer or was customarily engaged in an independent trade or business.

B. Medical Benefits

The employer is liable for medical treatment reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101, C.R.S. The employer has the right to choose the claimant's treating physician "in the first instance." Section 8-43-404(5)(a)(I)(A), C.R.S. If the employer does not tender medical treatment forthwith upon learning of the injury, the right of selection passes to the claimant. *Rogers v. Industrial Claim Appeals Office*, 746 P.2d 565 (Colo. App. 1987).

As found, right to select a treating physician passed to Claimant, and he selected the Rocky Mountain Regional VA Medical Center. Employer is liable for reasonably necessary treatment from the VA Medical Center and its referrals to cure and relieve the effects of Claimant's industrial injury.

C. Average Weekly Wage

Section 8-42-102(2), C.R.S. provides compensation is payable based on the employee's average weekly earnings "at the time of the injury." The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. But § 8-42-102(3) gives the ALJ wide discretion to "fairly" calculate the employee's AWW in any manner that is most appropriate under the circumstances. The entire objective of AWW calculation is to arrive at a "fair approximation" of the claimant's actual wage loss and diminished earning capacity because of the industrial injury. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993).

As found, Claimant's AWW is \$262.50. This is based on the \$525 Employer promised for the roof project, averaged over the two weeks Claimant estimated the job should have taken had it been a one-layer roof as described to him.

D. Temporary disability benefits

A claimant is entitled to TTD benefits if the injury causes a disability, the disability causes the claimant to leave work, and the claimant misses more than three regular working days. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The claimant must establish a causal connection between a work-related injury and the wage loss to obtain TTD benefits. *Id.* The term disability connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function, and (2) impairment of wage-earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). Impairment of earning capacity may be evidenced by a complete inability to work, or by restrictions that impair the claimant's ability effectively and properly to perform her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). Once commenced, TTD benefits continue until the occurrence of one of the factors enumerated in § 8-42-105(3), C.R.S.

The persuasive evidence shows Claimant was disabled by severe injury-related low back and leg pain and could no longer tolerate his physically demanding work on September 7, 2019. He stopped working and has not returned to work since then. There is no persuasive evidence Claimant has been released to regular duty or been put at MMI

by an authorized treating physician. Accordingly, Claimant is entitled to TTD benefits commencing September 8, 2019 and continuing until terminated by law. The TTD rate is \$175 per week $\$262.50 \times 2/3 = \175).

E. Total TTD and statutory interest owed

Employers or their insurers must pay statutory interest of 8% per annum on all benefits not paid when due. Section 8-43-410(2), C.R.S. Based on the TTD rate of \$175 per week, Employer owes \$6,200 in TTD benefits and \$161.58 in statutory interest from September 8, 2019 through May 12, 2020. TTD will continue to accrue at the rate of \$175 per week until terminated by one of the events enumerated in § 8-42-105(3). Interest will continue to accrue at the rate of \$1.39 per day until the past-due TTD is paid. The accrued interest and ongoing daily interest were calculated using the Division of Workers' Compensation Benefits Calculator, which is available on the Division's website. <https://dowc.cdle.state.co.us/Benefits/tab/interest.aspx>

Workers' Compensation Benefits Calculator

Welcome to the Workers' Compensation Benefits Calculator, please select from the options below

*The information and interactive calculators are made available to you as self-help tools for your independent use. We can not and do not guarantee their applicability or accuracy in regards to your individual circumstances.

Home Average Weekly Wage TTD Calculator **Interest Calculator** Offset Calculator PPD Lump Sum PPD Indemnity Partial PPD Lump Sum PTD Lump Sum Lifetime Present Value

Annual Interest Rate Calculator

This calculator is meant to provide calculation assistance to determine the amount of interest owed to an injured worker on any past due benefits.

| | | |
|--|---------------|-----------|
| Name: | GERALD CHAVEZ | Calculate |
| Bi-Weekly benefit amount that should have been paid: | 350 | Clear |
| Bi-weekly amount that has been paid: | 0 | |
| Beginning date of unpaid benefits: | 09/08/2019 | |
| Ending date of unpaid benefits: | 05/12/2020 | |
| Date benefits were or will be paid: | 05/12/2020 | |
| Annual Interest rate: | 8 | |
| Number of days benefits are due: | 248.00 | |
| Number of days benefit not paid when due: | 0 | |
| Total bi-weekly benefits accrued through 5/12/2020 | \$6,200.00 | |
| Total interest accrued through 5/12/2020 | \$161.58 | |
| Total benefits and interest accrued | \$6,361.58 | |
| Daily interest after 5/12/2020 | \$1.39 | |

F. Penalties for failure to admit or deny

Claimant seeks a penalty under § 8-43-203 for “failure to file [a] General Admission of Liability.” The employer must admit or deny liability within 30 days after it learns of an injury that results in “lost time from work for the injured employee in excess of three shifts or calendar days.” Section 8-43-101; 8-43-203(1)(a). Under § 8-43-203(2)(a), an employer “may become liable” to the claimant “for up to one day’s compensation for each day’s failure” to file an admission or notice of contest with the Division. The maximum penalty for failure to admit or deny liability cannot exceed “the aggregate amount of three

hundred sixty-five days' compensation." Fifty percent of any penalty shall be paid to the claimant and fifty percent to the Subsequent Injury Fund. Section 8-43-203(2)(a), C.R.S.

The phrase "may become liable" means imposition of a penalty under § 8-42-203(2)(a) is discretionary. *E.g., Gebrekidan v. MKBS, LLC*, W.C. No. 4-678-723 (May 10, 2007). The purposes of the requirement to admit or deny liability are to notify the claimant he is involved in a proceeding with legal ramifications, and to notify the Division of the employer's position so the Division can exercise its administrative oversight over the claim process. *Smith v. Myron Stratton Home*, 676 P.2d 1196 (Colo. 1984). Two important purposes of penalties are to punish the violator and deter future misconduct. *May v. Colorado Civil Rights Commission*, 43 P.3d 750 (Colo. App. 2002). The ALJ should consider factors such as the reprehensibility of the conduct and the extent of harm to the non-violating party. *Associated Business Products v. Industrial Claim Appeals Office*, 126 P.3d 323 (Colo. App. 2005). The penalty should not be constitutionally excessive or grossly disproportionate to the violation found. *Dami Hospitality, LLC v. Industrial Claim Appeals Office*, 442 P.3d 94 (Colo. 2019). The claimant must prove circumstances justifying the imposition of a penalty under § 8-43-203(2)(a). *Pioneer Hospital v. Industrial Claim Appeals Office*, 114 P.3d 97 (Colo. App. 2005).

As found, Employer has never filed an admission or denial of liability regarding Claimant's injury. Employer knew Claimant suffered a lost time injury on September 7, 2018, so the deadline to admit or deny liability was October 7, 2019. Employer should be penalized \$5,475 from October 7, 2019 through May 12, 2020 for failure to admit or deny liability. This is based on 219 days at the daily compensation rate of \$25 dollars. Employer offered no explanation for its failure to admit or deny liability or any persuasive evidence to mitigate the allowable penalty. The penalty of \$5,475 is sufficient to penalize Employer's violation of the law and encourage future compliance without being excessively punitive. Fifty percent (50%) of this penalty shall be paid to Claimant and fifty percent (50%) to the Subsequent Injury Fund.

G. Increased compensation for failure to insure

Section 8-43-408(5), C.R.S. (2018) provides,

In addition to any compensation paid or ordered . . . an employer who is not in compliance with the insurance provisions of [the Act] at the time an employee suffers a compensable injury or occupational disease shall pay an amount equal to twenty-five percent of the compensation or benefits to which the employee is entitled to the Colorado uninsured employer fund created in section 8-67-105.

The penalty for failure to insure only applies to indemnity benefits; it does not apply to medical benefits. *Industrial Commission v. Hammond*, 77 Colo. 414, 236 P. 1006 (1925); *Jacobson v. Doan*, 319 P.2d 975 (Colo. 1957); *Wolford v. Support, Inc.*, W.C. No. 4-155-231 (February 13, 1998). Although the ALJ is not aware of a case directly on point, statutory interest is not properly considered "compensation or benefits" within the meaning of 8-43-408(5). Interest is a statutory right intended to secure claimants the

present value of benefits to which they are entitled by creating an equitable remedy for the lost time value of money during the accrual period. *Subsequent Injury Fund v. Trevethan*, 809 P.2d 1098 (Colo. App. 1991).

Employer has been ordered to pay Claimant \$6,200 in TTD benefits. Twenty-five percent (25%) of the compensation awarded is \$1,550.

H. Payment to Division trustee or a bond to secure payment of benefits

Employer was not insured for workers' compensation liability at the time of Claimant's injury. Under § 8-43-408(2), Employer must pay to the trustee of the Division of Workers' Compensation ("Division") an amount equal to the present value of all unpaid compensation or benefits, computed at 4% per annum. Although this Order awards ongoing TTD benefits, the end date is unknown, so the present value of ongoing TTD cannot be calculated. The total compensation, penalties, and interest Ordered herein is \$13,386.58. In the alternative, Employer may file a bond with the Division signed by two or more responsible sureties approved by the Director or by some surety company authorized to do business in Colorado. Employer may contact the Division trustee for assistance with its obligations in this regard. The Division trustee may be contacted via telephone through the Division's customer service line at 303-318-8700, or via email to Gina Johannesman gina.johannesman@state.co.us. The Division can also help Employer calculate medical payments owed under the fee schedule.

ORDER

It is therefore ordered that:

1. Claimant's injury on September 7, 2019 is compensable.
2. Employer shall cover reasonably necessary treatment from authorized providers to cure and relieve the effects of Claimant's injury.
3. The Rocky Mountain Regional VA Medical Center is authorized.
4. Claimant's average weekly wage is \$262.50.
5. Employer shall pay Claimant \$6,200 in TTD benefits from September 8, 2019 through May 12, 2020.
6. Employer shall pay Claimant \$161.58 in statutory interest accrued through May 12, 2020 on the past-due TTD. Interest will continue to accrue at the rate of \$1.39 per day until the past-due TTD is paid.
7. Employer shall pay Claimant \$175 per week in TTD benefits commencing May 15, 2020 and continuing until terminated by law.
8. Employer shall pay statutory interest of 8% per annum on all TTD owed on or after May 15, 2020 not paid when due.

9. Employer shall pay \$5,475 in penalties for failure to admit or deny liability. Fifty percent of the penalty shall be paid to the Claimant, and fifty percent of the penalty shall be paid to the Subsequent Injury Fund. The check for the Subsequent Injury Fund shall be payable to and sent to the Division of Workers' Compensation, 633 17th Street, Suite 900, Denver, Colorado 80202, Attention: Gina Johannesman, Trustee Special Funds Unit.

10. Employer shall pay \$1,550 to the Colorado Uninsured Employer Fund. The check shall be payable to the Division of Workers' Compensation, 633 17th Street, 9th Floor, Denver, CO 80202, Attention Iliana Gallegos, Revenue Assessment Officer.

11. In lieu of payment of the above compensation and benefits to the Claimant, the Employer shall:

a. Deposit \$13,386.58 with the Division of Workers' Compensation, as trustee, to secure payment of all unpaid compensation and benefits awarded. The check shall be payable to and sent to the Division of Workers' Compensation, 633 17th Street, Suite 900, Denver, Colorado 80202, Attention: Gina Johannesman, Trustee Special Funds Unit; or

b. File a surety bond in the amount of \$13,386.58 with the Division of Workers' Compensation within ten (10) days of this order:

(1) Signed by two or more responsible sureties who have received prior approval of the Division of Workers' Compensation; or

(2) Issued by a surety company authorized to do business in Colorado.

The bond shall guarantee payment of the compensation, penalties and benefits awarded.

12. Employer shall notify the Division of Workers' Compensation and Claimant's attorney of payments made pursuant to this order.

13. Filing any appeal, including a petition to review, shall not relieve Employer of the obligation to pay the designated sum to the Claimant, to the trustee or to file the bond as required by paragraph 11(b) above. Section 8-43-408(2), C.R.S.

14. Any interest that may accrue on a cash deposit shall be paid to the parties receiving distribution of the principal of the deposit in the same proportion as the principal, unless an agreement or Order authorizing distribution provides otherwise.

15. If Employer fails to pay the Claimant indemnity and/or medical benefits as ordered herein, Employer shall pay an additional 25% penalty to the Colorado Uninsured Employer Fund of the Colorado Division of Workers' Compensation, pursuant to § 8-43-408 (6), C.R.S.

16. All issues not decided herein are reserved for future determination.

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

DATED: May 12, 2020

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

Whether the claimant has demonstrated, by a preponderance of the evidence, that surgery recommended by Dr. David Miller is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted May 23, 2017 work injury.

FINDINGS OF FACT

1. The claimant worked for the employer as a superintendent. The claimant's job duties included overseeing construction and remodeling projects. Due to the nature of these projects, the claimant was considered a "working superintendent". This meant that he did all of the job duties of his crew members.

2. On May 23, 2017, the claimant and his crew were working on a remodeling project. On that date, the claimant assisted his crew with the lifting of a sales counter. While lifting, the claimant felt a pain in his back. The claimant completed an incident report for the employer.

Prior Low Back Treatment

3. Prior to May 23, 2017, the claimant had extensive treatment of low back symptoms. On August 4, 2007, the claimant was seen at the Veterans' Administration (VA) and reported low back pain "since Iraq".

4. On February 16, 2011, the claimant was seen for a neurology consultation at the VA. At that time, a nerve conduction study showed denervation in the L3-L4 dermatome, consistent with L3-L4 radiculopathy in the left lower extremity.

5. On February 22, 2011, a magnetic resonance image (MRI) of the claimant's lumbar spine showed moderate left neural foraminal stenosis and a broad-based disc bulge eccentric to the left side at the L3-L4 level and moderately severe bilateral facet arthrosis at the L4-L5 level.

6. On January 29, 2012, Dr. Craig Gustafson authored a letter regarding treatment for a work injury the claimant suffered on May 7, 2012. Dr. Gustafson noted a diagnosis of left lumbar radiculopathy and treatment including two epidural steroid injections (ESIs). At that time, Dr. Gustafson requested authorization for a third ESI.

7. On March 26, 2012, the claimant underwent a lumbar spine MRI. The MRI showed a central disc protrusion at the L3-L4 level; a broad-based disc bulge at the L4-L5 level; and a small disc protrusion to the left at the L5-S1 level.

8. On April 2, 2013, Dr. Gustafson placed the claimant at maximum medical improvement (MMI) for the March 7, 2012 injury. Dr. Gustafson assessed a 16 percent whole person impairment for the lumbar spine and assigned permanent work restrictions of no carrying, lifting, pushing, or pulling more than 45 pounds. In addition, Dr. Gustafson recommended maintenance medical treatment that included ESIs, physical therapy, medications and “potentially even surgery”.

Treatment After May 23, 2017

9. After the May 23, 2017 incident, initial medical treatment of the claimant’s low back was provided at the VA on June 9, 2019. On that date, the claimant was seen by Dr. John Severs. The claimant reported a history of low back pain that he believed began when he was in the military. The claimant also reported that the pain radiated down his left leg. Dr. Severs recommended x-rays and an MRI of the claimant’s lumbar spine.

10. On July 12, 2017, Dr. Severs noted that he had reviewed the claimant’s MRI and it showed “several bulging discs”¹ that were worse from the claimant’s “last MRI”. On that date, Dr. Severs referred the claimant for a neurological² consultation.

11. On September 19, 2017, the claimant was seen by Dr. Jeffrey Seigel for an electromyography (EMG) study. Dr. Seigel noted that the results of the EMG study suggested chronic and relatively mild left sided L5 radiculopathy. He also noted some possible mild involvement of the L4 nerve root.

12. On September 25, 2017, the claimant returned to Dr. Severs for a skin related concern. While at the VA on that date, the claimant reported that he “had an on the job injury” prior to his June 9, 2017 appointment with Dr. Severs. The claimant continued to report that he was experiencing radicular low back pain.

13. On October 2, 2017, the claimant first treated with his authorized treating physician (ATP), Dr. David Lorah. The claimant described feeling a sharp pain in his left lumbar area following the lifting incident on May 23, 2017. The claimant disclosed a prior injury that resulted in a whole person impairment rating of 16 percent. The claimant told Dr. Lorah that he fully recovered from that previous injury. The claimant reported that prior to May 23, 2017, he was not having any difficulties with lifting, walking, or moving. On that date, Dr. Lorah referenced the EMG study performed by Dr. Siegel. In addition, he recommended a neurosurgical evaluation for possible injections.

14. On December 29, 2017, the claimant returned to Dr. Lorah and reported ongoing low back and left lower extremity pain. On that date, Dr. Lorah referenced the June 30, 2017 MRI that showed a left paracentral disc extrusion at the L4-L5 level. In addition, Dr. Lorah referred the claimant to Dr. Cole for a physiatry consultation.

¹ The parties did not provide theALJ with a July MRI report.

² Although not mentioned by name, based upon the medical records, it appears that the claimant was referred to Dr. Jeffrey Seigel.

15. On April 27, 2018, the claimant was again seen by Dr. Lorah. At that time, the claimant reported continued left greater than right lumbar spine pain, with radicular symptoms into his left leg. Dr. Lorah referred the claimant to Dr. Giora Hahn for injections.

16. The medical records entered into evidence indicate that the claimant was seen by Dr. Hahn sometime between the April 27, 2018 referral and July 6, 2018. On July 6, 2017, the claimant returned to Dr. Hahn and reported that an ESI given approximately 10 days prior was helpful in addressing the claimant's low back pain. On July 7, 2019, Dr. Hahn recommended a repeat L5-S1 intralaminar ESI at the L5-S1 level.

17. Subsequently, the claimant was referred to Dr. David Miller for surgical consultation. On November 7, 2019, the claimant was seen by Dr. Miller. On that date, Dr. Miller made reference to MRIs that were performed in 2011, 2017, and November 2018.³ Dr. Miller noted that a comparison of the 2011 and 2017 MRIs indicated the development of a disc herniation at the L3-L4 and L4-L5 levels. In addition, he noted that the 2018 MRI showed a worsening when compared to the 2017 MRI. Dr. Miller opined that the claimant's symptoms were caused by the structural pathology at the L3-L4 and L4-L5 levels. Dr. Miller recommended surgery to address these issues.

18. Based upon the records entered into evidence, it appears that Dr. Miller has recommended a lumbar decompression laminectomy, with discectomy at the L3-L4 and L4-L5 levels.

19. At the request of the respondents, the claimant attended an independent medical examination (IME) Dr. Brian Reiss. In connection with the IME, Dr. Reiss reviewed the claimant's medical records, obtained a history from the claimant, and completed a physical examination. In his February 13, 2019 IME report, Dr. Reiss opined that the May 23, 2017 lifting incident caused a temporary aggravation of the claimant's preexisting and low back condition. In addition, he opined that the claimant has now returned to his baseline. Dr. Reiss opined that it is most likely that the bulging disc at the L3-L4 level is a degenerative change, rather than the result of an acute injury. Dr. Reiss further opined that the surgery recommended by Dr. Miller is neither reasonable nor necessary to treat the claimant's symptoms. In support of this opinion, Dr. Reiss noted that the claimant has mechanical low back pain and the recommended surgery would not decrease the claimant's pain or improve the claimant's function.

20. On November 27, 2019, Dr. Lorah responded to a number of questions posed by the respondents regarding the claimant's condition. In his response, Dr. Lorah opined that the claimant's low back and bilateral radicular symptoms were most likely related to the May 23, 2017 work injury. In support of this opinion, Dr. Lorah stated that the May 23, 2017 "lifting incident was a very clear point in time at which [the claimant's] symptoms worsened." With regard to possible treatment recommendations for the claimant, Dr. Lorah listed physical therapy, massage therapy, possible injections, and ultimately surgery.

³ The ALJ does not have the report for a November 2018 MRI.

21. On April 8, 2020, the respondents filed a General Admission of Liability (GAL) related to the claimant's May 23, 2017 lifting incident.

22. The ALJ credits the medical records and the opinions of Dr. Reiss over the contrary opinions of Dr. Lorah. Accordingly, the ALJ finds that the claimant has failed to demonstrate that it is more likely than not that the recommended surgery is reasonable medical treatment necessary to cure and relieve him from the effects of the work injury. The claimant has a long history of low back complaints. Following his prior injury the claimant was given a permanent impairment rating and permanent work restrictions. In addition, Dr. Gustafson opined that the claimant would likely need future low back surgery. The ALJ is not persuaded that the incident on May 23, 2017 aggravated, accelerated, or combined with the claimant's chronic preexisting low back condition to necessitate a need for surgery.

CONCLUSIONS OF LAW

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

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

4. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; see *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

5. The existence of a pre-existing medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the

proximate cause of the disability or need for treatment. See *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); see also *Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it “aggravates accelerates or combines with a preexisting disease or infirmity to produce disability or need for treatment.” See *H & H Warehouse v. Vicory*, *supra*.

6. As found, the claimant has failed to demonstrate that the surgery recommended by Dr. Miller is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the May 23, 2017 work injury. As found, the medical records and the opinions of Dr. Reiss are credible and persuasive.

ORDER

It is therefore ordered that the claimant’s request for surgery, as recommended by Dr. Miller, is denied and dismissed.

Dated this 13th day of May 2020.



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

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

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he sustained a compensable work-related injury on May 26, 2018.
2. Whether Claimant has established by a preponderance of the evidence an entitlement to medical benefits.
3. Whether Claimant has established by a preponderance of the evidence an entitlement to temporary total disability (TTD) benefits from May 26, 2018 through September 28, 2018.
4. Determination of Claimant's average weekly wage (AWW).
5. Whether Claimant has established by a preponderance of the evidence that [Redacted Employer] was his statutory employer on May 26, 2018.

FINDINGS OF FACT

1. Claimant is a 31-year-old male who worked as a framer at a construction project for Epoque Apartments. Claimant's duties at the project included installing trusses and beams for apartments that were being built.

2. On May 26, 2018, while working at the project, Claimant fell off a 9-foot deck onto his outstretched left hand while setting beams and trusses. Claimant had a harness on with rope grabs at the time he fell.

3. Claimant underwent medical treatment on the date of his fall, initially at Golden Freestanding Emergency Department and then at St. Anthony Hospital Emergency Department.

4. At St. Anthony Hospital Emergency Department, Claimant reported that he fell off a deck earlier in the day from a height of approximately 9 feet, landing on an outstretched left hand. Claimant reported severe pain in his left wrist. X-rays showed a displaced fracture of the left distal radius. Michael Ruygrock, M.D. performed a left distal radius reduction using hyperextension inline traction and applied a sugar tongue splint. Dr. Ruygrock noted that the left hand was neurovascularly intact with no other signs of trauma or complaints. Dr. Ruygrock recommended Claimant follow up with orthopedics and suspected Claimant would likely require open reduction internal fixation surgery. Claimant was discharged with pain medications. See Exhibits 2, G.

5. On May 31, 2018, Thomas Frierhood, M.D. at Panorama Orthopedics evaluated Claimant. A CT of the left wrist was performed for surgical planning. Surgical fixation was recommended. See Exhibits 3, I.

6. On June 6, 2018, Panorama Orthopedics noted that there was a delay as they were trying to find out if this was a workers' compensation injury since it happened at work. The note indicated that since Claimant was hired as a contractor, it did not fall under workers' compensation and would be self-pay. The next day, June 7, 2018 Panorama Orthopedics noted that Claimant's boss would be helping with payments and that the boss was included on HIPPA forms and was requesting a quote for surgical cost. See Exhibit I.

7. On June 19, 2018, Claimant underwent left open reduction internal fixation surgery for his distal radius fracture. On July 31, 2018, it was noted that Claimant was doing relatively well overall and that he would transition to a removable brace. Claimant was referred to hand therapy with instructions to work on range of motion and to start strengthening in two weeks. See Exhibits 3, I, J.

8. On August 10, 2018, a physical therapy evaluation noted that Claimant was not using his left hand much. Claimant reported that he was limited with some self-care activities, could not lift or carry, could not open jars, and could not take care of house or yard work. The therapist opined that Claimant was not able to work. Claimant's left wrist was noted to be quite stiff and Claimant had discomfort with range of motion. The goal was to return Claimant to full function. See Exhibits 3, K.

9. Claimant was off work from the date of his injury through September 28, 2018 when he began employment with a different company.

10. On October 3, 2018, Claimant underwent physical therapy. Claimant reported that his employer had stopped paying his therapy bills and that he needed to speak with his lawyer to see what to do. The therapist noted that Claimant's active range of motion in the left wrist was still considerably limited and that it would be detrimental to Claimant's recovery to not be able to continue with therapy. See Exhibit K.

11. On February 12, 2020, Gregory Reichhardt, M.D. performed an independent medical evaluation. Claimant reported that he was injured while working for [Employer Redacted] as a framer when he fell through the second floor. Claimant reported he was unsure how he landed but that he had the immediate onset of left wrist pain with no other areas of pain. Claimant reported that he was diagnosed with a left wrist fracture, was splinted, and discharged that day. Claimant reported that he underwent left wrist surgery in June, with splinting initially and casting for 1 to 1.5 months afterwards. Claimant reported that he was referred to physical therapy after surgery but did not go much because the company he worked for did not pay for it. Claimant reported that he stopped seeing his surgeon because he could not afford it and his company no longer paid for it. Claimant reported that his pain was aggravated by lifting heavy things. Dr. Reichhardt reviewed medical records and performed a physical examination. Dr.

Reichhardt opined that Claimant sustained a comminuted mildly displaced intraarticular distal radius fracture on May 26, 2018 and that he underwent appropriate treatment with 15 physical therapy visits. Dr. Reichhardt opined that Claimant was likely at maximum medical improvement on September 25, 2018, his last visit with his orthopedic surgeon. Dr. Reichhardt opined that medical maintenance treatment would be reasonable with two follow ups with a physician per year and four follow up visits with physical or occupational therapy for year for the next two years. Dr. Reichhardt opined that a 60-pound lifting restriction would be reasonable. Dr. Reichhardt provided a 15% upper extremity impairment rating for Claimant's injury. See Exhibits 4, L.

12. It is not disputed that Claimant fell while performing construction work at the Epoque Apartment project and injured his left wrist on May 26, 2018. However, a dispute exists as to who was Claimant's employer at the time of the injury and/or whether Claimant was an independent contractor.

13. Claimant is not an independent contractor and no evidence presented suggested he independently operated a business. Rather, the overwhelming evidence shows he was a non-sophisticated labor employee working hourly and paid personally with no independent business operation at all. The question and dispute surrounds who Claimant was employed by and/or whether any of the named Respondents are Claimant's employer or statutory employer under the WC Act.

14. Prior to Claimant's injury, and on April 11, 2018, Claimant underwent a project safety orientation for the Epoque Apartment project. The project safety orientation training record is an [General Contractor Employer Redacted] training record. It notes the name of the project as Newstar-Epoque Apartments and Travis J[Redacted] is listed as the superintendent. The subcontractor is listed as Summit. Claimant signed the training record acknowledging that he had received training regarding the site-specific safety plan and that he received a copy of the FCI job site safety rules. On April 11, 2018, Claimant also signed a sign in sheet noting he had received hard hat #144 and Claimant listed his company name as Summit. See Exhibit 1.

15. Following his injury, and on June 8, 2018, Claimant received a paycheck for \$570.28 from [Employer Redacted], Inc. with the notation Enrique A[Redacted] Worker. See Exhibits 5, D.

16. On July 6, 2018, Claimant received a paycheck for \$570.28 from [Employer Redacted], Inc. with the notation Enrique A[Redacted] Worker. Claimant also testified that he received three direct deposits from [Employer Redacted], Inc. as well, all in the amount of \$570. See Exhibits 5, D.

17. The Colorado Secretary of State lists Enrique A[Redacted] as the registered agent for Respondent [Redacted Employer].

18. On August 31, 2018, Claimant filed a Workers' Claim for Compensation reporting that he injured his left wrist when working for [Subcontracting Employer

Redacted], Inc. while on top of a joist pulling up beams and was thrown and fell breaking his left wrist. See Exhibit A.

19. The Workers' Claim for Compensation is filled out in handwriting that is not Claimant's. Claimant's signature appears at the bottom. It is unclear where "[Subcontracting Employer Redacted], Inc." came from or whom that company is. At hearing, Claimant's attorney indicated that listing [Subcontracting Employer Redacted] appeared to be a mistake and that Claimant was seeking a determination of employee/statutory employee against [Employer Redacted] and/or [Redacted Employer]. The Application for Hearing lists [Subcontracting Employer Redacted], [Employer Redacted], and [Redacted Employer] as the employee respondents.

20. [General Contractor Employer Redacted] was the general contractor on the site for the apartment complex that was being built. FCI project superintendent, Travis J[Redacted], testified credibly that FCI subcontracted all of the framing, siding, and window work to OZ2. In a Prehearing Conference on September 3, 2019, counsel for [Redacted Employer] and Pinnacol Assurance conceded that [Redacted Employer] was subcontracted for the framing work on the project at Epoque Apartments. Claimant was a framer at the Epoque Apartment site who was paid hourly in cash by his supervisor "Christian." Claimant received two paychecks both from [Employer Redacted], Inc. Both paychecks noted him as an Enrique A[Redacted] worker. If Claimant were an Enrique A[Redacted] worker, he would be a [Redacted Employer] worker since Enrique A[Redacted] is the registered agent for [Redacted Employer].

21. On the date of Claimant's injury, May 26, 2018, an Incident Reporting and Investigation Form was completed by Travis J[Redacted], project superintendent for FCI Constructors. The Incident Reporting and Investigation Form was signed by Mr. J[Redacted] and by Jayson E[Redacted], supervisor of OZ2.

22. The form lists the injured party as Luis C[Redacted], Framer, with contact information of Jayson E[Redacted], supervisor. The witnesses are listed as Rogelio-OZ2 and Christian-OZ2. The incident description indicates that crews were working on a 3rd floor section setting trusses and perimeter beams and that one truss crew decided to get one beam set before leaving for the weekend and that while doing so, Claimant fell down to the 2nd floor deck below. Mr. J[Redacted] noted he was at the project and that Claimant was able to stand up, walk around, and get into Jairo G[Redacted]' car to go to the hospital. Mr. J[Redacted] noted that he discussed what had happened with the OZ2 employees in the area and that they reported not wanting to set the beam by hand but that their supervisor Christian was in a hurry and decided to scoot the beam out on the trusses. The employees reported they knew what they were doing was not right, but still proceeded. Mr. J[Redacted] concluded that the incident was the result of hast and negligence and not using all the equipment available onsite. He concluded the accident could have easily been prevented and that the truss crew was removed permanently from the project. Mr. J[Redacted] noted that all cantilever trusses would now be fully attached prior to any loading whatsoever and that forklifts must be used in the future to set beams first, then trusses. Mr. J[Redacted] noted he reviewed truss setting process with OZ2,

had a stand down with framing crew with OZ2, and removed truss crew performing unsafe work processes with OZ2. Mr. J[Redacted] signed the investigation form on behalf of FCI and Mr. E[Redacted] signed on behalf of OZ2. See Exhibit 7.

23. Claimant testified at hearing. Claimant testified that prior to his injury, he was paid cash for his work by Christian R[Redacted]. Claimant testified that Mr. R[Redacted] directed him where to work and what to do each day onsite at Epoque. Claimant testified that he was paid \$18 per hour and worked between 40 and 45 hours per week and was always paid directly by Mr. R[Redacted]. Claimant testified that he was instructed to write Summit on the April 11, 2018 safety training orientation record by Mr. R[Redacted]. Claimant testified that his medical treatment was all paid for by his boss but didn't know who exactly made the payments. Claimant testified that although he worked for Mr. R[Redacted], the checks he received after his injury noted him as an Enrique A[Redacted] Worker. Claimant testified that prior to his injury he was never paid by [Employer Redacted], Inc. or by Enrique A[Redacted] but that he was always paid in cash by Mr. R[Redacted]. Claimant testified that around August 11, 2018, he stopped receiving checks or direct deposits and then filed a claim for workers' compensation.

24. Mr. J[Redacted] testified at hearing. He testified that he works for [General Contractor Employer Redacted] and was the project superintendent at Epoque Apartments. He testified that he managed FCI's subcontractors. He testified that he was onsite on the date of Claimant's injury but did not see the injury or talk with Claimant. He testified that he interviewed witnesses and completed an Incident Reporting and Investigation Report. He testified that he only mentioned OZ2 on the report because OZ2 is whom FCI subcontracted with and that if OZ2 subcontracted out their work, it was out of FCI's realm. He testified that FCI subcontracted all of the framing, siding, and window work to OZ2.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. See § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. See § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should

consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Employer/Statutory Employer

The claimant is required to prove by a preponderance of the evidence that at the time of the injury that both he and the employer were subject to the provisions of the act, that he was performing service arising out of and in the course of his employment, and that the injury was proximately caused by the performance of such service. Section 8-41-301(1)(a) through (c), C.R.S. The question of whether the claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000).

The term "employer" is defined to include every person, firm or corporation "who has one or more persons engaged in the same business or employment, except as expressly provided in articles 40 to 47 of this title, in service under any contract of hire, express or implied." Section 8-40-203(1)(b), C.R.S. Similarly, the term "employee" is defined as including any person in the service of any person or corporation "under any contract of hire, express or implied." Section 8-40-202(1)(b), C.R.S.

A contract of hire is subject to the same rules as any other contract. Thus, there must be competent parties, subject matter, legal consideration, mutuality of agreement, and mutuality of obligation. However a contract of hire may be formed without every formality attending commercial contractual agreements if the fundamental elements of the contract are present. *Aspen Highlands Skiing Corp. v. Apostolou*, 866 P.2d 1384 (Colo. 1994). A contract of hire may be implied from the circumstances. Where there is conflicting evidence the existence of a contract of hire presents a question of fact for the ALJ. *Rocky Mountain Dairy Products v. Pease*, 161 Colo. 216, 422 P.2d 630 (1966). To be entitled to compensation, Claimant also has the initial burden of establishing that he is an actual employee or a statutory employee at the time of the injury. *Surdi v. Timber Mountain Builders*, WC 4-209-544 (ICAO June 28, 1996). The determination of whether claimant sustained his burden to prove an injury out of an employment relationship is a

factual determination for an ALJ. *Stampados v. Colorado D&S Enterprises*, 833 P.2d 815 (Colo. 1992).

While a company may not be an injured worker's employer under common law, it may nevertheless be a statutory employer for purposes of workers' compensation coverage and immunity purposes. *O'Quinn v. Walt Disney Productions*, 177 Colo. 190, 493 P.2d 344 (1972). A statutory employment relationship can only exist between a subcontractor and a general contractor which "contracted out" work. Section 8-41-401(1)(a), C.R.S., provides:

Any person, company, or corporation operating or engaged in or conducting any business by leasing or contracting out any part or all of the work thereof to any lessee, sub lessee, contractor, or subcontractor ... shall be construed to be an employer ... and shall be liable ... to pay compensation for injury ... resulting there from to said lessees, sub lessees, contractors, and subcontractors and their employees

General contractors are ultimately responsible for injuries to employees of subcontractors. *Edwards v. Price*, 191 Colo. 46, 550 P.2d 856 (1976). The purpose is to prevent employers from avoiding responsibility for injuries under the Act by contracting out their regular work to uninsured independent contractors. *Hefley v. Morales*, 197 Colo. 523, 595 P.2d 233 (1979). The general test to determine an entity's status as a statutory employer pursuant to section 8-4-401(1)(a) C.R.S., "is whether the work contracted out is part of the regular business of the constructive employer." *Finlay v. Storage Tech. Corp.*, 733 P.2d 322, 323 (Colo.App.1986), *aff'd*, 764 P.2d 62 (Colo.1988). A relationship will be construed between an employer and an injured worker even if the employer is not the injured worker's employer as understood in the ordinary nomenclature of the common law, so long as the employer is a "statutory employer" within the meaning of the Act. *Id.*

Claimant has established, by a preponderance of the evidence that he qualifies under the WC Act as an employee of Respondent [Redacted Employer]. [Redacted Employer] was, more likely than not, Claimant's employer or statutory employer on the date of injury. As found above, FCI was the general contractor at the Epoque Apartment site. FCI contracted out the framing, siding, and window work to OZ2. OZ2 contracted out the framing work to [Redacted Employer]. Claimant was a framer who was onsite and working on May 26, 2018 when he was injured. [Redacted Employer] conceded that they were contracted to provide the framing work at Epoque Apartments. As a company contracted to performing framing work, framing was a regular part of the business of [Redacted Employer]. Claimant is a non-English speaking non-sophisticated worker. Although he was unable to indicate who his employer was with any certainty, Claimant credibly testified that he was paid by Christian and instructed by Christian at the project site and that he worked as a framer at the location of his injury. He was an employee with a non-formal contract of hire to perform framing work at an hourly rate with instruction from a person onsite. Claimant was injured while performing this work. The evidence establishes that Claimant was told by his supervisor to list Summit as the company that he worked for in April 2018 when he underwent training and signed out a hard hat. The

evidence also establishes that payments made to Claimant noted Claimant to be a worker of Summit's registered agent. [Employer Redacted], who issued the checks, is non-insured for workers' compensation. Summit Builders cannot contract its regular work of framing to an uninsured contractor (Canyon) to avoid responsibility for injuries.

A review of the evidence establishes that [Redacted Employer] is in the chain of employment with workers' compensation insurance. FCI subcontracted the framing, siding, and window work to OZ2. OZ2 subcontracted the framing work to [Redacted Employer]. On April 11, 2018, Claimant signed out his hard hat listing his company name as Summit. Claimant also underwent project safety training on April 11, 2018 and again listed Summit as the subcontractor. Following the accident, Claimant was listed as a "framer" in an incident investigation report and Claimant credibly testified that he worked as a framer on the project. Claimant was not onsite at Epoque Apartments performing framing work for fun. He was there as an employee. He was paid cash and his testimony was somewhat uncertain as to who his employer was given that he was not formally hired by contract, not paid by paychecks with paystubs, withholding information, etc. However, as the framing subcontractor onsite, and as listed in various places in the record, it is more likely than not that [Redacted Employer] was Claimant's employer or statutory employer. Further evidence of payments to Claimant to cover Claimant's lost time from work included a memo that Claimant was an Enrique A[Redacted] worker. Enrique A[Redacted] is the registered agent for Summit. The overall weight of the evidence establishes an employment relationship between Claimant and Summit such that Summit is an employer under the WC Act responsible for the injury Claimant sustained while working at the Epoque Apartments on May 26, 2018.

Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School District #11*, W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012).

Claimant has established, by a preponderance of the evidence, that he sustained a compensable work related injury on May 26, 2018. Claimant is entitled to reasonable and necessary medical benefits to cure and relieve the effects of his injury. Claimant has established that the emergent treatment at St. Anthony Hospital and that his treatment at Panorama Orthopedics was reasonable and necessary to cure and relieve the effects of his injury. Respondents are liable for the medical treatment at St. Anthony, Panorama, and physical therapy that Claimant underwent on referral from Panorama Orthopedics.

Temporary Total Disability Benefits

To prove an entitlement to TTD benefits, claimant must prove that an industrial "injury": (1) caused a disability lasting more than three work shifts, (2) that he left work as

a result of the disability, and (3) that the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2004); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), C.R.S., requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that claimant establish physical disability through a medical opinion of an attending physician; claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

Claimant has established, by a preponderance of the evidence, an entitlement to TTD benefits from the date of his injury through September 28, 2018. As found above, Claimant sustained a distal radius fracture after his fall onsite on May 26, 2018. Claimant testified credibly that he was unable to work after his accident. He testified that he had surgery and afterwards had to wear a cast brace and that he was unable to do the work with joists and nails and couldn't have done the work one handed because the job required both hands to carry heavy things. His testimony is supported by the surgical record from June 19, 2018 and by the subsequent therapy records where it was noted that Claimant was not able to work, was quite stiff, and had impacted function. A preponderance of the evidence establishes that Claimant was medically incapacitated following his injury, surgery, and therapy and that he was unable to resume his prior work as a framer, which impaired his wage earning capacity. This resulted in actual wage loss until Claimant resumed employment on September 28, 2018. Respondents are entitled to an offset for any previously paid TTD benefits.

Average Weekly Wage (AWW)

Section 8-42-102(2) requires the ALJ to base the claimant's Average Weekly Wage (AWW) on his or her earnings at the time of injury. However, under certain circumstances the ALJ may determine the claimant's AWW from earnings received on a date other than the date of injury. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Specifically, §8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp., supra*. Where the claimant's earnings increase periodically after the date of injury the ALJ may elect to apply § 8-42-102(3) and determine that fairness requires the AWW to be calculated based upon the claimant's earnings during a given period of disability, not the earnings on the date of the injury. *Campbell v. IBM Corp., supra*.

Claimant testified that he typically worked 40-45 hours per week and that he was paid at an hourly rate of \$18 per hour. The only records included in evidence are two checks paid to Claimant in the amount of \$570. This amount could be inferred to account for 2/3 of a 45-hour work week at a rate of \$19 per hour. Claimant testified that he understood these checks to be for his missed work and recovery time, however, no testimony surrounding the amount of the checks or how it was calculated/paid was presented. Although the ALJ could infer that the checks represented a pay rate of \$19/hour for a 45-hour work week, the ALJ finds Claimant's testimony surrounding his rate of pay to be the best approximation of Claimant's average weekly wage and diminished earning capacity. The ALJ finds that 45 hours per week at a rate of pay of \$18 per hour fairly approximates Claimant's wage loss and diminished earning capacity and finds Claimant's AWW to be \$810.

ORDER

It is therefore ordered that:

1. Claimant has established by a preponderance of the evidence that he sustained a compensable work-related injury on May 26, 2018.
2. Claimant has established by a preponderance of the evidence an entitlement to reasonable, necessary, and causally related medical benefits to treat his May 26, 2018 work injury.
3. Claimant has established by a preponderance of the evidence an entitlement to temporary total disability (TTD) benefits from May 26, 2018 through September 28, 2018. Respondents are entitled to offset any TTD benefits previously paid during this time period.
4. Claimant's average weekly wage is \$810.00.
5. Claimant has established by a preponderance of the evidence that [Redacted Employer] was his employer or statutory employer on May 26, 2018.
6. All issues not decided herein are reserved for future determination.

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

when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: <http://www.colorado.gov/dpa/oac/forms-WC.htm>.

DATED: May 13, 2020

/s/ Michelle E. Jones

Michelle E. Jones
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-088-222-003**

ISSUES

- Did Claimant prove he suffered a compensable injury arising out of and in the course of his employment on September 1, 2018?
- Did Employer prove Claimant was an independent contractor at the time of his injury?
- Is Employer liable for medical treatment Claimant received at the Parkview Hospital emergency Department on September 1, 2018?
- Did Claimant prove entitlement to a closed period temporary total disability (TTD) benefits from September 18, 2018 through October 22, 2018?
- Did Employer prove Claimant was responsible for termination of his employment?
- Did Claimant prove Employer should be penalized for failure to admit or deny liability?
- Must Employer pay additional compensation to the Colorado Uninsured Employer Fund failure to carry workers' compensation insurance coverage regarding Claimant's injury?

FINDINGS OF FACT

1. Employer is a marijuana grower and wholesale distributor. Kate B[Redacted] is the company's owner.

2. Claimant started working for Employer on July 18, 2018 at its "[Employer facility Redacted]" location in Pueblo West. At the time of his injury, Claimant's job title was "metric administrator." He performed a variety of duties, including pesticide control, plant care, harvesting, payroll, and managing the bio-tracking system. He was paid \$15 per hour.

3. When Claimant started with Employer, his typical shift was 8 AM to 5 PM, five days per week. The metric administrator functions were added to his job during the last week of July or first week in August 2018. He primarily performed those additional tasks on the weekend. Claimant testified he generally worked eight hours on Saturday and Sunday. Ms. B[Redacted] testified Claimant did not work "every" Saturday and Sunday. Claimant conceded at hearing he did not "always" work 16 hours each weekend.

4. No wage records were submitted into evidence by either party. Claimant alleged an average weekly wage of \$735 on his Workers' Claim for Compensation form, including \$135 of overtime per week.

5. The [Employer facility Redacted] facility is protected by a perimeter fence with an automatic gate. The gate is secured at night with a chain and padlock. When Claimant and his co-workers arrived for work on September 1, 2018, the key broke off in the padlock. Claimant's supervisor, Enda M[Redacted], decided to cut the lock with an angle grinder. Claimant held the chain taught with his hands on either side of the padlock while Mr. M[Redacted] cut the hasp. The grinder accidentally slipped and cut Claimant's left hand at the base of the thumb.

6. A co-worker drove Claimant to the Parkview Hospital emergency department. Claimant fainted in the triage area, which prompted the ER physician to order additional tests. The results were normal, and the ER physician assessed vasovagal syncope. Claimant's hand was sutured, and he was released with instructions to keep the wound clean and return in ten days to have the sutures removed.

7. On or about September 11, Claimant returned to Parkview Hospital and a triage nurse removed his stitches. Claimant has seen no other medical provider regarding this injury.

8. Employer never referred Claimant to a physician to treat the injury.

9. Claimant returned to work after the accident. He could only perform work with his right hand because his injured left hand was bandaged and painful. Employer modified his duties to accommodate the injury. Claimant primarily performed metric administration duties because he could not effectively work with plants. He performed various one-handed tasks, albeit with reduced efficiency.

10. Mr. M[Redacted] suspended Claimant on September 18, 2018 and terminated him on September 24, 2018. Mr. M[Redacted] did not testify, and Employer introduced no first-hand evidence of the reasons for the suspension or termination. Claimant testified he was "not too clear" why he was suspended or fired. Ms. B[Redacted] testified Claimant was fired because "he was a racist," but did not provide persuasive proof to support that allegation. Employer failed to prove Claimant performed any volitional act that resulted in his termination or exercised a degree of control over his termination.

11. Claimant was disabled from his regular job duties by the effects of the work injury. He suffered a wage loss commencing September 18 when Employer stopped offering modified work.

12. Claimant returned to work for a different employer on October 23, 2018.

13. Claimant filed a Workers' Claim for Compensation form with the Division on September 27, 2018.

14. Employer was uninsured for workers' compensation liability on the date of Claimant's accident.

15. Employer has never filed a Notice of Contest or an Admission of Liability. Employer offered no persuasive explanation why it did not admit or deny liability for Claimant's injury.

16. Parkview billed Claimant \$5,175.34 for injury-related treatment received in the emergency department on September 1, 2018.

17. On January 2, 2019, Parkview sent Claimant a letter stating,

The above account was billed to WORKERS COMP. As of this date we still have not received payment. Please call your insurance company to find out why they have not paid.

When payment is received, we will bill you for any co-pays, coinsurance or deductible.

18. On February 24, 2019, Parkview billed Claimant directly because no payment had been received.

19. On June 19, 2019, Claimant was notified the Parkview account had been sent to collections. The collection agency added interest at the rate of 8%, which increased the amount due to \$5,504.28 as of the date of the notice.

20. Claimant has been paying \$100 per month toward the Parkview bill. He did not provide details regarding when or how many payments he made, so no specific order regarding reimbursement can be entered.

21. Ms. B[Redacted] stated multiple times on the record Employer is responsible for the Parkview ER charges, is willing to pay the bill, and Claimant should not be responsible for it. The ALJ finds these statements were judicial admissions. Ms. B[Redacted] offered no explanation for why Employer did not pay the bill.

22. Ms. B[Redacted] testified Claimant was an independent contractor and not an employee. No persuasive evidence was offered to show Claimant was free from direction and control in the performance of his duties or that he is customarily engaged in an independent trade or business.

23. Claimant proved he was Employer's employee at the time of his accident.

24. Employer failed to prove Claimant was an independent contractor at the time of his accident.

25. Claimant proved he suffered a compensable injury to his left hand on September 1, 2018 arising out of and in the course and scope of his employment for Employer.

26. Claimant proved the treatment he received at the Parkview Hospital emergency Department on September 1, 2018 was reasonably necessary to cure and relieve the effects of his compensable injury.

27. Claimant's average weekly wage is \$735 as stated on the Workers' Claim for Compensation form. Claimant's testimony he typically worked over 40 hours per week is credible. He completed the WC claim form close to the date of injury, at which time his recollection of his typical earnings was fresher in his mind and probably more accurate than his recollection at hearing.

28. Claimant proved he was disabled by the effects of the work injury.

29. Claimant proved he is entitled to a closed period of temporary disability benefits from September 18, 2018 through October 22, 2018. Claimant's compensable injury contributed to a wage loss starting September 18, 2018, when Employer stopped accommodating his injury-related limitations. The period of TTD ended October 23, 2018 when he returned to work for a new employer.

30. Employer failed to prove Claimant was responsible for termination of his employment. Employer presented no persuasive evidence Claimant performed a volitional act or otherwise exercised a degree of control over the circumstances leading to his termination.

31. The TTD rate is \$490 per week, with a daily rate of \$70 ($\$735 \times 2/3 = \$490 \div 7 = \70). The total TTD owed from September 18, 2018 through October 22, 2018 (7 weeks) is \$2,450 ($\$490 \times 7 = \$2,450$).

32. Employer owes statutory interest in the total amount of \$331.27 through May 13, 2020. Interest will continue to accrue at the rate of \$0.61 per day until the past-due TTD is paid in full.

33. Employer must pay additional compensation to the Colorado Uninsured Employer Fund under § 8-43-408(5) for failure to maintain workers' compensation insurance coverage on the date of Claimant's accident.

34. Employer should be penalized \$70 per day for 70 days for failing to admit or deny liability.

CONCLUSIONS OF LAW

A. Compensability

To receive compensation or medical benefits, a claimant must prove he is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1), C.R.S.; *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo. App. 2001).

An individual who performs services for another in exchange for compensation shall be deemed an employee unless such individual is free from direction and control in the performance of the service and is customarily engaged in an independent trade, occupation, profession, or business related to the service performed. Section 8-41-202(2)(a), C.R.S. If the claimant establishes he performed services for pay, the burden shifts to the employer to prove the claimant was an independent contractor. *Stampados v. Colorado D & S Enterprises*, 833 P.2d 815 (Colo. App. 1992); *Almanza v. W.Y.B. d/b/a What's Your Beef*, W.C. No. 4-489-774 (April 16, 2002).

As found, Claimant proved he suffered a compensable injury to his left hand arising out of and in the course of his employment on September 1, 2018. There is no persuasive evidence Claimant was free from direction and control in the performance of service to Employer or was customarily engaged in an independent trade or business.

B. Medical Benefits

The respondents are liable for medical treatment reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101, C.R.S. The claimant must prove entitlement to medical benefits by a preponderance of the evidence. *Page v. Clark*, 592 P.2d 792 (Colo. 1979).

As found, Claimant proved the treatment he received at the Parkview Hospital emergency Department on September 1, 2018 was reasonably necessary to cure and relieve the effects of his compensable injury.

C. Right to select a treating physician

Section 8-43-404(5)(a)(I)(A), C.R.S. allows the employer to choose the claimant's treating physician "in the first instance." If the employer does not tender medical treatment forthwith upon learning of the injury, the right of selection passes to the claimant. *Rogers v. Industrial Claim Appeals Office*, 746 P.2d 565 (Colo. App. 1987). Treatment received on an emergency basis is deemed authorized without regard to whether the claimant had prior approval from the employer or a referral. *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990); see also WCRP 8-2. The emergency exception is not necessarily limited to life-threatening situations, and whether a "bona fide emergency" existed is a question of fact for the ALJ to be determined based on the circumstances. *Hoffman v. Wal-Mart Stores*, W.C. No. 4-774-720 (January 12, 2010). Once the emergency ends, the employer must designate a treating physician or the right of selection passes to the claimant.

As found, Employer never referred Claimant to a medical provider to treat the injury. Accordingly, the right of selection passed to Claimant. Because Claimant has not yet seen a physician regarding his injury, he may now see a doctor of his choice.

D. Average Weekly Wage

Section 8-42-102(2), C.R.S. provides compensation is payable based on the employee's average weekly earnings "at the time of the injury." The statute sets forth

several computational methods for workers paid on an hourly, salary, per diem basis, etc. But § 8-42-102(3) gives the ALJ wide discretion to “fairly” calculate the employee’s AWW in any manner that is most appropriate under the circumstances. The entire objective of AWW calculation is to arrive at a “fair approximation” of the claimant’s actual wage loss and diminished earning capacity because of the industrial injury. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). As found, Claimant’s AWW is \$735. The ALJ credits Claimant’s closely contemporaneous statement on the WC Claim form as the most reliable evidence of his typical earnings at the time of the injury.

E. Temporary disability benefits

A disabled claimant is entitled to TTD benefits if they miss more than three days of work. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term “disability” connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage-earning capacity as demonstrated by claimant’s inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). Impairment of earning capacity may be evidenced by a complete inability to work, or by restrictions which impair the claimant’s ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

The claimant must establish a causal connection between a work-related injury and the subsequent wage loss to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. If a work-related injury contributes “to some degree” to a claimant’s wage loss, the claimant is entitled to temporary total disability benefits. *Id.* at 548. “Temporary disability benefits are precluded only when the work-related injury plays no part in the subsequent wage loss. Therefore, if the injury contributed in part to the wage loss, temporary total disability benefits can be denied, suspended, or terminated only if one of the four statutory factors in § 8-42-105(3) is satisfied.” *Horton v. Industrial Claim Appeals Office*, 942 P.2d 1209, 1210-11 (Colo. App. 1996). Returning to work is one criteria for terminating TTD benefits. Section 8-42-105(3)(b), C.R.S.

The persuasive evidence shows Claimant was disabled by the injury because he could not use his left hand for work tasks. Employer accommodated his limitations by assigning work he could do primarily with the one hand. Employer stopped offering modified work on September 17, 2018. Claimant still had difficulty using his hand, which impaired his ability to perform his regular job and find suitable alternate employment. The totality of persuasive evidence shows Claimant is entitled to a closed period of TTD benefits from September 18, 2018 until he returned to work for another employer on October 23, 2018.

When a temporarily disabled claimant is terminated from modified duty, the claimant is generally entitled to TTD benefits unless he was “responsible for termination” of the employment. See §§ 8-42-103(g) and § 8-42-105(4)(a), C.R.S. The employer must prove by a preponderance of the evidence that a claimant was terminated for cause or was responsible for the separation from employment. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008). To establish that a claimant was responsible for termination, the employer must show the claimant performed a volitional

act or otherwise exercised “some degree of control over the circumstances which led to the termination.” *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 5 P.3d 1061, 1062 (Colo. App. 2002); *Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1995); *Velo v. Employment Solutions Personnel*, 988 P.2d 1139 (Colo. App. 1988). Whether the claimant acted volitionally or exercised control over the circumstances of the termination must be evaluated based on the totality of circumstances. *Knepler v. Kenton Manor*, W.C. No. 4-557-781 (March 17, 2004).

As found, Employer failed to prove Claimant was “responsible for termination” of his employment. Employer presented no persuasive evidence Claimant committed a volitional act or otherwise exercised a degree of control over the circumstances leading to his termination.

F. Total TTD and statutory interest owed

Employers or their insurers must pay statutory interest of 8% per annum on all benefits not paid when due. Section 8-43-410(2), C.R.S. Based on Claimant’s AWW of \$735, and corresponding TTD rate of \$490 per week, Employer owes \$2,450 in TTD benefits from September 18, 2018 through October 22, 2018. Employer also owes Claimant \$328.23 in statutory interest through May 13, 2020. Interest will continue to accrue at the rate of \$0.61 per day until the past-due TTD is paid. The accrued interest and ongoing daily interest were calculated using the Division of Workers’ Compensation Benefits Calculator, which is freely available to the public on the Division’s website. <https://dowc.cdle.state.co.us/Benefits/tab/interest.aspx>

The screenshot shows the 'Workers' Compensation Benefits Calculator' interface. The 'Interest Calculator' tab is selected. The form contains the following data:

| | | |
|--|-----------------|-----------|
| Name: | DEMETRIUS SMITH | Calculate |
| Bi-Weekly benefit amount that should have been paid: | 980 | Clear |
| Bi-weekly amount that has been paid: | 0 | |
| Beginning date of unpaid benefits: | 09/18/2018 | |
| Ending date of unpaid benefits: | 10/22/2018 | |
| Date benefits were or will be paid: | 05/13/2020 | |
| Annual Interest rate: | 8 | |
| Number of days benefits are due: | 35.00 | |
| Number of days benefit not paid when due: | 569 | |
| Total bi-weekly benefits accrued through 10/22/2018 | \$2,450.00 | |
| Total interest accrued through 10/22/2018 | \$331.27 | |
| Total benefits and interest accrued | \$2,781.27 | |
| Daily interest after 5/13/2020 | \$0.61 | |

G. Penalties for failure to admit or deny

Claimant seeks a penalty under § 8-43-203 for “failure to file [a] General Admission of Liability.” The employer must admit or deny liability within 30 days after it learns of an injury that results in “lost time from work for the injured employee in excess of three shifts or calendar days.” Section 8-43-101; 8-43-203(1)(a). Under § 8-43-203(2)(a), an employer “may become liable” to the claimant “for up to one day’s compensation for each day’s failure” to file an admission or notice of contest with the Division. The maximum penalty for failure to admit or deny liability cannot exceed “the aggregate amount of three hundred sixty-five days’ compensation.” Fifty percent of any penalty shall be paid to the claimant and fifty percent to the Subsequent Injury Fund. Section 8-43-203(2)(a), C.R.S.

The phrase “may become liable” means imposition of a penalty under § 8-42-203(2)(a) is discretionary. *E.g.*, *Gebrekidan v. MKBS, LLC*, W.C. No. 4-678-723 (May 10, 2007). The purposes of requiring the employer to admit or deny liability are to notify the claimant he is involved in a proceeding with legal ramifications, and to notify the Division of the employer’s position so the Division can exercise its administrative oversight over the claim process. *Smith v. Myron Stratton Home*, 676 P.2d 1196 (Colo. 1984). Two important purposes of penalties are to punish the violator and deter future misconduct. *May v. Colorado Civil Rights Commission*, 43 P.3d 750 (Colo. App. 2002). The ALJ should consider factors such as the reprehensibility of the conduct and the extent of harm to the non-violating party. *Associated Business Products v. Industrial Claim Appeals Office*, 126 P.3d 323 (Colo. App. 2005). The penalty should not be constitutionally excessive or grossly disproportionate to the violation found. *Dami Hospitality, LLC v. Industrial Claim Appeals Office*, 442 P.3d 94 (Colo. 2019). The claimant must prove circumstances justifying the imposition of a penalty under § 8-43-203(2)(a). *Pioneer Hospital v. Industrial Claim Appeals Office*, 114 P.3d 97 (Colo. App. 2005).

As found, Employer has never filed an admission or denial of liability regarding Claimant’s injury. Employer knew Claimant was losing time from work as of September 18, 2018, so the deadline to admit or deny liability was October 18, 2018. Although the Act allows a penalty of up to 365 days’ compensation, the maximum penalty would be grossly disproportionate to the harm suffered by Claimant or the system. The ALJ concludes Employer should be penalized seventy (70) days at the daily compensation rate for failure to admit or deny liability. A penalty of seventy (70) days is sufficient to penalize Employer’s violation of the law and encourage future compliance without being excessively punitive. This determination is based on balancing multiple factors. Employer offered no reasonable explanation for its failure to admit or deny liability. The Parkview Hospital bill was sent to collections despite Employer’s multiple judicial admissions it is responsible for and willing to pay the charges. And the system suffers harm when employers shirk their obligation to file the required notices. On the other hand, Claimant’s injury was relatively minor and did not require extensive treatment. He suffered a brief period of disability before returning to work. Given the nature of the injury and the body part involved, it is unlikely Claimant will ultimately be entitled to a substantial permanent partial award. A penalty equal to double the compensation awarded adequately balances these considerations.

H. Increased compensation for failure to insure

Section 8-43-408(5), C.R.S. (2018) provides,

In addition to any compensation paid or ordered . . . an employer who is not in compliance with the insurance provisions of [the Act] at the time an employee suffers a compensable injury or occupational disease shall pay an amount equal to twenty-five percent of the compensation or benefits to which the employee is entitled to the Colorado uninsured employer fund created in section 8-67-105.

The penalty for failure to insure only applies to indemnity benefits; it does not apply to medical benefits. *Industrial Commission v. Hammond*, 77 Colo. 414, 236 P. 1006 (1925); *Jacobson v. Doan*, 319 P.2d 975 (Colo. 1957); *Wolford v. Support, Inc.*, W.C. No. 4-155-231 (February 13, 1998). Although the ALJ is not aware of a case directly on point, statutory interest is not properly considered “compensation or benefits” within the meaning of 8-43-408(5). Interest is a statutory right intended to secure claimants the present value of benefits to which they are entitled by creating an equitable remedy for the lost time value of money during the accrual period. *Subsequent Injury Fund v. Trevethan*, 809 P.2d 1098 (Colo. App. 1991).

Employer has been ordered to pay Claimant \$2,450 in TTD benefits. Twenty-five percent (25%) of the compensation awarded is \$612.50.

I. Payment to Division trustee or a bond to secure payment of benefits

Employer was not insured for workers’ compensation liability at the time of Claimant’s injury. Under § 8-43-408(2), Employer must pay to the trustee of the Division of Workers’ Compensation (“Division”) an amount equal to the present value of all unpaid compensation or benefits, computed at 4% per annum. This Order awards no ongoing benefits, so the present value equals the total benefits awarded. The total medical benefits, compensation, penalties, and interest Ordered herein is \$13,798.05. In the alternative, Employer may file a bond with the Division signed by two or more responsible sureties approved by the Director or by some surety company authorized to do business in Colorado. Employer may contact the Division trustee for assistance with its obligations in this regard. The Division trustee may be contacted via telephone through the Division’s customer service line at 303-318-8700, or via email to Gina Johannesman gina.johannesman@state.co.us. The Division can also help Employer calculate medical payments owed under the fee schedule.

ORDER

It is therefore ordered that:

1. Claimant’s injury on September 1, 2018 is compensable.
2. Employer shall pay the Parkview Hospital charges associated with Claimant’s emergency department treatment on September 1, 2018.

3. Employer shall reimburse Claimant for any payments he made toward the Parkview Hospital charges.

4. Claimant may select a physician to treat his compensable injury.

5. Claimant's average weekly wage is \$735.

6. Respondents' defense that Claimant was responsible for termination of his employment is denied and dismissed.

7. Employer shall pay Claimant \$2,450 in TTD benefits from September 18, 2018 through October 22, 2018.

8. Employer shall pay Claimant \$331.27 in statutory interest accrued through May 13, 2020 on the past-due TTD. Interest will continue to accrue at the rate of \$0.61 per day until the past-due TTD is paid.

9. Employer shall pay \$4,900 in penalties for failure to admit or deny liability. Fifty percent of the penalty shall be paid to the Claimant, and fifty percent of the penalty shall be paid to the Subsequent Injury Fund. The check for the Subsequent Injury Fund shall be payable to and sent to the Division of Workers' Compensation, 633 17th Street, Suite 900, Denver, Colorado 80202, Attention: Gina Johannesman, Trustee Special Funds Unit.

10. Employer shall pay \$612.50 to the Colorado Uninsured Employer Fund. The check shall be payable to the Division of Workers' Compensation, 633 17th Street, 9th Floor, Denver, CO 80202, Attention Iliana Gallegos, Revenue Assessment Officer.

11. In lieu of payment of the above compensation and benefits to the Claimant, the Employer shall:

a. Deposit \$13,798.05 with the Division of Workers' Compensation, as trustee, to secure payment of all unpaid compensation and benefits awarded. The check shall be payable to and sent to the Division of Workers' Compensation, 633 17th Street, Suite 900, Denver, Colorado 80202, Attention: Gina Johannesman, Trustee Special Funds Unit; or

b. File a surety bond in the amount of \$13,798,05 with the Division of Workers' Compensation within ten (10) days of this order:

(1) Signed by two or more responsible sureties who have received prior approval of the Division of Workers' Compensation; or

(2) Issued by a surety company authorized to do business in Colorado.

The bond shall guarantee payment of the compensation, penalties and benefits awarded.

12. Employer shall notify the Division of Workers' Compensation and Claimant's attorney of payments made pursuant to this order.

13. Filing any appeal, including a petition to review, shall not relieve Employer of the obligation to pay the designated sum to the Claimant, to the trustee or to file the bond as required by paragraph 11(b) above. Section 8-43-408(2), C.R.S.

14. Any interest that may accrue on a cash deposit shall be paid to the parties receiving distribution of the principal of the deposit in the same proportion as the principal, unless an agreement or Order authorizing distribution provides otherwise.

15. If Employer fails to pay the Claimant indemnity and/or medical benefits as ordered herein, Employer shall pay an additional 25% penalty to the Colorado Uninsured Employer Fund of the Colorado Division of Workers' Compensation, pursuant to § 8-43-408 (6), C.R.S.

16. Pursuant to § 8-42-101(4), C.R.S., any medical provider or collection agency shall immediately cease any further collection efforts from Claimant because Employer is solely liable and responsible for the payment of all medical costs related to Claimant's work injury.

17. All issues not decided herein are reserved for future determination.

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

DATED: May 13, 2020

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that the MRI as recommended by Dr. Conyers is reasonable, necessary, and related to his work injury, as a part of admitted maintenance medical care?

STIPULATIONS

At the outset of the hearing, it was agreed by the parties that the sole issue for determination at this hearing is the issue noted above. Claimant is not pursuing treatment from Respondents for issues relating to 'trigger finger' or 'trigger thumb'.

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

Procedural History

1. Claimant suffered an admitted work injury to his left wrist on July 21, 2013. (Ex. A, pp. 1-2).
2. Claimant was ultimately placed at maximum medical improvement ("MMI") by his ATP, Dr. Jones, on January 12, 2016. (Ex. B, p. 16).
3. Respondents have filed an Amended Final Admission of Liability on June 17, 2016, which among other things, admitted to Claimant's left wrist injury and reasonable and necessary medical maintenance. (Ex B, p. 4).

Claimant's Treatment and Recovery for the Work Injury to Date

4. On December 12, 2013, Dr. David Conyers, MD performed a bone graft surgery to correct Claimant's Kienbock's disease with fragmentation of the left lunate and triangular cartilage tear and palmar radial wrist ganglion cyst. (Ex. F, p. 194).
5. On January 29, 2015, Claimant then underwent a proximal row carpectomy, also by Dr. Conyers. In his operative notes, Dr. Conyers noted, under *Indications*:

This patient had *pretty well preserved articular cartilage*, and certainly rather than a fusion, it was felt that proximal row carpectomy was still his best option.....it was felt that *microfracturing would improve the articulating surface*. (Ex. F, p. 196)(emphasis added).

6. On December 4, 2015, Claimant underwent a CT scan on his left wrist. (Ex. I, p. 214). This CT scan was ordered by Dr. Conyers, and read by Krynne Stegelmeier, MD. Under Findings, Dr. Stegelmeier notes, in its entirety: "Resection of the proximal carpal row is identified. There is *severe degeneration* of the radial capitate articulation with subcortical cystic change." (emphasis added).

7. In a follow-up visit on 8/29/2017, under *Assessment and Plan*, Dr. Conyers noted:

I think David is doing pretty well.....His proximal row carpectomy seems to be holding up. The natural history of proximal row carpectomies is that they do eventually wear out and become arthritic because of the different size of the proximal articular surface of the capitate compared with the lunate fossa. The small capitate radius results and (sic) force concentration. *Up until now the only option with an arthritic painful proximal row carpectomy was fusion. Fortunately it does appear that there is a resurfacing device which will resurface the lunate fossa and the proximal pole of the capitate so the preservation of motion would be possible instead [of] a fusion.* I think David would be an *excellent candidate* for that considering his bone stock and carpal alignment. *For now however no treatment is indicated...*(Ex. 3, p. 39) (emphasis added).

8. Claimant had permanent work restrictions of no lifting more than 5 pounds with the left hand and no lifting or carrying more than 20 pounds with both hands. *Id.* He found new employment working in an office in 2016 where he did not lift forcefully. (Ex C, p. 17).

Additional Medical Treatment is now Recommended

9. During a follow-up appointment on August 30, 2019, Dr. Conyers noted, under *Assessment and Plan*:

We reviewed his wrist radiographs today as compared to radiographs from 1 year ago, indicating no further collapse of the radiocapitate articulation. I recommend he proceed with an *update MRI to re-evaluate* the articular cartilage, evidence of bony edema and any other *changes* which have occurred. I anticipate he will require further treatment as symptoms progress, and *may ultimately need a wrist arthrodesis*. (Ex. 3, p. 19)(emphasis added).

Dr. Mordick's IME Opinion of Claimant's Trigger Finger/Thumb Causation
(A point not now in dispute by Claimant).

10. Dr. Mordick performed an IME on behalf of Respondents in January, 2019. (Ex. C.). This included a records review, history taken from Claimant, and a physical exam. He is board certified in plastic surgery, and has practiced hand surgery since 1993. He has opined that Claimant's trigger finger/thumb issues are not related to his original work injury.

11. At hearing, Dr. Mordick also testified that, in his expert opinion, Claimant did not develop a trigger finger as a result of his July 2013 work injury. Dr. Mordick further noted that Claimant exhibited significant trigger nodules on multiple other digits, which indicated he is predisposed to trigger digit issues, and that the left trigger thumb was not caused by the cast he wore after his surgery. (Ex. C, p. 19).

Dr. Mordick's Opinion on the Proposed MRI

12. At hearing, Dr. Mordick noted that Dr. Conyers recommended the MRI to specifically evaluate Claimant's articular cartilage. Dr. Mordick reviewed Claimant's medical treatment records and testified that the MRI recommended by Dr. Conyers was not reasonable, because Claimant previously had a CT scan in 2015, which already revealed severe arthritis between the radius and the capitate. Dr. Mordick specifically noted that this CT had been read by a board-certified radiologist.

13. Dr. Mordick opined the MRI would not provide a benefit because Claimant did not have a previous MRI to use for a comparison to address any changes. Dr. Mordick testified that an MRI would not show resolution or improvement of Claimant's arthritis, and would only re-document the condition that was already revealed in the 2015 CT scan.

14. Dr. Mordick testified, that in his expert opinion, an MRI would be unnecessary to evaluate the status of a joint when a previous CT scan had already revealed severe arthritis. He opined that Claimant's arthritis would only get worse over time, and therefore he did not see any indication for another study.

15. Additionally, he noted that Dr. Conyers stated that he recommended the MRI since he wanted to review changes or evidence of bony edema. (Ex. E, p. 190). Dr. Mordick testified that bony edema is another component of arthritis. Dr. Mordick testified that the CT scan already revealed severe arthritis, and an MRI was unnecessary to confirm the presence of edema. Dr. Mordick testified that a CT scan was *just as good as an MRI to show arthritis.*

16. Dr. Mordick added:

A.....I don't see the MRI changing clinical decision-making regarding this when we have a CT scan. *All I can guess...is that maybe Dr. Conyers*

forgot that ...the CT scan had been done four years ago. (Transcript, p. 13)(emphasis added)

17. Additionally, Dr. Mordick testified that Dr. Conyers previously noted damage to Claimant's proximal capitate during his original surgery procedure. He testified that since Dr. Conyers was already aware of this damage, the proposed MRI would be unnecessary.

18. Dr. Mordick testified that there are several stages of Kienbock's disease, each of which can be treated with several different operations. However, he testified that a wrist arthrodesis (i.e. fusion) is the sole surgical option to treat Claimant at this point, given the severity of his arthritis.

19. Dr. Mordick, when asked if the proposed MRI could pick up changes since the [2015] CT scan, stated:

A. [It is] Hard to compare an MRI and a CT scan. If you wanted to compare two studies over two different time periods, *I'd repeat the CT scan* so you can compare apples and apples.

Q.So you just said that it's hard to compare an MRI to a CT scan?

A. *You look at it differently*, yes... But...if you want to compare a study in 2015 and a...study in 2019 to see for change, then you'd be asking for the same study, not something different.

Q. And in fact, you *don't even know what an MRI would have shown in 2015, do you?*

A. *No*, I can't go back in time and look at it...It doesn't exist, so you can't get one now and compare back to it. (Transcript, pp. 18-19)(emphasis added).

Dr. Mordick's Opinion of a Repeat CT Scan

20. Despite touting the advisability of a new CT scan compared to a new MRI, Dr. Mordick testified that a follow-up CT scan was also unnecessary, because Claimant's 2015 CT has already revealed severe arthritis and a second CT would only re-document this severe arthritis.

21. Dr. Mordick testified that a subsequent imaging study would not be valuable during Claimant's decision-making process, since Claimant would still essentially be balancing the reduction in pain with the loss of motion should he choose to undergo a fusion.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado is to assure quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1)*. Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. *Section 8-43-201, C.R.S.* A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark, 197 Colo. 306, 592 P.2d 792 (1979)*.

B. In determining credibility, the Administrative Law Judge should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil 3:16*. The Administrative Law Judge, as the fact-finder, is charged with resolving conflicts in expert testimony. *Rockwell Int'l v. Trumbull, 802 P.2d 1182, 1183 (Colo. App. 1990)*. In this instance, the Administrative Law Judge finds there to be a sincere difference in medical opinion between Dr. Mordick, who testified, and Dr. Conyers, whose medical opinion is expressed through his reports. As a result, their respective opinions will be weighed according to their *persuasiveness*, as opposed to their *credibility per se*.

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

Medical Treatment, Generally

D. Respondents are liable for medical treatment reasonably necessary to cure or relieve the effects of an industrial injury. *Section 8-42-101*. Even if the Respondents admit liability, they retain the right to dispute the reasonable necessity or relatedness of any particular treatment, and the mere occurrence of a compensable injury does not compel the Administrative Law Judge to approve all requested treatment. *Snyder v. City of Aurora, 942 P.2d 1337 (Colo. App. 1997)*; *McIntyre v. KI, LLC., W.C. No. 4-805-040 (July 2, 2010)*. The Claimant must prove

that an injury directly and proximately caused the condition for which she seeks treatment, and that the treatment is reasonably necessary. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

Post MMI-Maintenance Medical Care, Generally

E. In cases where the respondents file a final admission of liability admitting for ongoing medical benefits after MMI they retain the right to challenge the compensability, reasonableness, and necessity of specific treatments. *Hanna v. Print Expeditors Inc.*, 77 P.3d 863 (Colo. App. 2003); *Oldani v. Hartford Financial Services*, W.C. No. 4-614-319-07, (ICAO, Mar. 9, 2015). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School District No.11*, W.C. No. 3-979-487, (ICAO, Jan. 11, 2012); *Ford v. Regional Transportation District*, W.C. No. 4-309-217 (ICAO, Feb. 12, 2009). The question of whether the claimant has proven that specific treatment is reasonable and necessary to maintain her condition after MMI or relieve ongoing symptoms is one of fact for the ALJ. See *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

Is the MRI as Proposed by Dr. Conyers Reasonable and Necessary?

F. There is nothing in the record to suggest that Dr. Conyers has not been attentive to Claimant's treatment. At the time of Claimant's (1/29/2015) proximal row carpectomy, he noted that Claimant had "*pretty well preserved articular cartilage*", and sought to preserve his articulating surface to the extent possible. Eleven months later, the CT scan radiologist interpreted Claimant's articular surface as showing "severe degeneration". No other detail is noted in the radiologist report.

G. On the 8/29/2017 follow-up, Dr. Conyers noted the possibility of a resurfacing device, as an intermediate surgical step, which might obviate a future fusion for Claimant. He noted in particular Claimant's possible suitability for this procedure, but proposed that they wait and see what progress might occur without intervention. Two years later, upon review of the radiographs, the possibility of a fusion in the future was raised. There was no specific mention of the resurfacing procedure, but neither was it taken off the table. But first, he wanted an *updated* MRI to *re-evaluate* the articular cartilage, evidence of *edema*, and *any other changes* which *may* have occurred. This follow-up MRI was timely denied by Respondents.

H. Dr. Mordick posits that a new CT scan would be preferable to a new MRI *to look for changes*, but sees no real value in either one. He also opines that a CT scan was as good as an MRI *to show arthritis*. However, he acknowledges that he *does not know what a 2015 MRI* would have shown. One might expect him to say it *would have shown exactly what the CT scan* did, but he stopped short of that. It is apparently hard to compare an MRI directly to a CT scan, since "you look at it differently." This suggests the possibility that subtle differences in interpretation might have been noted in a 2015 MRI vs. the 2015 CT scan. This also suggests there might be differences in the results

of an MRI vs. a CT scan beyond *changes*, and showing *arthritis*; however, those possible differences were not addressed.

I. As noted by Claimant, Dr. Mordick did not even address the possibility of the resurfacing option. After his review of Dr. Conyers' records, one would expect, at the very least, that Dr. Mordick might have opined that such a procedure would never be a good possibility for Claimant. Instead, he presented Claimant's choice on a single axis: Fuse or don't fuse – trade motion loss for pain relief. Dr. Conyers wants Claimant, if warranted, to have a better compromise, but first, he wants to see what Claimant's wrist looks like now. He wants to *re-evaluate* the cartilage, look for *edema*, and look for other *changes* (whatever they might be) which may have occurred.

J. Because Dr. Conyers is looking for *changes*, and wants to *re-evaluate* the cartilage is strongly suggestive (and the ALJ so finds) that he was, in fact, aware of the 2015 CT scan results. It was he who ordered the CT scan, and it is presumably in Claimant's medical file. He did not forget about those results. Furthermore, being the surgeon who has seen to Claimant's care for 6+ years, and the one who would operate again, if warranted, *Dr. Conyers wants to read the MRI himself, and perform his own evaluations.* He does not want to rely solely on the non-treating, radiologist's CT interpretation from 4 years ago, before he performs a surgery – *or even chooses between available surgical alternatives.*

K. Dr. Mordick is a successful, highly credentialed hand surgeon. Perhaps his surgical approach - *should Claimant be his patient* - is medically reasonable. However, the ALJ is not prepared to accept his approach to the exclusion of that of Dr. Conyers. Dr. Conyers is the treating physician, and wants to see for himself the *current state* of Claimant's wrist. He does not want to rely solely upon the radiologist's interpretation of the 2015 CT scan. He has chosen an MRI, instead of another CT scan –to get a better preview of the *cartilage*, to look for *edema*, to contrast any other *changes*, and perhaps *to look at them differently.* Dealer's choice.

L. Dr. Conyers' rationale for the MRI is more persuasive than the contrary opinion of Dr. Mordick. The ALJ finds, by a preponderance of the evidence, that the requested MRI is reasonable, necessary, and related to Claimant's work injury, and is a necessary component to his medical maintenance treatment.

ORDER

It is therefore Ordered that:

1. Respondents shall pay for the MRI as recommended by Dr. Conyers.
2. Respondents shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.
3. All matters not determined herein are reserved for future determination.

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

DATED: May 13, 2020

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

PROCEDURAL HISTORY

The applications for hearing in these separate claims for compensation, WC No. 5-075-625 (DOI 4/18/18) and WC No. 5-103-884 (DOI 3/18/19) were consolidated for hearing.

Compensability under WC No. 5-075-625 has been admitted pursuant to a General Admission of Liability ("GAL") and was only endorsed in anticipation of consolidation to determine liability for a subsequent work injury and resulting workers' compensation benefits. The issue of AWW in WC No. 5-075-625 was withdrawn at the commencement of hearing. The issue of reopening temporary indemnity benefits in WC No. 5-075-625 on the grounds of change in medical condition and error/mistake was added via Claimant's uncontested motion at the commencement of hearing.

ISSUES

WC No. 5-075-625 (DOI 4/18/18)

- I. Whether [Redacted Respondents] are liable for the costs of the surgery performed by Dr. Nanney on October 26, 2018, and continuing medical benefits to cure and relieve the effects of Claimant's April 18, 2018 work injury.
- II. Whether the Director's order terminating temporary indemnity benefits should be reopened due to error/mistake or change in condition. If so, whether Claimant was responsible for his termination.
- III. Whether Claimant is entitled to temporary indemnity benefits.

WC No. 5-103-884 (DOI 3/18/19)

- I. Whether Claimant sustained a compensable industrial injury on March 18, 2019.
- II. If so, whether Claimant is entitled to medical benefits and temporary indemnity benefits beginning March 19, 2019 and ongoing.
- III. If so, determination of Claimant's average weekly wage ("AWW").
- IV. If not, whether, [Redacted subsequent Employer] is entitled to reimbursement from [Redacted Respondents] for wage loss benefits paid to Claimant, and [Redacted subsequent Employer Insurer] is entitled to reimbursement from [Redacted Respondents] for medical benefits paid on behalf of Claimant.

FINDINGS OF FACT

1. Claimant sustained an industrial injury to his low back on April 18, 2018 during the course and scope of his employment as a plumber for [Redacted Employer].

2. Claimant treated with UC Health and Melinda Gehrs, M.D. as his primary authorized treating physician ("ATP") for the April 18, 2018 work injury. Dr. Gehrs initially assessed Claimant with acute on chronic low back pain without sciatica, noting Claimant had a prior work injury involving the low back for which he underwent L4-5 rhizotomies and received permanent impairment. She prescribed Claimant a Medrol dosepak, Percocet, and physical therapy.

3. Claimant underwent a lumbar spine MRI on May 15, 2018 that revealed multilevel spondylitic changes; a posterior broad-based disc protrusion at L5-S1 with impingement upon the traversing left S1 nerve root and mild central canal stenosis and moderate bilateral neural foraminal narrowing; and a posterior broad-based disc protrusion at L4-5 with a central annular tear, facet hypertrophic changes, and moderate bilateral neural foraminal narrowing with moderate canal stenosis. The findings were felt to be most significant at the L4-5 level.

4. [Redacted Employer] filed a GAL on May 25, 2018 admitting for an AWW of \$1,790.57 and corresponding temporary total disability ("TTD") rate of \$948.15.

5. Claimant received TTD benefits from April 24, 2018 to May 20, 2018.

6. On May 21, 2018, Claimant returned to modified duty with [Redacted Employer] pursuant to an offer of modified employment signed off by Dr. Gehrs. Claimant was to work 40 hours/week at \$12/hour for a total of \$480/week. In addition to one-pound ongoing lifting restrictions, Dr. Gehrs indicated ongoing restrictions of no bending and frequent position breaks.

7. Claimant received temporary partial disability ("TPD") from May 21, 2018 to June 19, 2018.

8. Claimant resigned his employment with [Redacted Employer] on June 19, 2018. He testified he resigned due to his belief that he would not be able to perform his regular job duties again without an assistant. Claimant was under the impression he would have to pay for an assistant. Claimant testified that he was advised by his doctor to look for a lighter duty job and/or to get an assistant to perform the heavy lifting required for his plumbing job. Claimant testified he could not perform his regular duties with [Redacted Employer] on one-pound lifting restrictions.

9. Claimant began working for [Redacted subsequent Employer] as an inspector on July 2, 2018. Claimant applied for the position with [Redacted subsequent Employer] on or around May 10, 2018 and attended an interview on or around May 25, 2018. At the interview, he indicated he could perform all aspects of the job without accommodation. Per the job description, the position required frequent standing,

walking, crawling, lifting, carrying, bending/stooping, and twisting, occasional exertion of up to 20 pounds of force, and frequent exertion of up to 10 pounds of force.

10. Claimant testified at hearing that, despite having good and bad days with respect to his symptoms, he was able to perform his job duties for [Redacted subsequent Employer]. Claimant performed his regular job duties for [Redacted subsequent Employer] until October 23, 2018.

11. On June 27, 2018, [Redacted Employer] filed a Petition to Modify, Terminate, or Suspend Compensation (the "Petition to Terminate") on the basis that Claimant voluntarily terminated his employment as of June 18, 2018. The Petition to Terminate noted Claimant was receiving TPD at the rate of \$948.15 per week. [Redacted Employer] requested termination of benefits as of June 20, 2018.

12. Claimant did not respond to the Petition to Terminate. On July 23, 2018, the Division approved [Redacted Employer]'s Petition to Terminate, terminating Claimant's disability benefits as of the date of the Petition to Terminate. [Redacted Employer] filed a GAL on July 30, 2018 terminating temporary indemnity benefits pursuant to the Division's approval of the Petition to Terminate.

13. Claimant continued to undergo treatment with Dr. Gehrs for his April 18, 2018 work injury, including physical therapy, medication, dry needling, acupuncture and chiropractic care. Claimant continued to report mid and low back pain radiating into the left gluteal region and left leg. He denied any significant numbness and tingling. At his September 25, 2018 examination, Claimant reported pain in the low back greatest in the left gluteal region radiating down the posterior thigh. Claimant reported being unable to bend and get his shoes and socks on the left leg. Dr. Gehrs recommended a L4-5 facet injection. She noted Claimant's pain is likely multifactorial and stated Claimant was not a good surgical candidate, but that referral to a surgeon could be a future option. Dr. Gehrs noted trigger point injections could also be a consideration.

14. Claimant underwent a left L4-5 facet joint steroid injection on October 12, 2018.

15. On October 23, 2018, Claimant felt a sudden onset of increased low back pain after getting up for work and using the bathroom at home. Claimant testified nothing specifically occurred to increase his pain. Claimant was transported to the emergency room at UC Health via ambulance. He reported 10/10 pain and some ongoing left foot tingling. The admitting physician remarked that there was "[n]o evidence of acute issues or anything that needs emergent surgical intervention." Claimant underwent a repeat lumbar spine MRI that revealed worsened disc extrusions at L5-S1 with worsened spinal canal stenosis, most severely affecting the left lateral recess with possible impingement of the left S1 nerve root. Claimant was admitted for pain control and a neurosurgery evaluation.

16. Allan Nanney III, M.D. performed the neurosurgical evaluation that same day. Claimant reported left buttock and leg pain of the left side that had progressively

worsened over the last five months. Dr. Nanney reviewed Claimant's MRIs and agreed Claimant had a "significant amount of stenosis to the descending S1 nerve on the left from a disc herniation." He noted Claimant had tried a significant amount of traditional nonsurgical therapies and there was significant structural explanation for his symptoms. Dr. Nanney wrote,

I do believe he would benefit from microdiscectomy on the left at L5-S1 and I am willing to perform this during this hospital admission, if he chooses to do so. Other options include continued medical management, tincture of time and other nonsurgical strategies. I will follow him closely along.

17. Claimant remained in the hospital, electing to proceed with the surgery recommended by Dr. Nanney. He testified at hearing that Dr. Nanney possibly discussed other treatment options with him but he elected to proceed with the surgery. Claimant did not seek prior approval for the surgery from [Redacted Employer]. Dr. Nanney performed a left L5-S1 hemilaminotomy, medial facetectomy, and microdiscectomy on October 26, 2018.

18. Claimant initially reported significant improvement in his pain complaints post-surgery, with some continued numbness and tingling in the left lower extremity. On November 15, 2018, Dr. Gehrs released Claimant to modified duty with restrictions of no lifting more than five pounds, no walking for more than four hours a day, and no crawling, bending, twisting or climbing ladders. On November 27, 2018, Claimant reported to Dr. Gehrs he felt like he could do 100% field work. He continued to report cramping and numbness. Dr. Gehrs continued restrictions of no bending or twisting and limited lifting to 15 pounds.

19. Claimant's symptoms subsequently began to worsen. On December 18, 2018, Claimant reported to Dr. Gehrs worsening pain over the last month with fairly consistent cramping pain in the left gluteal region which intermittently radiated down the left leg. Claimant continued to have numbness and tingling in a S1 distribution on the left leg. Dr. Gehrs prescribed Claimant Gabapentin on January 9, 2019. By January 23, 2019, Claimant was reporting 9/10 pain, again complaining of progressive worsening of symptoms since the surgery.

20. On January 30, 2019, Claimant reported progressive left leg symptoms that had been getting worse and worse. Dr. Gehrs noted the pain was generally more of a dull, aching pain, but also could be sharp and shooting pain with movement. She prescribed Claimant a Medrol dosepak and recommended Claimant undergo a lumbar MRI.

21. The lumbar MRI was obtained on February 1, 2019 and compared to Claimant's October 23, 2018 lumbar MRI. The radiologist noted multilevel lumbar disc pathology and spondylopathy and, at the level of L5-S1, a 1.0 cm free disc fragment within the left lateral position that contacted the left S1 nerve root that "appear[ed] to represent a recurrent free disc fragment."

22. On February 6, 2019, Claimant saw Richard Skurla, M.D., who opined that the recent MRI revealed a recurrent L5-S1 disc herniation compressing the S1 nerve root, but not nearly as severe as prior to the surgery. He noted Claimant continued to work, but had significant pain at night, with pain radiating down the left lower extremity and numbness in the left foot. Claimant reported using one of his mother's fentanyl patches to help relieve his pain. Dr. Skurla noted Claimant was failing conservative management at the time, but recommended an injection and continuing physical therapy. He prescribed Claimant Percocet for his pain.

23. Claimant returned to Dr. Gehrs on February 20, 2019. She noted Claimant initially had some improvement post-surgery, but that his pain never completely resolved and then progressively worsened. Dr. Gehrs noted the repeat lumbar MRI showed a recurrent left L5-S1 disc herniation and that Claimant had been advised to undergo a L5-S1 epidural steroid injection, which had not been authorized. Claimant was reporting constant pain in the low back and left gluteal radiating down the posterior thigh with occasional shooting pains into the foot. Claimant also complained of constant numbness and tingling down the posterior thigh and foot. Dr. Gehrs noted Claimant continued to work, but did not do any significant lifting, climbing ladders, or crawling.

24. While working as an inspector for [Redacted subsequent Employer] on March 18, 2019, Claimant's left foot went through flooring, causing Claimant to fall approximately 18 inches. Claimant testified he landed on his feet and then went into a seated position on the floor and felt immediate low back pain. Claimant reported the incident to [Redacted subsequent Employer] and was taken by his manager to Concentra. Claimant reported 8/10 sharp back pain. Richard Shouse, PA-C assessed Claimant with lumbar back pain. He characterized it as a new injury that aggravated Claimant's pre-existing April 18, 2018 back condition. He sent Claimant to the emergency room at UC Health for pain control. At UC Health, Christopher Scott PA-C noted Claimant may have exacerbated his chronic low back condition. Claimant was prescribed medication and discharged.

25. Claimant returned to Concentra on March 20, 2019 and saw Nancy Strain, M.D., who noted Claimant suffered a large jolting action on March 18, 2019, but did not fall down. She opined Claimant aggravated his prior back condition.

26. Claimant underwent a repeat lumbar MRI on March 21, 2019 that was compared to his February 1, 2019 lumbar MRI. The radiologist found no significant change since the February 1, 2019 MRI. The impression was stable postoperative and spondylitic change, continued findings of left lateral recess stenosis and moderate bilateral neural foraminal narrowing at L5-S1 and no underlying canal stenosis.

27. All of the medical evaluators agreed that the March 21, 2019 MRI showed no significant change compared to the February 1, 2019 MRI.

28. Dr. Gehrs reexamined Claimant on March 26, 2019, noting the March 18, 2019 incident that occurred while Claimant was working for [Redacted subsequent Employer]. Claimant reported pain in the low back, left gluteal, and down the posterior thigh into the calf down to the lateral foot with a S1 distribution. Dr. Gehrs noted Claimant's pain had worsened but remained in the same location. She further noted Claimant was now using a cane to ambulate. Dr. Gehrs remarked there were not significant changes on MRI. She wrote,

Patient unfortunately has recurrent left-sided disc. Prior to incident on 3/18 was recommending an epidural injection which to date has been denied. He really needs to undergo this so he can be more comfortable and proceed with his work...His pain is not in a new location and its just somewhat worse but even prior to that incident he needed an injection. Will maintain him on gabapentin and ibuprofen in addition to limited amounts of Percocet.

29. Dr. Gehrs related Claimant's symptoms to the April 18, 2018 work injury. On April 4, 2019 she wrote,

Patient once again continues to be flared up in the left leg as a result of disc protrusion at L5-S1 towards the left. It has not been getting better with time. He needs to try either injection or surgical interventions...Unfortunately patient now has 2 insurance companies dealing with the injury but I think most of his issues are really related to his first injury and this should be taken care of through that one. MRI did not worsen after the second injury.

30. On April 5, 2019, PA-C Shouse reexamined Claimant at Concentra. He noted Claimant had not returned to work because of the pain for the second most present injury. Claimant reported that, since the March 18, 2019 incident, his pain had doubled and he was now walking with a cane. On April 17, 2019, Dr. Linda Thomas at noted Claimant was having significant back and leg pain in February 2019, that worsened with the fall in March 2019. She noted Claimant was having significant difficulties with the physical requirements of his job.

31. On April 18, 2019, Dr. Gehrs noted Claimant "had a second incident with another job which aggravated his symptoms but I really do not think there is any significant change in his etiology of his pain."

32. On April 19, 2019, Claimant presented to Bryan Castro, M.D. Claimant reported that, prior to the March 18, 2019 incident his pain was 4-6/10 and he was able to work. Claimant reported that after the incident his pain was 6-8/10 and he was not working. Dr. Castro reviewed the February 1, 2019 and March 21, 2019 MRIs and opined there appeared to be a small recurrence of a disc herniation on both, but there was not substantially worsening revealed on the March 21, 2019 MRI. He wrote, "In fact, I do not see largely any change. These are noncontrasted images and it is unclear to see how

much of this is actually scar tissue versus recurrent herniation.” Dr. Castro noted microdiscectomy decompression revision could be a consideration, but recommended obtaining a repeat MRI with contrast to determine if the possible recurrent disc herniation could actually be scar tissue.

33. [Redacted Employer] retained Jeffrey J. Sabin, M.D. for an independent medical examination (“IME”). Dr. Sabin provided three reports, including a record review dated February 28, 2019, an evaluation dated April 1, 2019, and an additional record review dated April 26, 2019. In his first report, Dr. Sabin concluded, “it would appear that the patient’s low back condition and need for further treatment are necessary and related to the April 2018 incident.” He did not have a copy of the MRIs. He stated, “If the MRIs do indeed show recurrent disc herniation at L5-S1, then epidural steroid injections would be reasonable and if no benefits, then re exploration and repeat hemilaminotomy and partial discectomy should be performed for the predominant leg pain greater than back pain.” Dr. Sabin’s conclusion remained the same after his evaluation of Claimant and additional record review. He opined “There is no medical record evidence of any intervening or new injury and therefore worsening of the disc herniation would be a naturally occurring event related back to the 04/18/18 alleged lifting incident.”

34. [Redacted subsequent Employer] filed a Notice of Contest on April 4, 2019.

35. On April 26, 2019, [Redacted Employer] denied Claimant’s request for authorization of L5-S1 steroid injections.

36. On May 6, 2019, Dr. Gehrs noted Claimant had considerable pain issues limiting his ability to work which started after the second accident and that Concentra was working to get Claimant back to pain levels before the March 2019 incident. She opined Claimant likely needed surgical intervention, stating, “This should be done under the injury for which I am seeing him for because felt that this was necessary even prior to his second injury.”

37. On June 6, 2019, Claimant underwent a left S1 transforaminal epidural steroid injection which did not provide Claimant any significant improvement.

38. Jeffrey Raschbacher, M.D. conducted a Physician Advisor Review on July 9, 2019. Dr. Raschbacher did not recommend authorization of any further treatment of Claimant in connection with the March 18, 2019 incident. He opined,

It appears given his level of symptomatology and the lack of any clear objective change from his prior status, from before 03/18/2019, that he should simply continue his care as he was already planning on doing for date of injury 04/18/2018. Again, it is remarkable to note that further care was clearly planned and recommended, and that his pain levels were quite significant before he reported the injury claim on 3/18/2019.

39. Dr. Castro reexamined Claimant on July 10, 2019. Claimant reported that, prior to the March 2019 incident, his pain was 4/10 and that if he worked a hard day, he would take anti-inflammatories and ice, but remained able to work. Claimant reported that since the March 2019 incident his symptoms have worsened and he is unable to perform activities. Dr. Castro noted that an April 30, 2019 lumbar MRI revealed majority scar tissue from his previous surgery and only a very small recurrence of disc bulge. He recommended Claimant undergo an EMG of the lower extremities.

40. Claimant underwent an EMG on August 13, 2019 which revealed some mild findings of both acute and chronic denervation and re-innervation in S1 distribution.

41. Claimant returned to Dr. Castro on August 28, 2019. Dr. Castro noted Claimant's April 2019 MRI revealed partial displacement of the nerve related to recurrence of scar tissue rather than large herniation. He stated that moving forward with surgery was a 50/50 proposition, noting further surgery could result in more scar tissue and may not alter Claimant's symptoms dramatically, if at all.

42. Kathy McCranie, M.D. provided physiatry treatment through Concentra. After review of the records she provided a report, dated August 30, 2019. She stated that recommendations for surgical evaluation and injections would have been the same without the [Redacted subsequent Employer] incident. She indicated that chiropractic care, massage and acupuncture had been recommended by Concentra under the March 18, 2019 claim. She would describe the [Redacted subsequent Employer] incident as a temporary aggravation. She noted that Claimant's pain ratings have been essentially unchanged compared to his visits just prior to the [Redacted subsequent Employer] incident. She stated that she did not anticipate permanent impairment for the March 18, 2019 injury, as it was a temporary aggravation. Dr. McCranie opined that Claimant's symptoms, medical recommendations and additional restrictions are due to the expected progression of the documented admitted [Redacted Employer] claim.

43. On September 5, 2019, Allison Fall, M.D. performed an IME at the request of [Redacted subsequent Employer]. Dr. Fall noted that, although Claimant reported increased pain after the March 2019 incident, the pain was in the same area and the March 2019 MRI did not reveal any changes as compared to the February 2019 MRI. Dr. Fall opined that, while Claimant may have had a temporary exacerbation of his symptoms, there was no substantial intervening injury on March 18, 2019, and the need for treatment was related to the April 18, 2018 work injury. She noted that the fact Claimant was taken off of work after the March 18, 2019 incident did not indicate that there was objective evidence of a substantial worsening of his condition.

44. On September 13, 2019, Gretchen L. Brunworth, M.D. performed a medical record review at the request of [Redacted Employer]. She noted that Claimant's symptoms worsened after the March 18, 2019, but there was no change in pathology on the MRI. Dr. Brunworth opined that surgery and injections were being contemplated prior to the March 2019 incident and it was "most reasonable" do injections and surgery under the 2018 claim. She noted, however, that Claimant had completely been taken off

of work since March 18, 2019 and opined that the “additional disability since the 2019 incident would be related to that incident.”

45. Dr. Brunworth testified at hearing as a Level II accredited expert in physical medicine and pain rehabilitation. Dr. Brunworth opined Claimant suffered a worsening of his condition as a result of the March 18, 2019 incident. She testified Claimant had an increase in symptoms and disability after the March 18, 2019 incident, and continues to report pain and has been unable to return to work. Dr. Brunworth admitted that she was relying upon Claimant’s representations in making her conclusions. Dr. Brunworth acknowledged that surgery and injections were contemplated as treatment prior to March 18, 2019, and testified that one cannot determine causation solely based on pain complaints. Dr. Brunworth agreed that without the treatment that was being recommended under the [Redacted Employer] claim, Claimant’s pain could have worsened.

46. Dr. Fall testified at hearing as a Level II accredited expert in physical medicine and rehabilitation. Dr. Fall explained Claimant is currently suffering from a recurrent disc herniation causing denervation and radiculopathy, which was his condition prior to the March 18, 2019 incident and was already causing disability and the need for medical treatment. Dr. Fall opined that Claimant did not suffer a distinct injury on March 18, 2019, nor a substantial aggravation of his condition. Dr. Fall stated that, although he may have had a temporary exacerbation of his symptoms, there was no substantial intervening injury at the time of the [Redacted subsequent Employer] incident. Claimant’s diagnosis did not change. Dr. Fall pointed out that, during his visit after the [Redacted subsequent Employer] incident, his pain complaint was still 8/10, as it had been in his February 20, 2019 appointment. His January 23, 2019 pain complaints were described as 9/10. Dr. Fall explained that the natural progression for Claimant’s condition was that Claimant was most likely headed for surgery. She explained that even without the [Redacted subsequent Employer] incident, there was no reasonable expectation that Claimant’s symptoms would have improved. She would not therefore expect that restrictions would have been removed. Dr. Fall testified that Claimant had pain complaints prior to March 18, 2019 that were the natural consequence of his admitted [Redacted Employer] injury. She did not anticipate that Claimant’s complaints would have improved without the treatment recommended under that claim.

47. Dr. Fall testified that, prior to March 18, 2019 Claimant had an active process that included inflammation on the nerve, which was very painful. This type of pain is easily set off or stressed once a patient has a disc impacting the nerve because of this kind of pre-existing condition. She stated that this is a natural consequence of Claimant’s pre-existing condition. Given Claimant’s situation, she testified that Claimant’s pre-existing condition produced the effect that Claimant experienced at the time of the [Redacted subsequent Employer] incident. She reiterated her opinion no new pathology was created after the [Redacted subsequent Employer] incident and there is no new pathology driving Claimant’s complaints after the [Redacted subsequent Employer] incident. The [Redacted subsequent Employer] incident did not result in any unexpected complaints, given the pre-existing condition. Without the admitted

[Redacted Employer] work injury and its effects, Dr. Fall testified that she would not have expected that Claimant would have been removed from work entirely because of the mechanism of the [Redacted subsequent Employer] incident.

48. Dr. Fall addressed the relevance of Claimant's off-work status after the [Redacted subsequent Employer] incident. She testified that the records did not reflect a change in pathology, and she attributed differences in restrictions to differences in the opinions of his medical providers. She testified that working before the [Redacted subsequent Employer] incident and not working afterward did not indicate to her that there was a distinct compensable injury, nor did it indicate that the [Redacted subsequent Employer] incident caused the need for restrictions. Dr. Fall testified that she attributed Claimant's disability to the admitted [Redacted Employer] April 18, 2018 injury.

49. Dr. Brunworth and Dr. Fall both testified that the acupuncture, massage, and chiropractic treatment provided to Claimant by Concentra were reasonable treatment for Claimant's condition. Dr. Fall testified that the [Redacted subsequent Employer] incident did not lead to new or different treatment that could not have been provided under the admitted [Redacted Employer] claim. She testified that the Concentra providers were just trying to give Claimant any pain relief that they could provide him, and that that need for treatment existed before the [Redacted subsequent Employer] incident.

50. As of the date of the hearing, no physician, whether from Concentra or UC Health, has released Claimant to return to work since being taken completely off work after the March 18, 2019 incident.

51. Claimant was separated from his employment with [Redacted subsequent Employer] after exhausting available and donated leave.

52. Claimant's pay records indicate that, at the time of the March 18, 2019 incident, Claimant earned \$28.28/hour and worked 40 hours per week. Accordingly, a fair approximation of Claimant's AWW for [Redacted subsequent Employer] is \$1,131,20.

53. Amy Wells, Benefits Manager for [Redacted subsequent Employer] , testified at hearing that based upon [Redacted subsequent Employer] 's policy, Claimant would not have been eligible for his position if he had informed [Redacted subsequent Employer] of his ongoing work restrictions. Following the [Redacted subsequent Employer] incident, [Redacted subsequent Employer] was made aware of restrictions for Claimant that they could not accommodate. Despite [Redacted subsequent Employer] denying Claimant's claim, [Redacted subsequent Employer] continued to pay when he was not physically working, totaling Claimant paid 700 hours in holiday pay, sick leave, annual leave, short term disability, injury leave, comp time, donated leave and other leave from March 18, 2019 to October 23, 2019. This was paid at the rate of \$28.28 per hour, for a total of \$19,796.00.

54. Claimant testified at hearing that he had a substantial increase in pain after the March 18, 2019 incident. He acknowledged that his pain is not different in nature, just more intense. Claimant testified he currently walks with a cane, which he did not do prior to the [Redacted subsequent Employer] incident. Claimant testified that as of the date of hearing, even if he had not separated from his employment with [Redacted subsequent Employer] due to exhausting available leave, he would still be unable to return to work due to his significant pain.

55. Claimant's testimony is found credible and persuasive.

56. The ALJ finds Dr. Brunworth's testimony more credible and persuasive than the testimony of Dr. McCranie.

57. [Redacted Employer] and [Redacted Insurer] are not liable for the October 26, 2018 surgery performed by Dr. Nanney, as the surgery was unauthorized and non-emergent.

58. [Redacted Employer] and [Redacted Insurer] remain liable for reasonable and necessary medical treatment that is causally-related to the April 18, 2018 work injury.

59. Claimant failed to prove it is more likely than not there was an error/mistake justifying reopening temporary disability benefits in the [Redacted Employer]/[Redacted Insurer] claim. Claimant failed to prove entitlement to TPD benefits from June 28, 2018 to October 22, 2018.

60. Claimant proved by a preponderance of the evidence he suffered a significant worsening of his condition as of October 23, 2018. Claimant is entitled to TTD benefits from October 23, 2018 to November 15, 2018.

61. Claimant failed to prove he suffered wage loss as a result of the April 18, 2018 between November 16, 2018 to March 18, 2019, and thus failed to prove entitlement to TPD for such time period.

62. The preponderant evidence establishes Claimant sustained a compensable aggravation arising out of and during the course of his employment for [Redacted subsequent Employer] on March 18, 2019.

63. [Redacted subsequent Employer] is liable for reasonable, necessary and causally-related medical benefits to cure and relieve the effects of the March 18, 2019 aggravation.

64. [Redacted subsequent Employer] is liable for temporary indemnity benefits for wage loss suffered by Claimant beginning March 19, 2019 and ongoing, until terminated by law.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

October 2018 Surgery & Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School District #11*, W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012).

Section 8-43-404(7)(a), C.R.S. provides that “an employer or insurer shall not be liable for treatment provided pursuant to article 41 of Title 12, C.R.S. unless such treatment has been prescribed by an authorized treating physician.” If the claimant obtains unauthorized medical treatment, the respondents are not required to pay for it. *In Re Patton*, W.C. Nos. 4-793-307 and 4-794-075 (ICAO, June 18, 2010); see *Yeck v. Industrial Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999).

Authorization to provide medical treatment refers to a medical provider’s legal authority to provide medical treatment to the claimant with the expectation that the provider will be compensated by the insurer for treatment. *Bunch v. Industrial Claim Appeals Office*, 148 P.3d 381 (Colo. App. 2006); *One Hour Cleaners v. Industrial Claim Appeals Office*, 914 P.2d 501 (Colo. App. 1995); *In re Bell*, W.C. No. 5-044-948-01 (ICAO, Oct. 16, 2018). Authorized providers include those medical providers to whom the claimant is directly referred by the employer, as well as providers to whom an ATP refers the claimant in the normal progression of authorized treatment. *Town of Ignacio v. Industrial Claim Appeals Office*, 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). Whether an ATP has made a referral in the normal progression of authorized treatment is a question of fact for the ALJ. *Kilwein v. Indus. Claim Appeals Office*, 198 P.3d 1274, 1276 (Colo. App. 2008); *In re Bell*, W.C. No. 5-044-948-01 (ICAO, Oct. 16, 2018); *In re Patton*, W.C. Nos. 4-793-307 and 4-794-075 (ICAO, June 18, 2010)

Section 8-43-404(5)(a), C.R.S. grants employers the initial authority to select the ATP. However, in a medical emergency a claimant need not seek authorization from her employer or insurer before seeking medical treatment from an unauthorized medical provider. *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777, 781 (Colo. App. 1990). A medical emergency affords an injured worker the right to obtain immediate treatment without the delay of notifying the employer to obtain a referral or approval. *In Re Gant*, W.C. No. 4-586-030 (ICAP, Sept. 17, 2004). Because there is no precise legal test for determining the existence of a medical emergency, the issue is dependent on the particular facts and circumstances of the claim. *In re Timko*, W.C. No. 3-969-031 (ICAP, June 29, 2005). Once the emergency is over the employer retains the right to designate the first “non-emergency” physician. *Bunch v. Indus. Claim Appeals Office of State of Colorado*, 148 P.3d 381, 384 (Colo. App. 2006); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

[Redacted Employer] and [Redacted Insurer] concede they are liable for Claimant’s initial emergency care provided on October 23, 2018. They contend, however, that the surgery performed by Dr. Nanney on October 26, 2018 was non-emergent and unauthorized. The ALJ agrees. The admitting emergency room physician remarked that there was no evidence of acute issues or anything requiring emergent surgical intervention. Although Claimant was subsequently admitted for pain control and, pursuant to a surgical evaluation, recommended for surgery, the medical records indicate the need for surgery was not emergent. Dr. Nanney noted he was willing to perform the surgery while Claimant was hospitalized if Claimant chose to do so, yet Dr.

Nanney clearly noted other options for treatment that included medical management, tincture of time and nonsurgical strategies.

Claimant testified he elected to proceed with the surgery. While it is understandable Claimant likely wished to proceed with the surgery at the time for convenience and in hopes of experiencing some relief of his symptoms sooner rather than later, there is insufficient evidence indicating the surgery was emergent. Although Dr. Nanney performed the surgery during the same stint of hospitalization, the emergency effectively ended with Dr. Nanney's determination that surgery was one option of others, and that the surgery could or could not be performed at that time. It is undisputed Claimant did not seek prior authorization for the surgery. The totality of the evidence establishes the surgery performed by Dr. Nanney on October 26, 2018 was non-emergent and unauthorized. Accordingly, [Redacted Employer] and [Redacted Insurer] are not liable for the costs of the October 26, 2018 surgery. [Redacted Employer] and [Redacted Insurer] remain liable for authorized, reasonable and necessary medical benefits related to the April 18, 2018 work injury.

Reopening the Petition to Terminate & Claimant's Entitlement to Temporary Indemnity Benefits

An "award" may be reopened on the ground of "mistake." Section 8-43-303, C.R.S. The party seeking to reopen bears the burden of proof to establish grounds to reopen. See *Richards v. Industrial Claim Appeals Office*, 996 P.2d 756 (Colo. App. 2000). The term "mistake" refers to any mistake whether one of law or fact. *Renz v. Larimer County School District Poudre R-1*, 924 P.2d 1177 (Colo. App. 1996). The authority to reopen is discretionary provided the statutory criteria have been met. *Berg v. Industrial Claim Appeals Office, supra*. In order to reopen based on mistake the ALJ must determine that there was a mistake that affected the prior award. If there was a mistake the ALJ must determine whether, under the circumstances, it is the type of mistake that justifies reopening the claim. *Travelers Insurance Co. v. Industrial Commission*, 646 P.2d 399 (Colo. App. 1981). Factors the ALJ may consider when determining whether a mistake warrants reopening include the potential for injustice if the mistake is perpetuated, and whether the party seeking to reopen could have avoided the mistake by the exercise of due diligence in the handling or adjudication of the claim. *Klosterman v. Industrial Commission*, 694 P.2d 873 (Colo. App. 1984); *Travelers Insurance Co. v. Industrial Commission, supra*.

Claimant contends that termination of all temporary disability benefits pursuant to the Petition to Terminate was an error/mistake because Claimant was only receiving TPD based on modified employment at the time. Claimant argues that, at most, [Redacted Employer] was entitled to a credit against TPD in the amount of \$480 pursuant to the modified job offer.

As found, Claimant failed to meet his burden to prove any error/mistake occurred justifying the reopening of the termination of temporary indemnity benefits pursuant to the approved Petition. WCRP Rule 6-4 allows insurers to, in certain circumstances, file

a petition to suspend, modify or terminate temporary disability benefits. If the claimant does not file a written objection with the Division within 20 days of the date of the mailing of the petition, the Director may grant the insurer's request to suspend, modify or terminate disability benefits as of the date of the petition.

Under the termination statutes in §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S., a claimant who is responsible for his or her termination from regular or modified employment is not entitled to temporary indemnity benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and wage loss. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1131 (Colo. App. 2008). The termination statutes provide that, in cases where an employee is responsible for her termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, W.C. No. 4-631-681 (ICAO, Apr. 24, 2006).

The Petition to Terminate was properly filed and approved under WCRP Rule 6-4, terminating Claimant's temporary benefits pursuant to §8-42-105(4) C.R.S. and §8-42-103(1)(g). As noted above, when a claimant is responsible for his or her termination, any resulting wage loss is deemed not attributable to the industrial injury. Thus, Claimant's contention that only Claimant's TPD benefits at the time should have been affected per the Petition to Terminate is unpersuasive. Even assuming, arguendo, that there was a mistake regarding whether Claimant was responsible for his termination, the ALJ is not persuaded such mistake in fact would justify reopening, when Claimant had the opportunity to respond to the Petition to Terminate and failed to respond or timely appeal the Director's approval of the Petition to Terminate. The record does not support any mistake in law or fact justifying reopening under the circumstances.

Accordingly, Claimant is not entitled to TPD benefits from June 28, 2018 to October 22, 2018. As Claimant failed to prove the Petition to Terminate temporary disability benefits should be reopened on the basis of error/mistake, the ALJ does not address the issue of Claimant's responsibility for his termination.

Claimant has, however, established he suffered a significant worsening of his April 18, 2018 work injury as of October 23, 2018, entitling Claimant to additional temporary disability benefits.

Section 8-42-105(4) does not bar TTD wage loss claims after a termination for which the employee was responsible when the worsening of a work-related injury incurred during that employment causes subsequent wage loss. *Anderson v. Longmont Toyota, Inc.*, 102 P.3d 323, 326 (Colo. 2004). This is limited to cases in which the "claimant's condition worsens after the termination of employment and prevents or diminishes the claimant's ability to work," rather than where the wage loss is the result of the voluntary or for-cause termination of the regular or modified employment. *Gilmore*, 187 P.3d at 1132; *Grisbaum v. Indus. Claim Appeals Office*, 109 P.3d 1054, 1056 (Colo. App. 2005); *Anderson*, 102 P.3d at 326.

To prove entitlement to TTD benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result

of the disability, and that the disability resulted in an actual wage loss. See Sections 8-42-(1)(g), 8-42-105(4); *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office*, 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term “disability” connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (citing *Ricks v. Industrial Claim Appeals Office*, P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic*, 952 P.2d 831, 833 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

Claimant suffered increased pain and a repeat lumbar spine MRI revealed worsened disc extrusions, resulting in the need for surgery on October 26, 2018. Claimant did not work at all from October 23, 2018 to November 15, 2018 due to the worsening of his April 18, 2018 work injury and related treatment. As Claimant suffered wage loss due to the significant worsening of his April 18, 2018 work injury, Claimant is entitled to TTD benefits from October 23, 2018 to November 15, 2018, when Claimant was released to modified duty by Dr. Gehrs.

Claimant argues he is entitled to TPD from November 16, 2018 to March 18, 2019, as the wages Claimant earned for [Redacted subsequent Employer] during such time period were less than Claimant's AWW on the [Redacted Employer] claim. Although Claimant was on work restrictions during this time period, the wage loss was not due to the restrictions from his worsened condition. Accordingly, Claimant is not entitled to TPD benefits from November 16, 2018 to March 18, 2019.

Compensability of the March 18, 2019 Incident

A claimant is required to prove by a preponderance of the evidence that at the time of the alleged injury he was performing service arising out of and in the course of the employment, and that the alleged injury or occupational disease was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. The Act creates a distinction between an “accident” and an “injury.” The term “accident” refers to an “unexpected, unusual, or undesigned occurrence.” Section 8-40-201(1), C.R.S. In contrast, an “injury” contemplates the physical or emotional trauma caused by

an “accident.” An “accident” is the cause and an “injury” is the result. No benefits flow to the victim of an industrial accident unless the accident causes a compensable “injury.” A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). *Soto-Carrion v. C & T Plumbing, Inc.*, W.C. No. 4-650-711 (ICAO, Feb. 15, 2007); *David Mailand v. PSC Industrial Outsourcing LP*, W.C. No. 4-898-391-01, (ICAO, Aug. 25, 2014).

A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). However, no compensability exists if the disability and need for treatment was caused as the direct result of an independent intervening cause. *Owens v. Industrial Claim Appeals Office*, 49 P.3d 1187 (Colo. App. 2002). The question of whether the claimant met the burden of proof to establish a compensable injury is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000). Similarly, the question of whether the disability and need for treatment was caused by the industrial injury or an intervening cause is a question of fact. *Owens v. Industrial Claim Appeals Office*, *supra*.

It is undisputed that, at the time of the March 18, 2019 injury, Claimant was subject to certain work restrictions, and had worsening symptoms and recommendations for additional treatment in connection with the April 18, 2018 work injury. Nonetheless, leading up to March 18, 2019, Claimant was able to perform his job duties and maintained some level of function. Subsequent to the March 18, 2019 injury, Claimant has suffered from increased pain, he now walks with the assistance of a cane, and he has not returned to work due to his pain. Claimant has not been released to return to work by any providers. [Redacted subsequent Employer] argues that Claimant would not have been qualified for his job in the first instance had he revealed his pre-existing disability at the time of his interview, and that additional restrictions assigned after the March 18, 2019 merely represent differences in physician opinions. These arguments are unpersuasive to the ALJ as the fact remains, that despite Claimant’s worsening pre-existing condition and disability, Claimant was physically performing his job duties before the March 18, 2019 injury and subsequently was unable to do so. Accordingly, the preponderant evidence indicates the March 18, 2019 injury produced additional disability.

To prove an aggravation, a claimant need not show an injury objectively caused any identifiable structural change to their underlying anatomy. *Cambria v. Flatiron Construction*, W.C. No. 5-066-531, 2019 WL 2115963 (Colo. Indus. Cl. Apps. Office May 7, 2019). Pain is a typical symptom from the aggravation of a pre-existing condition, and a claimant is entitled to worker’s compensation benefits, “so long as the pain is proximately caused by the employment-related activities and not the underlying pre-existing condition.” *Martinez v. LKQ Holding Corp.*, W.C. Nos. 5-007-076; 5-066-360, 2019 WL 580514 (Colo. Indus. Cl. Apps. Office, Feb. 4, 2019). Although there has not been any identifiable structural change to Claimant’s underlying anatomy,

Claimant's reports of increased pain and decreased function subsequent to the March 18, 2019 are credible. The ALJ acknowledges that, in the month prior to the March 18, 2019 work injury, Claimant was reporting significant pain. However, medical records from February 2019 specifically note that while Claimant had significant pain at night, and he was not doing any significant lifting, climbing ladders, or crawling, he was continuing to work.

Dr. Brunworth testified that Claimant suffered additional disability as a result of the March 18, 2019 work injury. Drs. McCranie and Fall have acknowledged that Claimant likely suffered a temporary aggravation, but no substantial intervening injury. A temporary aggravation of a pre-existing condition is compensable, as long as the industrial exposure is the proximate cause of the claimant's need for treatment. See *Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 448 (1949); *Subsequent Injury Fund v. State Compensation Insurance Authority*, 768 P.2d 751 (Colo. App. 1988). Here, Claimant's March 18, 2019 injury proximately caused at least some of Claimant's additional disability. While the aggravation may have been temporary, whether Claimant has returned to what could be considered baseline is a determination for an ATP.

Medical Benefits

Respondents are liable to provide reasonable, necessary and casually related medical treatment to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School District #11*, W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012).

As the ALJ determined Claimant sustained a compensable aggravation of his pre-existing condition on March 18, 2019, [Redacted subsequent Employer] and [Redacted subsequent Insurer] are liable for reasonable, necessary and causally related medical treatment to cure and relieve the effects of the aggravation.

TTD Benefits

To prove entitlement to TTD benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. See Sections 8-42-(1)(g), 8-42-105(4); *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office*, 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which

impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (citing *Ricks v. Industrial Claim Appeals Office*, P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic*, 952 P.2d 831, 833 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

As found, Claimant is entitled to temporary indemnity benefits beginning March 19, 2019 until terminated by law. The March 18, 2019 injury produced additional disability and Claimant has not worked since such time. [Redacted subsequent Employer] and [Redacted subsequent Insurer] are liable for temporary indemnity benefits to the extent Claimant suffered lost wages since March 19, 2019.

AWW

Section 8-42-102(2) requires the ALJ to base the claimant's Average Weekly Wage (AWW) on his or her earnings at the time of injury. However, under certain circumstances the ALJ may determine the claimant's AWW from earnings received on a date other than the date of injury. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Specifically, §8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp.*, *supra*. Where the claimant's earnings increase periodically after the date of injury the ALJ may elect to apply § 8-42-102(3) and determine that fairness requires the AWW to be calculated based upon the claimant's earnings during a given period of disability, not the earnings on the date of the injury. *Campbell v. IBM Corp.*, *supra*.

As found, Claimant earned \$28.28/hour and worked 40 hours per week. Accordingly, a fair approximation of Claimant's wage loss and diminished earning capacity is an AWW of \$1,131.20.

ORDER

1. [Redacted Employer] remains liable for reasonable, necessary and causally related medical benefits to cure and relieve the effects of the April 18, 2018 work injury.

2. [Redacted Employer] is not liable for the costs of the October 26, 2018 surgery performed by Dr. Nanney, as such treatment was non-emergent and unauthorized.
3. Claimant's petition to reopen temporary disability benefits based on error/mistake is denied and dismissed. Claimant is not entitled to TPD benefits from June 28, 2018 to October 22, 2018.
4. [Redacted Employer] shall pay Claimant TTD benefits from October 23, 2018 to November 15, 2018 due to Claimant's wage loss as a result of a significant worsening of his condition.
5. Claimant is not entitled to TPD benefits from November 16, 2018 to March 18, 2019.
6. Claimant sustained a compensable aggravation arising out of and during the course of his employment for [Redacted subsequent Employer] on March 18, 2019.
7. [Redacted subsequent Employer] is liable for reasonable, necessary and causally-related medical benefits to cure and relieve the effects of the March 18, 2019 aggravation.
8. [Redacted subsequent Employer] is liable for temporary indemnity benefits for wage loss suffered by Claimant beginning March 19, 2019 and ongoing, until terminated by law.
9. Claimant's AWW for [Redacted subsequent Employer] is \$1,131.20.
10. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory

reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: <http://www.colorado.gov/dpa/oac/forms-WC.htm>.

DATED: May 14, 2020

A handwritten signature in black ink, appearing to read 'Kara Cayce', is written over a horizontal line.

Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

- Whether the respondent hospital was properly joined as a party to this proceeding.
- Whether the language included in the claimant's Application for Hearing pled the issue of penalties with sufficient specificity.
- Whether the claimant has demonstrated, by a preponderance of the evidence, that penalties should be assessed against the respondent hospital pursuant to Sections 8-43-304 and 8-43-305, C.R.S., for the respondent hospital's alleged violation of Section 8-42-101(4), C.R.S. The claimant has requested penalties for the period of June 13, 2019 up to and including October 9, 2019.

FINDINGS OF FACT

1. On July 22, 2017, the claimant suffered an injury while working as a tow truck driver. The injury occurred while the claimant was loading an F250 pickup truck onto her assigned tow truck. To do so, the claimant was lying on the ground attaching the safety chains. At that time, the winch on the tow truck released and caused the truck to roll back. The claimant was underneath the truck when this occurred and one of the tires of the pickup truck rolled onto the claimant's right arm. The claimant was able to remove her arm from under the tire. However, the truck rolled a second time and the tire rolled onto the claimant's chest. The claimant was able to extract herself from out from under the truck and called for help. Bystanders assisted the claimant in calling the respondent employer and emergency services.

2. The claimant initially received medical treatment at Valley View Hospital (VVH) in Glenwood Springs, Colorado. That initial treatment included six days in ICU at VVH. At the time of the accident, the claimant lived in New Castle, Colorado. Subsequently, the claimant moved to Hotchkiss, Colorado. After her move, the claimant transferred medical treatment for her injury to Delta County Memorial Hospital, the respondent hospital in the current case.

3. On September 11, 2018, the undersigned ALJ held a hearing on the issues of: 1) whether the claimant was an employee of the respondent employer; 2) whether she suffered a compensable injury; 3) whether the claimant's medical treatment was reasonable, necessary, and related to that injury; 4) whether the claimant's medical treatment was authorized; 5) whether the claimant was entitled to temporary total disability (TTD) benefits; and 6) whether penalties were to be assessed for the respondent employer's failure to obtain and maintain workers' compensation insurance.

4. On October 11, 2018, the ALJ entered Findings of Fact, Conclusions of Law, and Order (FFCLO) in which the respondent employer was found to have been the employer of the claimant at the time of the July 22, 2017 injury. In addition, the ALJ ordered that the employer was responsible for the payment of medical treatment related to the claimant's work injury. That treatment included treatment the claimant received from Delta County Memorial Hospital.

5. At hearing, the claimant testified that she provided the respondent hospital a copy of the ALJ's FFCLO. The claimant has also provided copies of the FFCLO to collection agencies attempting to collect on behalf of the hospital. However, the claimant has continued to receive bills from the hospital for medical treatment related to her work injury.

6. The claimant also testified that the respondent employer has not paid any amount related to her work injury, as ordered by the ALJ. The claimant testified that to her knowledge the respondent employer has not made any payment to any of her medical providers.

7. On April 10, 2019, the claimant's attorney authored a letter in which he informed the hospital that they were to collect from the respondent employer. In that letter counsel referenced Section 8-42-101(4), C.R.S. which states:

Once there has been an admission of liability or the entry of a final order finding that an employer or insurance carrier is liable for the payment of an employee's medical costs or fees, a medical provider shall under no circumstances seek to recover such costs or fees from the employee.

8. In addition, the April 10, 2019 letter notified the hospital that they could be subject to penalties pursuant to Sections 8-43-304 and 8-43-305, C.R.S.

9. Ms. B[Redacted] is the hospital's Billing Manager for physician billing. Ms. B[Redacted] explained that the hospital has two billing departments. Those departments are physician billing and facility billing. Ms. B[Redacted] testified that she first became aware of issues surrounding the claimant's bills on May 7, 2019. At that time, Ms. B[Redacted] received the April 10, 2019 letter from the claimant's counsel and a copy of the FFCLO. Based upon her understanding of the FFCLO, Ms. B[Redacted] instructed her staff to send the claimant's bills to the Division of Workers' Compensation (DOWC).

10. At the hearing, the hospital provided a copy of a communication from the DOWC in response to the hospital's attempts to bill the DOWC. In that communication the DOWC confirmed that the employer did not send any payment to the DOWC; nor did the employer post a bond. In a later communication from the DOWC, it was clarified that even if monies had been paid by the employer to the DOWC, those funds would ultimately be distributed to the claimant and not to any specific medical provider.

11. On June 13, 2019, counsel for the hospital responded to the April 10, 2019 letter from the claimant's counsel. In that reply, the hospital reiterated the information obtained from the DOWC. In that same response, the hospital took the position that "[the hospital's] only recourse is to resume collection from [the claimant]."

12. Ms. B[Redacted] testified that physician billing has not sent a bill to the claimant since May 7, 2019. A bill was sent to the claimant on that date, which was the same date Ms. B[Redacted] learned of the ALJ's FFCLO. Ms. B[Redacted] credibly testified that the May 7, 2019 bill was generated automatically within the billing system. Records entered into evidence at hearing indicate that the physician billing department has not billed the claimant since May 7, 2019.

13. Ms. B[Redacted] also testified that amounts are owed the claimant's medical treatment. However, Ms. B[Redacted] is "holding" those bills as it is unclear to her where to send the billing. Based upon the information submitted via testimony and evidence, it does not appear to the ALJ that the hospital has sent any billing directly to the employer.

14. Ms. BX[Redacted] is the hospital's Business Office Manager. She and her staff handle facility billing. Ms. BX[Redacted] testified that she first learned that the claimant has an order regarding her medical bills in July 2019. Ms. BX[Redacted] also testified that bills are sent to collections through an automated system.

15. Records entered into evidence show that the respondent hospital sent bills directly to the claimant on June 18, 2019; July 2, 2019; July 8, 2019; July 18, 2019; July 31, 2019; August 7, 2019; August 13, 2019; and September 12, 2019.

16. Records entered into evidence indicate that some of the claimant's bills from the facility billing department have been turned over to collections. Specifically, on September 20, 2019, A-1 Collections began attempts to collect on two bills, one in the amount of \$977.00 and the other in the amount of \$547.00.

17. On June 18, 2019, the claimant filed an Application for Hearing (AFH) for penalties for the hospital's alleged violation of Section 8-42-101(4), C.R.S. That application was rejected by the Office of Administrative Courts (OAC) because the case caption listed the hospital as the employer and did not correctly identify the respondent employer.

18. On June 19, 2019, the claimant filed a second AFH endorsing the same penalty issues. This AFH was also rejected by the OAC because the hospital and the respondent employer were identified together as "employer". The staff with the OAC instructed the claimant's counsel to caption the case as identified by the DOWC (ie. the claimant vs. the uninsured respondent employer).

19. On June 20, 2019, the claimant filed a third AFH for penalties for the respondent hospital's alleged violation of Section 8-42-101(4), C.R.S. This application was processed by the OAC as the claimant and employer were properly identified on the

case caption. In the June 20, 2019 AFH, “Penalties” was marked as an endorsed issue. In addition, the AFH included the following:

8-42-101(4) DELTA MEMORIAL HOSPITAL; No Recovery from Employee, Once there had been Once there has been an admission of liability or the entry of a final order finding that an employer or insurance carrier is liable for the payment of an employee's medical costs or fees, a medical provider shall under no circumstances seek to recover such costs or fees from the employee.

20. All of the AFHs filed by the claimant were provided to the respondent hospital. In addition, the hospital was provided notice of the October 9, 2019 hearing.

21. The respondent hospital argues that the claimant has received other medical treatment from their facilities that is unrelated to the claimant’s work injury. However, neither party presented evidence clarifying this “other” and allegedly unrelated treatment.

22. The respondent hospital further argues that if they are unable to collect from the claimant and are unable to collect from the DOWC, they are left without recourse. The ALJ is not persuaded by this assertion. The ALJ finds no impediment to the respondent hospital simply collecting from the respondent employer. As indicated by communications entered into evidence, the employer has apparently attempted to file for bankruptcy and the claimant is a creditor.

23. The ALJ credits the claimant’s testimony and the evidence entered into evidence and finds that the claimant has demonstrated that the respondent hospital has continued to bill the claimant after receiving notice of the FFCLO. The ALJ finds that on June 18, July 2, July 8, July 18, July 31, August 7, August 13, and September 12, 2019, the respondent hospital sent bills to the claimant. In addition, the ALJ finds two additional instances of the respondent hospital attempting to collect from the claimant when two bills were forwarded to collections on September 20, 2019. The ALJ also finds that the claimant has demonstrated that it is more likely than not that the respondent employer violated the language of Section 8-42-101(4), C.R.S.

CONCLUSIONS OF LAW

1. The purpose of the “Workers’ Compensation Act of Colorado” (the Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers’ Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probable than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers’ Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights

of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2017).

4. The respondent hospital first argues that they were not properly joined in this case, and therefore a claim for penalties cannot be asserted against them. The ALJ disagrees. Section 8-43-304, C.R.S., governs when penalties may be imposed in a workers' compensation matter and provides, in relevant part, that:

Any employer or insurer, or any officer or agent of either, or any employee, **or any other person** who violates articles 40 to 47 of this title 8, or does any act prohibited thereby, or fails or refuses to perform any duty. . . or fails, neglects, or refuses to obey any lawful order made by the director or panel or any judgment or decree made by any court as provided by the articles . . . shall also be punished by a fine of not more than one thousand dollars per day for each offense, to be apportioned, in whole or part, at the discretion of the director or administrative law judge. . . (*emphasis added*).

This provision has been construed as applying to violation of an order issued by an ALJ. *Giddings v. Industrial Claim Appeals Office*, 39 P.3d 1211 (Colo. App. 2001).

5. As one of the claimant's authorized medical providers, the ALJ concludes that the respondent hospital is a subject to the provisions of the Act. Therefore, the hospital can be found to be in violation or in compliance with the Act.

6. The ALJ concludes that the claimant correctly captioned this case as the claimant vs the respondent employer and regarding the respondent hospital. The language of Section 8-43-304, C.R.S. does not require that penalties be asserted against a "party" to the claim. Furthermore, the hospital's reliance on two Industrial Claim Appeals Office (ICAO) orders¹ is unfounded. Neither of those cases are determined on the issue of "joining" a party to a claim. Nor do those cases speak to the procedural process for assessing penalties against a non-party medical provider. The ALJ concludes that the

¹ *Davis v. Cub Foods*, (WC 3-990-098; ICAO 11/20/93) and *Gutierrez v. Startek USA*, (WC 4-842-550-05; ICAO 8/29/14).

respondent hospital was properly notified of their involvement in the claimant's claim as a medical provider and the claimant's allegations of a statutory violation.

7. The respondent hospital has also argued that the claimant did not meet the specificity requirement in filing the Application for Hearing (AFH) requesting penalties. Section 8-43-304(4), C.R.S., provides that in "any application for hearing for a penalty pursuant to subsection (1) of this section, the applicant shall state with specificity the grounds on which the penalty is being asserted." The failure to state the grounds for penalties with specificity may result in dismissal of the penalty claims. *In re Tidwell*, W.C. No. 4-917-514-03 (ICAO, Mar. 2, 2015).

8. The purposes of the specificity requirement are to provide notice of the basis of the alleged violation so as to afford the putative violator an opportunity to cure the violation, and to provide notice of the legal and factual bases of the claim for penalties so that the violator can prepare its defense. See *Major Medical Insurance Fund v. Industrial Claim Appeals Office*, 77 P.3d 867 (Colo. App. 2003); *Davis v. K Mart*, W.C. No. 4-493-641 (ICAO, Apr. 28, 2004); *Gonzales v. Denver Public School District Number 1*, W.C. No. 4-437-328 (ICAP, Dec. 27, 2001). In essence, the notice aspect of the specificity requirement is designed to protect the fundamental due process rights of the alleged violator to be "apprised of the evidence to be considered, and afforded a reasonable opportunity to present evidence and argument in support of" its position. *In re Tidwell*, W.C. No. 4-917-514-03 (ICAO, Mar. 2, 2015). *Matthys v. City of Colorado Springs*, W.C. No. 4-662-890 (ICAO, Apr. 2, 2007). Of course, the statute does not prescribe a precise form for pleading penalties, and an ALJ may consider the circumstances of the individual case to determine whether the application for hearing was sufficiently precise to satisfy the statute. See *Davis v. K Mart*, W.C. No. 4-493-641 (ICAO Apr. 28, 2004).

9. As found, the claimant's AFH marked "Penalties" as an endorsed issue. In addition, the AFH included the following:

8-42-101(4) DELTA MEMORIAL HOSPITAL; No Recovery from Employee, Once there had been Once there has been an admission of liability or the entry of a final order finding that an employer or insurance carrier is liable for the payment of an employee's medical costs or fees, a medical provider shall under no circumstances seek to recover such costs or fees from the employee.

10. The ALJ has considered the specific facts of this case and finds that the claimant has met the specificity requirement in the inclusion of the above language in her AFH. The claimant identified that penalties were sought against the respondent hospital. The claimant also quoted the section of the Act that the hospital is alleged to have violated. The ALJ finds that the hospital was sufficiently notified of the issues to be addressed at hearing.

11. With regard to the issue before the ALJ, the ALJ notes that prior to the assessment of any penalties, the ALJ must first determine whether a party has violated any provision of the Workers' Compensation Act or an order. If the ALJ finds such a violation, penalties may be imposed if it is also found that the employer's actions were objectively unreasonable. Section 8-43-304, C.R.S. *City Market, Inc. v. Industrial Claim Appeals Office*, 68 P.3d 601 (Colo. App. 2003); *Pioneers Hospital of Rio Blanco County v. Industrial Claim Appeals Office*, 114 P.3d 97 (Colo. App. 2005); *Jimenez v. Industrial Claim Appeals Office*, 107 P.3d 965 (Colo. App. 2003). The "objective standard" is measured by reasonableness of the insurer's action and does not require knowledge that the conduct was unreasonable." *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office*, 907 P.2d 676 (Colo. App. 1995). Section 8-43-305, C.R.S. provides that each day is a separate offense. Therefore, penalties may be assessed of up to \$1,000.00 per day.

12. Section 8-42-101(4), C.R.S. provides: "Once there has been an admission of liability or the entry of a final order finding that an employer or insurance carrier is liable for the payment of an employee's medical costs or fees, a medical provider **shall under no circumstances** seek to recover such costs or fees from the employee (*emphasis added*)." The ALJ reads the legislature's use of the language "shall" and "under no circumstances" to clearly state the intent that a medical provider shall cease all collection against a claimant once there has been an admission of liability or a final order.

13. In this case, the claimant seeks penalties for the hospital's alleged violation of Section 8-42-101(4), C.R.S. for continuing to seek payment from the claimant for medical treatment. The claimant has requested penalties from June 13, 2019 up to and including the date of hearing, October 9, 2019.

14. The respondent hospital points to language found in Section 8-43-304(4), C.R.S. and argues that the claimant's burden of proof is clear and convincing evidence. The ALJ disagrees with this assertion. Section 8-43-304(4), C.R.S. addresses what is to occur if penalties are alleged, but the violation has been cured. Then, and only then, does the burden of proof increase from a preponderance of the evidence to clear and convincing evidence. Here, there has been no cure of the hospital's violation as they continue to seek payment from the claimant. Therefore, Section 8-43-304(4), C.R.S. is not applicable in the current case.

15. As found, the respondent hospital has continued to bill the claimant for medical treatment related to her work injury. In addition, the hospital's facility billing department has turned the claimant's balances over to collections. As found, these continued attempts to collect from the claimant constitute a violation of the clear language of Section 8-42-101(4), C.R.S. The respondent hospital was notified that they were to no longer pursue collection against the claimant. Nevertheless, they continue to seek payment from the claimant, despite the notification that the respondent employer is responsible for payment of the claimant's work related medical expenses.

16. The hospital has argued that there are certain bills at their facilities that may not be part of the treatment of the claimant's work related injury. While that may be the case, the ALJ finds no persuasive evidence on the record to indicate that the hospital has attempted to clarify any non-work related treatment. It is the position of this ALJ that is the responsibility of the medical provider to correctly categorize the claimant's medical treatment as work related and non-work related. The hospital's practice of billing the claimant for any and all treatment, despite the clear language of Section 8-42-101(4), C.R.S., further demonstrates the hospital's clear disregard of the Act.

17. In the Remand Order dated March 13, 2020, ICAO specifically stated "the penalties in this matter may only be imposed for the days on which the billing actually occurred". Therefore, the ALJ concludes that the respondent hospital billed the claimant eight times between June 13, 2019 through and including October 9, 2019; (June 18, July 2, July 8, July 18, July 31, August 7, August 13, and September 12, 2019). In addition, two bills were sent to collections on September 20, 2019, resulting in two additional instances of the respondent hospital attempting to collect from the claimant.

18. Based upon all of the foregoing, the ALJ concludes that penalties are appropriate in this matter. Given the statutory violation, the ALJ orders the respondent hospital to pay to the claimant penalties of \$750.00 per day for the 10 total billing instances that occurred during the period of June 13, 2019 through and including October 9, 2019. This results in total penalties of \$7,500.00 (\$750.00 per day for 10 separate instances). No portion of this total shall be apportioned to the uninsured employer fund.

ORDER

It is therefore ordered that the respondent hospital shall pay the claimant penalties of \$7,500.00.

Dated this 18th day of May 2020.



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-121-543-001**

ISSUES

Whether the claimant has demonstrated, by a preponderance of the evidence that on October 21, 2019, she suffered an injury arising out of and in the course and scope of her employment with the employer.

If the claim is found compensable, whether the claimant has demonstrated, by a preponderance of the evidence that medical treatment of her neck and back is reasonable, necessary, and related to the work injury.

If the claim is found compensable, whether the claimant has demonstrated, by a preponderance of the evidence that she is entitled to temporary total disability (TTD) benefits and/or temporary partial disability (TPD) benefits, beginning on October 21, 2019 and ongoing.

At hearing, the parties agreed that if the claim is found compensable, they will stipulate to the claimant's average weekly wage (AWW).

FINDINGS OF FACT

1. The claimant began working for the employer in July 2019 as a grocery clerk. The claimant's job duties included unloading the delivery truck for the dairy department. On October 21, 2019, the claimant was engaged in this unloading process. The claimant testified that she was unstacking crates of milk from pallets and then restacking those same crates onto the floor. The claimant further testified that while moving the milk in this way, she began to feel sharp pain in her left shoulder and low back. The claimant continued performing her job duties, but attempted to do so using only her right arm. Thereafter, the claimant began to also experience pain in her right arm.

2. The claimant reported this incident to the employer. Subsequently, the claimant was directed to seek treatment at Glenwood Medical Associates (GMA).

3. On October 24, 2019, the claimant was first seen at GMA by Dr. Konrad Nau. On that date, the claimant reported the pain she developed in her left shoulder and low back on October 21, 2019. Dr. Nau assessed tendonitis and muscle spasm of the shoulders and referred the claimant to physical therapy. In addition, he ordered x-rays of the claimant's lumbar spine, left shoulder, and right shoulder. Dr. Nau assessed work restrictions of no lifting, carrying, pushing, or pulling over five pounds, and no squatting.

4. On October 24, 2019, an x-ray of the claimant's lumbar spine showed moderately advanced degenerative disc space narrowing at the L4-L5 level with endplate sclerosis and marginal spurring. There was no evidence of fracture. The right shoulder x-ray taken on that date showed mild glenohumeral osteoarthritis, with no fracture.

5. The claimant began physical therapy on October 29, 2019 with Brian Edmiston, PT. The claimant testified that she continued physical therapy for four or five sessions. The claimant has not returned to physical therapy because it has been denied by the respondent.

6. Beginning on November 6, 2019, the claimant was seen at GMA by Dr. Bruce Lippman. On that date, the claimant reported neck pain, with pain in both the anterior and posterior of her bilateral shoulders. Dr. Lippman diagnosed cervical radiculopathy and ordered an x-ray of the claimant's cervical spine. Dr. Lippman assessed a 20 pound lifting restriction. In addition, Dr. Lippman recommended the claimant continue with physical therapy, with a focus on the claimant's neck.

7. On November 6, 2019, an x-ray of the claimant's cervical spine showed moderate multilevel degenerative disc disease and facet arthropathy, mild spinal canal stenosis at the C5-C6 level, and multilevel bilateral neural foraminal stenosis.

8. The claimant testified that she did not work from October 21, 2019 through November 17, 2019. On November 18, 2019, the claimant returned to modified duty with the employer.

9. On November 20, 2019, the claimant returned to Dr. Lippman. At that time, Dr. Lippman limited the claimant to working no more than four hours per day. In addition, the claimant was limited to two hours of standing and two hours of sitting restrictions.

10. At the claimant's request, Dr. Lippman further altered the claimant's work restrictions on January 27, 2020. From that date, the claimant was limited to working on her feet for four hours per day, with a break every 30 minutes. In addition, the claimant was limited to two hours of sitting per day, with a break every 30 minutes.

11. The claimant continued to work with the January 27, 2020 work restrictions until March 10, 2020. It was on that date that the claimant became severely ill with influenza. The claimant has not returned to work. The claimant testified that her personal care provider believes that she has both influenza and COVID-19.

12. At the request of the respondent, the claimant attended an independent medical examination (IME) with Dr. Lawrence Lesnak on March 3, 2020. In connection with the IME, Dr. Lesnak reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. At the IME, the claimant reported "constant, diffuse, posterolateral, bilateral neck and bilateral suprascapular pain". In his IME report, Dr. Lesnak opined that the claimant did not sustain an injury at work on October 21, 2019. In support of this opinion, Dr. Lesnak referred to the claimant's prior history of chronic neck, back, and upper trapezius pain and that he observed no reproducible objective evidence of an acute injury on exam. In addition, Dr. Lesnak noted that the claimant did not report any neck pain to Dr. Nau on October 24, 2019.

13. Dr. Lesnak's testimony by deposition was consistent with his written report. Dr. Lesnak testified that it remains his opinion that the claimant did not suffer an injury at work on October 21, 2019. In support of this opinion, Dr. Lesnak testified that the claimant has subjective complaints that are not reproducible on exam. Dr. Lesnak also noted that

it is his opinion that there is no “clinical evidence of any symptomatic pathology”. In his testimony, Dr. Lesnak also referenced the claimant’s prior chronic neck and upper extremity symptoms.

14. With regard to the prior history noted by Dr. Lesnak, the medical records entered into evidence indicate that the claimant obtained treatment of her neck, shoulders, and back prior to October 21, 2019. On October 14, 2016, the claimant’s primary care provider, Dr. Sarah Rieves, opined that the claimant had possible cervical myelopathy and made a referral to a neurologist. Thereafter on November 1, 2016, Dr. Rieves again made reference to the claimant’s chronic neck pain. On November 29, 2016, Dr. J. Siegel conducted electromyography (EMG) studies of the claimant’s right upper extremity. The EMG results were consistent with entrapment neuropathies of the medial nerves at the claimant’s bilateral wrists, with no evidence of cervical radiculopathy or brachial plexopathy.

15. The ALJ does not find the claimant’s testimony regarding the alleged work injury and her symptoms to be credible or persuasive. The ALJ credits the medical records and the opinions of Dr. Lesnak and finds that the claimant has failed to demonstrate that it is more likely than not that she suffered an injury at work on October 21, 2019. The ALJ also finds that the claimant has failed to demonstrate that it is more likely than not that her work duties on October 21, 2019 aggravated, accelerated, or combined with a preexisting condition to necessitate medical treatment.

CONCLUSIONS OF LAW

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

2. The ALJ’s factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness’s testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias,

prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJL, Civil 3:16.

4. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. See *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); see also *Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it “aggravates accelerates or combines with a preexisting disease or infirmity to produce disability or need for treatment.” See *H & H Warehouse v. Vicory*, *supra*.

5. As found, the claimant has failed to demonstrate by a preponderance of the evidence that on October 21, 2019 she suffered an injury arising out of and in the course and scope of her employment with the employer. As found, the claimant has failed to demonstrate by a preponderance of the evidence that her work duties on October 21, 2019 aggravate, accelerated, or combined with a preexisting condition to necessitate medical treatment. As found, the medical records and the opinions of Dr. Lesnak are credible and persuasive.

ORDER

It is therefore ordered that the claimant’s claim for an alleged work injury on October 21, 2019 is denied and dismissed.

Dated this 20th day of May 2020.



Cassandra M. Sidanycz
Administrative Law Judge

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

ISSUES

- I. Whether Claimant sustained a compensable injury on January 21, 2019.
- II. Whether Claimant is entitled to reasonable, necessary, and related medical benefits, including the recommended right shoulder surgery.

STIPULATIONS

If found compensable, the parties stipulated to the following:

- A. Claimant earned an average weekly wage (AWW) of \$480.00.

FINDINGS OF FACT

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

1. Claimant has been working for Employer since August 2010. She is a swim and water fitness instructor teaching private swim lessons and deep-water aerobics classes. *Hearing Tr. 14:9-23.*
2. In March 2018 Employer underwent an expansion that included constructing a new community center and a hallway that connects the new community center to the original building the pool is in. *Hearing Tr. 15:9-15.*
3. In the hallway that connects the two buildings is a double fire door. To enter the pool building patrons of the community center have to open and walk through the double fire door. *Hearing Tr. 16:20-21.*
4. The double fire doors are side-by-side. Above the right door is a mechanism that, once activated, opens the right-side-door. To activate the opening mechanism patrons have to turn the handle downward and pull the door open two to three inches. After the door has been pulled open two to three inches the mechanism turns on and opens the door the rest of the way. *Hearing Tr. 17:5-20.*
5. The double fire doors are always kept closed because propping one opened is considered a fire hazard. *Hearing Tr. 39:17-19.*
6. On January 21, 2019, Claimant was scheduled to teach a private swim lesson. She had to enter the pool building through the double fire doors. Claimant opened the right-side door by turning the handle downward with her right hand and pulling the door open the required two to three inches with her right arm. When she pulled the door she felt an immediate pop or pull in her right shoulder accompanied by an "annoying ache." *Hearing Tr. 17-18:21-4.*

7. The incident happened around 5:30 p.m. There was no manager or boss on duty to whom Claimant could report the injury. Claimant taught her scheduled swim lesson and went home. *Hearing Tr. 18:10-17.*
8. The next day, January 22, 2019, Claimant's shoulder was still aching and she believed "something had happened" so she reported the injury to her pool manager Tiffany L[Redacted]. *Hearing Tr. 18-19:18-17.*
9. Claimant and Ms. L[Redacted] agreed that Claimant would monitor the condition of her right shoulder and could seek medical care if it worsened. *Hearing Tr. 19-20:14-1.*
10. Claimant's condition worsened over the next two weeks. On February 4, 2019, she sought treatment at UC Health Timberline Medical Center where she was evaluated by Katrina Plassmeyer, NP. It is noted that Claimant suffered a right shoulder injury on 1-21-2019 while opening a fire door at work. Claimant disclosed her prior right shoulder injury. Also, that Claimant's right shoulder was extremely tight and sensitive to touch. Claimant was prescribed Flexeril and referred for an orthopedic evaluation and an x-ray. She was also instructed to take ibuprofen and adhere to work restrictions that limited the use of her right arm. *Cl. Ex. 7.*
11. Claimant suffered a previous work injury to her right shoulder. On September 20, 2013, she slipped and fell while working for Employer. *Cl. Ex. 11.* The fall led to Claimant undergoing right shoulder surgery on April 15, 2014, inclusive of rotator cuff repair, ORIF of the os acromiale, and distal clavicle resection. *Cl. Ex. 6 pg. 22.* Claimant was placed at MMI on October 13, 2015. She was assigned permanent impairment of the right upper extremity, and permanent work restrictions inclusive of 75 lb. push / pull limitations. *Cl. Ex. 11.*
12. On February 5, 2019, Claimant underwent an x-ray of her right shoulder. It reveals post-surgical changes and degenerative changes of the right glenohumeral joint, but no acute displaced injury is identified. *Cl. Ex. 7:44.*
13. On February 6, 2019, Claimant had a scheduled medical appointment with at Estes Park Medical Group. She was evaluated by Juli Schneider, M.D. It is noted that Claimant was there to transition her care from her previous primary care provider. That roughly three weeks prior Claimant injured her right shoulder while opening a fire door at work. Also, Claimant previously injured her right shoulder roughly five years ago after falling at work, which led to surgery. Lastly, that Claimant "was doing fine until injury [three] weeks ago at work." *Cl. Ex. 8:51.*
14. On February 11, 2019, Claimant was evaluated by orthopedist Michael Grant, M.D. at Estes Park Medical Group. Claimant's chief complaint was right shoulder pain that began on January 21, 2019 while opening a heavy fire door at work. It is noted that Claimant "immediately felt a pull to her right shoulder, and now is experiencing right shoulder pain, with limited ROM." Claimant disclosed her prior right shoulder injury and surgery. It is also noted that "overall she has done fairly well but was [pulling] on a door about [three] weeks ago after which she had significant escalation of her symptoms. Since that time her shoulder has been

stiff and painful with noticeable crepitus.” Dr. Grant referred Claimant for physical therapy and, if needed, to follow up with the surgeon who performed her prior surgery. *Cl. Ex. 8:61.*

15. Claimant returned to UC Health Timberline Medical Center on February 21, 2019 where she was again evaluated by Ms. Plassmeyer, NP. Claimant was referred to Armodios Hatzidakis, M.D.; the orthopedist who performed her previous right shoulder surgery. Claimant was instructed to limit the use of her right arm, and to do aqua therapy while she was working in the pool. *Cl. Ex. 7:46-50.*
16. Respondent filed a Notice of Contest on February 26, 2019. *Cl. Ex. 1.*
17. On April 1, 2019, Claimant was evaluated at Western Orthopaedics by Dr. Hatzidakis. It is noted that Claimant was experiencing right shoulder pain that began on January 21, 2019 when she opened a heavy fire door at work. Dr. Hatzidakis concluded that because of Claimant’s “history of previous rotator cuff repair as well as the mechanism of injury, pulling on a heavy exit door, there is a possibility of further rotator cuff pathology post surgically.” Claimant was referred for physical therapy, labs to rule out infection, and an MRI. *Cl. Ex. 6:26-27.*
18. Claimant underwent a right shoulder MRI on April 25, 2019. *Cl. Ex. 4.*
19. On May 14, 2019, Claimant returned to Western Orthopaedics to review the MRI with Rose Christiansen, PA-C. It is noted the MRI shows a full-thickness anterior superior rotator cuff re-tear with evidence of prior extensive surgical repair of the supraspinatus with some slight thinning. Advanced arthritic changes within the joint with some superior migratory change. It is also noted that Claimant reported her right shoulder condition was doing well after her first surgery, and that is “was 90% of normal up to re-injury on January 21, 2019.” Surgical options, inclusive of a total shoulder arthroplasty, were discussed. Claimant elected to undergo steroid injection and continued physical therapy. *Cl. Ex. 6:30-31.*
20. Claimant began physical therapy at MedEx of Estes on June 5, 2019. She underwent 23 sessions. The last on August 19, 2019. *Cl. Ex. 10.*
21. On July 15, 2019, Medical Case Manager Constance Tilghman on behalf of Respondent Insurer wrote a letter to Dr. Hatzidakis asking whether Claimant is at maximum medical improvement (MMI) and what her anticipated plan of treatment was. *Cl. Ex. 6:34-35.*
22. On July 16, 2019, Claimant returned to Western Orthopaedics. Dr. Hatzidakis determined Claimant needed a reverse shoulder arthroplasty with capsular scar release and biopsies for cultures. Dr. Hatzidakis also responded to Insurer’s July 15, 2019 letter stating that Claimant was not at MMI because she would need to undergo claim related right shoulder surgery. *Cl. Ex. 6:34-40.*
23. On July 22, 2020, Dr. Hatzidakis requested authorization to perform right shoulder surgery to cure Claimant from the effects of her January 21, 2019 work injury. *Cl. Ex. 6:40*
24. On August 22, 2019, Nicholas Olsen, D.O., conducted an Independent Medical Examination (RIME) at the request of Respondents. R. Ex. A. Dr. Olsen

reviewed the medical records from Claimant's prior work injury and this work injury. *R. Ex. A:6-9*. Dr. Olsen did not review medical records for medical visits in between the two work injuries which span from November 23, 2015 through October 11, 2018. *Depo Tr. 27-29:7-8*. Dr. Olsen opined Claimant's mechanism of injury cannot cause injury to the rotator cuff. *R. Ex. A:10*. Dr. Olson opined when opening doors people only use their forearm, which places the elbow in a movement of extension, and triceps muscle. *Depo Tr. 9:8-19*.

25. On December 24, 2019, Gary Zuehlsdorff, D.O., conducted an Independent Medical Examination (IME) at the request of Claimant. *Cl. Ex. 4*. Dr. Zuehlsdorff reviewed medical records from Claimant's first work injury, for this work injury, and the medical records for the dates in between the two work injuries. *Cl. Ex. 4:7*. He also reviewed Dr. Olsen's RIME which led Dr. Zuehlsdorff to call Dr. Hatzidakis. *Cl. Ex. 4:9-11*. Ultimately, Dr. Zuehlsdorff concluded that Claimant did suffer a work injury while opening the fire door at work on January 21, 2019, and the recommended surgery is reasonable and necessary medical treatment resultant of this injury. *Cl. Ex. 4:11-13*.
26. On December 24, 2019, Dr. Hatzidakis wrote a letter to Dr. Zuehlsdorff summarizing the phone conversation the two had. Dr. Hatzidakis wrote, "I agree with you that her mechanism of injury can be consistent with causing a re-tear of the rotator cuff. As you know, the rotator cuff is active with all shoulder stabilizing activities, and opening a door with the elbow bent at her waist could certainly cause this, particularly if the door was difficult to open." Further, that "I think it is within the realm of medical probability that a re-tear of the rotator cuff could have occurred at the time of the injury." Additionally, "retraction of the rotator cuff and damage to the rotator cuff that is seen on the MRI could certainly have occurred from the Claimant's mechanism of injury in my opinion." *Cl. Ex. 6:40(A)*.
27. Claimant testified that the condition of her shoulder was "good" and that it felt "fine" from the time she was released from care for her first work injury on October 13, 2015 until she injured her shoulder on January 21, 2019. She could work her full job duties without pain or limitation. She could conduct her daily living activities without pain or limitation. She could work in her garden and remodel her cabin without pain or limitation. *Hearing Tr. 21:2-19*.
28. Claimant's testimony is supported by the medical records from her primary care provider at Estes Park Medical Group. Beginning on November 23, 2015 (about a month after being placed at MMI from the 2013 work injury) through October 11, 2018, there are 29 dates of service and Claimant did not seek treatment for her right shoulder once, nor did she complain of right shoulder pain or limitations. *Cl. Ex. 9:72-97*.
29. Claimant also testified that she has had to modify her work and daily living activities due to the January 21, 2019 work injury. Claimant no longer performs the full exercise routine in her water aerobics class like she did before January 21, 2019. She now has to get help to move equipment around the pool that she could move by herself prior to the January 21, 2019 work injury. Claimant now

also has limitations with doing yard work and maintenance around her property, and other daily living activities. *Hearing Tr. 23-24:1-22.*

30. Claimant opening the fire door so she could access the pool to perform her job duties is sufficiently incidental to her work and employment. Moreover, had Claimant not have had to pull the door open two to three inches before activating the automatic opening mechanism to access the pool to teach her swim lesson that night she would not have been injured.
31. This Judge finds the opinions of Dr. Zuehlsdorff and Dr. Hatzidakis to be credible and more persuasive than that of Dr. Olsen.
32. This Judge finds Claimant is credible. Claimant has remained remarkably consistent on the mechanism of injury and the progression of her symptoms afterward. She has not embellished her symptoms and continues to work full duty for Employer.
33. Claimant did suffer an injury due to the January 21, 2019 incident.
34. Claimant is entitled to medical treatment to cure and relieve her from the effects of her compensable right shoulder injury. This includes the right shoulder surgery recommended by Dr. Hatzidakis that this ALJ finds reasonable and necessary to cure Claimant from the effects of her work injury.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge draws these conclusions of law:

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered “to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence.” See *Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency, or inconsistency of the witness’s testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *CJI*, Civil 3:16 (2007). A workers’ compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Claimant sustained a compensable injury on January 21, 2019.

In Colorado, only those injuries “arising out of” and “in the course of employment,” are compensable under the Workers’ Compensation Act. Section 8-41-301(l)(b), C.R.S. The course of employment requirement is satisfied when the claimant shows that the injury occurred within the time and place limits of the employment. *Popovich v. Irlanda*, 811 P.2d 379 (Colo. 1991).

In this case, the incident in question happened on Employer’s premises at a time Claimant was scheduled to work. Thus, Claimant’s incident occurred within the course of her employment.

The inquiry does not stop there, however, and Claimant must also satisfy the “arising out of” requirement for compensability. The “arising out of” element is narrower than the “course” element and requires the claimant to prove that the injury had its “origin in an employee’s work-related functions and is sufficiently related thereto to be considered part of the employee’s service to the employer.” *Popovich v. Irlanda, supra*. The “arising out of” test is one of causation. See *Finn v. Indus. Commission*, 165 Colo. 106, 437 P.2d 542 (1968). The determination of whether there is a sufficient “nexus” or causal relationship between the claimant’s employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *City of Brighton v. Rodriguez, supra*.

To satisfy the arising out of requirement, it is unnecessary that Claimant be engaged in performing job duties at the time of the injury. See *Employers’ Mut. Ins. Co. v. Indus. Commission*, 76 Colo. 84, 230 P. 394 (1924). Our courts have recognized that it is not essential for the compensability determination that the activities of an employee emanate from an obligatory job function or result in some specific benefit to the employer so long as the employee’s activities are sufficiently incidental to the work itself as to be properly considered as arising out of and in the course of employment. See

Price v. Indus. Claim Appeals Office, 919 P.2d 207, 210 (Colo. 1996) (an activity arises out of employment if it is sufficiently “interrelated to the conditions and circumstances under which the employee generally performs the job functions that the activity may reasonably be characterized as an incident of employment”). It is sufficient if the injury arises out of a risk which is reasonably incidental to the conditions and circumstances of the particular employment. *Phillips Contracting, Inc. v. Hirst*, 905 P.2d 9 (Colo.App. 1995).

Here, Claimant’s job for Employer on January 21, 2019 was to teach a private swim lesson in the Employer’s pool. To get to the Employer’s pool she had to enter through the fire door located in the hallway that connected the pool to the community center. Claimant opening the fire door on January 21, 2019 was done so for the benefit of Employer because it had to be done to allow Claimant to do the job Employer was paying her to do that night. This ALJ concludes that Claimant’s actions of opening the fire door to access the pool to teach a swim lesson is sufficiently incidental to the work itself to be properly considered as arising out of and in the course of her employment.

But the argument put forth by Respondents is not that this incident did not happen on January 21, 2019, but that this incident did not cause an injury to Claimant’s right shoulder.

In Colorado, no benefits flow to the victim of an industrial accident unless the accident causes an injury. See *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). Claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.*, 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Indus. Claim Appeals Office*, 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). The question of whether Claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000).

In this case, Claimant has established by a preponderance of the evidence that she suffered a compensable injury to her right shoulder on January 21, 2019.

As found, Claimant is a reliable historian regarding the mechanism of injury and extent and progression of her symptoms. She relayed the same mechanism of injury to every provider she was evaluated by for this injury, including Ms. Plassmeyer, NP, Dr. Schneider, Dr. Grant, Dr. Hatzidakis, Dr. Olsen, and Dr. Zuehlsdorff. Claimant also disclosed her prior right shoulder injury and surgery to all of these providers.

As found, the medical records from Estes Park Medical Group support Claimant’s testimony that her right shoulder condition was good and felt fine from the time she was discharged from care for her first right shoulder injury on October 13, 2015 until she injured her shoulder on January 21, 2019.

As found, the opinions of Dr. Hatzidakis and Dr. Zuehlsdorff are more persuasive than those of Dr. Olsen. Dr. Hatzidakis is an orthopedist and he believes that the

mechanism of injury as described by Claimant can cause injury to the rotator cuff. Dr. Hatzidakis also opined “the rotator cuff is active with all shoulder stabilizing activities, and opening a door with the elbow bent at her waist could certainly caused [Claimant’s injury], particularly if the door was difficult to open.” Dr. Hatzidakis is an authorized treater on this claim. He was not hired by Claimant or Respondent to do an evaluation. He is truly an independent objective opinion on this matter. Dr. Zuehlsdorff is of the same opinion that Claimant’s mechanism of injury caused her current shoulder condition and need for surgery. Dr. Zuehlsdorff also opines that “there is no position where a rotator cuff is not vulnerable to injury” due to her pre-existing shoulder condition.

Dr. Olsen’s opinions are not credible. He contends that people only use the forearm, elbow, and triceps to open doors. He also states that all adults, whether a young adult male or a female 66 years old, open doors the same way. Both assertions are not credible. First, to become convinced Dr. Olsen is not correct on this matter on simply needs to go pull open a heavy door to realize more than the forearm, elbow, and triceps are activated. When one does this there is activation of the shoulder muscles. Second, not all people use the same muscles to open doors. A female who is 66 is most likely going to require more force, and the activation of more muscles, to open a heavy door than most young people, male or female, require.

As a result, the Judge concludes Claimant has proven by a preponderance of the evidence that she suffered a compensable injury on January 21, 2019 when she injured her right shoulder while pulling open the fire door to access the pool.

II. Whether Claimant is entitled to reasonable, necessary, and related medical benefits, including the recommended right shoulder surgery.

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve Claimant from the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether Claimant has proved treatment is reasonable, necessary, and related to the work injury is one of fact for the Judge. *Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

As found, and set forth above, Claimant sustained compensable injury to her right shoulder on January 21, 2019. As a result, this Judge concludes that Claimant has established by a preponderance of the evidence that she is entitled to reasonable, necessary, and related medical treatment to cure and relieve Claimant from the effects of the January 21, 2019 injury. Claimant has also established by a preponderance of the evidence that the right shoulder surgery recommended by Dr. Hatzidakis is reasonable and necessary to cure her from the effects of her January 21, 2019 work injury. Therefore, this ALJ concludes that Respondents shall pay for the right shoulder surgery recommended by Dr. Hatzidakis.

ORDER

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

1. Claimant suffered a compensable injury involving her right shoulder on January 21, 2019.
2. Claimant is entitled to reasonable and necessary medical treatment to cure and relieve the effects of her compensable work injury.
3. Respondents shall pay for Claimant to undergo the right shoulder surgery recommended by Armodios Hatzidakis, M.D.
4. Claimant's average weekly wage is \$480.00.
5. Issues not expressly decided herein are reserved to the parties for future determination.

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

DATED: May 22, 2020

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- I. Whether Claimant is entitled to TTD benefits from November 22, 2019 to December 18, 2019, and whether penalties should be imposed against Respondents for failing to pay Claimant TTD benefits from November 22, 2019 through December 1, 2019.
- II. Whether Respondents violated Section 8-43-503(3) C.R.S. by setting demand appointments for Claimant with an Authorized Treating Physician (ATP), and whether penalties should be imposed against Respondents if such violation occurred.
- III. Whether Respondents are entitled to reimbursement for fees charged by the ATP for appointments missed by Claimant.

FINDINGS OF FACT

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

Claimant's work injury

1. Claimant, who worked for Employer as a nurse, suffered a compensable injury to his right shoulder on October 5, 2015.
2. Claimant has had two shoulder surgeries under this claim. The first surgery, which was performed by Dr. Noonan, failed to improve Claimant's shoulder condition. Later, Claimant came under the care of Dr. Armodios Hatzidakis, who performed a right reverse shoulder arthroplasty on March 19, 2018. (*Ex. A, p. 4*).
3. On July 11, 2019, Dr. Hatzidakis placed Claimant at MMI for his shoulder injury. (*Ex. 4, p. 1; Ex. A, p. 04*). Dr. Hatzidakis noted Claimant was stable for a rating, but did not perform an impairment rating examination or provide an impairment for Claimant's right shoulder at the July 11, 2019 office visit. *Id.*
4. As of July 11, 2019, the date Claimant was placed at MMI for his shoulder injury, Claimant had been paid \$176,365.69 in TTD benefits. ¹

¹ Based on the November 22, 2019 GAL Claimant was paid TTD benefits from October 6, 2015 through June 7, 2016 at a weekly rate of \$830.01. The total TTD paid during this period was \$29,168.22. Beginning June 8, 2016, Claimant's TTD rate increased to \$914.27. Between June 8, 2016 and July 11, 2019, which is 161 weeks, Claimant had been paid another \$147,197.47 in TTD benefits. As result, when Dr. Hatzidakis placed Claimant at MMI for his shoulder condition, Claimant had been paid \$176,365.69 in TTD benefits. The amount of TTD benefits paid to Claimant at that time exceeded the statutory cap of \$168,677.59 by \$7,688.10. As a result, regardless of Claimant's permanent partial disability rating, the statutory cap in Section 8-42-107.5, C.R.S. precluded Claimant

5. Pursuant to statute, there is a cap that limits the amount of temporary and permanent partial disability benefits payable to Claimant under this claim. If Claimant's whole person impairment rating is 25%, or less, his temporary and permanent partial disability benefits cannot exceed \$84,339.86. If, on the other hand, Claimant's whole person rating is 26%, or more, his temporary and permanent partial disability benefits cannot exceed \$168,677.59. See Section 8-42-107.5, C.R.S.
6. When Claimant was placed at MMI on July 11, 2019 by Dr. Hatzidakis, the amount of TTD benefits received by Claimant exceeded the highest statutory cap by \$7,688.10. As a result, regardless of Claimant's impairment rating, he would not be paid any permanent partial disability benefits. Thus, assuming Claimant was at MMI on July 11, 2019 for all of the medical conditions that were caused by his industrial accident, Respondents would have had the right to terminate Claimant's TTD benefits and file a final admission of liability at that time if they agreed with the conditions rated and the rating provided. And regardless of the permanent partial disability rating, they would not have to pay any permanent partial benefits due to the statutory cap.
7. Thus, Claimant's right to temporary and permanent partial disability benefits could cease once he returned to Dr. Hatzidakis and was provided an impairment rating for his shoulder.
8. As a result, Respondents had a reasonable reason for wanting Claimant to return to Dr. Hatzidakis promptly so Dr. Hatzidakis could provide him an impairment rating. And Claimant had an unreasonable reason to delay returning to Dr. Hatzidakis to receive an impairment rating.

Demand appointments set by Respondents

9. Respondents requested Claimant attend demand appointments on August 15, 2019; September 5, 2019; October 29, 2019; and November 21, 2019 with Dr. Hatzidakis to be evaluated for an impairment rating, if any. (*Exs. B, p. 07; D, p. 12; F, p. 18; H, p. 23*).
10. Notice of the August 15, 2019 appointment was sent to Claimant's attorney, with a copy sent by certified mail to Claimant at 1830 Pinto Trail, Elizabeth, CO 80107-8421. (*Ex. B, p. 08*). The notice stated Claimant's benefits could be suspended for failure to attend, as required by Rule 6-1(A)(5). *Id.* Claimant did not attend the August 15, 2019 appointment. (*Ex. C, p. 10*).
11. Respondents reset the appointment for September 5, 2019. Notice of the September 5, 2019 appointment was sent to Claimant's attorney, with a copy sent by certified mail to Claimant at 1830 Pinto Trail, Elizabeth, CO 80107-8421. (*Ex. D, p.13*). The notice stated Claimant's benefits could be suspended for

from being paid any permanent partial disability benefits since his TTD payments exceeded the statutory cap by \$7,688.10 as of July 11, 2019.

failure to attend, as required by Rule 6-1(A)(5). *Id.* Claimant did attend the September 5, 2019 appointment; however, he was not seen by Dr. Hatzidakis, and no impairment rating examination was conducted. (*Ex. E, pp. 15-16*).

12. Respondents then reset the appointment to October 29, 2019. Notice of the October 29, 2019 appointment was sent to Claimant's attorney, with a copy sent by certified mail to Claimant at his last known address on file at WCRP: 16910 E. Carlson Dr. Apt. 211, Parker, CO 80134. (*Ex. F, p.p. 18-19*). The notice stated Claimant's benefits could be suspended for failure to attend, as required by Rule 6-1(A)(5). *Id.* Claimant did not attend the October 29, 2019 appointment. (*Ex. G, p. 21*).

November 21, 2019 appointment and Order to Compel

13. Respondents again reset the appointment with Dr. Hatzidakis for November 21, 2019. Notice of the November 21, 2019 appointment was sent to Claimant's attorney, with a copy sent by certified mail to Claimant at 1830 Pinto Trail, Elizabeth, CO 80107-8421. (*Ex. H, pp. 23-24*). The notice stated Claimant's benefits could be suspended for failure to attend, as required by Rule 6-1(A)(5). *Id.* Respondents also filed a Motion to Compel Claimant's attendance at the November 21, 2019 appointment, which was granted by PALJ Craig. C. Eley on November 18, 2019. (*Exs. I, pp. 27-29; J, p. 31*).

Claimant's testimony

14. Claimant testified he did not receive notice of the August 15, 2019 or October 29, 2019 appointment. (*Tr. pp. 37, 38-39*). Claimant did receive notice of the September 5, 2019 appointment, but could not recall how he received the notice, and believes the notice came by regular U.S. mail. (*Tr. p, 46*). This is even though the notice procedure performed by Respondents was the same as given for the August 15, 2019, and the November 21, 2019 appointments. Claimant did attend the September 5, 2019 appointment and was seen by Renee Charest, PA-C. Claimant was not seen by Dr. Hatzidakis at the September 5, 2019 appointment, and no impairment rating examination took place. (*Ex. 4, pp. 3-4; Ex. E, pp. 15-16*). Claimant does not dispute receipt of notice of the November 21, 2019 or December 19, 2019 appointments, but again testified he believes he received the notices through U.S. regular mail. (*Tr. pp. 39, 47*).
15. Claimant also testified his prior address was 16910 E. Carlson Dr. Apt. 211, Parker, CO 80134, and that he moved from that address to his current residence in 2015 but could not recall ever updating his address with the WCRP. (*Tr. pp.43, 51*).
16. A letter properly mailed is presumed received by its addressee. *Olsen v. Davidson*, 142 Colo. 205, 350 P.2d 338 (1960); *see also Nat'l Motors, Inc. v. Newman*, 29 Colo. App. 380, 484 P.2d 125 (1971). When an addressee denies receiving the letter, the binding effect of the presumption ends, and the trier of fact is left to decide the issue based on the weight of the evidence. 9 J.

Wigmore, Evidence § 2519 (Chadbourn rev. ed. 1981). See also *Olsen v. Davidson*, *supra*.

17. This ALJ finds parties in workers' compensation proceedings are under a continuing duty to update WCRP records and all parties with current addresses and contact information. This ALJ finds the failure of Claimant to update his current address with WCRP does not provide a basis for claiming lack of notice for the October 29, 2019 appointment.
18. This ALJ finds Claimant's lack of notice argument lacks credibility. Claimant attended the September 5, 2019 appointment, yet could not recall how he received notice, but thought it was by regular U.S. mail. This is despite the procedure used by Respondents was the same for both the August 15, 2019, September 5, 2019, November 21, 2019 and December 19, 2019 appointments. Claimant acknowledged receipt of the notices for the September 5, 2019, November 21, 2019, and December 19, 2019 appointments, which were all sent by certified mail to the claimant's current address: 1830 Pinto Trail, Elizabeth, CO 80107-8421. It is unclear whether he was advised of any of these appointments by his attorney, who also received the notices.

November 21, 2019 appointment and Order to Compel

19. Claimant does not dispute receiving notice of the November 21, 2019 appointment and being ordered to attend. He also testified that he believes he received the notice by U.S. regular mail. (*Tr. pp. 39, 47*). Claimant, however, testified that he decided to not attend the court ordered appointment because of a medical emergency involving his daughter. According to Claimant, his daughter's condition was serious and an emergency and therefore he had to take his daughter to an emergent doctor appointment. (*Tr. pp. 39, 47*).
20. During Claimant's direct testimony - and despite being a nurse - he did not provide any details in support of his contention that his daughter's condition was an emergency. He also provided no details as to why he had to schedule his daughter's medical appointment at the same time of the PALJ ordered appointment with Dr. Hatzidakis.
21. Claimant was, however, cross examined about the alleged medical emergency involving his daughter.
22. Claimant's contention that he missed the appointment with Dr. Hatzidakis that PALJ Eley ordered him to attend due a medical emergency involving his daughter is not found to be credible for many reasons.
 - i. Once Respondents' counsel began cross examining Claimant about the alleged emergency involving his daughter, the overall tone, and fluency of Claimant's voice changed. For example, he started pausing while answering questions. As a result, it appeared to this ALJ that while testifying, he was trying to come up with a story to support his contention that his daughter's condition was an emergency that justified violating PALJ Eley's order.

- ii. As he continued to testify about the “emergency,” his description of his daughter’s symptoms escalated – as if he realized his initial answer did not rise to the level of an emergency. For example, her symptoms were first described as “a little bit of congestion” and then he escalated her symptoms to be a possible asthma attack. As shown below, Claimant testified that:

What I did was that morning she was complaining of -- it was difficulty for -- you know, she was having a little bit of congestion and little difficulty breathing. She thought she was having a -- like, an asthma attack or whatever.

(Tr. p. 48).

- iii. Claimant also used a lot of qualifiers in his answer. For example, he used the qualifier “little” when describing her congestion and breathing symptoms. Then, when he escalated her symptoms into something sounding more serious – “an asthma attack” - he added additional qualifiers and said, “like an asthma attack.”
- iv. In addition, even though Claimant is a nurse, he did not provide his own assessment when he implied his daughter might have been having an asthma attack. Instead, Claimant switched persons by placing on his daughter the responsibility for interpreting - or misinterpreting - her condition as an asthma attack and therefore an emergency. Claimant testified that:

She thought she was having a – ***like***, an asthma attack ***or whatever***. (Emphasis added)

He also qualified “asthma attack” with “like” and “whatever.” As a result, his testimony might mean that neither he nor his daughter thought she was having an asthma attack.

- v. During cross examination, Claimant also said his daughter had a fever. When Respondents’ counsel pressed for more detail and asked Claimant how high his daughter’s fever was, he again struggled to provide a succinct and straight answer. Claimant said:

It was -- well, it -- it -- it was above 100. I -- and I think it was below 101, but it was, like, between 100 and, like, maybe, 106 -- 100.6, 100.8, something like that.

Again, it sounded like his was buying time – by having so many pauses – to try to come up with a reasonable excuse for violating PALJ Eley’s order. In the end, it is not clear whether his daughter’s symptoms were mild, moderate, or severe.

- vi. Claimant was also asked the age of his daughter. Again, he struggled to answer that question promptly as well. Although his daughter was 17 at the time, Claimant dragged out answering the question. This ALJ infers he struggled to answer that questions as well because having a 17-year-old child with a fever, compared to a young child, changes the overall impression Claimant was trying to convey about the emergent nature of the situation and whether it warranted and justified violating PALJ Eley's order.
- vii. Claimant also failed to:
- Testify why he had to schedule his daughter's appointment at the same time of his appointment with Dr. Hatzidakis.
 - Provide any documentation supporting his contention that his daughter had an emergent medical appointment at the same time of the court ordered appointment and that it had to be at the same time.
- viii. Claimant testified that he notified Dr. Hatzidakis' office on November 21, 2019 that he was unable to attend the appointment and that he requested his office to reschedule the appointment. (*Tr. p.39*). Claimant did not, however, say what time he contacted Dr. Hatzidakis' office. The time noted on the transmission of the letter from Dr. Hatzidakis' office, 12:43 p.m., suggests Claimant did not contact them that morning to cancel and reschedule the appointment until sometime after the appointment was to take place and after that letter was issued. (*Ex. K*).
23. Claimant's testimony is not found to be credible or persuasive as it relates to only receiving notice for some of the demand appointments. Claimant's testimony is also not found to be credible or persuasive regarding the reasons he gave for not attending each appointment - including the appointment of November 21, 2019.
24. Claimant failed to present credible and persuasive testimony providing a reasonable excuse justifying missing the November 21, 2019 appointment with Dr. Hatzidakis that he was ordered to attend by PALJ Eley.
25. The ALJ finds Claimant intentionally violated PALJ Eley's order and did not provide a legitimate or reasonable excuse for violating the court order and failing to attend the November 21, 2019 appointment with Dr. Hatzidakis.
26. Claimant did, however, attend another rescheduled appointment with Dr. Hatzidakis on December 19, 2019 and TTD was reinstated.
27. As a result of Claimant missing the November 21, 2019 court ordered appointment, Claimant may have extended the payment of TTD benefits by 28 days, or \$3,657.08.

Respondents General Admission suspending TTD

28. After the missed appointment on November 21, 2019, Respondents filed a General Admission of Liability stopping TTD payments to Claimant under Rule 6-1(A)(5). (*Ex. L, p. 36*).

29. WCRP Rule 6-1(A)(5) states as follows:

TERMINATION OF TEMPORARY DISABILITY BENEFITS IN CLAIMS ARISING FROM INJURIES ON OR AFTER JULY 1, 1991

(A) In all claims based upon an injury or disease occurring on or after July 1, 1991, an insurer may terminate temporary disability benefits without a hearing by filing an admission of liability form with:

(5) a copy of a certified letter to the claimant or a copy of a written notice delivered to the claimant with a signed certificate of service, advising that temporary disability benefits will be suspended for failure to appear at a rescheduled medical appointment with an authorized treating physician, and a statement from the authorized treating physician documenting the claimant's failure to appear.

7 CCR 1101-3:6

30. Dr. Hatzidakis' office provided statements documenting the Claimant's failure to appear at the August 15, 2019, October 29, 2019, and November 21, 2019 appointments. (*Exs. C, p. 10; G, p. 21; K, p. 34*).

31. This ALJ finds proper notice of the demand appointments with Dr. Hatzidakis were provided by Respondents under Rule 6-1(A)(5), and the suspension of TTD benefits after Claimant failed to appear at a rescheduled appointment with an authorized treating physician was proper.

Claimant's Application for Hearing filed December 3, 2019

32. Claimant filed an Application for Hearing on December 3, 2019, endorsing the issues of TTD, and penalties under Section 8-43-304 C.R.S. against Respondents for violating Section 8-43-503(3) C.R.S., which states as follows:

Employers, insurers, claimants, or their representatives shall not dictate to any physician the type or duration of treatment or degree of physical impairment. Nothing in this subsection (3) shall be construed to abrogate any managed care or cost containment measures authorized in articles 40 to 47 of this title.

Section 8-43-503(3) C.R.S.

33. This ALJ finds the Respondents setting demand appointments for Claimant with Dr. Hatzidakis was not a dictation of medical care. There was no credible or

persuasive evidence admitted showing Respondents sought to dictate the duration of treatment or the degree of physical impairment. This ALJ finds Respondents' purpose was to obtain an impairment rating for Claimant's right upper extremity, and was not the dictation of medical care, in compliance with WCRP Rule 5-5(D)(1)(b), as Dr. Hatzidakis was the ATP who found Claimant to be at MMI regarding his right upper extremity, and is level II accredited for upper extremity impairment. See <https://WCRP.cdle.state.co.us/physicians/default.aspx>

34. For that reason, this ALJ finds Respondents did not violate Section 8-43-503(3) C.R.S., and therefore no penalty is warranted.
35. Claimant also endorsed the issue of penalties under Section 8-43-304 C.R.S. against Respondents for violating Section 8-42-105 C.R.S., for Respondents suspending TTD benefits as of November 22, 2019.
36. Having found Respondents' suspension of TTD was proper after the Claimant did not attend the November 21, 2019 rescheduled appointment, there is no violation of the Act. As a result, this ALJ finds there is no penalty warranted as requested by Claimant for Respondents allegedly violating Section 8-42-105 C.R.S.
37. Respondents set yet another appointment for Claimant with Dr. Hatzidakis on December 19, 2019 and followed the same notification procedures used previously. (Ex. Q). Claimant did attend this appointment and received an impairment rating for his right upper extremity from Dr. Hatzidakis. (*Ex.4, p.11*).

**Claimant's request for TTD benefits
from November 22, 2019 to December 18, 2019**

38. Respondents filed a General Admission of Liability on or about January 23, 2020 reinstating TTD benefits from December 19, 2019 and ongoing. (*Ex. 2*).
39. This ALJ finds Claimant is not entitled to TTD benefits for the period from November 22, 2019 through December 18, 2019, as Claimant failed to submit to the examination on November 21, 2019 after being directed to do so by PALJ Eley, and in accord with Section 8-43-404(3) C.R.S., those benefits are barred.

**Respondent's request for reimbursement of the
fees charged by Dr. Hatzidakis for the missed appointments through a penalty.**

40. Dr. Hatzidakis' office billed Respondents \$369.00 for the appointments Claimant failed to attend on August 15, 2019 (\$94.50), October 29, 2019 (\$94.50), and November 21, 2019 (\$180.00). (*Ex. M, p.39*).
41. On November 18, 2019, PALJ Eley did not grant Respondent's request for the reimbursement of missed appointment fees but stated in his order that "the parties may wish to submit the issue of cancellation fees to a prehearing conference." (*Ex. J, p. 31*).

42. The parties did submit this issue at the prehearing conference conducted by PALJ Sisk on February 5, 2020. PALJ Sisk did, *sua sponte*, add the issue of “reimbursement of the no show fees” to the issues at hearing, but did not mention penalties under § 8-43-304. Respondents did not assert penalties in their Response to Application for Hearing and did not mention that they were seeking penalties under such statute at the hearing. As a result, neither party addressed the issue of penalties against Claimant for his failure to attend the demand appointment he was ordered to attend by PALJ Eley during the hearing.
43. Respondents did raise penalties against Claimant under Section 8-43-304(1) and 8-43-305 in their proposed order, but Claimant did not in his proposed order. Claimant was therefore given a chance to file a supplemental proposed order to address the penalty issue. In his supplemental proposed order Claimant objected to the issue of penalties against Claimant being addressed by this ALJ – asserting Claimant was not provided proper notice. This ALJ agrees. The issue of penalties against Claimant under Section 8-43-304(1) and 8-43-305 was not properly noticed for hearing or tried by consent. For those reasons, Respondents’ claim for penalties against Claimant will be reserved.

CONCLUSIONS OF LAW

Based on the foregoing specific findings of fact, the Judge draws these conclusions of law:

General Provisions

The purpose of the Workers’ Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is what leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers’ compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers’ compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

In accordance with §8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. The ALJ’s factual findings concern only evidence and inferences found to resolve the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng’g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered “to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence.” See *Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App.

2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Claimant is entitled to TTD benefits from November 22, 2019 to December 18, 2019, and whether penalties should be imposed against Respondents for failing to pay Claimant TTD benefits from November 22, 2019 through December 1, 2019.

Any employer or insurer, or any officer or agent of either, or any employee, or any other person who violates articles 40 to 47 of this title 8, or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or panel, for which no penalty has been specifically provided, or fails, neglects, or refuses to obey any lawful order made by the director or panel or any judgment or decree made by any court as provided by the articles shall be subject to such order being reduced to judgment by a court of competent jurisdiction and shall also be punished by a fine of not more than one thousand dollars per day for each offense, to be apportioned, in whole or part, at the discretion of the director or administrative law judge, between the aggrieved party and the Colorado uninsured employer fund created in section 8-67-105; except that the amount apportioned to the aggrieved party shall be a minimum of twenty-five percent of any penalty assessed. Section 8-43-304 (1) C.R.S.

To assess penalties under Colo. Rev. Stat. § 8-43-304(1), an ALJ must engage in a two-step analysis. First, the ALJ must find that the putative wrongdoer has violated the Workers' Compensation Act ("Act"), failed to perform a duty lawfully enjoined, or failed to obey a lawful order. *Allison v. Indus. Claim Appeals Office*, 916 P.2d 623 (Colo. App. 1995). Second, if a violation is found, the ALJ must determine whether the violation was objectively reasonable in the sense that it was predicated on an argument rationally based in law or fact. *Jiminez v. Indus. Claim Appeals Office*, 107 P.3d 965 (Colo. App. 2003).

So long as the employee, after written request by the employer or insurer, refuses to submit to medical examination or vocational evaluation or in any way obstructs the same, all right to collect, or to begin or maintain any proceeding for the collection of, compensation shall be suspended. If the employee refuses to submit to such examination after direction by the director or any agent, referee, or administrative law judge of the division appointed pursuant to section 8-43-208 (1) or in any way obstructs the same, all right to weekly indemnity which accrues and becomes payable

during the period of such refusal or obstruction shall be barred. Section 8-43-404(3) C.R.S.

The Industrial Claim Appeals Panel has held “the provisions for a demand appointment and the consequences for refusing to attend or obstructing a demand appointment in § 8-43-404(3), C.R.S., applies to requests for an examination by an authorized treating physician or to a request for an Independent Medical Examination.” *Larry Johnston V. Hunter Douglas, Inc.*, W.C. No. 4-879-066-01 (April 29, 2014).

WCRP 6-1(A)(5) provides:

In all claims based upon an injury or disease occurring on or after July 1, 1991, an insurer may terminate temporary disability benefits without a hearing by filing an admission of liability form with:

. . .

a copy of a certified letter to the claimant or a copy of a written notice delivered to the claimant with a signed certificate of service, advising that temporary disability benefits will be suspended for failure to appear at a rescheduled medical appointment with an authorized treating physician, and a statement from the authorized treating physician documenting the claimant's failure to appear, OR

Respondents followed the procedures stated in Rule 6-1(A)(5) and were therefore allowed to suspend TTD benefits without a hearing. Respondents provided a copy of the certified letter sent to Claimant at either his current address or his last known address on file at WCRP, advising him that temporary total disability benefits will be suspended for failure to appear; and provided statements from the authorized treating physician documenting the Claimant's failure to appear. Contrary to Claimant's argument, there is no requirement in the rule that Respondent must also provide a copy of the “green card” showing signed receipt of the certified letter by Claimant. To impose such a requirement would make the threat of suspending TTD for failing to attend appointments meaningless, as Claimants could simply choose not to accept or sign for the certified letters.

No violation being found of Rule 6-1(A)(5), there is no basis to proceed with the second step of the penalty analysis under *Allison* and *Jimenez, supra*. Claimant's alleged violation and request for penalties are not supported by the facts or law in this case.

Claimant is not entitled to TTD benefits for November 22, 2019 through December 19, 2019. Claimant failed to attend the November 21, 2019 appointment after being directed to do so by PALJ Eley, and so those benefits are barred, in accord with Section 8-43-404(3) C.R.S., and *Johnston, supra*.

II. Whether Respondents violated Section 8-43-503(3) C.R.S. by setting demand appointments for Claimant with an Authorized Treating Physician (ATP), and whether penalties should be imposed against Respondents if that violation occurred.

Section 8-43-503(3) C.R.S. states as follows:

Employers, insurers, claimants, or their representatives shall not dictate to any physician the type or duration of treatment or degree of physical impairment. Nothing in this subsection (3) shall be construed to abrogate any managed care or cost containment measures authorized in articles 40 to 47 of this title. §8-43-503(3) C.R.S. (2016).

WCRP Rule 5-5(D)(1)(b) states:

If the authorized treating physician determining MMI is Level II accredited, within 20 days after the determination of MMI, such physician shall determine the claimant's permanent impairment, if any.

Dr. Hatzidakis was the ATP who placed Claimant at MMI regarding his right shoulder injury, and that Dr. Hatzidakis is level II certified. So, Dr. Hatzidakis was the proper physician to determine the Claimant's permanent impairment, if any, related to his shoulder injury.

The Respondents' purpose in setting demand appointments for Claimant with Dr. Hatzidakis was to get an impairment rating after Dr. Hatzidakis placed Claimant at MMI on July 11, 2019. At no time did the Respondents dictate the type or duration of treatment, or degree of physical impairment by setting demand appointments with Dr. Hatzidakis

Having concluded there was no violation of Section 8-43-503(3) C.R.S, there is no basis to proceed with the second step of the penalty analysis under *Allison* and *Jimenez, supra*. Claimant's alleged statutory violation and request for penalties are not supported by the facts or law in this case.

III. Whether Respondents are entitled to reimbursement for fees charged by the ATP for appointments missed by Claimant.

Dr. Hatzidakis' office billed Respondents \$369.00 for the appointments Claimant failed to attend on August 15, 2019 (\$94.50), October 29, 2019 (\$94.50), and November 21, 2019 (\$180.00).

On November 18, 2019, PALJ Eley did not grant Respondent's request for the reimbursement of missed appointment fees but stated in his order that "the parties may wish to submit the issue of cancellation fees to a prehearing conference."

The parties did submit this issue at the prehearing conference conducted by PALJ Sisk on February 5, 2020. PALJ Sisk did, *sua sponte*, add the issue of "reimbursement of the no show fees" to the issues at hearing, but did not mention penalties under § 8-

43-304 and 8-43-305. Instead, PALJ Sisk relied on § 8-43-207(1)(p) for imposing sanctions for the no show fees.

Section 8-43-207(1)(p) provides that an ALJ may:

Impose the sanctions provided in the Colorado rules of civil procedure, except for civil contempt pursuant to rule 107 thereof, for willful failure to comply with any order of an administrative law judge issued pursuant to articles 40 to 47 of this title.

Based on a strict reading of Section 8-43-207(1)(p), an ALJ lacks the authority to impose a monetary sanction for Claimant's violation of a PALJ's order compelling Claimant to attend a demand appointment with a treating physician. If the appointment were ordered by the PALJ as part of discovery, this ALJ would have the authority to impose a monetary sanction. See *Reed v. Hewlett Packard* WC No. 3-843-951 (Jan. 12, 1999) (the Act creates a wide array of possible punishments for discovery violations, including monetary and non-monetary sanctions).

Respondents did not, however, assert a claim for penalties in their Response to Application for Hearing and did not mention that they were seeking penalties under Section 8-43-304(1) and 8-43-305 at the hearing. As a result, during the hearing, neither party addressed the issue of penalties under Section 8-43-304(1) against Claimant for his failure to comply with PALJ Eley's order and attend the November 21, 2019 appointment and whether Section 8-43-305 allows a penalty for each day afterward until Claimant attended an appointment with Dr. Hatzidakis on December 19, 2019.

Respondents did raise penalties under Section 8-43-304(1) and 8-43-305 in their proposed order, but Claimant did not. Claimant was therefore given a chance to file a supplemental proposed order addressing the issue of penalties raised by Respondents. In his supplemental proposed order, Claimant objected to the issue being addressed by this ALJ – asserting Claimant was not provided proper notice. This ALJ agrees.

Moreover, although Respondents raised penalties under Section 8-43-304(1) and 8-43-305 in their proposed order, it was not clear whether Respondents were also arguing that the ALJ should consider each day after Claimant failed to attend the November 21, 2019 appointment is a separate and distinct violation under Section 8-43-305. See *Crowell v. Indus. Claim Appeals Office*, 298 P.3d 1014, 2012 COA 30, (Colo. App. 2012). Here, Claimant did not attend a follow up appointment with Dr. Hatzidakis until 28 days after the court ordered appointment. In addition, Claimant, did not have a chance to raise a proportionality and ability to pay defense, as allowed in *Div. of Workers Compensation v. Dami Hospitality, LLC*, 442 P.3d 94, 2019 CO 47 (Colo. 2019).

As a result, Respondents claim for penalties against Claimant under Section 8-43-304(1) and 8-43-305 is reserved for future determination.

ORDER

Based on these findings of fact and conclusions of law, the Judge enters the following order:

1. Respondents did not violate Section 8-42-105 C.R.S. or WCRP Rule 6-1(A)(5) by suspending Claimant's TTD benefits after he failed to attend the appointment set by Respondents for November 21, 2019, and Claimant's request for penalties is denied.
2. Claimant's request for TTD benefits for November 22, 2019 through December 18, 2019 is denied, and those benefits are barred under Section 8-43-404(3) C.R.S.
3. Respondents did not violate Section 8-43-503(3) C.R.S. by setting demand appointments for Claimant with Dr. Hatzidakis to obtain an impairment rating and Claimant's request for penalties is denied.
4. The issue of whether Respondents are entitled to penalties against Claimant for his failure to attend the PALJ ordered demand appointment with ATP Hatzidakis is reserved for future determination.
5. Any other issues not expressly decided herein are also reserved to the parties for future determination.

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

DATED: May 25, 2020

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-048-238-004**

ISSUES

- Did Claimant prove entitlement to a general award of medical benefits after MMI?
- The parties stipulated the endorsed issue of disfigurement will be reserved for future determination, if necessary.

FINDINGS OF FACT

1. Claimant worked for Employer as an undercover detective. On May 22, 2017, he suffered multiple admitted injuries in a “T-bone” motor vehicle accident.

2. Claimant received authorized treatment through Employer’s occupational medicine clinic, primarily under the direction of PA-C Paula Homberger. Ms. Homberger referred Claimant to various specialists, including Dr. Rauzzino, Dr. Sparr, and Dr. Abercrombie.

3. Dr. Nicholas Kurz placed Claimant at MMI on October 23, 2018 with a 6% whole person cervical impairment rating after apportionment for a previous injury.

4. Claimant saw Dr. Timothy Hall for an IME at his counsel’s request on March 7, 2019. Dr. Hall opined Claimant was not at MMI because he required treatment for a head injury. Dr. Hall recommended various modalities, including vestibular therapy, cognitive rehabilitation, counseling, and neuromuscular therapy.

5. Claimant saw Dr. Anjmun Sharma for a Division IME on March 15, 2019. Dr. Sharma agreed Claimant reached MMI on October 23, 2018 but calculated a 20% whole person impairment rating for the cervical and lumbar spines. Dr. Sharma opined Claimant required no “maintenance care.”

6. Dr. Sharma testified in an evidentiary deposition on August 9, 2019. During the deposition, Dr. Sharma amended his opinion regarding medical treatment after MMI. He agreed with many of Dr. Hall’s recommendations but opined they should be done as “maintenance” care:

You could just do this as a maintenance care plan . . . I could certainly draft another addendum where these could be done under maintenance care, a specific plan of action – see Dr. Watt, neuro vestibular therapy, etc. . . . and I think that would be more than reasonable.

7. The case went to hearing before ALJ Lamphere on September 11, 2019. Judge Lamphere found Claimant failed to overcome the DIME regarding MMI but overcame the DIME on impairment. Judge Lamphere awarded an additional 10% whole person impairment for residuals of a head injury.

8. Respondent filed a Final Admission of Liability (FAL) on December 11, 2019 based on Judge Lamphere's order. The FAL contains the following notations regarding medical benefits after MMI:

Admit to Maintenance Care after MMI? Yes No If no, pursuant to Dr. Dr Sharma DIME 's medical report dated 04/26/19

9. This language is internally contradictory because Dr. Sharma's April 26, 2019 DIME report stated Claimant required "no maintenance." Although Dr. Sharma amended that opinion in his deposition, the FAL makes no reference to the deposition.

10. Claimant has continued to pursue treatment with Ms. Homberger, Dr. Sparr, and Dr. Abercrombie since MMI, none of which Respondent has denied. Nevertheless, Claimant's providers are confused about their authorization to treat based on the language of the FAL. As Ms. Homberger explained in her December 17, 2019 report:

I have reviewed available paperwork from the ALJ, the IMEs on file, & the paperwork¹ indicating maintenance care. At this time, there appears to be a discrepancy as the paperwork indicates maintenance per the IME. However, the IME report indicates no need for maintenance care. I will request additional information & review this case with Dr. Kurz to see how to proceed. I have explained to the patient that I will provide [treatment] today based upon this form indicating that the risk management has admitted to a need for maintenance care, but that we would need to clarify what the ruling was in order to provide continued care.

11. On January 28, 2020, Dr. Kurz apparently released Claimant from care, stating "he remains at MMI without the need for any [maintenance medical]." Dr. Kurz' report referenced the same "discrepancy" in the "paperwork" as to whether further treatment is admitted.

12. During the hearing, Respondent's counsel stated on the record Respondent believes it admitted for medical benefits after MMI and the FAL is not intended to limit the general nature of the award. Respondent does not believe an amended FAL is necessary.

13. Claimant proved by a preponderance of the evidence he requires medical treatment after MMI to relieve the effects of his injury and prevent deterioration of his condition.

CONCLUSIONS OF LAW

Respondents are liable for authorized medical treatment reasonably needed to cure or relieve the employee from the effects of the injury. Section 8-42-101(1)(a); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Medical benefits may extend beyond MMI if a claimant requires treatment to relieve symptoms or prevent deterioration of their condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo.

¹ The ALJ infers "the paperwork" refers to the FAL.

1988). Proof of a current or future need for “any” form of treatment will suffice for an award of post-MMI benefits. *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995). If the claimant establishes the probability of a need for future treatment, he is entitled to a general award of medical benefits after MMI, subject to the respondents’ right to dispute causation or reasonable necessity of any specific treatment. *Hanna v. Print Expeditors, Inc.*, 77 P.3d 863 (Colo. App. 2003). The claimant must prove entitlement to post-MMI medical benefits by a preponderance of the evidence. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997).

As found, Claimant proved he is entitled to a general award of reasonably necessary and related medical treatment after MMI from authorized providers.

ORDER

It is therefore ordered that:

1. Respondent shall cover reasonably necessary and related medical treatment after MMI from authorized providers.
2. All issues not decided herein and not otherwise closed by operation of law are reserved for future determination.

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

DATED: May 27, 2020

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

Whether the claimant has demonstrated, by a preponderance of the evidence, that a left total hip replacement (as recommended by Dr. Louis Stryker) is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted December 12, 2018 work injury.

FINDINGS OF FACT

1. The claimant created his professional corporation (PC) in 2002. At that time, the claimant became an employee of the PC. On December 12, 2018, the claimant was an employee of the PC.

2. On December 12, 2018, the claimant tripped while carrying a box of paper to be recycled. As the claimant fell, his head struck a door and his right hand struck the wall with enough force to puncture the drywall. In addition, the claimant landed on the box of paper, striking his left upper thigh on the box. The claimant testified that he developed a bruise at the site where he struck the box. The claimant testified that he received medical treatment on December 12, 2018 with his authorized treating provider (ATP), Western Valley Family Practice.

3. The medical records entered into evidence show that beginning on December 12, 2018, the claimant was seen by Dr. Thomas Motz¹ at Western Valley Family Practice. At that time, the claimant reported his symptoms as dizzy and tired, pain in his neck, right arm, and lower back. In addition, the claimant reported pain in the right side of his groin that radiated down the outside of this right leg. Dr. Motz diagnosed acute thoracic back pain and rib pain. Dr. Motz also noted the claimant's fall resulted in a loss of consciousness. Dr. Motz ordered a head computed tomography (CT) scan and imaging of the claimant's thoracic spine.

4. The claimant underwent the recommended head CT after seeking treatment at the emergency department (ED) at Community Hospital². At the ED, the claimant was seen by Dr. Julie McCallen. At that time, the claimant described the tripping incident and reported his symptoms as significant soreness on the left side of his neck,

¹ The claimant testified that on December 12, 2018, he was seen by a nurse practitioner. The claimant also testified that although the medical records indicate that he was seen by Dr. Motz and Dr. Kurtis Holmes, he only saw the nurse practitioner at that practice.

² The claimant testified that he sought treatment at the ED because he was having difficulty scheduling a CT in a timely manner.

right side of this low back, and groin. The head CT performed on that date showed no acute intracranial process.

5. The claimant testified that his initial symptoms included pain in his right wrist and shoulder and a concussion. The claimant further testified that all of those initial symptoms have resolved.

6. On December 21, 2018, the claimant returned to Western Valley Family Practice and was seen by Dr. Kurtis Holmes. On that date, the claimant reported pain in his low back with pain radiating down the outside of his left leg. In addition, the claimant reported numbness and tingling in his left lower extremity. On the right side, the claimant described some pain in his right buttock and down the inside of his right leg. Dr. Holmes diagnosed a lumbar strain with radiculopathy. In addition, Dr. Holmes ordered a magnetic resonance image (MRI) of the claimant's lumbar spine and referred the claimant to physical therapy.

7. On December 31, 2018, the lumbar spine MRI showed multilevel degenerative disc and facet disease.

8. The claimant continued to treat with Dr. Holmes and reported ongoing pain and numbness in both legs. On March 28, 2019, Dr. Holmes referred the claimant to an orthopedic spine specialist. The claimant testified that the referral was to Dr. Kirk Clifford.

9. On April 19, 2019, the claimant was seen by Dr. Clifford and reported a combination of low back and radiating leg pain. On that date, an x-ray of the claimant's lumbar spine showed moderate to severe bilateral hip degenerative joint disease with osteophyte formation and joint space narrowing. Dr. Clifford diagnosed bilateral hip degenerative joint disease and L5-S1 foraminal stenosis with bilateral radiculopathy. Dr. Clifford recommended that the claimant undergo bilateral L5-S1 transforaminal epidural steroid injections (TFESIs). In addition, Dr. Clifford referred the claimant to Dr. Louis Stryker for consultation of the claimant's "hip arthritis". Dr. Clifford opined that the claimant's hip condition could be the result of osteoarthritis and radiation treatment the claimant underwent to treat a sarcoma.

10. A request for authorization of the recommended bilateral L5-S1 TFESI was submitted to the insurer on May 5, 2019.

11. On May 16, 2019, the claimant was seen by Dr. Stryker. On that date, the claimant reported bilateral groin pain radiating down the lateral aspect of the claimant's bilateral hips and into his feet. The claimant also described experiencing limited range of motion that resulted in difficulty putting on socks. Dr. Stryker ordered hip x-rays which were done on that same date. These x-rays showed "complete obliteration" of joint space in both hips with subchondral sclerosis and osteophyte formation, and CAM lesions of both femoral heads. Dr. Strker opined that the claimant has long standing arthritic changes in his hips, that is likely due to femoral acetabular impingement. Dr. Styker also opined that the claimant's hip condition was exacerbated by his fall at work on December 12, 2018. Dr. Stryer discussed treatment opinions that could include gait aids, the use of

antiinflammatories, physical therapy, intra articular joint injections, and total hip replacement.

12. On May 22, 2019, the claimant reported to Dr. Holmes that Dr. Stryker had recommended bilateral hip replacements.

13. On May 29, 2019, Dr. Clifford administered bilateral L5-S1 TFESIs.

14. The claimant returned to Dr. Holmes on June 20, 2019, and reported that the injections reduced his low back and upper leg pain. Despite this improvement, the claimant continued to report numbness and burning in his lower legs.

15. On July 15, 2019, the claimant returned to Dr. Clifford and reported that the injections provided 60 percent overall relief of his symptoms. The claimant further reported that he had 85 percent improvement of his thigh pain and 45 percent relief of his calf and toe pain. Dr. Clifford suggested possible repeat injections if the claimant's pain symptoms returned.

16. On July 24, 2019, the claimant returned to Dr. Stryker and reported excellent relief from the TFESIs. On that date, Dr. Styker recommended proceeding with a total hip replacement. On July 26, 2019, a request for authorization was submitted to the insurer for a left total hip arthroplasty.

17. On August 2, 2019, Dr. Jon Erickson reviewed the surgical recommendation. In his review Dr. Erickson recommended that the surgery be denied, pending an MRI of the claimant's left hip. In support of this recommendation, Dr. Erickson noted that there was some indication in the medical records that the claimant has "radiation-induced" hip arthritis, but without an MRI he could not opine regarding whether the claimant's current hip condition was related to the December 12, 2018 fall at work.

18. On August 20, 2019, Dr. Clifford's office submitted a request for authorization of repeat bilateral L5-S1 TFESIs.

19. On September 16, 2019, an MRI of the claimant's left hip showed advanced osteoarthritis, with no evidence of avascular necrosis.

20. On September 18, 2019, Dr. Clifford administered the recommended repeat bilateral L5-S1 TFESIs.

21. On September 27, 2018, Dr. Erickson again reviewed the request for a left hip replacement. Dr. Erickson noted that the left hip MRI showed evidence of degenerative tearing of the acetabular labrum and advanced degenerative osteoarthritis. Dr. Erickson recommended continued denial of the surgery, to allow him the opportunity to review the MRI with a MSK expert radiologist.³

³ Musculoskeletal radiology.

22. Dr. Erickson did review the claimant's MRI with an MSK expert and on October 29, 2019 he issued his third report related to the recommended left hip replacement. Dr. Erickson recommended denial of the recommended surgery. Dr. Erickson noted that the MRI showed advanced bone on bone arthrosis and "huge" periarticular osteophytes in both of the claimant's hips. Dr. Erickson opined that no fall or trauma would worsen the degenerative condition of the claimant's left hip.

23. On November 7, 2019, the claimant was seen by Dr. Holmes. On that date, Dr. Holmes noted that Dr. Erickson's opinion was that "the degenerative arthritis of [the claimant's] hips is so profound that no accident could have made either of them worse". Dr. Holmes noted that the claimant would seek a second opinion from a surgeon in Vail.

24. On February 21, 2020, Dr Elizabeth Carpenter authored a letter regarding the claimant's September 16, 2019 hip MRI. Dr. Carpenter noted that the MRI showed advanced bilateral hip osteoarthritis, with bone on bone contact (left greater than right). Dr. Carpenter noted that she had also reviewed a pelvic MRI taken on December 24, 2013 and an abdominal and pelvic CT scan performed on December 18, 2014. Dr. Carpenter noted that left hip osteoarthritis with bone on bone contact was present at the time of those prior imaging studies. Dr. Carpenter opined that there is no evidence of an acute injury indicated by the September 16, 2019 hip MRI.

25. The claimant testified that due to a sarcoma in his left groin area, he underwent radiation in 2008. As a result of that treatment, the claimant underwent regular imaging of that area. As noted in Dr. Carpenter's February 2020 letter, on December 11, 2013, an MRI of the claimant's pelvis was performed. The medical records indicate that MRI showed a small amount of fluid in the left hip joint. Thereafter, on December 18, 2014, a CT of the claimant's abdomen and pelvis showed degenerative joint disease in both hips.

26. On January 21, 2020, Dr. James Lindberg performed a review of the claimant's medical records. On February 25, 2020, Dr. Lindberg issued a report in which he noted that the claimant has severe osteoarthritis in both hips, including bilateral and symmetrical osteophytes on the acetabulum and femur. Dr. Lindberg opined that the claimant's December 12, 2018 slip and fall did not cause this osteoarthritis. In his report, Dr. Lindberg opined that the claimant should have bilateral hip replacements. However, the claimant's need for hip replacement was not related to the December 12, 2018 work injury.

27. On March 27, 2020, Dr. Stryker authored a letter in which he disputed the opinions of Dr. Lindberg. Dr. Stryker argued that while the claimant has degenerative changes in his hips, he was asymptomatic prior to the December 12, 2018 fall. Therefore, it is Dr. Stryker's opinion that the claimant's symptoms were exacerbated by his fall at work.

28. At hearing, Dr. Lindberg testified that he continues to opine that the current condition of the claimant's left hip is not related to the December 12, 2018 fall. After hearing the claimant's testimony, Dr. Lindberg changed his opinion regarding whether hip

replacement surgery is reasonable and necessary treatment for the claimant. Although Dr. Lindberg had previously opined that the claimant was in need of bilateral hip replacement, at hearing, he stated that because the claimant does not have hip pain, he is not a candidate for hip replacement.

29. Dr. Lindberg also testified regarding the cause of the claimant's current hip condition. Dr. Lindberg noted that the claimant has a chronic degenerative condition that was advancing before the 2014 MRI. Dr. Lindberg also testified that the claimant's mechanism of injury on December 12, 2018 did not have the requisite rotational forces or excessive flexion necessary to cause the level of damage in the claimant's hips. Dr. Lindberg testified that the claimant's current symptoms are related to sciatica and back pain and not in his hips.

30. Ms. Miller was the claimant's martial arts instructor from approximately 2003 through October 2018. Ms. Miller testified that the claimant progressed in his martial arts training. In October 2018, the claimant was able to complete "midline" kicks. Ms. Miller also testified that the claimant was able to perform warm up exercises involving "opening" his hips. Ms. Miller testified that she recalls last seeing the claimant in class in approximately October 2018. She further testified that the claimant has not returned to martial arts training since that time.

31. The claimant testified that prior to his fall on December 12, 2018, he was able to perform midline kicks in his martial arts training. In addition, he could ride a bicycle and take hikes on rocky terrain. The claimant further testified that since his fall, he is unable to spread his legs more than 26 to 28 inches. He has not returned to martial arts training. In addition, he is unable to spread his legs to be able to straddle a bicycle. It is difficult to place his left foot on his right knee to put on socks and shoes. The claimant testified that he began to notice these limitations approximately two to three weeks after the December 12, 2018 fall.

32. The claimant testified that the recommended left hip replacement surgery has been scheduled for June 1, 2020. The recommended right hip replacement has been scheduled for July 13, 2010.

33. The ALJ credits the medical records and the opinions of Drs. Erickson, Carpenter, and Lindberg over the contrary opinions of Dr. Stryker. The ALJ finds that the claimant has failed to demonstrate that it is more likely than not that the recommended surgery is reasonable medical treatment necessary to cure and relieve him from the effects of the December 12, 2018 work injury. The ALJ is persuaded that the claimant's current hip condition is related to chronic and long standing degenerative joint disease, and not the December 12, 2018 slip and fall. The ALJ also finds that the claimant has failed to demonstrate that it is more likely than not that the fall on December 12, 2018 aggravated, accelerated, or combined with that degenerative condition to necessitate treatment, including surgery. The ALJ is persuaded that although the degenerative joint disease in the claimant's hips became symptomatic after his fall at work, the fall did not cause the claimant's condition to become symptomatic.

CONCLUSIONS OF LAW

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

2. The ALJ’s factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness’s testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2018).

4. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

5. The existence of a pre-existing medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it “aggravates accelerates or combines with a preexisting disease or infirmity to produce disability or need for treatment.” *See H & H Warehouse v. Vicory, supra*.

6. As found, the claimant has failed to demonstrate by a preponderance of the evidence that a left total hip arthroplasty is reasonable medical treatment necessary to cure and relieve him from the effects of the December 12, 2018 work injury. As found, the claimant has failed to demonstrate by a preponderance of the evidence that the fall on December 12, 2018 aggravated, accelerated, or combined with that degenerative condition to necessitate treatment, including surgery. As found, the medical records and the opinions of Drs. Erickson, Carpenter, and Lindberg are credible and persuasive.

ORDER

It is therefore ordered that the claimant's request for a left total hip arthroplasty is denied and dismissed.

Dated the 1st day of June 2020.



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

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

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NOS. 4-926-368-09 and 4-926-368-05**

ISSUES

1. Whether Insurer has demonstrated by a preponderance of the evidence that it properly cancelled Employer's Workers' Compensation insurance policy effective April 16, 2013.
2. Was Claimant an employee of [Alleged Employer Redacted]?
3. Does the settlement agreement between Claimant and [Prior Insurer Redacted] preclude recovery by Claimant against the remaining Respondents?

STIPULATIONS

The parties agreed to the following:

1. Claimant earned an AWW of \$1,153.84.
2. If Claimant's claim is compensable, he is entitled to Temporary Total Disability (TTD) benefits for the period April 27, 2013 until terminated by statute.
3. Claimant's TTD benefits are subject to a Social Security Disability Insurance (SSDI) offset in the amount of \$755.00 per month since October 1, 2014.
4. Claimant is not seeking a recovery against [Alleged Employer Redacted], as [Alleged Employer Redacted] filed for bankruptcy protection.

These Stipulations were approved by the ALJ and are made part of this Order.

PROCEDURAL HISTORY

This case has been extensively litigated, including on the issues which were set for determination at this hearing:

On December 30, 2014, ALJ Felter granted a Motion for Summary Judgment, dismissing Respondents [Prior claim parties]. This Order was affirmed by a second Order issued by ALJ Felter, dated April 15, 2015.

After a timely Petition to Review was filed, the Industrial Claims Appeals Office concluded the foregoing orders were not final and dismissed the appeal on September 5, 2015. After a hearing was held on January 25, 2016, ALJ Cannici issued findings of Fact, Conclusions of Law and Order (dated February 25, 2016). ALJ Cannici determined Claimant suffered a compensable injury and Respondent-Insurer [Redacted] substantially complied with 8-44-110, C.R.S. canceling the insurance policy it issued to Employer.

The ICAO remanded the case on September 7, 2016, finding that a disputed issue of material fact existed and the orders on the Motion for Summary Judgment were set aside. Because of this determination, this Order also found Respondents [Prior Respondents Redacted] needed to participate in the hearing in order to fully litigate the claim.

On or about June 19, 2017, a full and final settlement was reached between Claimant and [Prior Respondents Redacted]. The settlement was approved by the Director of the DOWC, Paul Tauriello on June 23, 2017.

On November 17, 2017, a Prehearing Conference Order was issued by PALJ Eley. At that time, based upon the acknowledgment by counsel for the parties, PALJ Eley determined the evidence to be presented would be identical to that which was presented at the previous hearing. Respondent-[Insurer Redacted] was permitted to call Mike R[Redacted] as a witness at the hearing. The parties did not waive their right to present rebuttal evidence. Judge Eley ordered the exhibits and transcript from the previous hearing to be submitted to the OAC ALJ assigned at the December 11, 2017 hearing, along with the settlement agreement between Claimant and [Prior Respondents Redacted]. The Order specified that it was not to be construed to take a position on what OAC ALJ should hear the case or the weight, if any, to be given by the OAC ALJ to the previous merits order rendered in the matter.

The parties participated in a Status Conference on February 20, 2020 for the purpose of confirming what pleadings, exhibits and transcripts were part of the record. Respondent [Insurer Redacted] objected to the inclusion of the transcripts of the hearings before ALJ Felter, as well as depositions in which it did not participate. Following the Status Conference, a Hearing Transcript for the December 2017 hearing was lodged with the Court on February 24, 2020 and the record closed.

FINDINGS OF FACT

1. [Alleged Employer Redacted] owns [Company name Redacted] as a sole proprietorship.¹
2. On September 19, 2012, a vendor Agreement between [Prior Respondents Redacted] and [Company name Redacted] was completed. The agreement specified that [Company name Redacted] would provide property, preservation inspections (“PPI”). This agreement was signed on September 21, 2012 by [Alleged Employer Redacted] and William Shapiro on behalf of [Prior Respondents Redacted]. Pursuant to this contract, Mr. [Alleged Employer Redacted] was a vendor for [Prior Respondents Redacted], which contracted out the services [Alleged Employer Redacted] was to perform. The agreement provided that [Alleged Employer Redacted] had restrictions when hiring any subcontractors.

¹ Exhibit A, p. 19.

3. In January 2013, [Alleged Employer Redacted] obtained a workers' compensation insurance policy for [Company name Redacted] in his personal name with [Insurer Redacted]. [Alleged Employer Redacted] 's address was listed as 4137 Warbler Drive, Ft. Collins, CO, 80526.

4. Andy L[Redacted] testified that he works as an Underwriter for Insurer. He previously worked for Insurer as a New Business Representative and Customer Service Representative. Mr. L[Redacted] explained that Employer obtained a Workers' Compensation insurance policy with Insurer in January 2013. The policy was issued in Mr. [Alleged Employer Redacted] 's name and Mr. L[Redacted] was the assigned underwriter. The policy issued by Insurer had a policy period which ran from January 25, 2013-February 1, 2014.

5. [Insurer Redacted] sent a letter to [Alleged Employer Redacted] via certified mail, dated March 26, 2013, which notified him that his insurance premium was overdue and his policy would be canceled on April 16, 2013, unless [Insurer Redacted] received the amount due by April 15, 2013 (hereinafter "Notice of Cancellation").² This Notice was sent to 4137 Warbler Drive, Ft. Collins, CO, 80526. [Insurer Redacted] contemporaneously mailed a copy of the Notice of Cancellation to The Ahbe Group, Inc./TAG Insurance Services ("TAG"), which was [Alleged Employer Redacted] 's insurance agent.

6. Rhonda I[Redacted] testified that she works for Insurer as a Corporate Services Assistant. Ms. I[Redacted] assists the manager who oversees Insurer's outgoing mail team and previously was a member of the outgoing mail team. She said Insurer's business custom was to send all notices of cancellation via certified mail and to enter the assigned certified mail numbers into Pitney Bowes' electronic equipment. The Pitney Bowes equipment meters and tracks Insurer's mail. Insurer also used envelopes that allow the contact information of the addressees listed in outgoing letters to be seen through transparent "windows" to ensure these are sent to the correct recipients. Ms. I[Redacted] explained that "certified mail" and "return receipt certified mail" are different. Insurer's standard practice was to send notices of cancellation via certified mail rather than return receipt certified mail.

7. Ms. I[Redacted] stated that the Pitney Bowes equipment generated a report reflecting that Insurer's March 26, 2013 Notice of Cancellation was mailed to Mr. [Alleged Employer Redacted] 's zip code of 80526 on March 27, 2013 and received on March 28, 2013. The equipment generated a document bearing certified mail number 9171082133393950727893.³ Although the report did not reflect that an individual had signed for the Notice of Cancellation, Ms. I[Redacted] explained that she has never seen a similar report that revealed an individual had signed for the document. Finally, the "Delivery Status" confirmation from the United States Postal Service (USPS) also stated

² Exhibit B, p. 50.

³ Exhibit B, p. 54.

that tracking number 9171082133393950727893 was delivered. The ALJ found the Notice of Cancellation was delivered to [Alleged Employer Redacted] 's business address.

8.Mr. L[Redacted] testified that Insurer sent the Notice of Cancellation to Mr. [Alleged Employer Redacted] at his address of record via certified mail because he failed to timely pay his insurance premiums. Mr. L[Redacted] confirmed that Insurer has a business custom of sending notices of cancellation via certified mail when policyholders fail to timely pay their premiums. He noted that he has never seen Insurer send a notice of cancellation through any method other than certified mail. He detailed that Insurer has a business custom of generating an electronic "notepad entry" when a notice of cancellation is issued and Insurer's underwriting file contains an entry stating that the Notice of Cancellation was sent via certified mail. The ALJ finds Mr. L[Redacted] 's testimony was credible and it was not refuted.

9.Mr. L[Redacted] also testified that Insurer has sent other correspondence to Mr. [Alleged Employer Redacted] using the same name and address since the inception of his Workers' Compensation insurance policy in January 2013. Mr. [Alleged Employer Redacted] never reported any trouble receiving mail. Although Mr. L[Redacted] acknowledged that Insurer does not possess a return receipt for the Notice of Cancellation, he explained that USPS only retains return receipts for two years and he had no reason to believe one might be relevant within the timeframe. Mr. L[Redacted] further commented that Insurer has a business custom of sending copies of notices of cancellation to the insurance agents of its policyholders and the Notice of Cancellation was mailed to [Alleged Employer Redacted] 's insurance agent. This was sent by regular mail.

10. Mr. [Alleged Employer Redacted] testified he received the Notice of Cancellation, but did not know when he received it.⁴

11. James R[Redacted] testified at the December 11, 2017 hearing. He is employed by TAG as the commercial division manager. TAG was the insurance agent for [Alleged Employer Redacted] /[Company name Redacted] in March 2013 in connection with the policy issued by [Insurer Redacted]. TAG received a copy of the Notice of Cancellation which was also addressed to McKeon/[Company name Redacted] . He did not personally see the document when it came in to the agency. TAG maintained business records, including notices of cancellation. The Notice of Cancellation was kept in electronic records, which showed it was received on March 29, 2013. The ALJ concluded that TAG, as the insured's agent received the Notice of the Cancellation.

12. [Insurer Redacted] substantially complied with the requirements of the statute when it cancelled the subject policy.

13. On April 16, 2013, the workers' compensation insurance policy issued to [Alleged Employer Redacted] by [Insurer Redacted] was canceled. There was no evidence in the record that the policy was reinstated.

⁴ January 25, 2016 Hearing Transcript, p. 94:20-25

14. Since [Alleged Employer Redacted] (as a subcontractor) did not have workers' compensation insurance, the ALJ concluded that [Prior Respondents Redacted] was a general contractor for the PPI services and required to provide workers' compensation coverage for any injuries.

15. Mr. [Alleged Employer Redacted] and Mr. P[Redacted] have been friends for approximately 15 years. In early April 2013, Mr. [Alleged Employer Redacted] offered property preservation and inspection work to Mr. P[Redacted] in Granby, Colorado.

16. Mr. P[Redacted] and Claimant completed the job in Granby, Colorado on or about April 21, 2013. They cleaned up firewood and other materials. Mr. [Alleged Employer Redacted] reviewed a picture of the job site and was satisfied with the work. He never showed Claimant and Mr. P[Redacted] how to do the work.

17. Copies of e-mails from Mr. [Alleged Employer Redacted] to Mr. P[Redacted] were admitted at hearing. One dated April 23, 2013 forwarded work orders to Mr. P[Redacted]. The next, dated April 24, 2013 requested a contract to be filled out, as well pictures to be taken of a specific property. There was no evidence in the record that Mr. P[Redacted] completed and returned a signed contract to Mr. [Alleged Employer Redacted]. The ALJ inferred this was evidence on intent on the part of [Alleged Employer Redacted] to enter into a contract with Mr. P[Redacted]. There was no evidence Mr. P[Redacted] executed a written independent contractor agreement.

18. Mr. [Alleged Employer Redacted] did not withhold taxes in the money he paid to Mr. P[Redacted]. He did not pay Claimant directly, as that was through Mr. P[Redacted].

19. Mr. [Alleged Employer Redacted] was aware that Claimant was going to Chicago with Mr. P[Redacted]. He gave Mr. P[Redacted] a list of materials they needed to buy in order to service the work orders when they got to Chicago. The ALJ concluded Mr. P[Redacted] was acting as a subcontractor.

20. Mr. P[Redacted] testified Mr. [Alleged Employer Redacted] directed him to go to Chicago where he would be employed doing PPI work. Mr. P[Redacted] testified he was going to have work orders from [Alleged Employer Redacted] when he arrived in Chicago. He said [Prior Respondents Redacted] and possibly other companies would be involved in giving Mr. [Alleged Employer Redacted] the work they would do. Mr. P[Redacted] did not think he was ever given any paperwork or contracts to sign by Mr. [Alleged Employer Redacted]. Mr. P[Redacted] testified the reason he went to Chicago and Claimant was recruited to go to Chicago was to work for Mr. [Alleged Employer Redacted]. Mr. P[Redacted] had no workers' compensation insurance of his own. Mr. P[Redacted] said that Mr. [Alleged Employer Redacted] told him he would earn at least \$10,000 each month working on projects in the Chicago area. Mr. [Alleged Employer Redacted] did not provide a 1099 tax form or other documents to Mr. P[Redacted].

21. There was no evidence in the record that Mr. P[Redacted] and Claimant executed any sort of contract or employment agreement. There was no evidence Claimant executed a written independent contractor agreement. Mr. P[Redacted] testified that he was going to split the money he received from Mr. [Alleged Employer Redacted] with Claimant.⁵ Mr. P[Redacted] described the arrangement as friends helping a friend, similar to when one friend pays another to help that person move. The ALJ inferred Claimant was going to work exclusively with Mr. P[Redacted] while he was in Chicago.

22. Mr. [Alleged Employer Redacted] testified that when Mr. P[Redacted] and Claimant drove to Chicago he was under the impression that he did not have to have workers' compensation insurance coverage for them because they were independent contractors. He stated that he lent a credit card (from one of his companies) to Mr. P[Redacted]. Mr. [Alleged Employer Redacted] stated he was going to deduct the expenses charged on the credit card from what he would pay Mr. P[Redacted] for the [Prior Respondents Redacted] work in Chicago.

23. There was no evidence in the record that Claimant had any contact with [Prior Respondents Redacted]. There was no evidence in the record that Claimant had any contact with [Alleged Employer Redacted] / [Company name Redacted]. Claimant had no workers' compensation coverage of his own. The ALJ inferred from the evidence that Claimant was travelling to Chicago to work for [Alleged Employer Redacted] with Mr. P[Redacted].

24. On April 26, 2013, Claimant and P[Redacted] were injured in a motor vehicle accident which occurred in Nebraska. Both were severely injured as a result.

25. [Alleged Employer Redacted] did not have workers' compensation insurance coverage in force on April 26, 2013.

26. On June 12, 2013, a First Report of Injury was completed on behalf of Mr. [Alleged Employer Redacted], who is listed as the employer. Kelly Ludu (guardian) completed the form. The employee was listed as Claimant. The date the administrator was notified was listed as April 10, 2013. [Insurer Redacted] was identified as the insurer.

27. The ALJ concluded [Prior Respondent Insurer Redacted] was the workers' compensation insurer for [Prior Respondents Redacted], as that was how it was identified in the settlement documents. The full and final settlement between Claimant and [Prior Respondents Redacted] / [Prior Respondent Insurer Redacted], which was approved on June 23, 2017 provided:

"9. A. The parties agree to each of the following terms as part of this settlement:

⁵January 25, 2016 Hearing Transcript, p. 63:20-64:23

(4) Liability under the Worker's Compensation act has been, and continues to be, denied by Respondents. The settlement of this claim is not an admission of liability by the Respondents. In the event Claimant petitions to reopen, Claimant understands that liability of the Respondents for the injury and Claimant's entitlement to any type of workers compensation benefits must be established since the settlement is not an admission of liability. The parties understand and agree that other than the terms specifically identified in the settlement agreement, Respondents shall not pay any medical or indemnity benefits in relation to the alleged Worker's Compensation claim".

28. Evidence and inferences inconsistent with these findings were not persuasive.

CONCLUSIONS OF LAW

General

The purpose of the Workers' Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S.

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

Cancellation of the Insurance Policy by [Insurer Redacted]

In the case at bar, [Insurer Redacted] had the burden to prove, by a preponderance of the evidence, that it effectively cancelled the insurance policy prior to the accident. *Butkovich v. ICAO*, 690 P.2d 257, 259 (Colo. App. 1984). Cancellations of workers' compensation

insurance policies are governed by § 8-44-110, C.R.S. (2019). That section provides in pertinent part:

“Notice of cancellation. Every insurance carrier authorized to transact business in this state, including [Insurer Redacted] Assurance, which insures employers against liability for compensation under the provisions of articles 40 to 47 of this title, shall notify any employer insured by the carrier or [Insurer Redacted] Assurance, and any agent or representative of such employer, if applicable, by certified mail of any cancellation of such employer's insurance coverage...”

The Colorado Court of Appeals has held substantial compliance with the statute suffices, if the insured received actual notice. *EZ Building Components Mfg., LLC v. ICAO*, 74 P.3d 516, 518 (Colo. App. 2003) (“there is no indication . . . that the provision for certified mail is a jurisdictional requirement”); *see also Juarez v. Pillow Kingdom, Inc.*, W.C. No. 4-364-252 (absence of certificate of mailing did not render notice of briefing schedule ineffective even when a different statute required one). Instead, the concept of “substantial compliance” applies when determining whether a workers’ compensation insurance policy was effectively cancelled. *EZ Building, supra*, 74 P.3d at 518.

In deciding whether substantial compliance occurred, the Court should consider whether the allegedly compliant acts fulfill the statute’s purpose. *Koontz v. Bowser Boutique, Inc.*, W.C. No. 4-359-795 (ICAO Jan. 13, 2012). The “purpose of § 8-44-110 is to afford the insured advance notice of an impending cancellation so that the insured has an opportunity to avoid the non-insured status”. *Davidovich v. Team Guilders Inc.*, W.C. No. 4-468-801 (ICAO Oct. 5, 2001).

In *Acosta v. Plumbing Co. of Colorado*, W.C. No. 4-732-044 (ICAO, Mar. 9, 2010) ICAO concluded that the record was “sufficient to establish a presumption that the notice of cancellation was mailed to and received by the employer based on the business custom of the insurer. Substantial compliance with the notice requirements of the statute was thus sufficient to effect cancellation of the policy. *Id.* Whether Insurer substantially complied with §8-44-110, C.R.S. in cancelling Employer’s policy and whether Mr. [Alleged Employer Redacted] actually received the Notice of Cancellation are questions of fact for the ALJ to resolve. *See EZ Building Components*, 74 P.3d at 519.

The question, therefore, is whether there was sufficient evidence to show that [Alleged Employer Redacted] had notice of the cancellation from [Insurer Redacted] that substantially complied with the statute. The ALJ concluded that Insurer proved there was substantial compliance with the statute and its insured had notice of the cancellation. The ALJ concluded Respondent-Insurer provided actual notice via certified mail to [Alleged Employer Redacted] . (Finding of Fact 5). There was direct evidence [Alleged Employer Redacted] received the Notice of Cancellation, as [Alleged Employer Redacted] testified that he received the Notice of Cancellation. (Finding of Fact 10). On this subject, the testimony of Mr. L[Redacted] and Ms. I[Redacted] established the business practice of Insurer when cancelling a policy. (Findings of Fact 6-9). This testimony was also persuasive to the ALJ that Mr. [Alleged Employer Redacted] received the Notice of

Cancellation. The method of cancellation effectuated the purpose of the statute in that it provided notice to Mr. [Alleged Employer Redacted] . The fact that Mr. [Alleged Employer Redacted] did not recall the precise date that he received the Notice of Cancellation does not vitiate the conclusion that the Notice of Cancellation was sent via certified and mail and received by [Insurer Redacted]'s insured, Mr. [Alleged Employer Redacted] .

The ALJ next considered whether there was substantial compliance with the statute by [Insurer Redacted] in mailing the Notice of Cancellation to [Alleged Employer Redacted] 's agent by regular mail. As found, the Notice of Cancellation was sent by regular mail, as opposed to certified mail. (Finding of Fact 9). The Notice of Cancellation was received by TAG, the agent for [Alleged Employer Redacted] /[Company name Redacted] . (Finding of Fact 11). TAG's manager (Mr. R[Redacted]) confirmed that they actually received the notice and a copy was saved electronically in TAG's records. *Id.* The ALJ determined this constituted substantial compliance with the statute by [Insurer Redacted]. (Finding of Fact 12).

Accordingly, the ALJ concluded that Respondent [Insurer Redacted] canceled the workers' compensation insurance policy it issued to [Alleged Employer Redacted] . The cancellation was proper, substantially complied with the requirements of the statute and there was no evidence the policy was reinstated. (Finding of Fact 11). [Alleged Employer Redacted] did not have Worker's Compensation insurance coverage on the day of the accident. (Finding of Fact 25). As found, neither Mr. P[Redacted] , nor Claimant had Worker's Compensation insurance coverage on the date of the accident. (Findings of Fact 6-9).

Claimant's Employer

On the question of which entity employed Claimant, [Insurer Redacted] primarily argued that [Prior Respondents Redacted] was the statutory employer. Respondent-Insurer further argued there can only be one liable employer per statutory employer claim according to the Colorado Supreme Court and cited the Colorado Supreme Court's decision in *Herriott v. Stevenson*, 473 P. 2d 720, 722 (Colo. 1970) in support of this argument. Respondent also argued that based upon the settlement agreement between Claimant and [Prior Respondents Redacted]/ [Prior Respondent Insurer Redacted], [Insurer Redacted]'s insured ([Alleged Employer Redacted]) could not be found to be the employer, since there could only be one employer. Claimant argued at hearing that the settlement agreement did not preclude him from asserting his Worker's Compensation claim against other entities.

The issue raised in the case at bench is whether [Prior Respondents Redacted] constituted the statutory employer of Claimant in this case, as argued by Respondent [Insurer Redacted] is governed by 8-41-401, C.R.S. The section provides in pertinent part:

"8-41-401. Lessor contractor-out deemed employer - liability recovery. (1) (a) (I) Any person, company, or corporation operating or engaged in or conducting any business by leasing or contracting out any part or all of the work thereof to any lessee, sublessee, contractor, or subcontractor, irrespective of the number of employees engaged in such work, shall be construed to be an employer

as defined in articles 40 to 47 of this title and shall be liable as provided in said articles to pay compensation for injury or death resulting therefrom to said lessees, sublessees, contractors, and subcontractors and their employees or employees' dependents, except as otherwise provided in subsection (3) of this section.

- (II) Notwithstanding subparagraph (I) of this paragraph (a) and any other provision of law to the contrary, it is presumed that a buyer of goods is not liable as a statutory employer when a lessee, sublessee, contractor, or subcontractor, or their employee who is delivering the goods to the buyer injures himself or herself while not on the buyer's premises. The presumption may be overcome by a showing that the lessee, sublessee, contractor, or subcontractor, or their employee was performing a job function that would normally be performed by an employee of the buyer of the goods being delivered. Nothing in this subparagraph (II) creates a presumption of a statutory employer-employee relationship when an injury occurs on the buyer's premises.
- (III) For the purposes of this section, a "statutory employer" is an employer who is responsible to pay workers' compensation benefits pursuant to subparagraph (I) of this paragraph (a).

As a starting point, the ALJ found that a contract existed between [Prior Respondents Redacted] and [Alleged Employer Redacted], under which [Alleged Employer Redacted] provided PPI services to [Prior Respondents Redacted]. (Finding of Fact 2). [Prior Respondents Redacted] contracted for these services, to be performed by Mr. McKeon, as opposed to an [Prior Respondents Redacted] employee. *Id.* Mr. [Alleged Employer Redacted] hired Mr. P[Redacted] and there was evidence of written documentation related to the work (work orders), as well as potentially a contract between Mr. [Alleged Employer Redacted] and Mr. P[Redacted]. (Finding of Fact 17). However, no evidence of a signed contract was admitted at hearing. There was also no evidence that Mr. [Alleged Employer Redacted] provided a 1099 tax form or other documents to Mr. P[Redacted]. (Finding of Fact 20). Mr. [Alleged Employer Redacted] directed Mr. P[Redacted] regarding work to be done in Granby, as well as arranging for him to travel to Chicago to perform PPI services. (Findings of Fact 16, 20). The ALJ determined Mr. P[Redacted] was acting as a subcontractor. (Finding of Fact 19).

Mr. P[Redacted], in turn, asked Claimant to work with him. As determined in the Findings of Fact 20-23, there was no evidence of a written contract between Mr. P[Redacted] and Claimant. Neither P[Redacted], nor Claimant had workers' compensation insurance or a signed independent contractor agreement. There was not a great deal of evidence in the record as to the precise circumstances of Claimant's hiring, except that Mr. P[Redacted] testified that this was in the nature of a friend helping out a friend. (Finding of Fact 21). Mr. P[Redacted] worked with Claimant on one of the jobs he did for Mr. [Alleged Employer Redacted] in Granby, Colorado and planned to split the proceeds of any remuneration he received for work done in Chicago. *Id.* Mr. [Alleged Employer Redacted] was aware that Claimant worked with Mr. P[Redacted] on the job. (Finding of Fact 19). However, there

was no evidence in the record of any contact between Claimant and Mr. Mr. [Alleged Employer Redacted] . (Finding of Fact 23).

The ALJ noted none of the parties argued Mr. P[Redacted] was Claimant's employer. Rather, the parties described Claimant and Mr. P[Redacted] as co-employees. Accordingly, based upon the totality of the evidence under the facts of the case, the ALJ concluded Claimant was hired to work with Mr. P[Redacted] for [Alleged Employer Redacted] . (Finding of Fact 23). Claimant and Mr. P[Redacted] 's work was for Mr. [Alleged Employer Redacted] , who uninsured at the time of the accident and who contracted with [Prior Respondents Redacted].

The Court next turned to the application of *Herriott v. Stevenson*, 473 P. 2d 720, 722 (Colo. 1970) to the facts in this case. In *Herriott*, the Supreme Court considered the 50% penalty assessed for the failure to carry insurance Provided for by § 81-5-7, C.R.S. [the predecessor to §8-43-408(1)]. In that case, Claimant worked for a subcontractor, which did not carry workers' compensation insurance. The general contractor was covered by a workers' insurance. The referee ruled that the general contractor was the statutory employer. The Colorado Supreme Court affirmed the lower courts' decision, which held that the general contractor fit within the statutory definition of an employer and since it carried insurance, the 50% could not be assessed. Writing for the Court, Justice Pringle concluded:

“Just as when the subcontractor is insured under the act, the contractor-out is not liable for compensation, so we have held that when the contractor-out is insured under the act, then the uninsured subcontractor is not liable for compensation. Under the latter circumstances the subcontractor who has failed to keep his liability insured is an employee and the contractor-out is the only employer contemplated under the act. *Hartford Accident & Indemnity Co. v. Clifton*, N, 190_P.2d_909. The amendment of 81-9-1 by the legislature in 1963 in no way modifies our decision in *Clifton*.

Under the rule set forth in *Clifton* it is clear that under the circumstances of this case no action by the employee against his subcontractor existed under the act, and that the subcontractor could not be classified as *the employer* under C.R.S. 1963, 81-5-7. Because the subcontractor was uninsured, and the primary contractor was insured, the contractor was the only employer contemplated by the statute. Since it was insured, the fifty per cent penalty does not apply”.

Herriott remains good law and the ICAO recently applied *Herriott* in *Read v. Gaines*, W.C. No. 4-835-962 (ICAO Aug. 10, 2011), which also concluded that there can only be one employer. In *Read*, Claimant replaced an air conditioning unit while working for an uninsured subcontractor. The ALJ concluded that Claimant was precluded from pursuing claims against the alleged actual employers because he entered into a settlement agreement with the statutory employer. The ICAO affirmed and cited *Herriott* as support for the proposition that “there only can be one employer liable for workers' compensation benefits.” The Court of Appeals agreed with this analysis in an unpublished opinion and concluded that *Herriott* precludes recovery against an alleged uninsured even when the statutory employer's “liability as an employer was established through a settlement”. This

was recently affirmed in the *Read v. ICAO*, Case No. 12CA0253, 2012 WL4950752 (unpublished) [Colo. App. Oct. 18, 2012]. No other authority was cited to contradict the holdings of these cases.

In the case at bar, [Prior Respondents Redacted] was the statutory employer of Claimant, given the evidence in the record. Since Mr. [Alleged Employer Redacted] was an uninsured at the time of the accident, pursuant to 8-41-401, [Prior Respondents Redacted] was potentially liable for the payment of benefits under the Colorado Worker's Compensation Act. Further, the settlement between Claimant and [Prior Respondents Redacted]/ [Prior Respondent Insurer Redacted] precludes Claimant from pursuing a recovery against another entity or person for these benefits. *Herriott* and *Read v. Gaines, supra*. No contrary authority was cited to lead the ALJ to conclude that these cases were overruled. Therefore, Claimant's claim for benefits is dismissed.

ORDER

Based upon the preceding Findings of Fact and Conclusions of Law, the Judge enters the following Order:

1. Claimant suffered a compensable industrial injury during the course and scope of his employment with Employer on April 26, 2013.
2. Claimant's claim against [Alleged Employer Redacted] is denied and dismissed, as [Prior Respondents Redacted] was the statutory employer. Claimant's full and final settlement with this entity extinguished his claim against other entities.
3. Claimant's claim for medical and TTD benefits is denied and dismissed.
4. Insurer substantially complied with §8-44-110, C.R.S. in cancelling its workers' compensation insurance policy with [Alleged Employer Redacted] / [Company name Redacted] , effective April 16, 2013.
5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S.

For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: <http://www.colorado.gov/dpa/oac/forms-WC.htm>.

DATED: June 5, 2020

STATE OF COLORADO

A handwritten signature in black ink, appearing to read "Timothy L. Nemechek", is displayed within a light gray rectangular box.

Digital signature

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts

ISSUES

- I. Whether Claimant established by a preponderance of evidence that he suffered a compensable work injury on November 13, 2018.
- II. Whether the medical treatment Claimant received is reasonable, necessary, and related.
- III. Whether Respondents are responsible for the payment of the medical treatment Claimant received.
- IV. Whether the right to select an authorized treating physician passed to Claimant.
- V. Whether Dr. Cebrian is an authorized treating physician if the claim is found compensable.

FINDINGS OF FACT

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

1. Claimant was born in Guatemala on April 22, 1966. In November 2018, when he reported his work injury, Claimant was 52 years old.
2. Claimant's primary language is Q'anjob'al and he is not 100% fluent in Spanish. He is also not fluent in English and requires an interpreter to communicate in English.
3. Throughout this Claim, co-employees translated for Claimant. It was not, however, established that his co-employees who provided translation were fluent in Q'anjob'al.
4. Claimant is small in stature and is about four feet, 9 inches tall, and weighs about 139 pounds. (*Ex K, p. 104.*)
5. Claimant has been employed by [Employer Name Redacted] since about November 1998. (*Hr'g Tr. p. 24.*)
6. Claimant's job title for about the last 15 years, including the date of injury, was brisket trimmer. (*Hr'g Tr. p. 25.*)
7. As a brisket trimmer, Claimant stands at a table with a cutting board and trims meat. There is a conveyor belt that runs continuously in front of the brisket trimmer tables from right to left. (*Hr'g Tr. p. 73.*) The conveyor belt is around 4-5 feet in front of the brisket trimmer's tables. (*Hr'g Tr. p. 67-68.*) Claimant uses a long metal meat hook to stretch over his table and retrieve each brisket and pull it to his station where he then trims off the fat. (*Hr'g Tr. p. 68.*) The long metal meat hook is about 18 inches long. (*Hr'g Tr. p. 70.*) To help retrieve the meat, Claimant will use his right and left hand to grab the handle of the meat hook and then pull each brisket to his station. After Claimant

retrieves each brisket, he puts down the 18-inch meat hook and picks up his knife in his right hand. (*Hr'g Tr. p. 70*). He then uses a small meat hook in his left hand and a knife in his right hand and trims the fat from the brisket.

8. Claimant works an 8-hour shift, with two fifteen-minute breaks and a ½ hour lunch break. As a result, Claimant works on the assembly line processing briskets for 7 hours a day.
9. A cursory ergonomic assessment of Claimant's job duties was performed and submitted as an exhibit at hearing. (*Exhibit J, p. 89*). Based on the ergonomic assessment, as well as the testimony from Dr. Cebrian, Claimant processes one brisket every 37 seconds. As a result, during each 7-hour shift, Claimant processes about 681 briskets each day at work.
10. The ergonomic assessment also states each brisket weighs 21 pounds. As a result, Claimant must grab and pull about 14,300 (fourteen thousand three hundred) pounds of brisket from the conveyor belt and onto his workstation during each workday. Once the brisket is at his workstation, Claimant must then grab, manipulate, and trim each brisket at a production pace. During the process, Claimant trims about 6 pounds of fat off each brisket during each 37 second cycle. After trimming off the fat, Claimant then pushes the 15-pound brisket back onto a conveyor belt. This results in Claimant pushing about 10,215 (ten thousand two hundred fifteen) pounds of brisket back onto the conveyor belt each workday. Claimant works 5 days a week. Thus, Claimant pulls about 71,500 pounds of brisket off the conveyor belt each week and pushes about 51,075 pounds of brisket back onto the conveyor belt each week. As a result, Claimant is moving about 122,575 pounds of brisket a week.
11. On November 13, 2018, Claimant began work at about 5:30 AM at [Employer Name Redacted]'s plant. (*Hr'g Tr. p. 28*). At around 9:00 AM or 9:30 AM, Claimant was working at his assigned station as a brisket trimmer when he tried to retrieve a piece of meat off the conveyor belt that weighed around 20-21 pounds, with the 18-inch meat hook. The conveyor belt had stopped for a minute, which caused about five pieces of meat to pile up on top of the piece of meat that Claimant was trying to retrieve. (*Hr'g Tr. p. 25-28, 48*). These pieces of meat were larger than the piece that Claimant was trying to retrieve. (*Hr'g Tr. p. 28*). Claimant estimates that some of the pieces of meat, on top of the piece he was trying to retrieve, weighed as much as 35 pounds per piece. (*Hr'g Tr. p. 29*).
12. Claimant had to use both hands to pull the meat out from under the other pieces of meat. (*Hr'g Tr. p. 76*) As he was pulling the piece of meat with both arms, he felt a "yanking" sensation in his shoulders and back. (*Hr'g Tr. p. 26*). The problem of the meat piling up is a common occurrence. (*Hr'g Tr. p. 76*).
13. Respondents allege that because Claimant did not specifically document on the Employee Statement of Injury that he used both hands when he was injured in November 2018, that Claimant is confusing his November 2018 injury with a later incident in July 2019. (*Hr'g Tr. p. 76*). Claimant clarified through his testimony that he did use both hands when he was injured in November 2018. (*Hr'g Tr. p. 76*). Claimant testified that he did not state how many hands he was using when he pulled the meat on the Employee Statement of Injury form, because there is so little space on the form

to write. (*Hr'g Tr. p. 76*). Claimant also testified that the events in November 2018 (when he was injured) and July 2019 are the same type of event. On both dates Claimant was using both hands to retrieve a piece of meat that was under other pieces of meat. (*Hr'g Tr. p. 78*).

14. Claimant's testimony about the mechanism of injury is found to be credible and persuasive. Claimant works on an assembly line performing a process that takes 37 seconds. Claimant repeats that process about 681 times each day. For that reason, it is more likely than not that Claimant would be doing the same types of tasks on two different days.
15. Claimant testified that on November 12, 2018, the day before the November 13, 2018 date-of-injury, he was working normally and his shoulders were not bothering him. (*Hr'g Tr. p. 40-41*).
16. Claimant reported the injury to his supervisor, Leanna Hernandez. (*Hr'g Tr. p. 26*). Claimant also reported the injury in writing by completing an Employee Statement of Injury on November 14, 2018. (*Cl. Ex. 26, p. 87*).
17. The Statement of Injury was translated by the interpreter at hearing which states, "Trimming brisket when I pulled on a piece with the hook to cut with my knife, and I felt yanking in my shoulder and my neck. And this is a very hard job to do because we are also short of personnel at work. Pain in my shoulder, neck, and back." (*Hr'g Tr. p. 32*).
18. On November 14, 2018, the Employer, [Employer Name Redacted], provided Claimant a designated provider list. The designated provider list makes clear it is being provided to Claimant under Section 8-43-404(5)(a)(I)(a). Dr. Cebrian, who is at the [Employer Name Redacted] on-site health care facility in Fort Morgan, Colorado, is the only provider on the list in Fort Morgan. The other providers are in two other cities. Two are in Denver and one is in Greenwood Village. Moreover, although Claimant does not speak English, the designation list is in English and Dr. Cebrian's name is circled. As a result, it is not clear whether Respondents even complied with Section 8-43-404(5)(a)(I)(a) and whether Claimant chose to treat with Dr. Cebrian at [Employer Name Redacted] or was merely directed there since Dr. Cebrian is onsite and the other three providers might not be reasonable options for Claimant since they are located in different cities.
19. That said, on November 14, 2018, Claimant sought treatment from the Employer's on-site medical clinic ([Employer Name Redacted] clinic). (*Hr'g Tr. p. 32*). At that time, Claimant reported he was experiencing a lot of pain in both shoulders. (*Hr'g Tr. p. 32-33*). Claimant stated, "I couldn't do any work as I normally would." (*Hr'g Tr. p. 33*). Claimant rated his level of pain at 8 out of 10, at this time. (*Hr'g Tr. p. 33*).
20. When an employee is seen at [Employer Name Redacted]'s clinic, the nursing staff enters the relevant information associated with the medical appointment into the Daily Visit Log ([Employer]'s clinic log). (*Cl. Ex. 1*); (*Cebrian Depo., p. 43-44*).
21. The November 14, 2018 entry in [Employer]'s clinic log documents Claimant reported pain in his right bicep and into his right shoulder, right sided neck pain, and left shoulder pain. Claimant also reported pain sometimes traveling down the back of his neck. The notes also reflect Claimant complained of swelling in his right shoulder. The notes also

reference the lipoma. The appointment concluded with Claimant being directed to ice his shoulder, take some ibuprofen, and return to work. (*Cl. Ex. 1, p. 12mn*).

22. On November 15, 2018, Claimant returned to [Employer]’s clinic and again saw a nurse for his bilateral shoulder and neck injury and reported a pain level of 6 out of 10. At this appointment, Claimant was again told to use ice, take ibuprofen, and return to work. (*Cl. Ex. 1, p. 12*).
23. On November 16, 2018, Claimant again returned to the Employer’s clinic for his bilateral shoulder and neck injury, however the nursing notes reveal his pain level increased to 8 out of 10. The [Employer] clinic log notes reflect Claimant’s range-of-motion is normal but “very painful.” Even though this was his third visit to the [Employer] clinic for his November 13, 2018, work injury, the nursing notes establish Claimant was seen by a nurse and not a physician at this appointment. This appointment concluded like the others with Claimant being directed to ice his shoulder, take ibuprofen, and return to work. (*Cl. Ex. 1, p. 12-13*).
24. On November 19, 2018, Claimant returned to Employer’s clinic for his bilateral shoulder and neck injury and again reported a pain level of 8 out of 10. The Employer’s clinic log nursing notes document tightness from the right shoulder extending to the right side of the neck. Although, the [Employer] clinic log states Claimant had full range of motion, it documents Claimant demonstrated hesitation to perform the range-of-motion test. At the end of the appointment, Claimant was again returned to work. (*Cl. Ex. 1, p. 13*).
25. On November 20, 2018, his fifth visit to the on-site [Employer] clinic for his bilateral shoulder pain, Claimant was evaluated by a physician, Dr. Cebrian. (*Hr’g Tr. p. 34*); (*Cl. Ex. 1, p. 13*). Dr. Cebrian is employed by [Employer] as the on-site medical director of the Employer owned and operated on-site medical clinic. (*Dr. Cebrian Depo., p. 42-43*). Dr. Cebrian admits that before the deposition, he had never seen the [Employer] clinic notes, which document Claimant’s four prior visits to the [Employer] clinic or the Employee Statement of Injury, all of which document Claimant’s symptoms (including pain complaints in both shoulders and his neck), and the treatment provided. (*Dr. Cebrian Depo., p. 44*); (*Cl. Ex. 1, p. 12-13*). Further, Dr. Cebrian could not recall whether he had reviewed the Employee Statement of Injury when he evaluated Claimant on November 20, 2018. (*Dr. Cebrian Depo., p. 44*). The Employee Statement of Injury, which was signed by Claimant on November 14, 2018, provides:

Trimming the brisket was pulling my piece with long hook and cutting with knife I felt a pulling pain on shoulders and neck I have to force myself to do my job because we are shorthanded with people. (*Cl. Ex. 27, p. 88*).

26. Claimant testified that he discussed the November 13, 2018 incident with Dr. Cebrian at the November 20, 2018 medical appointment. (*Hr’g Tr. p. 35*). Claimant reported to Dr. Cebrian that the worst part of his pain was in his arms from the shoulder, not the lipoma. (*Hr’g Tr. p. 70*). Claimant testified that he was unable to lift his arms upward when he was evaluated by Dr. Cebrian. (*Hr’g Tr. p. 34*). At this visit, Claimant rated his pain as eight out of ten in his shoulders, as well as the right side of his neck and bicep. (*Cl. Ex. 1, p. 13*).

27. Dr. Cebrian, in his November 20, 2018 medical report simply assessed Claimant with myofascial pain and a lipoma on his right shoulder. (*Cl. Ex. 3*). Yet before making his assessment, Dr. Cebrian did not order any diagnostic imaging to evaluate Claimant's reported injuries. (*Dr. Cebrian Depo., p. 57*). At the same appointment, Dr. Cebrian released Claimant from care and provided no treatment. (*Dr. Cebrian Depo., p. 43-44*). Dr. Cebrian also released Claimant to regular duty and despite concluding Claimant did not suffer a compensable work injury, he noted Claimant was at maximum medical improvement (MMI) with no impairment. (*Cl. Ex. 3*). Dr. Cebrian confirmed in his deposition that he offered Claimant no treatment for his bilateral shoulder pain. (*Dr. Cebrian Depo., p. 51*). Dr. Cebrian also testified that he closed Claimant's case that same day. (*Dr. Cebrian Depo., p. 50-51*).
28. Despite concluding Claimant did not suffer a compensable work injury, Dr. Cebrian gratuitously noted in his report Claimant was at maximum medical improvement (MMI) with no impairment. To the extent there is any ambiguity on Dr. Cebrian's MMI statement, the ALJ finds Dr. Cebrian did not conclude Claimant reached MMI for his November 13, 2018 compensable shoulder injury since Dr. Cebrian did not think Claimant suffered a compensable shoulder injury.
29. Claimant testified that during the appointment on November 20, 2018, Dr. Cebrian directed Claimant to seek care through his personal physician for all his complaints, which included his bilateral shoulder pain and the lipoma. (*Hr'g. Tr. p. 35*). Dr. Cebrian also testified that he referred Claimant outside Worker's Compensation for treatment. (*Dr. Cebrian Depo., p. 49*).
30. Claimant was seen at the Employer's clinic 5 times between the date of injury, November 13, 2018, and the date he was released from care on November 20, 2018. Yet the only treatment he was provided was in the form of being directed to ice his shoulders, take ibuprofen, use Flexall rub, and stay to stay active: return to work. None of the medical providers at the Employer's onsite clinic, including Dr. Cebrian, ordered diagnostic testing, imaging, or referred Claimant to a specialist for further evaluation. (*Cl. Ex. 1, p. 12-13*).
31. Claimant testified that after his injury he was working with a great deal of pain and that his pain was interfering with his ability to perform his job duties. (*Hr'g Tr. p. 37*).
32. On November 20, 2018, the Employer filed an Employer's First Report of Injury.
33. On December 10, 2018, Claimant was evaluated for his bilateral shoulder pain, outside the workers' compensation system, by Rebecca K. Hutcheson, a Nurse Practitioner, at Salud Family Healthcare. (*Cl. Ex. 4, p. 26-28*).
34. Ms. Hutcheson's December 10, 2018 medical record states, "his shoulders are painful." "The pain started about one month ago, he reported it at work but that doctor said the pain had nothing to do with work and that he needs to see his personal doctor." (*Cl. Ex. 4, p. 26*). This statement aligns with Claimant's reported date of injury as well as his testimony that Dr. Cebrian directed Claimant to seek treatment on his own for bilateral shoulder pain.

35. At the December 10, 2018 appointment, Ms. Hutcheson performed several tests on each shoulder to determine whether Claimant's shoulder pain was based on an underlying injury to Claimant's rotator cuff, labrum, or both.

The tests and results are as follows:

- Empty can test. This was performed to assess Claimant's rotator cuffs. This test was positive bilaterally, right greater than left.,
- Lift-Off test. This test was also performed to assess each of Claimant's rotator cuffs. This test was also positive, bilaterally.
- Yergason's test. This was performed to assess whether Claimant had any tendonitis involving his biceps. This test was positive for tendonitis of the biceps.
- Hawkins impingement test. This was performed to assess Claimant for any impingement. This test was also positive.
- Sulcus sign test. This was performed to assess Claimant for glenohumeral instability. This test was negative.
- Apprehension test. This was performed to assess whether Claimant had any glenohumeral instability. This was positive bilaterally.

(See *Cl. Ex. 4, p. 25-27*); (*Dr. Cebrian Depo., p. 54-56*).

36. Dr. Cebrian performed none of the tests performed by Ms. Hutcheson. Dr. Cebrian did document Claimant had full shoulder range of motion but failed to mention whether it was with or without pain. He also failed to document which shoulder planes had normal range of motion. On the other hand, Ms. Hutcheson did both and specifically documented that during her examination, Claimant had bilateral shoulder pain with:

- Anterior abduction.
- Lateral abduction.
- Anterior adduction.
- Lateral adduction.
- Internal rotation.
- External rotation.

(See *Cl. Ex. 4, p. 26-28*); (*Dr. Cebrian Depo., p. 54-56*).

37. Ms. Hutcheson also noted tenderness to palpation of the AC joint and the glenohumeral joint. She also found Claimant had tenderness at the subscapular & insertion of the long head of the biceps tendon, which was mild on the left but moderate on the right. (*Id. at p. 26-28*).

38. After performing and documenting a thorough examination of Claimant's right and left shoulder, Ms. Hutcheson assessed his condition as follows:

- Unspecified rotator cuff tear or rupture of the left shoulder, not specified as traumatic, and
- Unspecified rotator cuff tear or rupture of the right shoulder, not specified as traumatic.

(Id. at p. 26-28).

39. Based on her examination and assessment, Ms. Hutcheson ordered an MRI of each shoulder. In contrast, after Claimant was seen at the employer's onsite-clinic four times in the week before Dr. Cebrian's evaluation, (consistently rating his pain between six to eight out of ten for his bilateral shoulder and neck injury), Dr. Cebrian conducted no specific shoulder tests to fully evaluate Claimant's bilateral shoulder pain and ordered no diagnostic imaging. (*Cl. Ex. 3*); (*Dr. Cebrian Depo., p. 57*).

40. On March 20, 2019, Claimant underwent an MRI of each shoulder. The left shoulder MRI showed the following:

- A full-thickness supraspinatus tendon tear with retraction,
- Severe subscapularis tendinopathy with partial tearing, and
- Advanced acromioclavicular joint arthrosis and tearing of the superior posterior glenoid labrum.

The right MRI showed the following pathology:

- A full-thickness supraspinatus tendon tear with mild retraction,
- Tearing of the superior to posterior glenoid labrum, and a
- Subcutaneous lipoma along the superior posterior shoulder.

41. On April 15, 2019, Claimant was seen by Dave Keller, P.A., reporting a three-year history of on and off again pain. In addition, Mr. Keller documented that there has been a slow and steady progression and worsening. (*Cl. Ex. 5, p. 29*). The medical record also states Claimant denied any trauma to either shoulder and any time. *Id.* That said, Claimant testified that although he may have denied any trauma to his shoulders, Claimant does not know the words "traumatic" or "trauma." (*Hr'g. Tr. 58*). Claimant's native language is Q'anjob'al. (*Hr'g. Tr. 35*). Claimant is not 100% fluent in Spanish, there are words he does not understand. (*Hr'g. Tr. 36*). Claimant has never had an interpreter at his medical appointment's that spoke Q'anjob'al. (*Hr'g. Tr. 36*).

42. At the April 15, 2019, medical appointment, Mr. Keller assessed bilateral rotator cuff symptoms but would not recommend formal treatment until he reviewed the x-rays and MRIs. (*Cl. Ex. 5, p. 29-31*).

43. On April 25, 2019, Claimant attended a follow-up appointment with Mr. Keller, to evaluate Claimant's bilateral shoulder symptoms. After reviewing the MRIs, Mr. Keller diagnosed Claimant with complete bilateral rotator cuff tears. (*Cl. Ex. 5, p. 32-34*). Mr. Keller also noted the rotator cuff tears were nontraumatic. *Id.*

44. On September 9, 2019, Claimant was evaluated for his bilateral shoulder pain by an orthopedic surgeon Dr. Ken Keller, M.D. (*Cl. Ex. 6, p. 35-37*). Dr. Keller is Dave Keller's

brother. Dr. Keller noted that Claimant related bilateral shoulder pain due to his work for the past couple decades of doing fairly heavily assembly-line work. (*Cl. Ex. 6, p. 35*). Dr. Keller's report notes Claimant noticed development of an intolerable worsening pain in the right shoulder back in November and he saw the company doctor at that time who did not relate this to a work-related event. He continued to work with both shoulders hurting and in June had another event in the right shoulder with exacerbation of pain. (*Cl. Ex. 6, p. 35*). Dr. Keller physically examined Claimant and found, "obvious rotator cuff signs with painful abduction toward flexion as well as internal rotation behind the back. Although there is no evidence of frozen shoulder, he does have limited internal rotation. Passive motion is nearly full. Positive lift-off test with reproducible pain bilaterally and reproducible pain superior laterally with active abduction." (*Cl. Ex. 6, p. 36*). Dr. Keller also noted that he reviewed the MRI, which revealed a retracted superior cuff tear as 8-9 mm, as well as moderate tendinosis of his subscapularis. (*Cl. Ex. 6, p. 36*). Dr. Keller stated that the "many years of repetitive resisted work with the arms away from the body could certainly contribute to rotator cuff disease." (*Cl. Ex. 6, p. 36*).

45. Dr. Keller diagnosed Claimant with complete bilateral complete rotator cuff tears. (*Cl. Ex. 6, p. 36*). The only treatment recommended by Dr. Keller was surgical repair. (*Cl. Ex. 6, p. 36*).
46. On July 10, 2019 Claimant reported a second event at work that might have aggravated his November 13, 2018, bilateral shoulder injuries. Claimant testified that after his November 13, 2018 injury, he continued to work his normal position at [Employer], however his shoulders were causing him so much pain that he had to use the force of his back to perform his duties. (*Hr'g. Tr. p. 63*). It is found, however, that the July 2019 increase in bilateral shoulder pain flows from his November 2018 injury and the increase in shoulder pain in July 2019 is not an intervening superseding injury.
47. On July 31, 2019, Dr. Cebrian authored a medical report in response to Claimant's claimed second date-of-injury of July 10, 2019. The medical report was authored without evaluating Claimant. Dr. Cebrian comments on two prior shoulder injuries in 2005 and 2012, which he documents as both resolving with conservative treatment. In addition, Dr. Cebrian's report also references the March 20, 2019 MRIs. Dr. Cebrian did not, however, review the MRI films. (*Dr. Cebrian Depo., p. 58*).
48. Dr. Cebrian diagnosed Claimant with bilateral rotator cuff tears. (*Resp. Ex. J, p. 84-87*). He also concluded that Claimant's rotator cuff tears were not causally related to his work or aggravated by his work. (*Resp. Ex. J, p. 85*). Part of Dr. Cebrian's opinion on causation turns on a video that he viewed that demonstrated Claimant's job duties. (*Resp. Ex. J, p. 84-85*). During the deposition of Dr. Cebrian, Claimant's counsel objected to questions relating to the video because the video was not disclosed to Claimant or authenticated. (*Cebrian Depo., p. 14*). Respondents never exchanged the video and there was scant evidence provided to establish exactly what the video represented.
49. In his July 31, 2019 report, Dr. Cebrian also references the video of Claimant's job. That said, neither in his report or his testimony does Dr. Cebrian specify:
 - i. Whether Claimant was performing the brisket trimming tasks in the video or whether it was a co-worker?

- ii. If it was a co-worker in the video, are they taller than Claimant?
And if they are taller, how much taller?
- iii. Was the brisket trimmer working at a production pace or at a slower
pace for demonstrative purposes?

50. Respondents did submit a job description at hearing that sets forth the general tasks required to trim a brisket. The job description shows there is a hyperlink that can be accessed to watch a video demonstrating the tasks required to trim a brisket. (*Resp. Ex. C, p.14*). The video referenced in this job description was not made available to Claimant's counsel or the court. As a result, the ALJ infers Dr. Cebrian watched a general training video and not a video of Claimant trimming a brisket. Whether Dr. Cebrian reviewed a video of Claimant or another worker trimming briskets is important because Claimant is small in stature and is about 4 feet, nine inches tall. It seems unlikely that the assembly line was maximized ergonomically for someone of that stature. As result, Claimant would have to raise his arms higher than the average worker to perform his job duties and end up exerting more force through his rotator cuffs. As a result, the quality of the data used by Dr. Cebrian to support his opinion is of questionable quality as is his resulting opinion.
51. Moreover, in his July 31, 2019, report. Dr. Cebrian outlines how he assessed causation in assessing whether Claimant suffered a compensable injury on July 10, 2019. The ALJ, however, does not find his causation assessment to be credible or persuasive for many reasons.
52. First, Dr. Cebrian explains the scientific evidence on degeneration of the shoulder and rotator cuff. He explains that degeneration by itself does not result from a wear and tear process, but the natural consequence of degeneration at the cellular level based on aging. Thus, he contends that the degenerative process is usually independent of external factors such as the physical demands of work. In the end, he concludes in his report that "This is the normal human predicament." ¹ As a result, he concludes Claimant's need for medical treatment and resulting disability is completely unrelated to the physical demands of his job on November 13, 2018 – but completely related to the "normal human predicament," i.e., the aging process.
53. Second, Dr. Cebrian moves on to the Colorado Workers' Compensation Shoulder Medical Treatment Guidelines to support his causation opinion that Claimant's job

¹ In his report, Dr. Cebrian provides:

It is important to understand that degeneration is not a wear and tear process. The concept and terminology of wear and tear has been outdated by appreciating the genetics and biochemistry behind degeneration. Degeneration takes place at the cellular level. Degeneration is the result of the inability to replace normal tissues as one ages. This is not the result of external trauma to the tissues but the aging of the cells. Over time, there is progressive loss of the number of cells that are available to produce new healthy tissue. The rate at which cells disappear is genetically determined. The ability of the cell to continue to produce healthy cartilage and tendon tissue is determined by the telomere at the end of each DNA strand. With each cell division, the telomere shortens. When the telomere is gone so is that cellular function. This results in the replacement of healthy tissue with less healthy tissue that then begins the fray and split (tear). This is the normal human predicament. There is nothing unique about the abnormalities in Mr. Juan's shoulders.

duties, on a cumulative basis, did not cause the need for Claimant's medical treatment and resulting disability in the form of an occupational disease.

54. Dr. Cebrian provides in his report the following except from the Guidelines:

There is some evidence that jobs requiring heavy lifting, heavy carrying, above shoulder work, and handheld vibration, are likely to be associated with an increased risk of symptomatic supraspinatus tendon lesions, either partial or full thickness tears. Given all of this information, it is reasonable to consider that there is some evidence for the following causative risk factors for shoulder tendon related pathology:

- i. Overhead work of 30 minutes per day for a minimum of five years;
- ii. Work that requires shoulder movement at the rate of 15-36 repetitions per minute and no two second pauses for 80% of the work cycle; and
- iii. Work that requires shoulder movement with force greater than 10% of maximum with no two second pauses for 80% of the work cycle.

(Respondents' Ex. J, p. 86; Exhibit 4, Medical Treatment Guidelines, pg. 15-16.)

It is also likely that jobs requiring daily heavy lifting at least 10 times per day over the years may contribute to shoulder disorders. In the study relying on self-report, men over 45 and women of any age were more likely to report heavy lifting (probably 20kg or greater) which was significantly related to shoulder findings.

Overhead work is defined as only the specific amount of time in which the arm is utilized with the upper arm above a 90-degree angle at the shoulder.

55. After setting forth the factors above, Dr. Cebrian failed to show whether Claimant's job duties, as performed by Claimant, meet any of the job task thresholds in the *Guidelines*. But, more troubling, is that even if Claimant's job tasks did not meet the thresholds outlined in the *Guidelines* and quoted by Dr. Cebrian, Dr. Cebrian also failed to quote the following section from the *Guidelines*, which reveals there is a lack of quality studies from which to obtain exposure thresholds involving the shoulder. The portion of the *Guidelines* Dr. Cebrian failed to include in his report provides:

Given the lack of multiple high quality studies [regarding the shoulder] it is necessary to consider each case individually when dealing with the likelihood of cumulative trauma contributing to or causing shoulder pathology.

(Rule 17, Exhibit 4, Medical Treatment Guidelines, p. 16).

56. The *Guidelines* also provide that:

Work-related conditions may occur from the following:

- a specific incident or injury,
- aggravation of a previous symptomatic condition, or
- a work-related exposure that renders a previously asymptomatic condition symptomatic and subsequently requires treatment.

57. In the end – after cherry picking certain information from the *Guidelines* - Dr. Cebrian concludes Claimant's bilateral shoulder complaints, current symptoms, and need for treatment are independent, incidental, and unrelated to his work for [Employer].

58. Dr. Cebrian also failed to explain how he concluded Claimant's job duties could not have led to an:

- aggravation of a previous symptomatic condition, or
- a work-related exposure that renders a previously asymptomatic condition symptomatic and subsequently requires treatment.

59. Dr. Cebrian explains that Claimant's shoulders have weakened and degenerated - genetically – to the point where he needs surgery. That said, despite Claimant's shoulders becoming so weak and brittle – genetically - he fails to explain how the exertional forces of Claimant's job on November 13, 2018, did not aggravate or accelerate Claimant's underlying shoulder conditions and necessitate the need for medical treatment.

60. The critical juncture is whether the incident described by Claimant that occurred on November 13, 2018 aggravated Claimant's underlying degenerative shoulder conditions and necessitated the need for medical treatment. And at that critical juncture, the ALJ finds Dr. Cebrian's opinions on causation are neither credible nor persuasive.

61. On September 13, 2019, Claimant filed a Workers' Claim for Compensation. (Resp. Ex. A, p. 1).

62. On September 30, 2019, Respondents filed a Notice of Contest. (*Cl. Ex. 11*).

63. On October 15, 2019, Claimant's counsel emailed Respondents under C.R.S. section 8-42-101(6)(a), again placing Respondents on notice that Claimant required medical treatment for his claimed work-related injury and it is Claimant's understanding that Respondents were not authorizing any medical treatment at that time. (*Cl. Ex. 28, p. 89*). The email also places Respondents on notice again that Claimant would be seeking treatment outside the Worker's Compensation system and, if the claim is found compensable, Claimant would seek reimbursement of costs for the medical treatment. (*Cl. Ex., p. 28*). Claimant presented evidence that the Notice was received by Respondents' counsel in the form of a computer-generated email read notification dated October 15, 2019 from Respondents. (*Cl. Ex. 29*). In addition, on October 15, 2019, Respondents counsel responded to Claimant's counsel's email, further evidencing that Respondents did receive the notice. (*Cl. Ex. 31*). Nor do Respondents dispute being put on notice of these issues.

64. On October 18, 2019, Claimant filed an Application for Hearing. The Application specified Claimant would be seeking medical benefits, including medical benefits based on a physician's refusal to treat for non-medical reasons. (*Cl. Ex. 12.*)
65. After being placed on notice that Claimant required medical treatment and had been denied medical treatment for non-medical reasons, Respondents offered no other treatment or appointments with Dr. Cebrian or an alternative provider.
66. On November 12, 2019, Claimant was evaluated by Armodios Hatzidakis, M.D. who is an orthopedic surgeon with expertise in shoulders. In addition, Dr. Hatzidakis, although not a radiologist, also has over 17 years of experience reading MRIs. (*Hatzidakis Depo, p. 4.*)
67. Dr. Hatzidakis' November 12, 2019 medical record states Claimant reported that he injured both shoulders on November 13, 2018, while working at the [Employer] meat processing plant in Ft. Morgan. "The patient described the incident as having a hook in the left hand, which was used to grab a piece of meat on a conveyor belt. He described the meat as coming very quickly and piling up. While trying to retrieve the meat, he felt a sharp jolt in both shoulders." (*Cl. Ex. 7, p. 39.*) Claimant's statements to Dr. Hatzidakis aligns with his testimony and other records.
68. On November 12, 2019, Dr. Hatzidakis performed various shoulder specific tests including: range-of-motion examination, inspection, tenderness examination to evaluate for tenderness over the shoulder, and evaluation of the contour of the shoulder, range of motion measurements, strength testing, and special tests that specifically apply to certain shoulder muscles and tendons. (*Hatzidakis Depo, p. 12*); (*Cl. Ex. 7, p. 40*).
69. At the November 12, 2019 appointment with Dr. Hatzidakis, Claimant rated his pain as a constant 8 out of 10 with up to 9 out of 10 with overhead activity. Dr. Hatzidakis diagnosed Claimant with bilateral work-related shoulder strain with rotator cuff tears, symptomatic AC joint arthrosis, and subacromial impingement. Claimant was also diagnosed with right shoulder large lipoma. (*Cl. Ex. 7, p. 40*).
70. Dr. Hatzidakis reviewed the MRI films and confirmed that Claimant suffered a full thickness rotator cuff tear in both shoulders. (*Hatzidakis Depo., p. 15*). In addition, Dr. Hatzidakis concluded that there is nothing in MRI films that would help determine whether the Claimant's rotator cuff tears were chronic versus acute. (*Hatzidakis Depo., p. 15-16*).
71. Dr. Cebrian testified that Claimant's condition was chronic and not an acute injury that occurred on November 13, 2018. (*Cebrian Depo., p. 12*).
72. Armodios Hatzidakis, M.D., an orthopedic surgeon with expertise in shoulders and 17 years of experience reading MRIs, concluded that Claimant was not at MMI on November 20, 2018. (*Hatzidakis Depo. p. 4, 20*). Dr. Hatzidakis reasoned that Claimant was still having significant complaints, and the actual injury or problem was not fully evaluated. (*Hatzidakis Depo, p. 20*).
73. Dr. Hatzidakis testified that conducting specific shoulder tests including strength testing; testing to determine whether there's been a soft tissue injury; stability testing; and rotator cuff/labral tear tests is a large portion of figuring out if there is a significant injury to a patient's shoulder. (*Hatzidakis Depo, p. 19*). These tests should have been

conducted by Dr. Cebrian during the November 20, 2018 appointment. (*Hatzidakis Depo*, p. 18-19). Dr. Cebrian admitted that he did not conduct any shoulder specific tests other than range-of-motion. (*Cebrian Depo*., p. 56-57). Dr. Hatzidakis testified that someone can have a full range of motion of their shoulder but still have significant injury. (*Hatzidakis Depo*., p. 19).

74. Dr. Hatzidakis also testified that to sufficiently evaluate Claimant's shoulder, Dr. Cebrian should have ordered radiographs and potentially further imaging, such as MRIs. No imaging was ordered until Claimant was evaluated by Ms. Hutcheson outside the workers' compensation system. (*Hatzidakis Depo*., p. 20, 28-29).
75. Dr. Hatzidakis' provided his medical opinion that the November 13, 2018 work-related incident exacerbated Claimant's pre-existing condition. (*Hatzidakis Depo*., p. 26). Dr. Hatzidakis testified that he disagreed with Dr. Cebrian's opinion that Claimant's bilateral shoulder rotator cuff tears were not causally related to his work at Employer, nor has a pre-existing condition been aggravated. Dr. Hatzidakis explained, "The patient's had recurrent shoulder issues over time, with waxing and waning symptoms. The patient has an injury in November. There is imaging afterwards that shows definitive damage to rotator cuff and tears. And with the patient's continued symptoms from a temporal standpoint, it makes some sense that the patient has an industrial-related injury due to his work as a meat cutter, which is very demanding job on the upper extremities. (*Hatzidakis Depo*., p. 23-24).
76. Dr. Cebrian also testified that a person can have a chronic condition that is asymptomatic and then have an event that causes the condition to become symptomatic. (*Cebrian Depo*., p. 59).
77. Dr. Hatzidakis stated that it would be reasonable to conclude that Claimant's bilateral rotator cuff tears have some relation to the event in November 2018 or work-related activities. (*Hatzidakis Depo*., p. 25-26).
78. Dr. Hatzidakis discussed treatment options with Claimant and advised, "Given the line of work that he is in and the risk for enlargement of the tear, we did suggest definitive treatment with rotator cuff repair, subacromial decompression, distal clavicle resection, a possible lipoma excision, and possible biceps tenodesis if required." (*Cl. Ex. 7*, p. 41).
79. Shortly after his appointment with Dr. Hatzidakis, Claimant selected Dr. Hatzidakis to treat his shoulder injury and provide the surgery that he recommended.
80. Claimant continued working his normal position for Employer from the date-of-injury until December 13, 2019, when he underwent surgery to repair his rotator cuff of his right shoulder. (*Hr'g Tr. p. 37*); (*Cl. Ex. 7*, p. 42-44).
81. On December 13, 2019, Claimant underwent a right shoulder arthroscopy with excessive debridement, arthroscopic subacromial decompression, arthroscopic rotator cuff repair, and arthroscopic long head of biceps tenodesis, performed by Dr. Hatzidakis. (*Cl. Ex. 7*, p. 42-44). The non-work-related lipoma was also excised. *Id.*
82. Claimant has continued his post-surgery treatment with Dr. Hatzidakis. (*Cl. Ex. 7*, p. 45-48).

83. The ALJ finds Dr. Hatzidakis' testimony and opinions on causation to be credible and persuasive.
84. The ALJ finds Claimant's testimony to be credible and persuasive.
85. The ALJ does not find Dr. Cebrian's medical reports to be reliable, credible, or persuasive.
86. The ALJ does not find Dr. Cebrian's testimony to be reliable, credible, or persuasive.
87. The ALJ finds Claimant suffered a compensable bilateral shoulder injury on November 13, 2018, while using a long meat hook with both hands to pull a brisket that was stuck under other briskets. The compensable injury caused the need for medical treatment and became disabling.
88. Claimant timely reported his injury in writing to his supervisor and Employer. Claimant was directed to seek treatment at the on-site [Employer] medical clinic. Claimant was seen four times by a nurse and basically told to use ice, take ibuprofen, and stay active, i.e., go back to work.
89. On the fifth visit to the onsite [Employer] clinic, Claimant was seen briefly by Dr. Cebrian. Dr. Cebrian provided a cursory examination and focused mainly on the lipoma on Claimant's right shoulder. Dr. Cebrian failed to recognize the compensable nature of Claimant's shoulder complaints and refused to provide any medical treatment. Dr. Cebrian's mistaken belief that Claimant's shoulder problems were not compensable is a refusal to treat for non-medical reasons. Dr. Cebrian also directed Claimant to seek treatment for his shoulder problems on his own and referred Claimant to see his own medical providers.
90. Claimant went to Salud and was seen by a nurse practitioner. She diagnosed Claimant with bilateral rotator cuff tears. Claimant was evaluated by another nurse practitioner, Mr. Keller, who made the same diagnosis. Claimant was then evaluated by Dr. Keller who also diagnosed Claimant as suffering from bilateral rotator cuff tears and recommended surgery.
91. Claimant decided to get a second opinion about Dr. Keller's surgical recommendation. Claimant's actions of seeking a second opinion about a surgical recommendation is a reasonable undertaking. As a result, Claimant made an appointment to be evaluated by Dr. Hatzidakis. After performing a thorough examination, Dr. Hatzidakis also recommended surgery. As a result, Claimant selected Dr. Hatzidakis to be a treating physician to surgically repair his right shoulder.
92. The evaluations and medical treatment Claimant incurred at Salud (Ms. Hutcheson, N.P.) Eastern Colorado Orthopedic Center (Mr. Keller and Dr. Keller), the MRIs, and the evaluation and treatment with Dr. Hatzidakis, including the surgery, was reasonable, necessary, and related to Claimant's November 13, 2018 compensable injury.

CONCLUSIONS OF LAW

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

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002).

The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Claimant established by a preponderance of evidence that he suffered a compensable work-related injury on November 13, 2018.

To recover benefits under the Worker's Compensation Act, the Claimant's injury must have occurred "in the course of" and "arise out of" employment. See § 8-41-301, C.R.S.; *Horodyskyj v. Karanian*, 32 P.3d 470 (Colo. 2001). The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements to establish compensability. *Younger v. City and Cty. of Denver*, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals*, 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which

a work-related injury occurs. *Popovich v. Irlando*, 811 P.2d 379, 381 (Colo. 1991). Thus, an injury occurs “in the course of” employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.*, 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976).

The term “arises out of” refers to the origin or cause of an injury. *Deterts v. Times Publ'g Co. supra*. There must be a causal connection between the injury and the work conditions for the injury to arise out of the employment. *Younger v. City and Cty. of Denver, supra*. An injury “arises out of” employment when it has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered part of the employee's employment contract. *Popovich v. Irlando supra*.

The determination of whether there is a sufficient “nexus” or causal relationship between Claimant's employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals*, 759 P.2d 17 (Colo. 1988); *Moorhead Mach. & Boiler Co. v. Del Valle*, 934 P.2d 861 (Colo. App. 1996).

The mere existence of a pre-existing condition does not disqualify a claim for compensation for medical benefits. A claimant with a pre-existing condition may recover benefits if an industrial accident “aggravates, accelerates, or combines with” the pre-existing condition to cause disability or a need for medical treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). Pain is a typical symptom caused by the aggravation of a pre-existing condition, but an incident which merely elicits pain symptoms caused by a pre-existing condition does not compel a finding that the claimant sustained a compensable aggravation. *Witt v. James J. Keil, Jr.*, W.C. No. 4-225-334 (ICAO, April 7, 1988). Rather, a claimant is entitled to medical benefits for treatment of pain only if the pain is proximately caused by the work-related activities or accident, rather than the underlying pre-existing condition. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Rockwell Int'l v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990).

As found, on November 13, 2018, Claimant was working for Employer at his assigned station as a brisket trimmer. Claimant testified he was retrieving a piece of meat off a conveyer belt when he stretched across the table with an 18-inch meat hook to retrieve the piece of meat. The piece of meat the Claimant hooked weighed about 20 pounds. Further, the 20-pound piece of meat was buried under several other pieces of meat that weighed about 20 pounds each.² Claimant testified that it is was common occurrence for the conveyor belt to sometimes stop, causing the meat to pile up. Claimant credibly testified that, with both hands, he pulled the meat trying to retrieve the piece of meat that was beneath the pile of other meat and felt an immediately “yank” in both shoulders and neck. Claimant testified that he was working normally, and his shoulders did not bother him the day before the injury.

The action and force Claimant used to retrieve the meat more likely than not caused the bilateral shoulder injuries. Claimant was observed in court to be of small

² It is estimated that about 100 pounds of meat was piled on top of the piece of meat Claimant was trying to retrieve.

stature and with a limited reach. It is also undisputed that the conveyor belt that carried the meat was about five feet in front of Claimant's station. At hearing, Claimant showed the action of retrieving the meat and it is found that the action caused him to stretch his body and arms to reach the meat on the conveyor belt. Considering the weight of the multiple pieces of meat (weighing about 20 pounds each) on top of the piece of meat he was pulling, there would be a substantial force against Claimant's outstretched arms and shoulders.

Claimant reported the injury and sought medical care through the Employer's on-site medical clinic. Claimant orally reported his injury to his supervisor Leanna Hernandez and in writing to Employer the next day. Claimant sought treatment for his injuries the day after the incident at Employer's on-site medical clinic.

On November 20, 2018, Claimant was scheduled to be evaluated by Dr. Cebrian at the Employer's onsite clinic for his work-related injury. Claimant testified that the reason for the evaluation with Dr. Cebrian was his bilateral shoulder injuries. Although Dr. Cebrian testified that the reason for the visit was the concern of the non-work-related lipoma on his shoulder and not his shoulder injury itself, Dr. Cebrian's testimony is not found to be credible.

Claimant was seen at Employer's onsite clinic on November 14, 15, 16, and 19, consistently reporting a pain level of six to eight out of ten in both shoulders and neck, which is documented in the Employer's clinic log notes. And although Claimant received minimal treatment (e.g., instructions to ice his shoulders, take ibuprofen, and return to work) as the medical director for Employer's clinic, Dr. Cebrian would have access to the Employer's clinic log. It does not make sense that Claimant, who was reporting a pain level of six to eight out of ten in both shoulders and neck the day he was seen by Dr. Cebrian and who had requested treatment every day of the work week following the initial onset, would state that his only concern was the lipoma on his shoulder. It is found that Claimant reported to Dr. Cebrian his primary concern was the bilateral shoulder and neck injuries that occurred during the November 13, 2018 work-related incident. Dr. Cebrian's testimony to the contrary is not credible.

Dr. Cebrian's opinion that Claimant did not sustain work-related bilateral shoulder injuries on November 13, 2018, is found not credible, as he did not fully evaluate Claimant's injury. Dr. Hatzidakis', who is a level II accredited orthopedic shoulder surgeon, credibly testified that considering Claimant's bilateral shoulder symptoms documented in the Employer's clinic log, the minimum standard of care would have included a bilateral shoulder evaluation with specific shoulder tests and diagnostic x-ray imaging of the shoulders. Dr. Hatzidakis testified that upon reviewing Dr. Cebrian's November 20, 2018 medical record, Dr. Cebrian did not conduct any specific shoulder tests, nor did he order any diagnostic imaging/tests. To the contrary, Dr. Cebrian, discharged Claimant, referred him outside the workers' compensation system to his personal physician for treatment, and closed his case. Further, Dr. Cebrian offered no treatment during or after the November 20, 2018 appointment.

The MRIs of his shoulders outside the workers' compensation system confirmed Claimant's bilateral shoulder injury. On March 20, 2019, MRIs of Claimant's bilateral shoulders were obtained outside the workers' compensation system. The MRIs

confirmed bilateral rotator cuff tears. Dr. Cebrian testified that Claimant's rotator cuff tears were present when he was evaluated on November 20, 2018, as the condition was chronic. The fact that Dr. Cebrian, assessed Claimant with minor muscle soreness, when in fact, Claimant was suffering with bilateral rotator cuff tears, bolsters a finding that Dr. Cebrian's evaluation on November 20, 2018, was insufficient to accurately assess causation for Claimant's bilateral shoulder condition.

Respondents' argument that Claimant's bilateral shoulder condition is merely a chronic condition that was not aggravated by Claimant's job duties on November 13, 2018, is not found to be credible or persuasive. Dr. Cebrian stated that the MRI reports documented findings of a chronic condition. Dr. Cebrian conceded, however, that the MRIs cannot distinguish between acute and chronic findings. Dr. Cebrian also agreed that a person can have a chronic condition that is asymptomatic and then have an event that causes the condition to become symptomatic. Claimant testified that his shoulders were not bothering him the day before the injury, and he was performing his job duties without issue. Further, Dr. Hatzidakis, who is an expert in shoulders, testified that nothing in the MRI films would help determine whether the Claimant's rotator cuff tears were chronic versus acute. Dr. Hatzidakis personally viewed the MRI films, while Dr. Cebrian only reviewed the radiologist's reports.

Two orthopedic surgeons Dr. Keller and Dr. Hatzidakis concluded that the Claimants work likely caused the bilateral rotator cuff tears to become symptomatic and necessitated the need for medical treatment. Dr. Keller stated in his September 9, 2019 medical report, that the many years of repetitive resisted work with the arms away from the body could certainly contribute to the rotator cuff disease. In addition, Dr. Hatzidakis testified that it would be reasonable to conclude that Claimant's bilateral rotator cuff tears have some relation to his work-related activities. Further, Dr. Hatzidakis stated that the November 2018 work-related incident exacerbated claimant's pre-existing shoulder conditions.

Finally, Respondents' expert Dr. Cebrian causal analysis also relies on the viewing of an Employer's video of Claimant performing his job duties. Despite his reliance on that video, the video was not submitted into evidence by Respondents and not provided to Claimant's counsel. Claimant has requested Dr. Cebrian's opinion be stricken as a sanction for Respondents' failure to provide Claimant the video. Claimant did not, however, file a motion to compel the production of the video. As a result, there is no order compelling Respondents to produce the video. Thus, the ALJ will not sanction Respondents for not providing the video to Claimant.

The ALJ finds and concludes Claimant established by a preponderance of the evidence that he suffered a compensable injury involving both of his shoulders on November 13, 2018.

II. Whether the medical treatment Claimant received is reasonable, necessary, and related.

Claimant bears the burden of establishing entitlement to medical treatment. See *Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997); *Sims v. Indus.*

Claim Appeals Office, 797 P.2d 777 (Colo. App. 1990). Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. C.R.S. § 8-42-101. But the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. C.R.S. § 8-41-301(1)(c); *Faulkner v. Indus. Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Indus. Comm'n*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Indus. Comm'n v. Royal Indemnity Co.*, 124 Colo. 210, 236 P.2d 2993. A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Indus. Comm'n of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Indus. Comm'n v. Royal Indemnity Co.*, 124 Colo. 210, 236 P.2d 293 (1951).

All results flowing proximately and naturally from an industrial injury are compensable. See *Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970). In order to prove causation, it is not necessary to establish that the industrial injury was the sole cause of the need for treatment. Rather, it is sufficient if the injury is a "significant" cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment. A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *Joslins Dry Goods Co. v. Indus. Claim Appeals Office*, 21 P.3d 866 (Colo. App. 2001); *H and H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *Seifried v. Indus. Comm'n*, 736 P.2d 1262 (Colo. App. 1986).

Pain is a typical symptom from the aggravation of a pre-existing condition. Thus, a claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment-related activities and not the underlying pre-existing condition. See *Merriman v. Indus. Comm'n*, 120 Colo. 400, 210 P.2d 488 (1940).

As stated above, on November 13, 2018 Claimant suffered a work-related injury to his right and left shoulders and neck, when he pulled with both arms a 20-pound piece of meat that had about five pieces of meat piled on top of it, from a moving conveyor belt. Claimant was asymptomatic before the November 13, 2018 work-related incident. Claimant reported a pain level of 6 to 8 out of 10 at his medical visits in the week after his November 13, 2018 work injury. On the other hand, Claimant was performing his job duties before November 13, 2018, without issue.

Diagnostic imaging in the form of x-rays and MRIs were taken of Claimant shoulders which revealed bilateral rotator cuff tears.

Dr. Hatzidakis credibly testified that it was necessary and prudent to order the x-rays and MRIs to sufficiently evaluate Claimant's shoulders. In addition, both Dr. Keller

and Dr. Hatzidakis (who is an expert in shoulders) found that the recommended course of treatment would be surgery for Claimant's right shoulder rotator cuff tear.

Respondents presented no credible and persuasive evidence that the medical treatment Claimant received for his bilateral shoulder injuries was not reasonable or necessary.

It is found and concluded that Claimant established by a preponderance of the evidence that the November 13, 2018 workplace incident was a significant cause for the need for treatment Claimant received, including the right shoulder surgery performed by Dr. Hatzidakis. The November 13, 2018 work incident aggravated Claimant's preexisting shoulder condition and produced the need for treatment. Since, the treatment with Salud (PA Hutcheson), Eastern Colorado Orthopedic Center (PA Keller and Dr. Keller), and Dr. Hatzidakis flows from the November 13, 2018 compensable injury, the treatment they provided it is found reasonable, necessary, and related to evaluate, diagnose, and treat Claimant's work injury.

III. Whether Respondents are responsible for the payment of the medical treatment Claimant received.

Pursuant to C.R.S. § 8-42-101(6)(a),

If an employer receives notice of injury and the employer or, if insured, the employer's insurance carrier, after notice of the injury, fails to furnish reasonable and necessary medical treatment to the injured worker for a claim that is admitted or found to be compensable, the employer or carrier shall reimburse the claimant, or any insurer or governmental program that pays for related medical treatment, for the costs of reasonable and necessary treatment that was provided. ...

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

This section allows Claimant to obtain reimbursement for reasonable and necessary medical treatment without requiring that the treatment, or the medical provider, be authorized by Respondents. The conditions that serve as a prerequisite to an order for reimbursement include: 1) the request must be for reimbursement — the medical treatment has already been provided; 2) the claim has been admitted or found compensable by an ALJ or the Director; 3) the Respondents have failed to furnish the medical treatment; 4) and an ALJ or the Director finds the medical treatment is "related ... reasonable and necessary." C.R.S. § 8-42-101(6)(2).

Moreover, if compensability of Claimant's injury is disputed and Respondents do not provide medical treatment, the ability to select the treating doctor passes to the Claimant and when the claim is deemed compensable, the Respondents are liable for the cost of the reasonable and necessary treatment provided by Claimant's selected

medical providers. See *Ruybal v. University of Colorado Health Sciences Ctr.*, 768 P.2d 1259 (Colo. App. 1988).

Furthermore, an authorized provider can be reimbursed even when the treatment was not authorized by the Respondents but was found to be reasonable and necessary. *Martin v. Hyams*, W.C. No. 4-781-144 (May 11, 2010).

Claimant sought treatment at [Employer]'s onsite clinic and received only minimal treatment for his injuries. Claimant was not provided the reasonable and necessary medical treatment necessary to treat him from the effects of his work injury because Dr. Cebrian failed to adequately assess Claimant's shoulder condition and determine that it was a compensable work injury. Instead, on November 20, 2018, Dr. Cebrian, evaluated Claimant and referred Claimant outside the workers' compensation system for treatment of his work-related injuries. As [Employer]'s onsite physician, he also directed Claimant to seek treatment for his shoulder pain with his own providers and "closed" Claimant's case. Dr. Cebrian offered no other treatment for Claimant's shoulder injuries.

As a result, Dr. Cebrian's general referral in the capacity of [Employer]'s onsite physician shifts the responsibility of payment for medical treatment to Claimant, his personal health insurance carrier, or both. It also allows Claimant to treat with medical providers outside the Workers' Compensation system. Thus, the responsibility for payment would fall on Claimant, his insurer, or both unless compensability is established, and the treatment is found reasonable and necessary.

Claimant provided Respondents the notice required by § 8-42-101(6)(a), C.R.S., several times. These occasions include, but are not limited to, the following:

- i. November 14, 2018, when he verbally advised his supervisor,
- ii. November 14, 2018, when he reported the injury in writing,
- iii. November 14th, 15th, 16th, 19th and 20th of 2018 when he sought treatment from the [Employer] onsite medical clinic,
- iv. September 13, 2019, Claimant's Worker's Claim for Compensation,
- v. October 15, 2019, email from Claimant's counsel to Respondents' counsel, and
- vi. October 18, 2019, Application for Hearing filed by Claimant where he endorsed several medical benefit issues, including multiple authorized provider issues.

Moreover, the email from Claimant's counsel dated October 15, 2019, specifically stated that it is Claimant's understanding that the insurance carrier/employer was not authorizing any medical treatment, Claimant required medical treatment for his bilateral shoulders and neck, and therefore Claimant would be seeking treatment outside the workers compensation system, per Dr. Cebrian's referral. The email also notifies Respondents that if the claim is found compensable Claimant will seek reimbursement of any costs of any reasonable and necessary medical treatment. The notice was provided before Claimant's appointment with Dr. Hatzidakis and surgery. Again, upon

receiving Claimant's notice on October 15, 2019, Respondents provided no medical care and took no action to attempt to redirect Claimant to a treater within the workers' compensation system.

In accordance with Dr. Cebrian's referral, Claimant received the following medical treatment outside the workers' compensation system: Evaluation with nurse practitioner Hutcheson at Salud Family Health Centers; evaluations by physician assistant Dave Keller and Dr. Keller at Eastern Colorado Orthopedics Center; and evaluations and surgery with Dr. Hatzidakis at Western Orthopedics. The surgical procedures performed included: right shoulder open lipoma excision, right shoulder arthroscopic with debridement, arthroscopic subacromial decompression, arthroscopic rotator cuff repair, and arthroscopic long head of biceps tenodesis.

As found, Claimant established by a preponderance of the evidence a compensable injury and that the treatment provided was reasonable, necessary, and related.

As a result, the ALJ finds and concludes Claimant established by preponderance of the evidence that he met the requirements of Section 8-42-101(6)(a), and therefore Respondents shall reimburse Claimant and his insurance carrier for the treatment provided for his bilateral shoulder injuries and neck pain. The Respondents are not, however, liable for costs associated with removing the lipoma.

- IV. Whether the right to select an authorized treating physician passed to Claimant when Dr. Cebrian referred Claimant outside the workers' compensation system for treatment of his work-related injury.**
- V. Whether Dr. Cebrian was deauthorized as a treating physician when he referred Claimant outside the workers' compensation system for treatment of his work-related injury.**
 - i. Employer's Failure to designate a physician in a timely manner who treats Claimant in a timely manner.

If upon notice of the injury the employer fails to timely designate a physician to treat Claimant, the right of selection passes to Claimant. *Rogers v. Indus. Claim Appeals Office*, 746 P.2d 565 (Colo. App. 1987). The Employer's obligation to appoint a treating physician who will treat Claimant arises when it has some knowledge of the accompanying facts connecting an injury to the employment such that a reasonably conscientious manager would recognize the case might result in a claim for compensation. *Bunch v. Indus. Claim Appeals Office*, 148 P.3d 381 (Colo. App. 2006).

The Employer's obligation to appoint and provide a "physician" who will treat Claimant timely is also set forth in WCRP 16. Under rule 16-3(A)(1), a designated provider can delegate some of their treatment obligations to a nurse practitioner or physician assistant. That said, the Employer is still required to provide a physician who will oversee the assessment, treatment, and return to work decisions being made by a nurse practitioner or physician assistant. For example, the physician has to "counter-sign patient records related to the injured worker's inability to work resulting from the

claimed work injury or disease, and the injured worker's ability to return to regular or modified employment." See *Rule 16-3(A)(5)(a-b)*.

Here, upon reporting his injury in writing to his Employer on November 14, 2018, the Employer provided Claimant a designated provider list the same day. Dr Cebrian, at the [Employer] on-site clinic in Fort Morgan, was listed as one of the designated providers. There were three other providers, but they were not in the same city. Two were in Denver and one was in Greenwood Village, Colorado.

Claimant sought treatment with Dr. Cebrian by going to the [Employer] clinic on November 14, 2018, where he was evaluated by a nurse. The nurse evaluated Claimant's shoulders and other pain complaints and directed him to use ice on his shoulders, take ibuprofen, and returned Claimant to work. Claimant returned to the [Employer] clinic again on November 15th, 16th and 19th of 2018 for ongoing bilateral shoulder pain. Each time, Claimant was seen by a nurse and not a physician. On each occasion, the nurse assessed Claimant's condition, made basically the same recommendations for Claimant to use ice and take ibuprofen, and then returned Claimant to work. And although the nurses were making return to work decisions, those decisions were never signed off by a physician as required by WCRP 16-3(A)(5)(a-b).

WCRP 16 also requires that "The treating physician [designated by the Employer] must evaluate the injured worker within the first three visits to the physician's office." *Rule 16-3(A)(5)(c)*. But, in this case, Claimant was not seen by a physician within the first three visits to the [Employer] clinic. It was not until the fifth visit to the [Employer] clinic on November 20, 2018 that Claimant was seen by a physician — Dr. Cebrian.

Rule 16 prevents employers from circumventing their statutory obligation to provide an injured worker a treating "physician" in a timely manner by using "non-physician providers" such as nurse practitioners or physician assistants – especially when making return to work decisions. Rule 16 prevents employers from circumventing their statutory obligation to provide an injured worker a treating physician by requiring return to work decisions to be signed off on by a physician. Rule 16 also prevents employers from circumventing their obligation to provide Claimant a treating physician in a timely manner by using non-physicians more than twice at the start of a claim.

As a result, if a physician is not signing off on each return-to-work decision made by a "non-physician provider" and if a physician does not evaluate the Claimant by the third visit, the employer has failed to provide Claimant a treating physician in a timely manner under rule 16.

Thus, the ALJ finds and concludes [Employer] failed to provide Claimant a physician in a timely manner to treat Claimant for his claimed work injuries pursuant to WCRP 16-3(A)(5)(a-c).

- ii. Employer must designate a physician who will provide medical treatment and treat Claimant's claimed injuries.

Likewise, §8-43-404(5), C.R.S. contemplates that the Respondent will designate a physician who is willing to provide treatment. See *Ruybal v. University Health Sciences Ctr.*, 768 P.2d 1259, 1260 (Colo. App. 1988). If the Employer fails to timely tender the services of a physician who is willing to treat the Claimant, the right of selection passes to the Claimant and the selected physician becomes an authorized treating physician. See *Rogers v. Indus. Claim Appeals Office*, 746 P.2d 565 (Colo. App. 1987); *Garrett v. McNelly Construction Company, Inc.*, W.C. No. 4-734-158 (ICAO, Sept. 3, 2008).

On November 20, 2018, Claimant presented to the [Employer] clinic for the fifth time to obtain treatment for his bilateral shoulder injury. At this visit, Claimant was seen by Dr. Cebrian.

Claimant credibly testified that he discussed the November 13, 2018 incident with Dr. Cebrian at the November 20, 2018 medical appointment. Claimant reported to Dr. Cebrian that the worst part of his pain was in his arms and shoulders, not the lipoma. Claimant was unable to lift his arms upward when he was evaluated by Dr. Cebrian because of his bilateral shoulder pain. At this visit, Claimant rated his pain as eight out of ten in his right neck, bicep, neck, and shoulders.

At this appointment, Dr. Cebrian ignored Claimant's shoulder complaints and failed to perform even a rudimentary physical evaluation of Claimant's shoulders. In contrast, Ms. Hutcheson, the nurse practitioner from Salud, evaluated Claimant's shoulders. Based on her initial findings, she assessed Claimant as suffering from a probable right and left shoulder rotator cuff tears. Based on her examination, she also ordered an MRI of each shoulder to assist in her diagnoses and treatment recommendations. As found, the MRIs confirmed her initial assessment.

On the other hand, Dr. Cebrian did not order any diagnostic imaging to assist in evaluating Claimant's reported shoulder injuries. Dr. Cebrian also failed to even review the prior [Employer] nursing notes from Claimant's four prior appointments at the [Employer] clinic.

By the end of the November 20, 2018 appointment, Dr. Cebrian diagnosed Claimant with myofascial pain and a lipoma on his right shoulder. He also concluded that none of Claimant's pain complaints resulted from a compensable work injury. As a result, Dr. Cebrian directed Claimant to seek treatment on his own and outside the workers' compensation system for his bilateral shoulder pain, the lipoma, and other pain complaints. Dr. Cebrian also advised Claimant to stay active, i.e., return to work, and returned Claimant to regular duty.

Despite concluding Claimant did not suffer a compensable work injury, Dr. Cebrian gratuitously noted in his report Claimant was at maximum medical improvement (MMI) with no impairment. To the extent there is any ambiguity over Dr. Cebrian's MMI statement, the ALJ finds and concludes Dr. Cebrian did not conclude Claimant reached MMI for his November 13, 2018 compensable shoulder injury because Dr. Cebrian concluded Claimant did not suffer a compensable work injury.

As a result, the ALJ finds and concludes Dr. Cebrian was not willing to treat Claimant as required by Section 8-43-404(5), C.R.S. The mere fact Claimant was

directed to a physician by Employer does not mean the Employer provided Claimant a physician who was willing to treat him and that the treatment rose to the level of the provision of medical treatment by a physician required by Section 8-43-404(5), C.R.S.

The employer must not only provide a physician who will look at an injured worker in his office, the Employer must provide a physician who is willing to provide treatment in the form of at least an initial evaluation in which the physician actually evaluates the injuries claimed by Claimant.

The ALJ is not finding and concluding that just because a physician misses a diagnosis, the Employer has failed to provide medical treatment. The ALJ is finding and concluding, however, that when the Employer provides a physician who fails to perform even a basic evaluation and summarily “closes” the case, such actions do not rise to the level of satisfying the provision of medical treatment by a physician as required by the Act.

As a result, the ALJ finds and concludes the Employer failed to properly designate a physician who was willing to treat Claimant for his work injury. Claimant established by a preponderance of the evidence that the right of selection passed to Claimant.

- iii. If the designated physician refuses to treat for non-medical reasons, such as compensability has not been established, the right of selection passes to Claimant.

If Respondents timely designate a physician and the physician provides medical treatment in a timely manner in the first instance, the right of selection passes to the Claimant if the physician refuses to treat the Claimant for non-medical reasons. Whether an authorized physician has refused to provide treatment for non-medical reasons is a question of fact for the ALJ. *Ruybal v. University of Colorado Health Sciences Ctr.*, 768 P.2d 1259 (Colo. App. 1988); *Lesso v. McDonalds, W.C. No. 4-915-708-01* (ICAO, Apr. 21, 2014).

As found, Claimant established by a preponderance of the evidence that Dr. Cebrian refused to treat Claimant’s shoulder problems because he did not think Claimant’s shoulder problems were due to a compensable injury. Refusal to treat because “compensability has not been established” is considered a non-medical reason. See WCRP 16-11(B)(1). Thus, the ALJ finds and concludes that to the extent Dr. Cebrian was a designated physician, his refusal to treat Claimant because he did not think Claimant’s shoulder conditions were compensable led to the right of selection passing to Claimant.

- iv. If the designated physician refers Claimant to his personal physician because the designated physician mistakenly thinks the condition is not work related, the referral is valid because the risk of mistake falls on Employer.

If an Employer's designated physician refers Claimant to the Claimant's personal physician based on the mistaken conclusion that a condition is not work related, the referral may be considered valid because the risk of mistake falls on the Employer. *Cabela v. Industrial Claim Appeals Office*, 198 P.3d 1277 (Colo. App. 2008). Whether an employer's designated physician has made a referral in the normal progression of authorized treatment is a question of fact for the ALJ. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997); *Suetrack USA v. Indus. Claim Appeals Office*, 902 P.2d 854 (Colo. App. 1995).

Here, about a week after Claimant's injury he was evaluated by Dr. Cebrian at the Employer's clinic. At that time, Dr. Cebrian was Respondent's selected authorized treating physician. Claimant credibly testified that on November 20, 2018, Dr. Cebrian referred Claimant outside the workers compensation system to his personal doctor for treatment of Claimant's bilateral shoulder injuries. The November 20, 2018, medical report, written by Dr. Cebrian, also documents the referral outside workers' compensation for medical treatment. In addition, Dr. Cebrian offered no treatment for Claimant shoulder injuries and instead closed Claimant's case.

Although Respondents allege that Dr. Cebrian's referral was only for treatment of the lipoma and not the shoulder injuries, Claimant's understanding of the referral is documented in his December 10, 2018 medical record from Salud Family Health Centers, with Ms. Hutcheson, that provides: "The pain started at work about 1 month ago, he reported it at work but the doctor said the pain had nothing to do with work and that he needs to see his personal doctor." Dr. Keller also documented that Claimant saw the company doctor who did not relate this injury to the work-related event.

Respondents did not timely tender medical services of a physician. On the Claimant's fifth visit to the [Employer] clinic, he saw Dr. Cebrian. Dr. Cebrian, however, provided no medical care for Claimant's injuries. As discussed above, Dr. Cebrian's only evaluation after the date-of-injury was insufficient as he did not conduct any specific shoulder tests, nor did he order any diagnostic imaging/tests. Dr. Cebrian offered no treatment during or after the November 20, 2018 appointment, for Claimant's bilateral rotator cuff tears.

Dr. Cebrian did, however, make a general referral and directed Claimant to treat with his personal physician for his bilateral shoulder pain and the lipoma. The failure of Dr. Cebrian to refer Claimant to a specific treating physician, allows Claimant to select the treaters of his choice and maintain the chain of referral - if necessary.

As found, Dr. Cebrian refused to treat Claimant's shoulder problems because he did not think Claimant's shoulder problems were due to a compensable injury. As a result, Dr. Cebrian directed and referred Claimant to seek treatment for his shoulder pain outside of the workers' compensation system. As a result, to the extent Dr. Cebrian was an authorized physician, his general referral for Claimant to seek treatment outside the workers' compensation system allows Claimant to select his treating physicians and for such physicians to be authorized to treat his work-related shoulder injuries. Moreover, once Dr. Cebrian refused to treat Claimant and directed Claimant to seek treatment outside the workers compensation system, Dr. Cebrian surrendered any status he might have had as an authorized treating physician.

Once Dr. Cebrian directed Claimant to treat with his personal physician, Claimant went to Salud Family Health services and was evaluated by Rebecca Hutcheson, a nurse practitioner. Ms. Hutcheson directed Claimant to Eastern Colorado Orthopedics Center, where he was evaluated by Mr. David Keller, a physician assistant, and then David Keller, an orthopedic surgeon. Both recommended rotator cuff surgery. Claimant, however, wanted a second opinion and saw Dr. Hatzidakis. After seeing Dr. Keller and Dr. Hatzidakis, Claimant selected Dr. Hatzidakis to treat his shoulder injuries via surgery. As a result, Dr. Hatzidakis operated on the claimant's right shoulder. During the surgery, he also removed the lipoma.

Claimant has established treatment with Dr. Hatzidakis, for the treatment of his bilateral shoulder injuries. Dr. Hatzidakis is a level II accredited physician. Respondents were on notice that Claimant required treatment and intended to seek treatment outside the workers' compensation system. Respondents took no action to attempt to redirect Claimant into the workers compensation for treatment and waived any remaining right to control the selection of Claimant's treating physicians. As a result, Dr. Hatzidakis is an authorized treating physician.

Based on the totality of the evidence, the ALJ finds and concludes Claimant established by a preponderance of the evidence that the providers from Salud (PA Hutcheson), Eastern Colorado Orthopedic Center (PA Keller and Dr. Keller), Dr. Hatzidakis (Western Orthopedics), and their referrals, are authorized providers. The ALJ also finds and concludes Claimant established by a preponderance of the evidence that Dr. Cebrian is not an authorized provider.

ORDER

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

1. Claimant suffered a compensable injury involving both shoulders on November 13, 2018, while working for Employer.
2. Respondents shall provide Claimant reasonable, necessary, and related medical treatment for his bilateral shoulder injury and neck pain.
3. The evaluations and treatment Claimant received for his bilateral shoulder injury and neck pain - including the surgery to his right shoulder that was performed by Dr. Hatzidakis - is reasonable, necessary, and related to his November 13, 2018 injury.
4. Respondents are responsible to pay for the treatment Claimant received from Salud Family Health Center (Rebecca Hutcheson, N.P.); Eastern Colorado Orthopedics Center (Dave Keller, P.A., and Ken Keller, M.D.); and Western Orthopedics (Armodios Hatzidakis, M.D.), and their referrals. This includes the shoulder surgery performed by Dr. Hatzidakis.

5. Respondents shall reimburse Claimant and any other insurer for the costs associated with evaluating, diagnosing, and treating Claimant's shoulders and neck pain under § 8-42-101(6).
6. Respondents are not responsible for the other costs associated with treating and removing the lipoma.
7. The right to select treating providers passed to Claimant. As a result, Rebecca Hutcheson, N.P., Dave Keller, P.A., Ken Keller, M.D., and Dr. Hatzidakis are authorized treating providers and Dr. Hatzidakis is Claimant's current authorized treating physician.
8. Dr. Cebrian is not authorized to treat Claimant.
9. All matters not determined herein are reserved for future determination.

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

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

DATED: June 3, 2020.

/s/ Glen Goldman _____

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUE

I. Has Claimant presented sufficient evidence that orthopedist Lucas King is an Authorized Treatment Provider for Claimant's admitted work injury? For purposes of this Supplemental Order, Issue # I can be broken into two components:

Should the statements made by Claimant at hearing regarding what he was told by medical personnel have been admitted as substantive evidence?

If such statements should not have been received as substantive evidence, is there sufficient evidence in the record, independent of those statements, to support a finding that Dr. King is an Authorized Treatment Provider?

SUPPLEMENTAL FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Supplemental Findings of Fact:

Claimant's Medical Records re: Treatment at Parkview ER

82. Claimant reported to the ER at Parkview Medical Center at 11:54 a.m. on 3/21/2019. (Ex. 11, p. 70). It was noted that Claimant "had a workman's comp MRI recently...has not seen Ortho to date" *Id.*

Tried to fu [follow-up] workmans comp today but they had no appt times x 3 days. Has not got treatment since MRI. *Id* at 70.
(emphasis added).

83. Later on the same page, it notes:

Pt here with Right knee pain, slipped in ice 3 weeks ago and has already been seen and MRI shows a miniscus (sic) tear. **Unable to see w/ comp dr today** and needs some sort of shot to the knee that is not NSAID. *Id* at 70. (emphasis added).

84. In the same report, signed by Alexis N. Bencze, MD, she notes:

I will have the patient follow-up with orthopedics. *Id* at 72.

Follow up with:

King, David C. [non-staff MD/DO/PA/NP] *Id.*

Claimant's Medical Records under Treatment with Dr. Olson

85. The first medical record from CCOM supplied by Claimant is dated 3/26/2019. (Although Dr. Olson, *upon questioning by Respondent's counsel*, stated he had also examined Claimant on 3/19/2019) (Olson Depo, p. 6). Dr. Olson notes, under HISTORY OF PRESENT ILLNESS ("HISTORY")

...Jose comes in for follow-up of this right knee pain. He did get his MRI scan is here to review it. *He states he went over to Parkview Emergency room recently and was made appointment with Dr. King for later today.* (Ex. 13, p. 76)

Under SPECIALIST VISITS:

Patient was seen at Park view E Don 3.21.19. ED referred patient to Ortho, Dr. King. *Id.*

Under **TREATMENT PLAN** (Emphasis added), Dr. Olson notes:

1. **He is scheduled to see Dr. King later today.** [which actually did occur/Finding of Fact #26]. 2. Discussed treatment options with him today. 3. Recheck his progress in 3 weeks. *Id* at 77 (emphasis added).

86. The next exam date with Dr. Olson is dated 4/10/2019 (Ex. 13, pp. 78-79). Under HISTORY, Dr. Olson notes:

The problem began on 3/04/2029 (sic). The patient states that *he should be scheduling surgery with Dr. King* for his right knee within the next 2 weeks. Patient states he isn't to go over [work] restrictions prior to surgery.The patient is aware that **we** would like to see him *after his surgery* so we can start physical therapy. (emphasis added). *Id.*

Under **TREATMENT PLAN**, Dr. Olson notes:

Schedule surgery with Dr. King for right knee arthroscopy within the next 2 weeks.

I would like to see Jose after surgery to schedule physical therapy right away *depending upon what Dr. King finds during surgery.* Follow-up 4 weeks after surgery. *Id.* (emphasis added).

87. Dr. Olsen next saw Claimant on 5/8/2019 (Ex. 13, pp. 81-83). Dr. Olson notes in HISTORY:

.....He did undergo arthroscopic surgery and chondroplasty by Dr. King. He did see the surgeon yesterday and will follow-up in 6 weeks. He is going to physical therapy at the PAC. *Id* at 81.

In SPECIALIST VISITS, Dr. Olson notes:

June 18 *Dr. King next. Id.*

Under **TREATMENT PLAN**, Dr. Olson notes:

1. Continue physical therapy
2. Continue the knee brace and an Ace wrap.
3. *Follow-up with Dr. King in 6 weeks.*
4. *I will follow up on **June 19**.* Id. (emphasis added).

88. On 5/30/2019, Dr. Olson next saw Claimant. (Ex. 13, pp. 84-86).

In HISTORY, Dr. Olson now notes:

....The Patient states that Dr. King would like to try hyaluronic Acid injections. That needs approval from insurance first. **We** are waiting on that now....Id at 84.

Dr. Olson notes under **TREATMENT PLAN**:

Continue tramadol prescribed by Dr. King.

We are currently waiting approval for hyaluronic injections to the right knee by insurance. Id at 85. [Insurance carrier is noted to be Broadspire].

89. Each subsequent periodic report from Dr. Olsen (6/3/19, 6/19/19, 7/18/19, 7/31/19, 9/3/19, 10/23/19, 1/8/20, 1/29/20) references Claimant's treatment by Dr. King, and includes Dr. King's treatment recommendations in Dr. Olsen's own TREATMENT PLAN. At no point does Dr. Olson dissent from, or object to, Dr. King, although he does reference that such surgeries do not always go as hoped.

90. Of significance, Dr. Olson notes on 8/29/2019:

HISTORY: He did have arthroscopic surgery, which did not help. Dr. King therefore sitting [sic..setting] up a total knee replacement on October 9...(Ex. 13, p. 96).

TREATMENT PLAN:

He is scheduled to have total knee replacement on October 9.

Broadspire received this invoice from the ATP on 9/10/2019. *Id.*

91. On 12/11/2019, Dr. Olson notes:

HISTORY: He is now status post total knee replacement by Dr. King. Unfortunately it appear that surgery has not given the results

everyone is hoping for. The physical therapy was delayed and now he has a great deal of adhesions that leaves his range of motion from -30-78 at best. *He did see Dr. King yesterday and he will be doing a joint manipulation by next Monday.* (Ex. 13, p. 104)

TREATMENT PLAN:

1. *He is to have manipulation of the joint next week.*
2. He will have aggressive physical therapy after the manipulation.
3. Recheck here in 3-4 weeks. Id. (emphasis added).

92. Dr. Olson filed WC164 Physician's Reports on 1/8/2020 (Ex. 13, p. 113), and 1/29/2020 (Ex. 13, p. 114). In each instance, he recommended that Claimant follow up with the surgeon. The final recommendation was to see the surgeon (Dr. King) on 2/11/2020.

Dr. Olson's Deposition Testimony re: Referral of Claimant to Dr. King

93. Neither party simply asked Dr. Olson if Claimant was referred to Dr. King by Dr. Olson. However, the following exchanges are noted:

Q. Okay. And in your March 26, 2019 chart note, you noted that Mr. Herrera was going to see a Dr. King. Now, had he scheduled this this before you saw him on the 26th?

A. I think that **referral** actually got started when he went to Parkview Emergency Room because he was having some increase in pain. And the emergency department there made the appointment for Dr. King. (Depo, p. 12)(emphasis added).

94. Q. All right. Have you ever been provided with a copy of Dr. King's April 22, 2019 operative report?

A. Let me look. I think have it. **Yes.** (depo, p. 13)

95. Q. And if you can recall, what was the context of the conversation with regard to whether or not he should even undergo Dr. King's first surgery, or what was it?

A. I just shared with him what the orthopedic literature has said, that – I told him, I said, you know, sometimes operating on these things does not solve the pain. And but I guess *Dr. King still wanted to do it*, so....(depo, p. 18)(emphasis added).

96. Q.when you have a patient, as you do here, who has seemingly worsened over time, despite Dr. King's operative interventions, would you, *as an authorized treating provider, make a referral to a second or different orthopedic surgeon* to get a fresh set of eyes on the situation?

A. That's a possibility. *I can be talking with Mr. Herrera after he meets with Dr. King*, and we'll see what the plan is there. (depo, p. 35)(emphasis added).

DISCUSSION

In this ALJ's own (mildly asserted) defense, these abbreviated hearings under the Administrative Procedure Act (except where noted) are generally completed within an hour or two (case in point). Documents are received, and objections thereto, are ruled upon summarily; the ALJ having just been tendered these packets mere moments before. And as testimony proceeds, objections are made, and ruled upon, without having the hindsight of what actually does or does not exist in the evidence packet, nor in deposition transcripts which perhaps have not even occurred. Thus, rulings must be made on the spot, without knowing at that moment if the implications therefrom prove to be trivial, cumulative, or pivotal.

Nonetheless, Respondents complain (and with significant justification) that the ALJ overruled his hearsay objections to all queries of Claimant about what he was told what to do, and where to go, when he complained of pain in his knee. The ALJ ruled at that time that he was receiving those statements from Claimant merely as background information, in order to make sense of the sequence of events. Respondents did a thorough and proper job of preserving this issue, and were granted a running objection, in order to maintain some continuity in understanding what Claimant did, and why he did it. Then, in the April 1, 2020 Order, the ALJ found Claimant's statements credible, and relied, in part, upon these statements in finding that Dr. King was an Authorized Treating Provider. In hindsight, Respondents have a valid argument, which must be addressed and corrected.

Claimant also complains (and also with justification) that the ALJ should have permitted Claimant's counsel to argue in response to the hearsay objection, perhaps with an alternative theory of substantive admissibility, as an exception to the hearsay rule. Alas, Claimant also has a valid point. However, before each of Claimant's alternate theories of admissibility are addressed separately, the ALJ does make the following:

Supplemental Conclusions of Law-Authorized Treating Physician, As Applied

10.1 The ALJ still finds Claimant to be credible in each of his responses to queries about what he was told to do by Dr. Olson's office, and by personnel at Parkview, which led to his referral and treatment by Dr. King. Claimant's statements at hearing are corroborated by significant medical records in evidence, and by Dr. Olson's deposition testimony. Nonetheless, (and for purposes of this Supplemental Order) Claimant's oral statements at hearing are now being disregarded as substantive evidence of the referral process, since they were not admitted at hearing for the truth of the matter asserted. The ALJ will abide by his own ruling at hearing.

10.2 Independent of that, the medical records in evidence, as now elaborated in the Supplemental Findings of Fact, are sufficient to conclude that Claimant was referred by Dr. Olson's office to the Parkview ER, since no one was available for at least 3 days for a WC appointment through traditional channels. Claimant was in great pain, and was correctly sent to the ER by Dr. Olson's staff. As noted by Claimant, this does not have to be Dr. Olson himself. Anyone in an Occupational Medicine Office knows to send an injured worker to the emergency room in an emergency. Given the amount of pain Claimant was in (and despite the efforts he made to try to go through Dr. Olson's office) *he did not even have to call CCOM first*. Had it been 3:00 a.m., for example, *Claimant was entitled to go straight to the ER for the severe pain he was in, due to his (admitted) work injury*. However, since someone answered at CCOM, it strains credulity to say Claimant must stay home in pain and wait at least three days to get a CCOM appointment.

10.3 At the ER, Claimant was referred by a Parkview physician to Dr. King, who took over his surgical care. **This referral to Dr. King has been fully sanctioned, adopted, and approved by Dr. Olson**, who, despite some misgivings about the surgery, worked hand in glove at every step of Claimant's orthopedic treatment with Dr. King from March 26, 2019 through the present. *This referral to Dr. King, albeit with mirrors, was made in the normal progression of Claimant's treatment*. The ALJ finds substantial evidence in support of this referral. The 3/18/2019 MRI, ordered by CCOM, rendered a referral to an orthopedist inevitable. **All treatments by Dr. King were part of the ATP's TREATMENT PLAN**. Dr. Olson corroborates this in his deposition testimony. No evidence in rebuttal has been presented by Respondents. The ALJ finds and concludes that Dr. King is an Authorized Treating Provider.

Meanwhile, about Claimant's Statements at Hearing...

Should the documentary and deposition evidence have proven insufficient to show a valid ATP referral to Dr. King, what could have been Claimant's theory of substantive admissibility for Claimant's statements about what he was told by CCOM and Parkview?

Claimant first argues that there are sufficient indicia of reliability to admit such statements under the APA provisions of C.R.S. 24-4-105(7). Thus the ALJ should engage in the nine-part analysis for administrative hearings under *ICAO v. Flower Stop Marketing*, 782 P. 2d 13 (Colo. 1983).

However, (and as Claimant himself obliquely notes) the ALJ finds that the specific Workers Compensation Statute, C.R.S. 8-43-210 will trump the general APA provisions, and render *Flower Stop* inapplicable to Workers Compensation administrative proceedings. In pertinent part, 8-443-210 states:

Notwithstanding section 24-4-105, C.R.S., the Colorado rules of evidence and requirements of proof for civil nonjury cases in the district courts shall apply in all hearings; except that medical and hospital records, physicians'

reports, vocational reports, and records of the employer *are admissible as evidence* and can be filed in the record as evidence without formal identification if relevant to any issue in the case... (emphasis added).

Thus, in a Workers Compensation case, the Colorado Rules of Evidence must be applied, and no nine-part *Flower Stop* analysis is permitted. Instead, the legislature has written in a huge hearsay exception, encompassing medical and hospital records and physician's reports. So long they are *relevant* to the ATP issue in this case, for example, such records come in as substantive evidence, no matter how much hearsay the hospital or physician chooses to stuff in there. Such was the case here. The legislature has deemed such documents to be sufficiently reliable per se, and en masse, and Workers Comp cases are streamlined thusly.

Claimant next argues that Claimant's testimony falls under CRE 803(4)-*Statements made for purposes of medical diagnosis or treatment*. Such reliance is misplaced. While *Claimant's own statements* to medical personnel would be admissible under this exception, what was excluded herein were the *responses* that Claimant (credibly, but inadmissibly) said came *from* the medical providers. Similarly, CRE 803(3)-*Then existing mental, emotional, or physical condition*, would not permit the statements from the declarant (medical providers) to come in as an exception- *only what Claimant said to them* at the time.

While criteria A, B, and C under the *Residual Hearsay Exception* CRE 807 were arguably met, Claimant could not assert it here. (Although, in fairness, the ALJ should have afforded him the opportunity to try). CRE 807 further requires the proponent [Claimant] to make it known to the adverse party [Respondents] sufficiently in advance of the hearing to provide Respondents a fair opportunity to meet it, the intention of Claimant to offer it, the particulars of the statement(s), and the name and address of the declarant. There is nothing in the record to indicate this was done in advance by Claimant. The difficulty for Claimant in this situation is compounded by the fact that while he was in distress, he could only call the *office* at CCOM, and was in no realistic position to identify the specific *person* who told him just to go to the ER.

Claimant also asserts, if briefly, that Dr. Olson's deposition testimony would somehow make Dr. Olson's oral statements as declarant to Claimant admissible for *Claimant* to recount at the hearing, under CRE 804(b)(1) *Former Testimony*. The ALJ does not concur. Any such statements made during the deposition *by the declarant*, Dr. Olson himself, would of course be admissible in the form of the transcript. It is thus incumbent upon the parties to ask the pertinent question of the declarant at the deposition, to make it a part of the record. In the Conclusions of Law thus rendered, sufficient evidence was elicited from Dr. Olson, but it could have been more straightforward by just asking him directly: "After the ER visit, did you refer Claimant, or sanction the referral by Parkview, to Dr. King?" Live and learn.

Lastly, as noted by the ALJ, Respondents were afforded a running hearsay objection, in order to keep the process intelligible. The ALJ will not thus penalize Respondents for failing to object each and every time a similar question is asked which calls for a hearsay answer. Otherwise, a running objection would effectively grant nothing. Respondents preserved this issue properly.

All of the foregoing leads to the most intriguing prospect of all: CRE 801(d)(2)(C) or (D), which reads:

*(d) A statement is **not hearsay** if.. (2) the statement is offered against a party and is....(C) a statement made by a person authorized by the party to make a statement concerning the subject, **or** (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the relationship...[Further]....The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), [**or**] the agency or employment relationship and scope thereof under subdivision (D)...(emphasis added).*

Parsing this language [and noting that the legal subparts go well beyond what one might otherwise consider an *Admission* by party-opponent] if Dr. Olson is *authorized* by either Respondent [Employer **or** Insurer] to make a statement concerning his appointment of Dr. King, subdivision (C) has been met. The ALJ is without authority to conclude this would *not* be the case – in fact, this is precisely what ATPs are paid by Employers and Insurers to do, if specialty care is needed. There is arguably sufficient extrinsic evidence of declarant's [Dr. Olson's] authority to make such statements, by simple virtue of administrative notice of the Workers Compensation process (including statutes, Rules, and case law). If the conditions are met (as this ALJ would posit), then *objection overruled* - Dr. Olson's and staff's statements to Claimant come in as substantive evidence, (although not the statements of ER personnel).

Similarly, if Dr. Olson were an *Agent or Servant* of either Employer or Insurer, subsection (D) would apply. ATPs are acting at the specific behest of Employers and Insurers and are *selected* by them to be part of a small pool of providers (sometimes even to the exclusion of all other providers). ATPs bill Employers/Insurers directly for services rendered on their behalf. ATPs thus perform an auxiliary function in behalf of Employers that is required by law in Colorado. This ALJ would posit that the Black's Law Dictionary definition of *Agent* fits this bill (less so for the definition of *Servant*). Similarly, if subsection (D) is satisfied, the ALJ should be able to take administrative notice of the Workers Compensation process as noted above, to establish extrinsic evidence of Dr. Olson's agency or employment relationship. Once again, if so, *objection overruled*.

Application of CRE 801(d)(2)(C) or (D) in such cases would satisfy the stated purposes of the Workers Compensation Act, to wit: to assure the quick and efficient

delivery...of medical benefits to injured workers...without the necessity of any litigation....*Admission* of these statements is exactly that, nothing more; there is no requirement that such statements be believed by the fact finder, especially those lacking in corroboration, or contradicted by other evidence. However, it would afford the opportunity for an injured worker in an administrative hearing to simply explain what he was told to do by his ATP in the course of his treatment, especially where the medical records don't tell the story on his behalf.

No case law has been identified by this ALJ interpreting CRE 801(d)(2)(C) or (D) in this context - pro or con. So, while the appellate courts are not generally in the business of issuing advisory opinions, should a court of appellate jurisdiction wish to tackle this issue (by finding insufficient evidence to support the ALJ's Conclusions of Law based upon these medical records and deposition), then the invite is hereby extended. Guidance from above is always a benefit to all concerned.

ORDER

It is therefore Ordered that:

1. The terms of the ALJ's initial ORDER, dated 4/1/2020, remain unchanged.
2. All matters not determined herein are reserved for future determination.

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

DATED: June 3, 2020

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-076-601-002**

ISSUES

- I. Whether Claimant overcame the opinion of the DIME physician, Dr. Tyler, by clear and convincing evidence and established that she is not at MMI.
- II. If Claimant is at MMI, whether she established that her impairment rating should be converted to a whole person impairment rating.
- III. Whether Respondent established ALJ Jones' prior order that found Dr. Gellrick to be an authorized treating physician should be reversed based on new facts, changes in the applicable law, or other persuasive circumstances.
- IV. Whether Claimant established the medical treatment recommended by Dr. Gellrick and Dr. Tyler is reasonable, necessary, and related to her compensable injury.
- V. Whether Respondent failed to timely pay PPD benefits pursuant to W.C.R.P. 5-6(C) and is subject to penalties pursuant to 8-43-304(1), C.R.S.
- VI. Whether Respondent violated ALJ Jones' Order and is subject to penalties pursuant to 8-43-304(1), C.R.S.
- VII. Whether Respondent providing Claimant a list of 4 providers, pursuant to W.C.R.P. 8-2(A), but directing Claimant to a specific provider on the list subjects Respondent to penalties pursuant to 8-43-304(1), C.R.S.
- VIII. Whether Claimant's Claim for penalties based on an alleged violation of W.C.R.P. 8-2(A) is barred by the statute of limitations.

FINDINGS OF FACT

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

1. This case involves an admitted Claim.
2. Claimant suffered a compensable injury on September 18, 2017, for which Respondent has admitted liability.
3. Before Claimant's injury was found to be work related, Claimant began treating with her personal physician for shoulder pain and underwent about 6 weeks of physical therapy.

4. Once it appeared her shoulder condition was work related, her personal insurance refused to pay for more treatment. Then, Claimant formally reported the injury to Employer.
5. Claimant contacted Heather N[Redacted], Employer's payroll clerk, about filing a workers' compensation claim. Ms. N[Redacted] sent Claimant an email on January 31, 2018. The email states:

"Attached is ALL the documentation you receive when filing a workers comp claim...Anything that says Dear Physician you give to them when you go to the Workers Comp Doctor. I circled the Concentra Medical Center. That is the location you need to go to.

Exhibit 2.

6. Ms. N[Redacted]' email contained a PDF attachment entitled "IF YOU ARE INJURED AT WORK." The document lists four medical providers and one hospital. Concentra Medical Center is circled. An arrow is drawn pointing to the circled Concentra provider. A handwritten notation states, "This is where you need to go." *Exhibit 1.*
7. Concentra was also highlighted in yellow on the attachment to Ms. N[Redacted]' email. The circle, highlighting, arrow and handwritten notation all appeared on the original PDF attachment to Ms. N[Redacted]' email.
8. Claimant did not understand Ms. N[Redacted] to be giving her a choice of four doctors. Claimant did not know the list was a provider list from which she could choose. She thought it was a list that Employer gave to all locations, but Concentra was the location she had to go to. Concentra was not Claimant's choice. Instead, Concentra was Respondent's choice. And Respondents directed Claimant to treat at Concentra. As a result, Concentra was selected by Respondent and not Claimant.
9. Exhibit 1 was the only list of designated providers that Claimant has received from Employer to date.
10. On January 31, 2018, Claimant went to Concentra and was evaluated by Hanna Bodkin, PA-C. Claimant presented with complaints of right shoulder pain. But because of her persistent symptoms, which did not improve with physical therapy, Claimant was referred to Dr. Nathan Faulkner, an orthopedic surgeon, for an evaluation.
11. On February 9, 2018, Claimant was evaluated by Dr. Faulkner. Based on his findings, Dr. Faulkner ordered an MRI of Claimant's right shoulder.
12. On February 27, 2018, Claimant underwent an MRI.
13. On March 2, 2018, Claimant returned to Dr. Faulkner. He noted the MRI shows the rotator cuff to be intact and that there was no indication of significant subacromial bursitis. He did, however, specify Claimant's symptoms were more localized into her biceps and that the MRI might suggest Claimant has a

longitudinal biceps tear. For that reason, he recommended an ultrasound-guided biceps tendon sheath injection and scheduled it for the next week.

14. After the injection failed to relieve Claimant's symptoms, Dr. Faulkner concluded that the MRI showed a longitudinal biceps tear and a partial subscapularis tear. Because conservative treatment failed, Dr. Faulkner recommended surgery.

15. On May 31, 2018, Claimant underwent shoulder surgery by Dr. Faulkner. Dr. Faulkner performed a:

- Right shoulder exam under anesthesia,
- Arthroscopy, and debridement including fraying of the superior labrum, particularly the articular side tearing of the supraspinatus,
- Subacromial bursectomy, and
- Mini open biceps tenodesis.

16. In his operative report, Claimant's preoperative diagnosis was:

- Right longitudinal biceps tear, and
- Right partial subscapularis tear.

His postoperative diagnosis was more extensive and included:

- Right sided type II SLAP tear,
- High grade partial tear of the biceps anchor,
- Subacromial bursitis, and a
- Partial articular sided supraspinatus tear.

17. On October 30, 2019, Claimant was evaluated by Dr. Burns at Concentra. Claimant had returned to work three weeks earlier and had completed her three-week graduated return to work plan. After working for three weeks and gradually increasing her workload, Claimant's shoulder condition began to worsen. Claimant was therefore referred to Dr. Faulkner for another appointment.

18. On November 16, 2018, Claimant was seen by Dr. Faulkner. At this visit, he noted Claimant developed "worsening pain as she returned to work doing repetitive reaching away from her body." He concluded that "her exam is consistent with subacromial bursitis/impingement, which has been refractory to therapy and anti-inflammatory pain medication." Based on Claimant's increasing symptoms, he provided Claimant a steroid injection into her shoulder.

19. On November 20, 2018, Claimant was seen by Dr. Burns at Concentra. Dr. Burns noted Claimant had been provided a steroid injection by Dr. Faulkner last week and noted some improvement regarding her shoulder. Claimant, however, was no longer working because the Employer could no longer accommodate her restrictions, even though Claimant wanted to work. As a result, it is not clear whether the steroid injection helped reduce Claimant's symptoms, her cessation

of work, or both. In any event, Claimant still had stiffness and catching in her right shoulder.

20. Based on Respondent's selection and direction, Claimant continued being treated at Concentra. Claimant, however, was dissatisfied with the care provided by Concentra. Claimant reported to Concentra that she was not happy treating with Physician Assistants. Claimant complained that Concentra did not provide consistency of care, since she saw different Physician Assistants each visit. She asked her Concentra providers for a second opinion several times. She did not receive the second opinion.
21. On December 17, 2018, before being placed at MMI, Claimant requested a change of physician to Dr. Caroline Gellrick. Claimant's request to treat with Dr. Gellrick stemmed from her contention that she was directed to a specific provider, Concentra, and was not given a choice of 4 providers as required by W.C.R.P. 8-2(A). Because her employer violated 8-2(A) and did not give her a choice of providers, Claimant asserted W.C.R.P. Rule 8-2(E) provided her the right to select Dr. Gellrick as an authorized treating physician.
22. The December 17, 2018, letter provides:

Respondents have not complied with Rule 8-2, WCRP. [Employer's] representative Heather N[Redacted] told claimant in writing, twice, that she had to go Concentra. I have attached her email stating as such, and the designated provider list in which she selected Concentra for claimant. Please accept this as Claimant's designation and request for Respondent's confirmation of Caroline Gellrick M.D., as Claimant's primary authorized treating physician (ATP).

Exhibit 3, Bates No. 4 (Bold in original).

23. On January 7, 2019, Respondent denied Claimant's request to change physicians and treat with Dr. Gellrick. Respondent asserted that even if Claimant was not provided a list of providers to choose from, as required by Rule 8-2(A), she ultimately "selected" Concentra by treating at Concentra.
24. On February 5, 2019, Claimant was seen by Hanna Bodkin, Physician Assistant, at Concentra. At this appointment, Claimant complained of continuing right sided neck pain with limited range of motion. She also described an episode in January where she woke up and could not lift her head off her pillow, with associated right sided neck pain and stiffness. Based on her assessment, PA Bodkin referred Claimant to Dr. Kawasaki. PA Bodkin states in her report that she is referring Claimant to Dr. Kawasaki to evaluate and treat Claimant's right cervical spine complaints and her trapezius. She also discusses restarting "MT" (manual therapy). Lastly, she indicates Claimant is to "restart psychology" treatment. On the other hand, in the discussion and summary portion of her report she indicates Claimant is approaching MMI and that she will send Claimant for an "IR," which the ALJ infers is an impairment rating. *Ex F, Bates No. 76.* PA Bodkin, however,

does not indicate to whom she is referring Claimant for an impairment rating. Moreover, concurrently sending Claimant for treatment and an impairment rating seems inconsistent. And there is no indication Dr. Burns is not Level II accredited. So, in the end, it is not clear from PA Bodkin's report if she is sending Claimant to Dr. Kawasaki for treatment or for an impairment rating.

25. On February 7, 2019, Claimant filed an Application for Hearing on the issue of authorized physician and sought to have Dr. Caroline Gellrick become an authorized treating physician.
26. On February 28, 2019, Claimant was evaluated by Dr. Kawasaki, a physiatrist, for assessment of her shoulder and neck complaints. Dr. Kawasaki, who was seeing Claimant for the first time, opined Claimant was at maximum medical improvement (MMI), assigned a permanent impairment rating, and did not recommend any maintenance medical treatment.
27. On March 4, 2019, Claimant returned to Concentra, and was seen by PA Bodkin. The report from this appointment is inconsistent with Claimant being at MMI. For example, in one section of the report PA Bodkin notes Claimant is at MMI. Yet in another section of the report, PA Bodkin notes that she has referred Claimant for a second opinion with another physiatrist for her right shoulder and neck pain. She also says that the referral is to "evaluate and treat" by a physiatrist and determine whether Claimant is at MM, and if so, to provide an impairment rating. It appears that based on the indication there would be a referral to another physiatrist for a second opinion, Respondent did not file a final admission of liability at that time.
28. On April 15, 2019, Claimant returned to Concentra and the report from that visit specifies Claimant is waiting for a second opinion with a physiatrist.
29. On April 26, 2019, Claimant called PA Bodkin at Concentra with the names of three physiatrists. PA Bodkin noted that she called Claimant back the same day and left a voice message stating that they can only put in one physiatrist referral, and that Claimant would have to call her back and let her know which one she preferred. On April 30, 2019, PA Bodkin noted that since she had not received a call back, she would be picking one of the physiatrists to provide a second opinion. PA Bodkin also noted that if Claimant does not have the second opinion within four weeks, her case will be closed and Claimant can "dispute case closure with insurance." There is, however, no indication PA Bodkin followed through and selected a physiatrist to evaluate Claimant for a second opinion.
30. On May 16, 2019, a hearing was held before Administrative Law Judge Margot W. Jones. The sole issue presented was: "Whether Claimant proved by a preponderance of the evidence that the right of selection of authorized treating physician (ATP) under W.C.R.P., Rule 8-2, passed to Claimant."
31. On May 28, 2019, after the hearing in front of ALJ Jones, Dr. Burns placed Claimant at MMI. Dr. Burns determined Claimant reached MMI on March 4, 2019.

32. On May 30, 2019, ALJ Jones issued her Summary Order. She found and concluded that:

- Claimant may select an authorized provider of her choosing pursuant to W.C.R.P. 8-2(E).
- Respondent did not supply a list of providers in accordance with W.C.R.P. 8-2(A), from which Claimant could choose.
- Claimant's request to change physicians is not a constructive challenge of an opinion regarding maximum medical improvement. Here, Claimant requested the change under W.C.R.P. 8-2(E) and filed her application for hearing prior to Dr. Kawasaki's opinion that she was at maximum medical improvement.

33. On June 6, 2019, after ALJ Jones issued her Summary Order, Respondent filed a Final Admission of Liability based on Claimant being placed at MMI as of March 4, 2019.

34. On June 13, 2019, Claimant requested a Division Independent Medical Examination.

35. On July 10, 2019, Claimant began treating with Dr. Gellrick.

- At Claimant's initial appointment, Claimant had pain and tenderness into the right side of the cervical spine, right shoulder, scapular deltoid region of the right upper extremity. She had ongoing right arm and neck pain. Driving made the pain worse and her hand could go numb. *Exhibit 10, pg. 43.*
- Dr. Gellrick's physical examination showed tight trigger points both trapezius, right greater than left with tenderness on the right side of the neck with pain going from the neck down into the back into the upper thoracic regions, pain from the right shoulder into the trapezius and from the neck into the trapezius on the right side. She had positive tenderness subscapular on the right. Her right shoulder range of motion produced mild crepitus with decreased internal rotations, abduction, and flexion. Her right shoulder was higher than the left. *Exhibit 10, p. 45.*
- Dr. Gellrick observed that after Claimant's surgery, she developed a worsening of condition, especially in October 2018, as reflected in the records, when she returned to work and had to lift above shoulder height in the clothing department. *Exhibit 10, p. 46.*
- Dr. Gellrick ultimately opined:

What is missing is any further pathology that has developed in the right shoulder because of return to modified duty. Repeat MRI of the shoulder with contrast needs to be completed for further evaluation. Once this is done, she should be re-seen with the surgeon of record, Dr. Faulkner, on this issue. In addition, the patient has been symptomatic for the C-spine pain and granted this may be surely due to the

shoulder, an MRI of the cervical spine is warranted in this situation to check for any further pathology. *Exhibit 10, pg. 46.*

36. Claimant saw Dr. Gellrick for another visit in August 2019. Dr. Gellrick noted the MRI's were not authorized. *Exhibit 10, p.48.* She also requested the MRI's again on her M-164 form. *Exhibit 10, p.50.*
37. On August 21, 2019, ALJ Jones issued her Findings of Fact, Conclusions of Law and Order. Consistent with her Summary Order, she concluded Respondent violated W.C.R.P. 8-2(A) and issued an order granting Claimant's request to change to Dr. Gellrick as her authorized treating physician.
38. On September 4, 2019, Claimant underwent a Division Independent Medical Examination (DIME) with John Tyler, M.D. During the DIME, Claimant was reporting that she was still having difficulties with her shoulder. Her problems included her shoulder locking when raising her arm above shoulder height or after sleeping. She was also having shoulder pain while cooking and stirring things. Claimant also described having difficulties with her neck. Dr. Tyler noted Claimant specified that in October 2018 she began having right sided lateral cervical pain that included difficulty lateralizing with rotation and flexion to the right. She also had problems when she was driving and looking behind her. And although her neck pain was not constant, it was brought on with lateral rotations mostly when looking behind herself while driving.
39. After obtaining Claimant's history, reviewing her medical records, and performing a physical examination, Dr. Tyler concluded Claimant reached MMI on March 4, 2019.
40. Dr. Tyler then assessed Claimant for any permanent impairment. As for her cervical spine, he concluded that an impairment rating was not warranted because he did not believe Claimant directly injured her cervical spine. He explained his rationale as follows:

I do not believe that the cervical spine was directly injured in this case and there was only a referral of pain symptomatology to the cervical spine based on the structural tightness within the region of the superior trapezii on the right side. This does not qualify the cervical spine for an impairment rating based on the AMA guidelines. There, again, was no trauma specifically to the cervical spine and no pathology of the cervical spine specifically is found on examination.
41. As for her shoulder, he concluded Claimant had an 11% upper extremity impairment or 7% whole person under the AMA Guides. *Exhibit 12, p.58.*
42. However, in direct contrast to a finding of MMI, Dr. Tyler recommended additional pre-MMI (curative) medical treatment. In his report, he explains Claimant needs to undergo additional diagnostic testing and evaluations to determine the extent of Claimant's work injury and to also determine whether additional curative treatment such as surgery is necessary.

Dr. Tyler states in his report:

I do believe that this patient has the potential of having further pathology that has not been addressed in relationship to ongoing pain in the right shoulder. It is my medical opinion that this patient should have a repeat MRI scan with arthrogram of the right shoulder at this time and that this should be covered under worker's compensation.

Once that has been completed, the patient should have an opportunity to undergo a 2nd opinion evaluation by another orthopedic surgeon besides Dr. Faulkner (I know of Dr. Faulkner's excellent reputation and do not question the appropriateness of all the surgery and the findings at that time) as this patient's level of pain and limitations has not, unfortunately, improved to the degree one would expect from the surgery performed.

If that 2nd opinion performed by an independent orthopedic surgeon specializing in shoulders finds evidence that further surgery is required, then that surgery would reopen this workers compensation case for the completion of that surgery and the postoperative care. If that surgeon, with the results of the MRI arthrogram, finds no reason for further surgical intervention, then the patient will remain at a point of maximum medical improvement. Beyond the above, no further maintenance care is required. *Exhibit 12, p. 67.*

43. Dr. Tyler determined Claimant needs to undergo additional diagnostic procedures and medical evaluations to define the extent of her work injury and to cure Claimant from the effects of her work injury.
44. As a result, the ALJ finds Claimant requires more diagnostic procedures and medical evaluations to define the extent of her work injury. The ALJ also finds that the diagnostic testing and evaluations are reasonable and necessary to cure Claimant from the effects of her work injury. The ALJ further finds this treatment offers a reasonable prospect for defining the extent of Claimant's work injury and the need for more medical treatment, which might include surgery.
45. On September 10, 2019, shortly after the DIME, Respondent filed a Petition to Review ALJ Jones' order. Claimant filed a motion to strike Respondent's petition to review. Claimant asserted that the portion of Judge Jones' order that determined Dr. Gellrick is an authorized provider is interlocutory and not subject to appeal.
46. On October 4, 2019, ALJ Kimberly Turnbow granted Claimant's motion and struck Respondent's Petition to Review. Judge Turnbow determined the portion of the order on which Claimant prevailed, granting a change of physician, is interlocutory and not subject to review.
47. On October 8, 2019, Respondent informed Dr. Gellrick, by a letter, that she was not authorized, and her treatment would not be paid. Respondent specifically

advised Dr. Gellrick that Claimant requested a hearing to change her authorized treating provider to her, but the order was found to be interlocutory and therefore there is not a final determination on whether she is an authorized treating physician. They also stated that treatment was being denied as not related to the September 18, 2017, claim. They also advised Dr. Gellrick that their position stemmed from Dr. Burns placing Claimant at MMI and not recommending any maintenance care and Dr. Tyler, the DIME, physician who agreed Claimant was at MMI.

48. On October 1, 2019, the Division of Workers' Compensation issued a notice that the DIME process was concluded. *RHE: A. Pg. 19.*
49. On October 3, 2019, Respondent issued a check to Claimant totaling \$3,094.62. This was for PPD benefits based on the difference between the previously admitted 6% impairment rating and the 11% impairment rating in the DIME. *Tr. 80.* The adjuster inadvertently sent the check to Claimant's attorney's old law firm, Ramos Law. That said, there was no credible and persuasive evidence submitted at the hearing establishing the check was delivered to Ramos Law and that addressing and sending the check to the wrong address led to the check getting lost or delayed. In other words, there is no way to determine at which point the check got lost and why it got lost. Thus, the court is unable to determine whether the wrong address on the check had anything to do with the check not getting delivered to Ramos Law. Had the check merely been delivered to the wrong address, i.e., Ramos Law, it seems logical that the Ramos Law firm would have forwarded the check to Claimant or her attorney, or contacted one of the parties to seek direction on what to do with the check.
50. On October 10, 2019, Respondent filed a Final Admission of Liability that was received by the Division on October 11, 2019. Respondent admitted for an 11% scheduled impairment rating and denied maintenance care after MMI pursuant to Dr. Burns' medical report of May 28, 2019. *RHE: A. Pg. 18. Tr. 79.* The certificate of mailing on the FAL also inadvertently listed June 6, 2019 and was mailed to Claimant's counsel's former address at Ramos Law. This was because the previous FAL form filed on June 6, 2019, was used. *Tr. 78.* But, the FAL was still mailed to Claimant. *RHE A. Pg. 18.*
51. Pursuant to Rule 5-6(C), and the October 10, 2019, filing of the FAL, Claimant was to receive her PPD benefit check by October 15, 2019.
52. On October 16, 2019, The Division issued an error letter notifying Respondent - and Claimant's counsel at her new firm - that the certificate of service on the FAL received on October 11, 2019, was incorrect because it listed the wrong date. The letter also stated the FAL listed the incorrect body code for the impairment. The Division requested these issues be corrected. *RHE: A. Pg. 17.*
53. Respondent filed an Amended FAL on October 18, 2019. It again denied medical maintenance care. A copy of the amended FAL was sent to Claimant's counsel at her new firm, The Frickey Law Firm. *RHE: A. Pg. 16.*

54. The October 16, 2019, letter from the Division was received by Claimant's counsel on October 18, 2019. As explained in the letter, the misdated FAL was received by the Division on October 11, 2019. Thus, it was apparent from the Division letter that a check for any additional PPD benefits should have been received by Claimant by approximately October 16, 2019. Despite Claimant's counsel receiving notice that a new admission was filed, and the FAL being mailed to Claimant, Claimant's counsel did not contact Respondent's counsel about the additional PPD benefits until October 31, 2019, which was two weeks later and the first day of the adjuster's vacation.
55. Brianna M[Redacted] is the adjuster for Claimant's claim. She was on vacation from October 31 through November 3, 2019. *Tr. 81-82.*
56. On October 31, 2019, Claimant's counsel emailed Respondent's counsel advising that she had not received the PPD check following the FAL admitting for 11% impairment rating. *Tr. 84.* Respondent's counsel responded promptly the same day, informing Claimant's counsel that the adjuster was out of town, and asked if she could she wait until the adjuster returned for a response about the status of the PPD check. There was no response from Claimant's counsel. *Tr. 84.*
57. Ms. M[Redacted] first became aware Claimant had not received the PPD check mailed on October 3, 2019, from defense counsel after she returned from vacation. *Tr. 82.*
58. Ms. M[Redacted] had coverage while she was on vacation who could have assisted with the lost PPD check while she was out of the office if Respondent had known of the urgency of the issue. *Tr. 83.*
59. It is not clear from the record the extent of communication between the parties between October 31, 2019, and November 11, 2019, about the lost PPD check. For example, did Claimant's attorney contact her old firm to determine whether they received the check, and if so, what happened to it? Or, did the parties decide to wait a few more days to see if the check would ultimately show up?
60. Regardless of the nature and extent of any additional discussions between the parties, the adjuster requested the \$3,094.62 PPD check be reissued to Claimant on November 11, 2019. *Tr. 84-85.* Later, the reissued PPD check was mailed to Claimant's attorney at her new address on November 14, 2019 and received by Claimant's attorney on November 15, 2019. (*Tr. 85 and CHE Ex. 13*)
61. The ALJ finds that misaddressing the initial check was a clerical error. The ALJ further finds that the overall conduct of the adjuster in issuing the first check and then the second check was objectively reasonable. Moreover, the clerical error was not shown to have delayed Claimant's receipt of the first PPD check because the check was lost in the mail. As a result, even if the check were properly addressed, it might have gotten lost as well and not arrived on time. Therefore, based on the totality of the circumstances, the clerical error that was found to be objectively reasonable cannot automatically elevate the error to unreasonable conduct that requires a penalty to be assessed. In the end, the clerical error was not updating Claimant's counsel's new address. Once the error was brought to

the attention of the adjuster, the clerical error was promptly cured. In the end, Claimant failed to establish by a preponderance of the evidence that such error caused the delay in Claimant receiving her PPD benefits.

62. When Claimant filed her Application for Hearing on November 14, 2019, she also endorsed a penalty against the Employer for the alleged violation of Rule W.C.R.P. 8-2(A) that occurred on January 30, 2018 when the Employer directed Claimant to obtain medical treatment from Concentra.
63. Respondent contends Claimant's claim for penalties pursuant to W.C.R.P. 8-2-(A) and 8-43-304(1), C.R.S., based on the Employer directing Claimant to treat at Concentra, is barred by the statute of limitations.
64. As found above, Claimant started treating at Concentra on January 31, 2018. For that reason, the facts that give rise to Claimant's penalty claim, which stems from Respondent's violation of W.C.R.P. 8-2(A), occurred on January 30, 2018 and were known to Claimant on January 30, 2018. As result, Claimant's claim for penalties for the conduct that occurred on January 30, 2018, was made more than one year after she became aware of the facts that form the basis of her penalty claim pursuant to W.C.R.P. 8-2-(A) and 8-43-304(1), C.R.S.
65. Claimant established by a preponderance of the evidence that the right of selection passed to her because Respondent failed to comply with W.C.R.P. 8-2. Respondent did not provide Claimant with a list of providers from which to select a provider for treatment of her September 2017 work injury. Instead, the Employer selected and directed Claimant to treat at Concentra.
66. On December 17, 2018, about 10 months after the Employer selected and directed Claimant to treat at Concentra and before Claimant was placed at MMI, Claimant asserted her right to select a treating physician and requested the right to select Dr. Gellrick.
67. Claimant's request to exercise her right of selection was not shown to be an effort to defeat an ATPs determination of MMI that occurred after she applied for a hearing and after the hearing concluded in front of ALJ Jones.
68. Moreover, based on the findings of this ALJ, Claimant is not at MMI.
69. Claimant can select Dr. Gellrick to be her authorized provider – and did so. As a result, Dr. Gellrick is an authorized provider.
70. The evaluations provided by Dr. Gellrick and her treatment recommendations are found to be reasonable, necessary, and related to treat and cure Claimant from the effects of her work injury.
71. The MRI of Claimant's cervical spine is reasonable and necessary to determine whether Claimant's cervical complaints flow from her initial work injury or flow from an independent condition.
72. The psychological evaluation is reasonable and necessary to assess whether Claimant's work injury has had a psychological impact on Claimant and whether treatment is appropriate.

CONCLUSIONS OF LAW

Based on these findings of fact, the Judge draws these conclusions of law:

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Claimant overcame the opinion of the DIME physician, Dr. Tyler, by clear and convincing evidence, and established that she is not at MMI.

MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." Section 8-40-201(11.5), C.R.S.

A DIME physician's finding that a party has or has not reached MMI is binding on the parties unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(III), C.R.S.; *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). Moreover, any ambiguities in the DIME physician's report over MMI can be resolved by the ALJ. See *MGM Supply Co. v. Indus. Claim Appeals Office*, 62 P.3d 1001 (Colo. App. 2002).

The party seeking to overcome the DIME physician's finding on MMI bears the burden of proof by clear and convincing evidence. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, *supra*. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician's finding on MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). The question of whether the party challenging the DIME physician's finding on MMI has overcome the finding by clear and convincing evidence is one of fact for the ALJ.

Under the statute MMI is primarily a medical determination involving the diagnosis of Claimant's condition. *Berg v. Indus. Claim Appeals Office*, 128 P.3d 270 (Colo. App. 2005); *Monfort Transp. v. Indus. Claim Appeals Office*, 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of Claimant's medical condition are causally related to the industrial injury. *Martinez v. Indus. Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007).

That said, it contradicts a finding of MMI that more diagnostic procedures, medical evaluations, or both, are needed and offer a reasonable prospect for defining the extent of Claimant's work injury and need for additional medical treatment. See *Patterson v. Comfort Dental East Aurora*, WC 4-874-745-01 (ICAO February 14, 2014); *Hatch v. John H. Garland Co.*, W.C. No. 4-638-712 (ICAO August 11, 2000).

As found, on July 10, 2019, Claimant began treating with Dr. Gellrick. It was also found that:

- At Claimant's initial appointment, Claimant had pain and tenderness into the right side of the cervical spine, right shoulder, scapular deltoid region of the right upper extremity. She had ongoing right arm and neck pain. Driving made the pain worse and her hand could go numb.
- Dr. Gellrick's physical examination showed tight trigger points both trapezius, right greater than left with tenderness on the right side of the neck with pain going from the neck down into the back into the upper thoracic regions, pain from the right shoulder into the trapezius and from the neck into the trapezius on the right side. She had positive tenderness subscapular on the right. Her right shoulder range of motion produced mild crepitus with decreased internal rotations, abduction, and flexion. Her right shoulder was higher than the left.
- Dr. Gellrick observed that after Claimant's surgery, she developed a worsening of condition, especially in October 2018, as reflected in the records, when she returned to work and had to lift above shoulder height in the clothing department.

- Dr. Gellrick opined, “What is missing is any further pathology that has developed in the right shoulder because of return to modified duty. Repeat MRI of the shoulder with contrast needs to be completed for further evaluation. Once this is done, she should be re-seen with the surgeon of record, Dr. Faulkner, on this issue. In addition, the patient has been symptomatic for the C-spine pain and granted this may be surely due to the shoulder, an MRI of the cervical spine is warranted in this situation to check for any further pathology.”
- Claimant saw Dr. Gellrick for another visit on August 7, 2019. Dr. Gellrick noted the MRI’s were not authorized. Dr. Gellrick again requested the MRI’s on her M-164 form.

The ALJ finds and concludes Dr. Gellrick’s opinions regarding Claimant’s need for future medical treatment to cure her from the effects of her work injury to be credible and highly persuasive. Her findings and opinions track Claimant’s reporting of symptoms and progression of symptoms throughout her claim and after returning to work in October 2018. Moreover, her conclusion that additional medical treatment is reasonable and necessary to cure Claimant from the effects of her work injury fits with some of the DIME physician’s findings regarding the need for future medical treatment to determine the extent of Claimant’s work injury and whether another surgery is necessary to treat Claimant’s work injury.

As also found, the Division Examiner concluded Claimant needs to undergo a repeat MRI scan with arthrogram of her right shoulder. He also concluded that upon completion of the MRI, Claimant should undergo a second opinion evaluation by another orthopedic surgeon who specializes in treating shoulders. The Division Examiner also states that if the new orthopedic surgeon finds evidence that further surgery is required, then a second shoulder surgery should be provided under this claim.

The ALJ finds Dr. Tyler’s opinion regarding Claimant’s need for more medical treatment to cure her from the effects of her work injury to be credible and persuasive. This portion of his opinion is credited because:

- It aligns with Dr. Gellrick’s opinion regarding Claimant not being at MMI.
- It aligns with Claimant’s ongoing pain complaints and functional limitations that emerged after returning to modified duty in October 2018 and have continued; and
- It aligns with PA Bodkin’s unsuccessful attempt to have Claimant evaluated by another psychiatrist for a second opinion.

That said, the ALJ finds and concludes Dr. Tyler’s opinion that Claimant is at MMI is wrong because his recommendations for additional medical treatment in the form of diagnostic testing and an orthopedic evaluation to determine the extent of Claimant’s work injury and whether additional surgery is needed conflicts with a finding of MMI. The DIME physician’s analysis defies the sequential evaluation and provision of medical treatment that must be provided before placing a Claimant at MMI. Before a Claimant can be placed at MMI, the physician must first determine whether more diagnostic testing and medical evaluations are reasonable and necessary to define the extent and scope of Claimant’s

work injury and to determine whether more treatment can be provided that has a reasonable prospect of curing Claimant from the effects of her work injury.

To first place Claimant at MMI and then provide diagnostic testing and medical evaluations to determine the extent of Claimant's work injury and various treatment options is putting the cart before the horse. Here, the DIME physician recommended more medical treatment in the form of evaluations to determine the extent of Claimant's work injury and help define the type and extent of additional treatment that is reasonable and necessary to cure Claimant from the effects of her work injury. In this case, his treatment recommendations prevent a finding of MMI.

The ALJ thus finds and concludes Claimant has overcome the Division Examiner's opinion on MMI by clear and convincing evidence. Claimant has established by clear and convincing evidence that she is not at MMI.

II. If Claimant is at MMI, whether she established that her impairment rating should be converted to a whole person impairment rating.

Since Claimant has overcome the opinion of the DIME physician on MMI - and is not at MMI - conversion of her impairment rating is no longer ripe for determination and is moot for now.

III. Whether Respondent established ALJ Jones' prior order finding Dr. Gellrick to be an authorized treating physician should be reversed based on new facts, changes in the applicable law, or other persuasive circumstances.

Respondent contends ALJ Jones' order that was issued on August 21, 2019, is interlocutory and subject to modification by this ALJ. Assuming Respondent is correct - about the interlocutory nature of the order - this ALJ may modify a prior interlocutory ruling by another judge as necessary if new facts, changes in the applicable law, or other persuasive circumstances warrant such a modification. *See In re Marriage of Burford*, 26 P.3d 550 (Colo.App.2001); *see People ex rel. Garner v. Garner*, 33 P.3d 1239 (Colo.App.2001)(one division of appellate court denied motion to dismiss; then another division granted a similar motion that raised an additional argument, even though the first ruling might have been considered law of the case); *Moore v. 1600 Downing St., Ltd.*, 668 P.2d 16 (Colo.App.1983)(reconsideration of a motion for summary judgment, even if based on the same issues argued in earlier motions to dismiss, is not barred by law-of-the-case doctrine).

After reviewing the record from the May 16, 2019 hearing, as well as Judge Jones' Summary Order - and her Specific Findings of Fact, Conclusions of Law, and Order - this ALJ determines that reversal of her decision is not warranted even though some new facts have emerged since the May 16, 2019 hearing.

Respondent has set forth some new facts that occurred after ALJ Jones held and concluded the hearing on May 16, 2019. But the emergence of these new facts after the hearing was not unexpected and do not rise to a level requiring a different result. These facts include, but are not limited to, the following:

- Claimant being placed at MMI by one of her authorized treating physicians.
- The filing of a FAL.
- Claimant being placed at MMI, retroactively, to a date that preceded the hearing held by ALJ Jones.
- Claimant undergoing a DIME and being found at MMI.

To the extent there was a jurisdictional bar to ALJ Jones addressing the change of physician issue, that bar has been removed by this ALJ finding Claimant is not at MMI and was not at MMI when ALJ Jones issued her order. To the extent necessary, this ALJ adopts and incorporates Judge Jones' findings of fact, conclusions of law, and order into this opinion in support of this ALJ's findings of fact and conclusions of law in determining Dr. Gellrick is an authorized provider.

As found, the only party who selected a provider and physician to treat Claimant at the outset was the Employer. The fact that Claimant was treated by Concentra, the Employer selected provider, for approximately ten months does not amount to a selection of Concentra by Claimant based on the facts of this case. Claimant did not select a physician until she selected Dr. Gellrick and therefore Dr. Gellrick is an authorized treating physician.

As a result, based on the totality of the circumstances, this ALJ finds and concludes that reversal of Judge Jones' decision that found Dr. Gellrick to be an authorized treating physician is not warranted. This ALJ also finds and concludes Claimant established by a preponderance of the evidence that the right of selection passed to Claimant and she selected Dr. Gellrick on December 17, 2018.

IV. Whether Claimant established the medical treatment recommended by Dr. Gellrick and Dr. Tyler is reasonable, necessary, and related to her compensable injury.

Section 8-42-101(1)(a), C.R.S., provides as follows:

Every employer, regardless of said employer's method of insurance, shall furnish such medical, surgical, dental, nursing, and hospital treatment, medical, hospital, and surgical supplies, crutches, and apparatus as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury."

This statute has not been interpreted as distinguishing between medical "treatment" that tends to cure or relieve symptoms or pathology (such as surgery or medications), and medical "treatment" (such as x-rays and EMG's) performed to identify the claimant's medical condition and clarify what specific procedures are likely to cure or relieve the effects of the injury. As a general matter our courts have held that medical "treatment" for purposes of § 8-42-101(1)(a) includes expenses for "medical or nursing treatment or incidental to obtaining such medical or nursing treatment," provided the

expenses are “reasonably needed to cure and relieve the effects of the injury and related to claimant’s physical needs.” See *Bellone v. Industrial Claim Appeals Office*, 940 P.2d 1116 (Colo. App. 1997) (holding childcare expenses constituted medical treatment under facts of the case). The cases also suggest that medical “treatment” encompasses both diagnostic and curative medical procedures. See *Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 448 (1949) (exploratory surgery held compensable even where it revealed non-industrial condition); *Public Service Co v. Industrial Claim Appeals Office*, 979 P.2d 584 (Colo. App. 1999) (“The record must distinctly reflect the medical necessity of any such treatment and any ancillary service, care or treatment as designed to cure or relieve the effects of such industrial injury.”); *Villela v. Excel Corp.*, W.C. No. 4-400-281 (ICAO February 1, 2001) (reasonable diagnostic procedures are a prerequisite to MMI if they have reasonable prospect for defining claimant’s condition and suggesting further treatment).

As found, Claimant established that after she had shoulder surgery she returned to work in October 2018. After Claimant returned to work, her shoulder symptoms worsened. Her new symptoms included her shoulder locking as well as an increase in shoulder pain. Claimant also developed neck pain and limitations with rotation and flexion to the right. It was also found that Claimant’s provider, Concentra, planned to refer Claimant to a new physiatrist for a second opinion. For whatever reason, Concentra failed to arrange for Claimant to undergo a second opinion with a new physiatrist.

Claimant, however, was ultimately evaluated by Dr. Gellrick, who became her authorized treating physician. Dr. Gellrick concluded Claimant should undergo a repeat MRI of her shoulder with contrast. Dr. Gellrick also recommended Claimant should be reevaluated by her surgeon, Dr. Dr. Faulkner. Dr. Gellrick also believes Claimant’s cervical complaints may relate to her shoulder injury. But to help determine whether Claimant’s neck pain relates to her work injury in some way, Dr. Gellrick also recommended an MRI of Claimant’s cervical spine. See *Merriman, supra*, at 403 (exploratory surgery held compensable even where it revealed non-industrial condition). Lastly, Dr. Gellrick also recommended a referral to Dr. Torres for a psychological evaluation to due Claimant’s delayed recovery, resultant reactive adjustment disorder, and increased stress.

As a result, the ALJ finds and concludes the treatment recommended by Dr. Gellrick is reasonable and necessary to treat Claimant from the effects of her industrial injury. Claimant has thus established by a preponderance of the evidence that she is entitled to a right shoulder MRI with contrast, a cervical spine MRI, a psychological evaluation with Dr. Torres, a follow up evaluation with Dr. Faulkner, and an evaluation by a physiatrist for a second opinion, as recommended by Concentra, but never completed.

The DIME physician did recommend Claimant undergo a surgical evaluation by a surgeon, other than Dr. Faulkner, who specializes in shoulders, for a second opinion. The ALJ, however, cannot order Respondent to provide specific diagnostic testing, evaluations, or both, which have not been prescribed by an authorized treating physician. See W.C.R.P. 11; *Potter v. Grounds Service Co.*, W.C. No. 4-935-523-04 (August 15, 2018); *Torres v. City and County of Denver*, W.C. No. 4-917-329-03 (May 15, 2018.) As a result, Claimant’s request for an order granting a second opinion with a surgeon based on the DIME physician’s recommendation is denied. If, however, an authorized treating

physician recommends Claimant have a second surgical opinion to see if more surgery is warranted, that is a separate issue and is not addressed in this order.

V. Whether Respondent failed to timely pay PPD benefits under W.C.R.P. 5-6(C) and are subject to penalties under 8-43-304.

Claimant contends Respondent should be penalized because she received a portion of her permanent partial disability more than five calendar days after Respondent filed their FAL on October 10, 2019 and their Amended FAL on October 16, 2019.

Rule 5-6(C) provides:

Permanent impairment benefits awarded by admission are retroactive to the date of maximum medical improvement and shall be paid so that the claimant receives the benefits not later than five (5) calendar days after the date of the admission. Subsequent permanent disability benefits shall be paid at least once every two weeks from the date of the admission. When benefits are continuing, the payment shall include all benefits which are due as of the date payment is actually issued.

As found, the Respondent decided to admit for the rating provided by the DIME physician. Pursuant to Rule 5-6-(C), Respondent had to provide Claimant her PPD benefits within in 5 days of the date of their FAL.

For that reason, on October 3, 2019, before they filed their FAL, the adjuster issued and mailed a check to Claimant's counsel totaling \$3,094.62. This was for PPD benefits based on the difference between the previously admitted 6% impairment rating and the 11% impairment rating provided by the DIME physician. The adjuster, however, inadvertently sent the check to the law firm at which Claimant's attorney previously worked. Regardless of the error, the check was lost in the mail and was not delivered to the prior law firm, the Claimant, or the Claimant's attorney at her new law firm, The Frickey Law Firm.

On October 10, 2019, Respondent filed a Final Admission of Liability that was received by the Division on October 11, 2019. Based on a clerical error, the FAL was dated June 6, 2019. When preparing the FAL, the adjuster revised the prior admission and forgot to update the date of mailing and to also update the new mailing address for Claimant's attorney.

On October 16, 2019, The Division issued an error letter notifying Respondent that the certificate of service on the FAL received on October 11, 2019, was incorrect because it listed the wrong date. The letter also stated the FAL listed the incorrect body code for the impairment. The Division requested these issues be corrected. The letter was also sent to Claimant's attorney at her new address at The Frickey Law Firm. As a result, Claimant's attorney knew that a new admission was filed and that it was most likely consistent with the DIME physician's finding regarding permanent impairment and that additional benefits were payable.

On October 18, 2019, Respondent promptly filed an Amended FAL. A copy of the Amended FAL was sent to Claimant's counsel at her new address, The Frickey Law Firm. Although PPD payments are due 5 days after the date of the admission, there is no indication Claimant's counsel followed up with Respondent on the status of the PPD payments until 2 weeks after the Amended FAL was filed.

On October 31, 2019, approximately two weeks after receiving the letter from the Division, and about a week after receiving the amended FAL, Claimant's counsel emailed Respondent's counsel advising that she had not received the PPD check following the FAL admitting for the 11% impairment rating. The same day, October 31, 2019, Respondent's attorney responded and informed her that the adjuster was out of town and asked if she could wait until the adjuster returned for a response to the status of the PPD check. There was no response from Claimant's counsel.

The adjuster, Ms. M[Redacted] first became aware Claimant had not received the PPD check mailed on October 3, 2019, from defense counsel after she returned from vacation. There is not, however, any indication regarding the extent of communication between the parties about what took place before the adjuster reissued the PPD check on November 11, 2019. The adjuster had coverage while she was on vacation. So someone else could have assisted with the missing PPD check while she was out of the office. That said, Claimant's counsel did not respond to Respondent's attorney. Was the lack of response because the check ultimately showed up and therefore the adjuster did not have to reissue the PPD check? Or, did Claimant and her attorney want to wait for the adjuster to return and see if the check would show up within the next week? In any event, the adjuster reissued the PPD check on November 11, 2019, and it was received by Claimant's counsel on November 15, 2019.

General Penalties Provision and Standard

Section 8-43-304(1) allows an ALJ to impose penalties of up to \$ 1,000 per day against any party "who violates any provision of articles 40 to 47 of [Title 8], or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or panel, for which no penalty has been specifically provided, or fails, neglects, or refuses to obey any lawful order made by the director or panel or any judgment or decree made by any court." The failure to comply with a procedural rule has been found to be a failure to obey an "order" and failure to perform a "duty lawfully enjoined" within the meaning of § 8-43-304(1); *Pioneers Hospital v. ICAO*, 114 P.3d 97,98 (Colo. App. 2005).

Penalties are not assessed on a strict liability standard.

Claimant contends that the imposition of penalties is mandatory if an indemnity payment is late. But penalties under § 8-43-304(1) are not imposed on a strict liability standard. See *Cruz v. Sacramento Drilling, Inc.*, W.C. No. 4-999-129-04, (July 28, 2017).

Once a claim for penalties is properly plead, the imposition of penalties under § 8-43-304(1) is a two-step process. The ALJ must first determine whether the disputed conduct violated the Workers' Compensation Act, of a duty lawfully enjoined, or of an order. If the ALJ finds such a violation, he may impose penalties if he also finds that the

actions were objectively unreasonable. *City Market v. ICAO*, 68 P.3d 601 (Colo. App. 2003).

Claimant must prove by clear and convincing evidence Respondent knew or reasonably should have known they were in violation of the Act or Rule.

Moreover, once a party applies for a hearing for a penalty under subsection § 8-43-304(1), with the requisite specificity of the violations asserted, the alleged violator shall have twenty days to cure the violation. If the violator cures the violation within such twenty-day period, and the party seeking a penalty fails to prove by clear and convincing evidence that the alleged violator knew or reasonably should have known such person was in violation, no penalty shall be assessed. See § 8-43-304(4), C.R.S.

As found, when Claimant filed her application for hearing on November 14, 2019 and asserted a penalty for the late payment of permanent partial disability benefits, the reissued check for her additional PPD benefits had been issued to Claimant on that same day and received by her attorney the next day. As a result, Respondent cured the violation. Thus, Claimant had to establish by clear and convincing evidence that Respondent knew or reasonably should have known they were in violation of the act or rule.

As found, the adjuster credibly testified that she inadvertently mailed Claimant's check for PPD benefits on October 3, 2019 to the wrong address. For some unknown reason, the check was lost and was not received by anyone. Moreover, even though the check was mailed to the wrong address, which was Claimant's attorney's prior law firm, there is no finding that using the wrong address caused Claimant to not get her PPD check on time. In other words, it was not established that the address on the check had anything to do with the first check that was issued getting lost in the mail.

As found, misaddressing the initial check was a clerical error because the new address of Claimant's attorney was not used. However, the ALJ finds and concludes that based on the totality of the circumstances the overall conduct of the adjuster in issuing the first check and then the second check was not unreasonable. Furthermore, as found, the clerical error was not shown to have delayed Claimant's receipt of the first check because the first check was lost in the mail.

Thus, the ALJ finds and concludes Claimant failed to meet her burden of proof to establish by clear and convincing evidence that the adjuster acted unreasonably in the payment of Claimant's PPD benefits and that the unreasonable conduct was the cause of the delay in Claimant receiving her PPD benefits and that penalties should be awarded.

VI. Whether Respondent violated ALJ Jones' Order and are subject to penalties under 8-43-304(1).

Claimant sought an order from ALJ Jones on the sole issue as to whether Dr. Gellrick is an authorized medical provider. ALJ Jones issued her Summary Order on May 30, 2019 and her full order — Findings of Fact, Conclusions of Law, and Order, on August 21, 2019. As found in each order, ALJ Jones concluded Dr. Gellrick is Claimant's authorized provider for her work injury.

Respondent filed a petition to review ALJ Jones' August 21, 2019 order. Claimant then filed a motion to strike Respondent's petition to review. Claimant asserted Judge Jones' order, which granted Claimant the right to select Dr. Gellrick as an authorized treating physician and found Dr. Gellrick was authorized was interlocutory and not subject to review.

Then, ALJ Turnbow issued an order on October 4, 2019, granting Claimant's motion and striking Respondent's petition to review.

An ALJ's order which is on appeal is interlocutory. Moreover, most interlocutory orders are not "lawful orders," for purposes of imposing penalties. This is true because a petition to review serves to stay the obligation to pay an award and an interlocutory order does not require a party to pay a benefit. See *Mosley v. Asphalt Paving, Co.*, W.C. No. 4-439-762 (March 26, 2003); *Citing Industrial Commission, v. Spoo*, 150 Colo. 581, 380 P.2d 49 (1963); *Industrial Commission v. Continental Investment Co.*, 85 Colo. 475, 277 P. 303 (1929) (penalties may not be imposed for the failure to pay during a good faith appeal from order); *Selcer v. Total Plumbing, Inc.*, W.C. No. 4-374-217 (August 11, 2000).

ALJ Jones' order merely found Dr. Gellrick authorized. The order did not direct Respondent to pay for any treatment. And Respondent attempted to appeal Judge Jones' order, but Claimant successfully struck Respondent's petition to review by asserting that the order merely found Dr. Gellrick authorized and was interlocutory because it did not order Respondent to pay anything. As a result, under Claimant's own argument, Respondent was not ordered to pay for any medical treatment. As a result, and under these circumstances, Respondent cannot be subject to penalties for failure to comply with an order that did not direct them to pay anything.

As a result, the ALJ finds and concludes Claimant failed to establish Respondent violated ALJ Jones' order and should be subjected to penalties.

VII. Whether Respondent's failure to comply with W.C.R.P. 8-2(A), subjects them to penalties under Section 8-43-304(1).

On January 30, 2018, after Claimant reported her work injury to Employer, and the Employer provided Claimant a list of 4 designated providers. The Employer, however, on January 30, 2018, directed Claimant to seek treatment from one specific provider on the list, which was Concentra. Claimant contends that this conduct, subjects Respondent-Employer to penalties under section 8-43-304.

The Employer, however, has raised several defenses. The first defense raised by Employer is that Claimant's claim for penalties under section 8-43-304(1) for the violation of W.C.R.P 8-2(A) is barred by the statute of limitations.

Section 8-43-304(5) provides that a "request for penalties shall be filed with the director or administrative law judge within one year after the date that the requesting party first knew or reasonably should have known the facts giving rise to a possible penalty." Section 8-43-305, C.R.S., provides that each day an insurer "fails to comply with any lawful order" of the director constitutes a "separate and distinct violation thereof." Section

8-43-305 further provides that in an action to enforce a penalty “such violation shall be considered cumulative and may be joined in such action.”

In *Spracklin v. Industrial Claim Appeals Office*, 66 P.3d 176 (Colo. App. 2002), the claimant observed that § 8-43-305 provides that each day an insurer disobeys an order constitutes a “separate violation” of the order. As a result, the claimant reasoned that failure to file an application seeking a penalty within one year of first learning the facts giving rise to the penalty was not fatal to the entire penalty claim. Rather, the claimant reasoned that § 8-43-304(5) acts as a “cap” on the amount of recovery and bars only those penalty claims based on violations that occurred more than one year before the application for hearing was filed.

But the *Spracklin* court rejected the claimant’s analysis of these statutes. The court reasoned that § 8-43-304(5) is a statute of limitations designed to “ensure prompt litigation of penalty claims once the underlying violation is first discovered.” Thus, the statute plainly “requires a request for penalties to be filed within one year after the requesting party first became aware of the circumstances that constitute a violation and support the imposition of a penalty, even if that violation was ongoing.”

As found, the conduct for which Claimant bases her penalty under W.C.R.P. 8-2(A) occurred on January 30, 2018, when the Employer directed the Claimant to seek treatment at Concentra. As found, Claimant was aware of this conduct because based on the directive by her Employer to treat at Concentra, Claimant started treating at Concentra on January 31, 2018. Claimant, however, did not file an application for hearing on the penalties issue for such conduct until November 14, 2019, which is more than one year after the conduct that forms the basis of Claimant’s penalty claim.

As a result, because Claimant did not file an Application for Hearing and seek penalties based on Respondent’s violation of 8-2(A) until November 14, 2019, Claimant’s claim for penalties under section 8-43-304(1) is barred by the statute of limitations.

ORDER

Based on these findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant is not at MMI.
2. Respondent failed to establish ALJ Jones’ prior order finding Dr. Gellrick to be an authorized treating physician should be reversed.
3. The right to select a treating physician passed to Claimant. Claimant exercised her right and selected Dr. Gellrick on December 17, 2018.
4. Dr. Gellrick became an authorized treating physician for Claimant on December 17, 2018.
5. Respondent shall pay for the treatment provided to Claimant by Dr. Gellrick as of December 17, 2018.

6. Respondent shall pay for Claimant to undergo the treatment recommended by her authorized treating physician, Dr. Gellrick. This treatment includes a:
 - a. right shoulder MRI with contrast,
 - b. cervical spine MRI,
 - c. psychological evaluation with Dr. Torres, and a
 - d. referral to a physiatrist for a second opinion, as discussed by Dr. Gellrick and recommended by Concentra, but never completed.
7. Claimant's claim for penalties relating to the payment of PPD benefits is denied and dismissed.
8. Claimant's claim for penalties relating to her contention Respondent violated Judge Jones' order is denied and dismissed.
9. Claimant's claim for penalties under W.C.R.P. 8-2(A) and Section 8-43-304(1) based on the Employer directing Claimant to treat at Concentra is denied and dismissed.
10. Issues not expressly decided herein are reserved to the parties for future determination.

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

DATED: June 3, 2020

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-100-151-004**

ISSUE

Whether Respondents have produced a preponderance of the evidence to overcome the Division Independent Medical Examination (DIME) opinion of David Orgel, M.D. that Claimant suffered an 11% left upper extremity impairment rating as a result of his August 29, 2017 admitted industrial injury.

FINDINGS OF FACT

1. Claimant worked as a Beef Processor for Employer. His responsibilities included cutting the ribs of beef carcasses and moving the carcasses into the cold area of the cooler. On August 29, 2017 Claimant was working in the cooler when an approximately 400-pound beef carcass that had been suspended on a chain fell on him. Claimant reported the carcass hit the top of his left shoulder. He fell to the ground and lost consciousness.

2. Employer's on-site Medical Director Carlos Cebrian, M.D. evaluated Claimant shortly after the accident. Claimant reported numbness in his left arm and leg. He also noted left-sided head and left hip pain. Upon physical examination, Dr. Cebrian documented Claimant had tenderness on the left side of his head and neck, as well as decreased sensation in the left arm and left leg. Dr. Cebrian placed Claimant in a hard collar and requested an ambulance.

3. Claimant was transported by ambulance to Colorado Plains Medical Center. X-rays and CT scans of Claimant's head, neck, cervical spine, chest, back, abdomen, pelvis, hips, left humerus and left forearm revealed no fractures and were otherwise normal.

4. On September 6, 2017 Claimant returned to visit Authorized Treating Physician (ATP) Dr. Cebrian. Claimant reported he was feeling better. He noted pain in his left shoulder, left arm, left hip, left leg and right elbow. Claimant also reported numbness in his left hand and into his left foot. Upon physical examination, He demonstrated full range of motion of the cervical spine, bilateral shoulders, lumbar spine, knees and ankles. Claimant mentioned subjective decreased sensation of the left arm and left leg. Dr. Cebrian noted Claimant would continue to be monitored at the nursing station with daily treatments.

5. On September 26, 2017 Claimant was getting a drink of water at work when he slipped on fat and bones on the floor. He landed on his right lower back and right hand. Claimant had bruising and swelling in those areas. Providers ordered x-rays of the lumbar spine and right hand.

6. On October 4, 2017 Claimant underwent a left shoulder MRI. The MRI revealed minimal infraspinatus tendinopathy and minimal degenerative changes at the left AC joint.

7. Claimant returned to Dr. Cebrian for a follow-up appointment on October 10, 2017. He reported continued subjective pain in the left shoulder, lower back and left hip. Nevertheless, Dr. Cebrian documented Claimant was able to move around easily without any apparent discomfort and had full lumbar range of motion. Specifically, Claimant's left shoulder had 120° of abduction. Dr. Cebrian noted that Claimant's left shoulder MRI revealed no tears, minimal tendinopathy of the infraspinatus and degenerative changes of the acromioclavicular (AC) joint.

8. By October 24, 2017 Claimant reported to Dr. Cebrian that he was feeling significantly better. Dr. Cebrian documented Claimant was able to move around easily without any discomfort and had full range of motion of the cervical spine and left knee. Further, Claimant reported that his shoulder, back and hip were all completely better and the only area where he had some discomfort was in the front of his left knee. Dr. Cebrian held Claimant's physical therapy sessions in abeyance and increased lifting and pushing limitations to 40 pounds based on his improving condition.

9. Claimant visited Dr. Cebrian on November 7, 2017 and reported he was doing well. His only area of concern was a small amount of pain just above his left hip. Claimant was able to return to his regular job. Dr. Cebrian noted Claimant had undergone multiple diagnostics that did not reveal any significant findings. Further, Claimant no longer had any numbness or pain in the shoulder, back, neck or leg. Dr. Cebrian noted Claimant had full range of motion of the left shoulder, left hip, lumbar spine, cervical spine and left leg. He thus placed Claimant at Maximum Medical Improvement (MMI) with no permanent impairment and determined there was no need for maintenance care. Dr. Cebrian released Claimant to full duty employment.

10. On December 19, 2017 Claimant returned to Employer's medical clinic and visited Kathleen D'Angelo, M.D. Claimant reported the development of neck and back pain, along with numbness in his left arm and leg after pushing and pulling at work. Dr. D'Angelo remarked that motion of Claimant's left and right arms did not elicit any complaints of thoracic muscle pain. Furthermore, upon lumbar examination, Dr. D'Angelo noted limited range of motion on testing, but normal motion when Claimant was transitioning between postures. Dr. D'Angelo summarized that Claimant exhibited a number of unusual and inconsistent pain behaviors.

11. On March 19, 2018 Claimant reported he was struck on the right side of his chest by a cow carcass. He remarked that the incident aggravated all of his prior symptoms.

12. On April 23, 2020 Respondents filed an amended Final Admission of Liability (FAL). The FAL recognized Dr. Cebrian's November 7, 2017 MMI determination, a 0% permanent impairment rating and medical benefits totaling \$4,993.55.

13. Claimant visited Dr. D'Angelo on August 1, 2018 regarding his March 19, 2018 injury. Despite having been struck by a carcass on the right side of his chest four months earlier, Claimant noted pain on his left side from "head to toe." Dr. D'Angelo again mentioned a number of unusual and inconsistent pain behaviors with non-physiologic complaints of numbness.

14. Claimant challenged the FAL and sought a Division Independent Medical Examination (DIME). On August 12, 2019 Claimant underwent a DIME with David Orgel, M.D. Dr. Orgel specifically addressed Claimant's August 29, 2017 injuries, but also noted Claimant's March 19, 2018 accident. He specifically evaluated Claimant for left shoulder, lumbar spine, left knee and left hip symptoms. Dr. Orgel noted that Claimant's October 4, 2017 left shoulder MRI revealed minimal left shoulder infraspinatus tendinopathy without tearing and minimal changes of the AC joint. Claimant reported that the symptoms from his first injury were improving until his second injury on March 19, 2018. The second injury aggravated all of Claimant's previous complaints and caused lower back pain, thoracic back pain and anterior right chest pain. Claimant continued to report worsening left shoulder pain with motion. Dr. Orgel diagnosed Claimant with left shoulder impingement. In specifically evaluating Claimant's left shoulder, Dr. Orgel noted range of motion deficits. He concluded that, "based on the MRI of August 4, 2017, there is a range of motion impairment of 11%." There were no other impairments. He thus assigned an 11% upper extremity impairment rating for Claimant's left shoulder. Finally, Dr. Orgel determined that Claimant reached MMI on the date of his second injury or March 19, 2018.

15. On January 25, 2020 Gary Zuehlsdorff, M.D. conducted a records review of Claimant's claim. He detailed that on August 29, 2017 Claimant was working in the cold storage area of Employer's meat packing plant when he was struck from behind and knocked to the ground by an approximately 400 pound carcass of steer. Dr. Cebrian placed Claimant at MMI with no impairment, restrictions or maintenance care on November 7, 2017. Dr. Zuehlsdorff also remarked that Claimant suffered a second injury on March 19, 2018 when he was hit on the right side of his chest by a cow carcass. In reviewing the DIME report, Dr. Zuehlsdorff noted that Claimant exhibited nonphysiologic findings throughout the records. He also remarked that Dr. Orgel determined that Claimant's only objective abnormality was an MRI of the left shoulder. Dr. Zuehlsdorff commented that Claimant's only work-related injury was thus left shoulder impingement. He explained that the October 4, 2017 left shoulder MRI revealed minimal left shoulder infraspinatus tendinopathy and minimal degenerative changes in the left AC joint.

16. Dr. Zuehlsdorff concluded that Claimant suffered "two significant mechanisms of injury," but the first injury was "by far the most consistent with subjective/objective correlates lending itself to a final singular diagnosis of left shoulder syndrome with pathology inclusive of tendinitis per the MRI." He thus agreed with Dr. Orgel's 11% range of motion impairment of the left upper extremity. He also agreed with Dr. Orgel's determination that Claimant reached MMI on the date of the second accident or March 19, 2018.

17. Claimant underwent an independent medical examination with Allison M. Fall, M.D. on January 30, 2020. Claimant recounted that on August 29, 2017 an approximately 400 pound piece of meat fell and struck him on the left side, including the top of his left shoulder, and he fell to the ground. After reviewing Claimant's medical records and performing a physical examination, Dr. Fall concluded that Claimant had "multiple bodily complaints without correlating objective findings." In evaluating the DIME, Dr. Fall concluded that Dr. Orgel erroneously assigned a left shoulder impairment because there was no diagnosis of a left shoulder injury as a result of the August 29, 2017 accident. Dr. Fall specified that merely because Claimant exhibited less than full range of motion on the day of the DIME did not mean that the deficits were the result of the work injury. Moreover, Dr. Orgel did not account for Claimant's report of the resolution of symptoms by November 7, 2017. Notably, Claimant had no left shoulder complaints and had been released back to regular-duty work. Finally, the left shoulder MRI was unremarkable without any evidence of internal derangement as a result of the work accident. Instead, Claimant only had subjective complaints. Therefore, relying on the *AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised) (AMA Guides)*, Dr. Fall determined "there is no impairment rating for pain complaints without correlating objective findings."

18. On January 31, 2020 Dr. Zuehlsdorff issued an Addendum to his report after reviewing medical records. He noted that it was interesting Claimant had been placed at MMI for his first injury based on marked improvement, feeling fine and that he sought to be discharged. Based on the implication from the final note from the first injury, Dr. Zuehlsdorff found Claimant was close to being asymptomatic and had a negative examination

19. On April 2, 2020 Dr. Fall issued an Addendum to her independent medical examination. After reviewing Dr. Zuehlsdorff's Report and Addendum, she did not change her medical opinion.

20. On April 2, 2020 the parties conducted the pre-hearing evidentiary deposition of Dr. Cebrian. Dr. Cebrian testified Claimant experienced a resolution of his complaints as of October 24, 2017. Reviewing the course of Claimant's treatment over multiple examinations, Dr. Cebrian explained that he believed Claimant had a contusion to the shoulder girdle that caused his complaints. However, a contusion cannot be rated for permanent impairment unless it produces some other condition. In reviewing the chronic findings revealed by the MRI, and comparing them to his examination findings, Dr. Cebrian determined tendinopathy constituted an unrelated, incidental finding. He noted that tendinopathy is a chronic condition. Moreover, Dr. Cebrian remarked the MRI did not reveal objective evidence of any substantial and permanent aggravation, acceleration, or exacerbation of Claimant's pre-existing conditions caused by the August 29, 2017 work injury. Finally, he commented that the mechanism of the second injury resulting in subsequent complaints of an aggravation of pain on the left side did not make medical sense.

21. In considering Dr. Orgel's DIME, Dr. Cebrian explained that range of motion deficits demonstrate limitations on a specific date. However, based on the *AMA Guides*, when an examiner is performing an impairment rating and their findings are not in substantial accord with the medical records, they must provide an explanation. Reviewing the entire medical record prior to the DIME, there were multiple evaluations by Dr. Cebrian that demonstrated normal range of motion, with a few visits where it was abnormal, but then it returned to normal. After several more visits with normal range of motion, Dr. Cebrian released Claimant from care. Notably, even when Dr. Cebrian saw Claimant for the March 19, 2018 injury, he had normal shoulder range of motion and did not have left shoulder complaints. Dr. Cebrian thus concluded that Claimant had no permanent impairment as a result of his work accidents.

22. Respondents filed an Amended FAL on April 23, 2019. The FAL acknowledged that Claimant reached MMI on November 7, 2017, had a 0% permanent impairment rating and received medical benefits to date totaling \$4,993.55.

23. On May 14, 2020 the parties conducted the post-hearing evidentiary deposition of Dr. Fall. Dr. Fall maintained that Dr. Orgel erroneously assigned a left shoulder impairment because there was no diagnosis of a left shoulder injury as a result of the August 29, 2017 injury. Specifically, Claimant's left shoulder MRI was unremarkable without any evidence of internal derangement. The MRI revealed tendinopathy or chronic degeneration of the tendon. The imaging did not reveal any inflammation or tearing. Furthermore, the MRI reflected only mild degenerative changes at the left AC joint. In performing a physical examination of the left shoulder, Dr. Fall noted that Claimant had unrestricted range of motion with diffuse pain complaints. Moreover, there were no signs of left shoulder impingement or internal derangement.

24. Dr. Fall explained that Dr. Orgel erroneously assigned an 11% permanent impairment rating for Claimant's left shoulder. She specified that Claimant did not suffer a left shoulder injury as a result of the August 29, 2017 work accident. Dr. Fall noted that Dr. Orgel failed to consider Claimant's reported resolution of symptoms on November 7, 2017. Moreover, there were no objective findings that would cause decreased left shoulder range of motion. Dr. Fall emphasized that Dr. Orgel erroneously assigned a left shoulder impairment rating in violation of the *AMA Guides* based only on range of motion deficits without any objective correlation.

25. Because Respondents are challenging DIME Dr. Orgel's upper extremity impairment rating, a preponderance of the evidence is the appropriate burden of proof. Respondents have produced a preponderance of the evidence to overcome Dr. Orgel's opinion that Claimant suffered an 11% left upper extremity impairment rating as a result of his August 29, 2017 admitted industrial injury. Initially, Claimant recounted that on August 29, 2017 an approximately 400 pound piece of meat fell and struck him on the left side, including the top of his left shoulder, and he fell to the ground. On October 4, 2017 Claimant underwent a left shoulder MRI. The MRI revealed minimal infraspinatus tendinopathy and minimal degenerative changes at the left AC joint. By November 7, 2017 Claimant reported to ATP Dr. Cebrian that he was doing well and only concerned

with a small amount of pain just above his left hip. Dr. Cebrian noted Claimant had undergone multiple diagnostics that did not reveal any significant findings. He remarked that Claimant had full range of motion of the left shoulder, left hip, lumbar spine, cervical spine and left leg. Dr. Cebrian thus placed Claimant at MMI with no permanent impairment and determined there was no need for maintenance care. He released Claimant to full duty employment.

26. After Respondents filed a FAL, Claimant underwent a DIME with Dr. Orgel. Dr. Orgel noted that Claimant's October 4, 2017 left shoulder MRI revealed minimal left shoulder infraspinatus tendinopathy without tearing and minimal changes of the AC joint. He diagnosed Claimant with left shoulder impingement. In specifically evaluating Claimant's left shoulder, Dr. Orgel noted range of motion deficits. He concluded that, "based on the MRI of August 4, 2017, there is a range of motion impairment of 11%." He thus assigned an 11% upper extremity impairment rating for Claimant's left shoulder. Finally, Dr. Orgel determined that Claimant reached MMI on the date of his second injury or March 19, 2018. After conducting a records review, Dr. Zuehlsdorff agreed with Dr. Orgel and commented that Claimant's only work-related injury was left shoulder impingement. He explained that the October 4, 2017 left shoulder MRI revealed minimal left shoulder infraspinatus tendinopathy and minimal degenerative changes in the left AC joint. Dr. Zuehlsdorff diagnosed Claimant with "left shoulder syndrome with pathology inclusive of tendinitis per the MRI." He thus agreed with Dr. Orgel's 11% left upper extremity permanent impairment rating based on range of motion deficits.

27. Despite Dr. Orgel's DIME opinion and Dr. Zuehlsdorff's supporting conclusions, Respondents have produced a preponderance of the evidence that Dr. Orgel erroneously assigned Claimant an 11% left upper extremity impairment rating. ATP Dr. Cebrian persuasively explained that Claimant's left shoulder condition did not warrant a permanent impairment rating. In reviewing the chronic findings revealed by the MRI and comparing them to his examination findings, Dr. Cebrian determined tendinopathy constituted an unrelated, incidental finding. Moreover, Dr. Cebrian remarked the left shoulder MRI did not reveal objective evidence of any substantial and permanent aggravation, acceleration, or exacerbation of the pre-existing conditions caused by the August 29, 2017 work injury. Dr. Cebrian explained that Dr. Orgel's range of motion deficits demonstrated limitations on a specific date. However, based on the *AMA Guides*, when an examiner is performing an impairment rating and their findings are not in substantial accord with the medical records, they must provide an explanation. Reviewing the entire medical record prior to the DIME, there were multiple evaluations that demonstrated normal range of motion, with a few visits where it was abnormal, but then returned to normal. After several more visits with normal range of motion, Dr. Cebrian released Claimant from care. Dr. Cebrian thus concluded that Claimant had no permanent impairment as a result of his work injury.

28. Similarly, Dr. Fall persuasively explained that Claimant did not suffer a permanent left shoulder impairment as a result of his August 29, 2017 work injury. She reasoned that there was no diagnosis of a left shoulder injury. Dr. Fall specified that merely because Claimant exhibited less than full range of motion on the day of the DIME

did not mean that the deficits were the result of the work injury. Moreover, Dr. Orgel did not account for Claimant's report of the resolution of symptoms by November 7, 2017. Finally, the left shoulder MRI was unremarkable without any evidence of internal derangement of the shoulder as a result of the work injury. The MRI specifically exhibited tendinopathy or chronic degeneration of the tendon. The imaging did not reveal any inflammation or tearing. Furthermore, the MRI reflected only mild degenerative changes at the left AC joint. Instead, Claimant only had subjective complaints. Therefore, relying on the *AMA Guides*, Dr. Fall determined "there is no impairment rating for pain complaints without correlating objective findings."

29. Respondents have demonstrated that it is more probably true than not that Dr. Orgel erroneously assigned Claimant an 11% left upper extremity impairment rating. The medical records and persuasive opinions of Drs. Cebrian and Fall reflect that Claimant did not suffer left shoulder range of motion deficits based on any objective pathology as a result of his August 29, 2017 work injury. Dr. Orgel failed to correlate a specific diagnosis regarding Claimant's left shoulder with objective signs or analysis. Based on the lack of a permanent impairment attributable to Claimant's work accident, Claimant does not warrant a left shoulder rating. Accordingly, based on the persuasive opinions of Drs. Cebrian and Fall Claimant suffered a 0% permanent impairment as a result of his August 29, 2017 admitted industrial injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. See *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *CJI*, Civil 3:16 (2007).

4. In ascertaining a DIME physician's opinion, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office*, 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician's determination regarding MMI and permanent impairment consists of his initial report and any subsequent opinions. *In Re Dazzio*, W.C. No. 4-660-149 (ICAO, June 30, 2008); see *Andrade v. Industrial Claim Appeals Office*, 121 P.3d 328 (Colo. App. 2005).

5. A DIME physician's opinions concerning MMI and impairment carry presumptive weight pursuant to §8-42-107(8)(b)(III), C.R.S.; see *Yeutter v. Industrial Claim Appeals Office*, No. 18CA0498 (Apr. 11, 2019) 2019 COA 53. The statute provides that "[t]he finding regarding [MMI] and permanent medical impairment of an independent medical examiner in a dispute arising under subparagraph (II) of this paragraph (b) may be overcome only by clear and convincing evidence." *Id.* Subparagraph (II) is limited to parties' disputes over "a determination by an authorized treating physician on the question of whether the injured worker has or has not reached [MMI]." §8-42-107(8)(b)(II). "Nowhere in the statute is a DIME's opinion as to the cause of a claimant's injury similarly imbued with presumptive weight." See *Yeutter*, 2019 COA 53 ¶ 18. Accordingly, a DIME physician's opinion carries presumptive weight only with respect to MMI and impairment. *Id.* at ¶ 21.

6. "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc.*, W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.*, W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); see *Shultz v. Anheuser Busch, Inc.*, W.C. No. 4-380-560 (ICAO, Nov. 17, 2000).

7. A DIME physician is required to rate a claimant's impairment in accordance with the *AMA Guides*. §8-42-107(8)(c), C.R.S.; *Wilson v. Industrial Claim Appeals Office*, 81 P.3d 1117, 1118 (Colo. App. 2003). However, deviations from the *AMA Guides* do not mandate that the DIME physician's impairment rating was incorrect. *In Re Gurrola*, W.C. No. 4-631-447 (ICAO, Nov. 13, 2006). Instead, the ALJ may consider a technical deviation from the *AMA Guides* in determining the weight to be accorded the DIME physician's findings. *Id.* Whether the DIME physician properly applied the *AMA Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In Re Goffinett*, W.C. No. 4-677-750 (ICAO, Apr. 16, 2008).

8. If a party has carried the initial burden of overcoming the DIME physician's impairment rating by clear and convincing evidence, the ALJ's determination of the correct rating is then a matter of fact based upon the lesser burden of a preponderance of the evidence. See *Deleon v. Whole Foods Market, Inc.*, W.C. No. 4-600-47 (ICAO, Nov. 16, 2006). The ALJ is not required to dissect the overall impairment rating into its numerous component parts and determine whether each part has been overcome by

clear and convincing evidence. *Id.* When the ALJ determines that the DIME physician's rating has been overcome, the ALJ may independently determine the correct rating. *Lungu v. North Residence Inn*, W.C. No. 4-561-848 (ICAO, Mar. 19, 2004); *McNulty v. Eastman Kodak Co.*, W.C. No. 4-432-104 (ICAO, Sept. 16, 2002).

9. The increased burden of proof required by the DIME procedures is not applicable to scheduled injuries. Section 8-42-107(8)(a), C.R.S. states that "when an injury results in permanent medical impairment not set forth in the schedule in subsection (2) of this section, the employee shall be limited to medical impairment benefits calculated as provided in this subsection (8)." Therefore, the procedures set forth in §8-42-107(8)(c), C.R.S., which provide that the DIME findings must be overcome by clear and convincing evidence, are applicable only to non-scheduled injuries. The court of appeals has explained that scheduled and non-scheduled impairments are treated differently under the Act for purposes of determining permanent disability benefits. Specifically, the procedures of § 8-42-107(8)(c), C.R.S. only apply to non-scheduled impairments. *Delaney v. Industrial Claim Appeals Office*, 30 P.3d 691, 693 (Colo. App. 2000); *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998); *Gagnon v. Westward Dough Operating CO. D/B/A Krispy Kreme* W.C. No. 4-971-646-03 (ICAO, Feb. 6, 2018). The determination of the impairment rating by the DIME physician regarding a scheduled impairment is thus not entitled to presumptive effect, including any prerequisite findings of relatedness. *Morris v. Olsen Heating & Plumbing Co.*, No. 4-980-171-002 (ICAO, July 6, 2018). Accordingly, Respondents' have the burden of overcoming a DIME's extremity impairment rating by a preponderance of the evidence. *Burciaga v. AMB Janitorial Services, Inc. and Indemnity Care ESIS Inc.*, W.C. No. 4-777-882 (ICAO, Nov. 5, 2010); *Maestas v. American Furniture Warehouse and G.E. Young and Company*, W.C. No. 4-662-369 (ICAO, June 5, 2007).

10. The Division of Workers' Compensation Desk Aid #11 for *Impairment Rating Tips* provides in pertinent part that, "[i]mpairment ratings are given when a specific diagnosis and objective pathology is identified. (Reference: C.R.S. §8-42-107(8)(c))." Desk Aid #11 notes that impairment ratings are given when a specific diagnosis and "objective pathology" are identified. The definition of "objective pathology" mentioned in Desk Aid #11 refers "to the identification of a problem, injury, disorder, condition, or disease that can be identified by virtue of objective signs or analysis." *Bryant v. Transit Mix Concrete*, W.C. No. 5-058-044-001 (ICAO, June 5, 2019).

11. As found, because Respondents are challenging DIME Dr. Orgel's upper extremity impairment rating, a preponderance of the evidence is the appropriate burden of proof. Respondents have produced a preponderance of the evidence to overcome Dr. Orgel's opinion that Claimant suffered an 11% left upper extremity impairment rating as a result of his August 29, 2017 admitted industrial injury. Initially, Claimant recounted that on August 29, 2017 an approximately 400 pound piece of meat fell and struck him on the left side, including the top of his left shoulder, and he fell to the ground. On October 4, 2017 Claimant underwent a left shoulder MRI. The MRI revealed minimal infraspinatus tendinopathy and minimal degenerative changes at the left AC joint. By November 7, 2017 Claimant reported to ATP Dr. Cebrian that he was doing well and only concerned with a small amount of pain just above his left hip. Dr. Cebrian noted Claimant had

undergone multiple diagnostics that did not reveal any significant findings. He remarked that Claimant had full range of motion of the left shoulder, left hip, lumbar spine, cervical spine and left leg. Dr. Cebrian thus placed Claimant at MMI with no permanent impairment and determined there was no need for maintenance care. He released Claimant to full duty employment.

12. As found, after Respondents filed a FAL, Claimant underwent a DIME with Dr. Orgel. Dr. Orgel noted that Claimant's October 4, 2017 left shoulder MRI revealed minimal left shoulder infraspinatus tendinopathy without tearing and minimal changes of the AC joint. He diagnosed Claimant with left shoulder impingement. In specifically evaluating Claimant's left shoulder, Dr. Orgel noted range of motion deficits. He concluded that, "based on the MRI of August 4, 2017, there is a range of motion impairment of 11%." He thus assigned an 11% upper extremity impairment rating for Claimant's left shoulder. Finally, Dr. Orgel determined that Claimant reached MMI on the date of his second injury or March 19, 2018. After conducting a records review, Dr. Zuehlsdorff agreed with Dr. Orgel and commented that Claimant's only work-related injury was left shoulder impingement. He explained that the October 4, 2017 left shoulder MRI revealed minimal left shoulder infraspinatus tendinopathy and minimal degenerative changes in the left AC joint. Dr. Zuehlsdorff diagnosed Claimant with "left shoulder syndrome with pathology inclusive of tendinitis per the MRI." He thus agreed with Dr. Orgel's 11% left upper extremity permanent impairment rating based on range of motion deficits.

13. As found, despite Dr. Orgel's DIME opinion and Dr. Zuehlsdorff's supporting conclusions, Respondents have produced a preponderance of the evidence that Dr. Orgel erroneously assigned Claimant an 11% left upper extremity impairment rating. ATP Dr. Cebrian persuasively explained that Claimant's left shoulder condition did not warrant a permanent impairment rating. In reviewing the chronic findings revealed by the MRI and comparing them to his examination findings, Dr. Cebrian determined tendinopathy constituted an unrelated, incidental finding. Moreover, Dr. Cebrian remarked the left shoulder MRI did not reveal objective evidence of any substantial and permanent aggravation, acceleration, or exacerbation of the pre-existing conditions caused by the August 29, 2017 work injury. Dr. Cebrian explained that Dr. Orgel's range of motion deficits demonstrated limitations on a specific date. However, based on the *AMA Guides*, when an examiner is performing an impairment rating and their findings are not in substantial accord with the medical records, they must provide an explanation. Reviewing the entire medical record prior to the DIME, there were multiple evaluations that demonstrated normal range of motion, with a few visits where it was abnormal, but then returned to normal. After several more visits with normal range of motion, Dr. Cebrian released Claimant from care. Dr. Cebrian thus concluded that Claimant had no permanent impairment as a result of his work injury.

14. As found, similarly, Dr. Fall persuasively explained that Claimant did not suffer a permanent left shoulder impairment as a result of his August 29, 2017 work injury. She reasoned that there was no diagnosis of a left shoulder injury. Dr. Fall specified that merely because Claimant exhibited less than full range of motion on the day of the DIME did not mean that the deficits were the result of the work injury. Moreover, Dr. Orgel did

not account for Claimant's report of the resolution of symptoms by November 7, 2017. Finally, the left shoulder MRI was unremarkable without any evidence of internal derangement of the shoulder as a result of the work injury. The MRI specifically exhibited tendinopathy or chronic degeneration of the tendon. The imaging did not reveal any inflammation or tearing. Furthermore, the MRI reflected only mild degenerative changes at the left AC joint. Instead, Claimant only had subjective complaints. Therefore, relying on the *AMA Guides*, Dr. Fall determined "there is no impairment rating for pain complaints without correlating objective findings."

15. As found, Respondents have demonstrated by a preponderance of the evidence that Dr. Orgel erroneously assigned Claimant an 11% left upper extremity impairment rating. The medical records and persuasive opinions of Drs. Cebrian and Fall reflect that Claimant did not suffer left shoulder range of motion deficits based on any objective pathology as a result of his August 29, 2017 work injury. Dr. Orgel failed to correlate a specific diagnosis regarding Claimant's left shoulder with objective signs or analysis. Based on the lack of a permanent impairment attributable to Claimant's work accident, Claimant does not warrant a left shoulder rating. Accordingly, based on the persuasive opinions of Drs. Cebrian and Fall Claimant suffered a 0% permanent impairment as a result of his August 29, 2017 admitted industrial injury.

ORDER

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

1. Respondents have overcome Dr. Orgel's DIME opinion regarding Claimant's upper extremity impairment rating. Claimant suffered a 0% left upper extremity impairment rating as a result of his August 29, 2017 admitted work injury.

2. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at <http://www.colorado.gov/dpa/oac/forms-WC.htm>.*

DATED: June 10, 2020.

DIGITAL SIGNATURE:

A rectangular box containing a handwritten signature in black ink that reads "Peter J. Cannici".

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- I. Whether Respondents overcame Dr. Pham's DIME opinion by clear and convincing evidence that Claimant's bladder condition is related and subject to a rating.
- II. Whether Claimant established by a preponderance of the evidence that she is permanently and totally disabled.
- III. Whether Claimant established that she is entitled to maintenance medical treatment.
- IV. Whether Claimant established by a preponderance of the evidence that her bladder condition is causally related to her industrial injury.
- V. Whether the medical treatment set forth in Exhibit 16, is reasonable, necessary, and related to Claimant's work injury.
- VI. Whether Claimant is entitled to reimbursement for past expenditures for medical services and supplies.
- VII. What is the appropriate disfigurement award for Claimant due to her industrial injury?
- VIII. Whether Respondent is barred by the doctrine of res judicata and collateral estoppel, from arguing that ALJ Kimberly Turnbow's previous findings regarding Claimant's urinary incontinence condition and need for a second lumbar surgery are not dispositive in the context of a challenge of Dr. Khoi Pham's Division IME opinion that Claimant is entitled to a permanent impairment rating for her incontinence condition.

PROCEDURAL HISTORY

This case was admitted by Respondents, and temporary total and temporary partial disability benefits, as well as medical benefits, have been paid.

After conservative medical care unsuccessfully curtailed Claimant's pain and urinary incontinence, Claimant proceeded to a hearing with ALJ Kimberly B. Turnbow on March 14, 2017 to request an order for lumbar surgery to be performed by Dr. Scott Falci.

By order dated June 26, 2017 (Exhibit 24), Judge Turnbow found and concluded as follows:

- The ALJ finds and concludes that Claimant has met her burden to prove, by a preponderance of the evidence, that Dr. Falci's recommended operative procedure involving a section of her filium

(untethering procedure) is reasonably necessary and relates to the admitted industrial accident. (Conclusions of Law, Turnbow Order, p. 7).

- Both neurosurgeons, Drs. Falci and Shogan, agree that Claimant's urinary incontinence and left leg weakness are caused by her fall at work. Therefore, relatedness of these conditions has been established by preponderance of the evidence. (Conclusions of Law, Turnbow Order, p. 7).
- The ALJ finds credible and persuasive Dr. Falci's theory that a stretched spinal cord suffered in her fall at work in conjunction with Claimant's low-lying conus explains why Claimant suffers from urinary incontinence and left leg weakness. (Conclusions of Law, Turnbow Order, p. 8).
- The ALJ is concerned about the possibility of continuing progressive worsening of the urinary incontinence and left leg weakness conditions, and possible right leg weakness and even bowel incontinence as described by Dr. Falci. This ALJ finds and concludes that all reasonable conservative treatment and diagnostics have been exhausted, and ... that Claimant's conditions are significant and require urgent care. The ALJ notes that Claimant's description of her urinary incontinence was credible and compelling. (Conclusions of Law, Turnbow Order, p. 8).
- Respondents shall pay for a repeat neurosurgical consultation with Dr. Falci and, if he offers a spinal untethering surgery, Respondents shall pay for all reasonable and related pre-operative, operative, and post-operative expenses, according to the Colorado Fee Schedule, that are related to such surgery. (Order, Turnbow Order, p. 9).

After Claimant underwent a surgery as performed by Dr. Falci, and reached MMI as determined by a one-time evaluator, Dr. Brian Harrington, she underwent a Division-sponsored IME by Dr. Khoi Pham on December 14, 2018.

Respondents filed an application for hearing to challenge the DIME with respect to Dr. Pham's impairment rating regarding Claimant's bladder dysfunction. Claimant responded with a claim for permanent total disability, for maintenance care and for reimbursement for past medical expenditures.

FINDINGS OF FACT

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

1. Claimant was born on April 4, 1965 and was 55 years old at time of the second hearing.
2. Before her injury here, Claimant suffered an injury to her right knee. Claimant ultimately underwent a total knee replacement in July 2014. But by December 2014, Claimant had made a full recovery. On December 2, 2014, her knee surgeon noted that Claimant “had made excellent progress” and released her to “full duty.” (*Exhibit M, p. 609*). The next day, December 3, 2014, Claimant saw Dr. Paulson. At this visit, Dr. Paulsen noted Claimant’s weight to be 238 pounds. (*Exhibit Q, p. 789*).
3. Claimant was injured on July 23, 2015 in the course and scope of her employment as assistant produce manager for Respondent-Employer. On that date, Claimant was pulling a pallet of heavy bags of potatoes. Suddenly the pallet of potatoes began to move extremely fast. As Claimant tried to slow the moving pallet, she turned to face the pallet and was thrown into some double doors. The pallet wheel caught her left shoe, forcing her to fall backwards to the concrete floor on her back and left hip. Because of the industrial accident, Claimant suffered an injury to her low back and a contusion to her sacral nerve.
4. On July 24, 2015, the day after her work accident, Claimant went to the emergency room because of her work injury. At that visit, Claimant’s weight was noted to be 100 kilograms, i.e., 220 pounds. (*Exhibit K, p.62*). Based solely on the December 3, 2014 record of Dr. Paulson and the July 24, 2015 report from the emergency room, Claimant lost 18 pounds once she recovered from her knee injury and was released to full duty.¹
5. Claimant timely reported the back injury, which was admitted by Respondent.
6. Claimant received temporary total disability benefits between August 10, 2015 and January 15, 2016. She returned to work on or about January 16, 2016, at which time she received temporary partial disability benefits which have continued through the date of the second hearing (*Exhibit A, General Admission of Liability dated January 31, 2018*).
7. Claimant is working part-time for Respondent-Employer at a part-time modified position, which includes checking expiration dates for products, changing prices on products as necessary, and returning expired products to a designated location for disposal or redistribution.
8. Claimant received conservative care for her back injury, including physical therapy, three injections, and medications. None of these modalities, however, substantially decreased her low back pain or increased her function.
9. By October 2015, Claimant began to experience the onset of left leg weakness, which would gradually increase with activity. It was also noted that she was experiencing progressive urinary incontinence.

¹ The ALJ acknowledges the record also contains data regarding Claimant’s weight that differs from these figures.

10. Claimant testified at the March 14, 2017 before ALJ Turnbow that she continued to suffer from low back pain and increasing weakness in her left leg despite the conservative care she has had undergone. She testified that she used a cane outside work and relied on carts for balance as much as possible at work. She also testified that her employer would not allow her to use a cane at work. She credibly testified that her left leg weakness was increasing over time. Judge Turnbow found that her testimony was generally “credible and compelling.” (See *Exhibit 24*).
11. On January 3, 2017, Dr. Shogan, who is Board Certified in Neurological Surgery, performed a records review. In his January 2017 report, Dr. Shogan mainly addressed whether the spinal cord untethering surgery proposed by Dr. Falci was reasonable and necessary to treat Claimant’s symptoms from her work injury – which included her urinary incontinence. Dr. Shogan noted in his initial report that Claimant underwent a urologic evaluation that revealed the presence of diminished detrusor function and some stress incontinence. He concluded that those urological findings were most consistent with a possible lower motor neuron abnormality. As a result, he did not think the untethering surgery would relieve Claimant’s symptoms, which included her urinary incontinence. Dr. Shogan did not, however, elaborate on the cause of the lower motor neuron abnormality that he thought was causing Claimant’s incontinence. (*Exhibit X, pp. 272-273*).
12. On February 1, 2017, Dr. Shogan performed an IME and physically examined Claimant. As part of his IME, Dr. Shogan was specifically asked to address whether Claimant’s left leg weakness and incontinence were caused by her accident. Dr. Shogan concluded that:

It is my opinion that Ms. Harper's intermittent left leg weakness and her urinary incontinence are related to her work-related injury of July 23, 2015 (emphasis added). Although her left leg weakness seemed to come on several days after her injury, as did her incontinence, I believe that she may have sustained a musculoskeletal injury, as well as a possible sacral nerve root contusion. I believe that this is responsible for her left leg symptoms and her symptoms of incontinence.
13. In the end, Dr. Shogan clarified that the lower motor neuron abnormality he mentioned in his initial report was most likely caused by a contusion to Claimant’s sacral nerve when she fell at work.
14. Along with Dr. Shogan concluding Claimant’s urinary incontinence was caused when she fell and contused her sacral nerve, the Division Examiner, Khoi Pham, a neurologist, came to the same conclusion. Dr. Pham concluded that the contusion to Claimant’s sacral nerve – which occurred when Claimant fell - was the only known medical cause for Claimant’s urinary incontinence. (*Exhibit AA, pp. 1113-1116*.)
15. After Judge Turnbow’s Order dated June 26, 2017 (*Exhibit 24*), summarized above in “Procedural Background”, Claimant consulted with Dr. Falci, who recommended and then performed a lumbar laminectomy with spinal cord untethering procedure in September 2017. (*Exhibit 12, p. 2*). This surgery was authorized and paid for by Respondent.

16. Although Dr. Paulson was her primary treating physician, he is not Level II Accredited, so Dr. Brian Harrington assessed Claimant's impairment.
17. By report dated August 2, 2018, Dr. Harrington concluded that Claimant was at MMI; that she had a tethered cord syndrome; that she has ongoing oxygen needs that seem to have been highlighted after her surgery; that she has a long smoking history, although there is a report that office spirometry did not show COPD; that severe obstructive sleep apnea was confirmed; that obstructive sleep apnea, combined with here severe obesity (BMI=51), account for her oxygenation problems; that she has treated for depression at one point but that the condition has resolved; that she has a debilitating low back injury and her persistent significant functional impairment; that along with her musculoskeletal problems, this impairment also includes urinary incontinence due to detrusor muscle dysfunction; that her condition is compounded by sero-positive sacroiliitis and severe obesity, but the proximate cause of her impairment was the work related injury. He also noted Claimant's weight was 296 pounds. (*Exhibit 10, pp. 14-15*).
18. As a result of her work injury causing Claimant to be less active, Claimant gained about 76 pounds due to her work injury.
19. In his August 2, 2018 report, Dr. Harrington concluded that, for maintenance care, Claimant will need ongoing medications, including muscle relaxants, NSAIDS, Ibuprofen, nortriptyline and gabapentin. He cautioned her to avoid chronic and daily opioid use. (*Exhibit 10, p. 15*).
20. Dr. Harrington also determined appropriate work restrictions for Claimant. Based on his assessment of Claimant, Dr. Harrington assigned significant work restrictions. The most restrictive aspects were the number of hours she could work each day, the limitation on the number of consecutive workdays she could work, as well as limitations on standing, sitting, and walking. As for permanent work restrictions, Dr. Harrington concluded Claimant should have a 20 pound weight limit lifting, carrying, pulling/pushing; that he would limit her to 4-hour workdays, with only two consecutive work days; that she may walk up to 2 hours, stand up 1 hour and sit up to 2 hours per shift; and that she cannot climb on ladders or stools based on her risk of falling. (*Exhibit 10, p. 15*).
21. As for her permanent impairment, Dr. Harrington assigned a 20% whole person for reduced spinal range of motion and 20% whole person for urinary system impairment because of her bladder disorder. The two ratings combined to a 36% whole person rating. (*Exhibit 10, p. 16*).
22. Respondents filed for a Division-sponsored IME (DIME) after receipt of Dr. Harrington's report.
23. In his report dated December 14, 2018, DIME physician Khoi Pham diagnosed status-post lumbar laminectomies (partial L1 and L3 and total L2, 2 levels) and transection of filium terminale for tethered cord syndrome; agreed with neurosurgeon Dr. Shogan that the mechanism of injury would be contused sacrum (for pain, besides her inflammatory arthropathy) and contused sacral nerve for her incontinence; that she still had the diagnosis of tethered cord syndrome and the procedure which only helped her to be

able to stand up straight; that she was at MMI as of April 18, 2018; and that she had a 38% whole person impairment (13% for specific disorder of the spine, 10% for range of motion and (like Dr. Harrington) 20% for her bladder dysfunction. (*Exhibit 7, p. 4*)).

24. As for the bladder dysfunction, Dr. Pham stated that “I had to rate the bladder dysfunction because other than that the trauma history, I cannot find any other medical cause for this condition.” (*Exhibit 7, p. 4*).
25. As for work restrictions, Dr. Pham opined “Considering all her superimposed medical conditions (spondyloarthropathies, morbid obesity, sleep apnea, s/p right knee replacement and left knee needs to be replaced eventually) she is likely only able for sedentary category work at best.” (*Exhibit 7, p. 4*).
26. For maintenance care, Dr. Pham concluded that Claimant should be allowed to see PA Wetterstein for maintenance care, 3-4 times a year for a couple of years and she be allowed to see “Urology” for another opinion re her incontinence and other therapy recommendations. (*Exhibit 7, p. 5*).
27. Dr. Burris issued three IME reports. Dr. Burris specifically noted in his November 2015, April 2018, and April 2019 IME reports that when he performed Waddell’s testing during each IME for inconsistencies, there were none.
28. In his reports report dated May 10, 2019 and August 6, 2019, Dr. John Burris, Respondents’ independent medical examiner, stated that Claimant reached MMI on April 7, 2018; that she is entitled to a permanent impairment rating of 14% whole person for lumbar dysfunction, but no rating for her urinary incontinence because “it is not clear if this issue is directly related to her work injury”; that she requires maintenance care in the form of follow up visits with PA Wetterstein for medication management and a health club/recreation center for six months; that no permanent work restrictions would be indicated but that participation in a self-directed home exercise program and supervision by PA Wetterstein could allow for staged increases in weight limit and number of hours worked per day. (*Exhibit 12*).
29. In his deposition taken on November 18, 2019, Dr. Burris generally testified consistently with his reports dated May 10, 2018 and August 26, 2019. He also contended that Claimant should be able to work (*p. 11*); that she should be able to manage her urinary incontinence at work with self-catherization and protective garments (*pp. 12, 33-34*); that she should be allowed at least six to eight sessions of directed cognitive behavioral therapy to address her pain issues (*pp.15-16*); that he disagreed with Dr. Paulsen’s recommendations for maintenance treatment (*pp. 16-22*); that the need for oxygen is not work-related since any collapsed lung during surgery would have returned to its normal status (*p. 20*); that Dr. Pham erred by giving a rating for the bladder dysfunction since the condition is not work-related (*pp. 22-23*); that PA Wetterstein and Dr. Paulsen were “coddling” Claimant (*pp. 32-33*); and that Claimant should be placed in the light duty category (*p.33*).
30. Dr. Andrew Castro, another independent medical examiner for Respondent, also prepared two reports dated April 20, 2019 and August 26, 2019. In those two reports, Dr. Castro agreed with Dr. Pham’s impairment rating for the lumbar spine; and that the proper rating should be 22% whole person. (*Exhibit 13, p. 16*).

31. Dr. Castro concluded, however, that Claimant's bladder dysfunction is unrelated to her work accident and should not receive a separate rating; that relating the condition to the injury is "an extremely long reach" because data going into making this diagnosis was progressive weakness, yet multiple providers showed normal neurological function before and after these evaluations, and the normal neurologic function was to sensory, motor, and reflexes; that also EMG studies were negative, and MRIs did not highlight thickening of the filium terminale but instead were relatively normal findings with no stenosis; that surgical intervention for a tethered cord is unrelated to the injury; and that recent evaluations highlighted no substantial alteration in her symptoms or exam findings from the preoperative state. (*Exhibit 13, p. 15*).
32. As for maintenance care, Dr. Castro contended that Claimant should continue home exercises and be allowed a 6-month gym membership; that she not be on narcotic medications; and that urology evaluations and follow-ups are unrelated to the claim. (*Exhibit 13, p. 17*).
33. For restrictions, Dr. Castro contended that Claimant should work 4-5-hour shifts, with two days on and one day off, which would be five shifts per week. (*Exhibit 13, p. 17*).
34. In his deposition, Dr. Castro testified consistently with his two reports. He also testified that he is an orthopedic surgeon. He stated that a tethered cord occurs when the very tip of the spinal cord sometimes has a remnant of some fibrous tissue that tethers it down to the lower sacrum; that a tethered cord can be caused by trauma, penetrating trauma, prior surgery or spinal cord injury; that sometimes it causes pain or incontinence; and that since the surgery did not improve her symptoms, he could not explain Claimant's symptoms. (*Castro Tr., pp 14-16*).
35. In his deposition, Dr. Castro explained that there are many causes of incontinence, but in this case "you've got more of a plumbing problem ... particularly in a female that's morbidly obese and has previous vaginal deliveries...it would be expected...in middle age that's very common." (*Castro Tr., p. 20*). But, Dr. Castro did not distinguish between stress incontinence and urge incontinence with any degree of specificity. He basically said they are "almost the same thing." (*Castro Tr., p. 20*). His lack of specificity may reveal either a lack of knowledge about the difference or an unwillingness to agree that urge incontinence aligns with a sacral nerve contusion as concluded by Dr. Shogan.
36. In his deposition, Dr. Castro also disagreed with all the recommendations made by Dr. Paulsen over maintenance medical care. (*Castro Tr., pp. 24-27*).
37. Dr. Castro also contended that Claimant's need for oxygen stems from her smoking, her COPD and living at higher elevation. As for her CPAP machine, he did not see a causal relation to the work injury. (*Castro Tr., p. 26*). Despite having strong opinions about these pulmonary matters, Dr. Castro is not a pulmonologist and did not testify about any specialization in pulmonary medicine.
38. Dr. Mark Paulsen was deposed on July 3, 2019 (*Exhibit 17*). Among other things, he testified to the following:
- He is a board-certified family medicine practitioner who has treated workers' compensation patients. (*Paulsen Tr. p. 5-6*).

- He served as supervising physician for physician assistant Dianne Wetterstein, who was the primary treating individual for Claimant through the date of the deposition. (*Paulsen Tr. 7-10*).
- As of the date of his deposition he had only met with Claimant once, but he reviewed all of PA Wetterstein's reports and approved of all her recommendations.
- He agreed with PA Wetterstein's restriction of no lifting, pushing, or pulling greater than eight pounds with a four-hour workday, three days per week.
- He also has substantial experience treating patients with urinary incontinence. (*Paulsen Tr. p. 25*).
- He agreed with an assessment of "urinary incontinence", explaining that she has two kinds of incontinence: Stress incontinence and urge incontinence.
- He agreed with Dr. Pham that Claimant should be allowed to see PA Wetterstein for maintenance care three to four times a year for a couple of years.
- He also agreed with Dr. Pham that she should be allowed to see her urology doctor for another opinion about her incontinence, which would be part of her maintenance plan. He also concluded that, as a maintenance treatment plan, it is reasonable for Claimant to have "Always" pads, extra heavy, two bags per week and cloth urinary pads for bed, four pads, two times per year
- As for self-catheterization, he would defer to Claimant's urologist as to the reasonableness and necessity.
- For oxygen and CPAP treatment, he concluded that Claimant's need for these therapies is not directly related to her industrial injury, but it is probably indirectly related based on Claimant's weight gain, morbid obesity and inactivity. He stated that, if her weight gain is proven to be causally related to inactivity and other events, medication or other, after the industrial accident, the need for oxygen would be work-related, or accident-related, specifically. (*Paulsen Tr. p. 28*).
- He stated that Claimant's list of medical supplies related to oxygen delivery are reasonable and necessary.
- He stated that the use of a cane, wheelchair and a "grabber" were appropriate. Likewise, Claimant should have the benefit of a treadmill or recumbent bike, either at home or at a gym. She should also have pool therapy because of her poor recovery after surgeries.
- He concluded that Claimant is not employable full-time, but is possible that she could work a sedentary job and could transition into full-time if she built the stamina necessary, her employer had flexibility to allow her to deal with her urinary incontinence, and she had to do only minimal lifting, pushing, and pulling. (*Paulsen Tr. p. 37*).

39. By report dated April 29, 2019, Dr. Carsten Sorenson, a urologist, noted that Claimant had mild stress urinary incontinence before her injury, and that post injury she still had

mild stress urinary incontinence, but significant symptoms consistent with urge urinary incontinence. (*Exhibit 14*).

40. By report dated May 13, 2019, PA Wetterstein stated that Claimant “will work four-hour days, three days per week.”

41. By report dated August 2, 2019, urologist Dr. Sorenson concluded that:

- Claimant has worsening urinary incontinence following her back injury;
- Claimant reports still having urinary leakage issues and more difficulty emptying her bladder; and
- Claimant should start self-catherization to be performed three times per day. (*Exhibit 25*).

42. By report dated December 2, 2019, PA Wetterstein restricted even more Claimant’s ability to work. She ordered Claimant to decrease her work hours to three hours per shift: that she work Tuesday, Thursday and Saturday: that she requires breaks during the shift as needed; that she do no repetitive bending. She also recommended counseling. (*Exhibit 26*).

43. By report dated February 4, 2020, Dr. Paulsen also increased Claimant’s restrictions to track the restrictions issued by PA Wetterstein. The work restrictions assigned by Dr. Paulsen also limited Claimant to working a “maximum [of] 3 hours per shift, 3 days per week, Tuesday, Thursday, Saturday, with no repetitive bending, and needs hourly break.” (*Exhibit 27*).

44. Claimant testified at hearing as follows:

- She has two years of college and no specialized education.
- She worked as assistant grocery manager for Respondent-Employer since 2013.
- Before her injury she worked an average of 60 hours per week, six to seven days per week.
- Before the injury she was a bigger person but a lot more muscular, so much so that she could throw loads as well as several men with whom she worked.
- Her job before injury required handling 50 pounds while unloading trucks and placing boxes on shelves.
- Her pre-injury weight was 224 pounds.
- She had mild episodes of urinary incontinence pre-injury, but never had to wear pads.
- She had no back or leg problems, or any physical condition that limited her ability to do her job before her injury.
- She injured her lower back and left leg when she was knocked to the floor based on the actions of a truck driver.
- Since her injury she has undergone injections, physical therapy, medications and surgery.

- Two weeks after the injury “I stood up from the couch and my bladder just emptied.
- After Judge Turnbow ordered a surgical consult with Dr. Falci, she underwent a laminectomy and an attempt to untether the spinal cord as performed by Dr. Falci.
- Before the surgery she had a pain level of 8 to 9 and she was unable to stand up.
- Before surgery her urinary incontinence was so serious that her leakage was “like cups” and it would soak her pants clear down into her shoes.
- She could hardly sleep because of leakage in her bed requiring her to take showers.
- That VESI care and other medications did not help her condition.
- Her lung collapsed during surgery.
- She had no problems with breathing before surgery.
- She has used oxygen therapy since surgery.
- The surgery helped her posture but did not correct her urinary incontinence.
- That post surgery her pain was reduced for four months but since then it has progressively worsened, because she returned to work.
- Her left leg problem persists. Her leg swells and she has sharp pains down her buttocks and into her leg and across the bottom of her foot;
- She uses a cane every day, a walker when she goes on long walks, and a wheelchair periodically.
- She uses a shopping cart at work to lean against for stability and to prevent her from falling.
- Her incontinence condition has gotten worse after the surgery. It has ruined her life. She must use pads due to leakage and had to start self-catheterization as of August 2019.
- Self-catheterization involves sitting on a stool in her home bathroom in front of a table set up with a mirror, flashlight and sanitary cloth with her catheters and the urine bag. She has to use the mirror to see where the catheters are going in, and she has to attach the catheter to the bag. The process takes about 15 minutes.
- She cannot do this process at work because she would have to bring in her table and supplies to work, and the bathroom is not sanitary enough.
- She has been self-catheterizing three times daily at home since August 2019.
- She could not follow her regular catheterization procedure at a regular job because of the need to bring her table and supplies and it would not be a private issue any longer.

- If she had an accident at work, she would not return because of embarrassment.
- She continues to have lower back pain which extends from the center point to the left and right sides of the body, along the area of the back a bit lower than the belt line down her left leg and around her left foot.
- She takes Hydrocodone, Flexeril and Ibuprofen for pain, but not at work.
- She has gained 75 pounds since the injury.
- The weight gain has caused her to be depressed.
- She cries often, sometimes at work.
- She currently works three hours per day, three days per week, a schedule which has changed from four hours per day, three days per week.
- PA Wetterstein prescribed specific days to work, Tuesday, Wednesday and Thursday, a schedule which the employer agreed to accommodate.
- Currently her job involves pushing a shopping cart to repack eggs, identify product which needs to be marked down, throw away expired product, and take certain product to a designated area to be marked down.
- She has not been disciplined for not completing her tasks during her shift.
- She takes a 20 to 30-minute break every hour to hour and a half because her back is too painful to continue.
- Her employer has accommodated her break schedule.
- Since her injury she has done no heavy work as she did pre-injury.
- Based on vocational expert Katie Montoya's statement that Claimant should be able to work at the Ski Depot in Winter Park and Granby, Claimant applied at the Ski Depot in Fraser. That store is located about 2 miles from her current job. She went online and completed an application for employment for a part-time cashier position, a seasonal position only. She was interviewed telephonically by a representative of Vail Resorts who told her that she needed knowledge of the equipment being used so she could sell it. She told him that she did not have that knowledge. She also told him about her availability only three days per week based on a doctor's restriction. She never received a call back from that employer.
- She has gone from 16 hours per week at her part-time job to 9 hours.
- She does not believe that she can keep performing that job because her condition has become progressively worse over time.

45. She testified about Exhibit 16, a list of medical supplies and services that she needs. She testified that she needs and would accept the following:

- A specific dietary plan supervised by a dietician.
- Bariatric surgery if prescribed.

- Incontinence pads, extra heavy, two bags per week, which her insurance company and she have been paying for since August 2015.
- Periodic visits with Dr. Paulsen who has assumed direct care.
- Wipes, which she has bought herself.
- Urinary pads for the bed, which she has bought on her own.
- Self-Catheterization supplies.
- Oxygen and oxygen supplies.
- Cane which she bought.
- Grabber which she has bought.
- Large ball, small ball, one and 3-pound weights, balancing pad, recumbent bike recommended by her physical therapist.
- Pool therapy prescribed by PA Wetterstein.

46. During her testimony, Claimant asked for a bathroom break, cried several times, and changed chairs because of discomfort.

47. The ALJ had a chance to observe Claimant during the first day of hearing and during her testimony. During the hearing, Claimant appeared physically uncomfortable and had poor posture. While sitting by her attorney, she also appeared to have a flat affect and looked depressed. Claimant's flat affect and depressed appearance continued through the entire hearing. Claimant's overall appearance and body language exhibited a sense of despair, hopelessness and lethargy. As a result, the ALJ finds Claimant's overall demeanor to match the degree of disability Claimed by Claimant and set forth in the records of her medical providers and vocational expert. Together with Claimant's visual demeanor, her manner of speech, tone of voice, and lack of hesitancy while testifying further added to her credibility. As a result, the ALJ finds Claimant to be credible and her testimony to be persuasive.

48. Claimant revealed her bodily disfigurement to the ALJ, who noted a vertical surgical scar on her back on the upper lumbar area measuring about 3 ½ to 4 inches long up to about a three quarters of an inch wide; and a very faint red pic line scar by her right shoulder that is about 1 ½ inches long and 1/16th of an inch wide.

49. In a report dated July 16, 2019, Gail Pickett, Claimant's vocational expert concluded that:

- Claimant continues to work for Respondent-Employer in a sheltered position.
- She considers the job to be sheltered employment because she is allowed to take an abnormal number of breaks, she can sit down at work, she only does the tasks that she can physically perform, she can enlist others to help her, and she goes home early.
- This is not a job that can be replicated in the economy.

- The job causes Claimant a great deal of pain, so she will be unable to continue it for the long term.
- Claimant only has a high school diploma, she has minimal skills, she has never held a job in the sedentary or light category of work, and she has only worked in retail establishments or in cleaning occupations which are not jobs that she will be able to do because of work restrictions.
- Her current work restrictions of having to have days off in between days makes it impossible for Claimant to locate alternative employment.
- Her labor market in the Colorado mountains has limited choices for employment.
- She is an older worker at 54, and older workers experience are at a disadvantage.
- She cannot compete with younger workers who are better educated, who have work experience in the sedentary category of work and who do not have severely limiting work restrictions.
- She suffers from incontinence.
- Given all these factors, she concluded that Claimant is unable to earn any wages in any regular occupation.

50. At hearing Ms. Pickett testified consistent with the opinions expressed in her July 16, 2019 report (*Exhibit 8*), but gave additional updates and clarifications, including the following:

- She spoke about her resume, which reflects 35 years of experience as a vocational evaluator (*Exhibit 29*).
- The restrictions she used for the opinions in her report were a work schedule of three days per week, four-hour workdays, with two days off in a row; changes in her work environment to make it ergonomically correct; and eight pounds of lifting, with occasional bending only.
- Since the date of her report, she gained an understanding that Claimant's restrictions had changed so that her work schedule decreased to a three-hour shift, three days per week, and that Dr. Paulson had, in a February 4, 2020 report directed Claimant to take a break every hour, while the eight pound lifting and occasional bending restrictions remained the same.
- She has familiarity with the labor market in question based on her personal experience living and owning a business in Winter Park.
- Most businesses in the relevant labor market are small "mom and pop" operations.
- The volume of business in that labor market varies seasonally.
- Claimant is unable to perform the duties of the job she held at time of injury.

- Claimant's current job, which involves markdowns in the dairy department and general merchandise department of the grocery store, does not exist in Claimant's labor market, and is sheltered employment.
- She based her opinion that Claimant works in sheltered employment not available in the local labor market on the number of breaks tolerated by her employer, her freedom to take a break whenever she wants, her freedom to not complete her work without negative consequences, and her ability to select the days she wants to work.
- She is unaware of jobs in the economy that pay health insurance when an employee only works 12 hours per week.
- Claimant is not employable in another sheltered employment within her labor market.
- Her age makes her less likely to be employed.
- Her urinary issues, regardless of causation, severely impact her ability to work due to embarrassment, odor and uncomfortableness of the situation.
- Use of an assistive device to walk would impact her ability to obtain and retain employment.
- The existence of a handicapped parking sticker or placard could also impact her employability.
- Claimant's limited computer skills and depression, as manifested by crying, would also degrade her employability.
- She disagreed with Dr. Burris' opinion that Claimant should be able to self-catheterize at work. She contended that it would be difficult to self-catheterize at work due to time constraints, hygiene issues, questions about ability to store a table and supplies, and potential embarrassment.
- The job identified by vocational expert Katie Montoya at Ski Depot as a cashier was inappropriate for Claimant since she has no experience with the products and could not effectively sell them, she has to stand for long periods, there may be a unisex bathroom shared by customers, there are no shopping carts to use to move items at work, and she would have to put items away, take items out, put the items on shelves and hang them on racks, all tasks Claimant could not do.
- That Dr. Harrington gave more liberal restrictions did not change her opinions about employability.

51. In her report dated November 4, 2019, vocational expert Katie Montoya concluded that Claimant was employable, but identified only one category of job at two locations in Claimant's labor market: Cashier at Ski Depot in Winter Park and Fraser. (*Exhibit 9*).

52. At hearing Ms. Montoya concluded that the job at Ski Depot which she had identified in her report was no longer appropriate for Claimant based on PA Wetterstein's and Dr. Paulsen's recent change of restrictions to three-hour workdays, three days per week.

(*Tr.*, p. 97). Ms. Montoya offered no other appropriate position for Claimant in the economy that existed at the time of the first hearing.

53. Claimant's surgery was complicated by a collapsed lung which required her to stay in the hospital about two weeks. (*Exhibit 12*, p. 2).
54. Due to her work injury, Claimant has become less active, depressed, and unable to control her weight. As a result of her work injury, Claimant has gained approximately 76 pounds.
55. There is no evidence in the record to establish that Respondents appealed ALJ Turnbow's order dated June 26, 2017.
56. Claimant's current work for Employer is sheltered.
57. Claimant is unable to earn any wages in the same or other employment.
58. Claimant's urinary incontinence and need for medical treatment for such condition was caused by her work injury when she suffered a contusion to her sacral nerve.
59. Claimant requires maintenance medical treatment to relieve her from the effects of her work injury and to maintain MMI.
60. Claimant requires maintenance medical treatment for her back injury and urinary incontinence.
61. Based on the General Admission of Liability dated January 31, 2018, Claimant's average weekly wage at that time was \$1,012.55 and her temporary total disability rate was \$675.06. As a result, Claimant's PTD rate is \$675.06. (*Exhibit A*).

CONCLUSIONS OF LAW

Based on the specific findings above of fact, the Judge draws these conclusions of law:

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1).

The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

Unless stated otherwise, Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). A DIME physician's opinions concerning MMI and impairment, however, carry presumptive weight under § 8-42-107(8)(b)(III), C.R.S.; see *Yeutter v. Indus. Claim Appeals Office*, No. 18CA0498 (Apr. 11, 2019) 2019 COA 53. The statute provides that "[t]he finding regarding [MMI] and permanent medical impairment of an independent medical examiner in a dispute arising under subparagraph (II) of this

paragraph (b) may be overcome only by clear and convincing evidence.” *Id.* Subparagraph (II) is limited to parties’ disputes over “a determination by an authorized treating physician on the question of whether the injured worker has or has not reached [MMI].” § 8-42-107(8)(b)(II). “Nowhere in the statute is a DIME’s opinion as to the cause of a claimant’s injury similarly imbued with presumptive weight.” *See Yeutter*, 2019 COA 53 ¶ 18. Accordingly, a DIME physician’s opinion carries presumptive weight only with respect to MMI and impairment. *Id.* ¶ 21.

In deciding whether a party has met the burden of proof, the ALJ is empowered “to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence.” *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness’s testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice or interest. *See Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A worker’s compensation case is decided on its merits. C.R.S. § 8-43-201.

The ALJ’s factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng’g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

I. Whether Claimant established by a preponderance of the evidence that she is permanently and totally disabled.

To prove her claim that she is permanently and totally disabled, Claimant shoulders the burden of proving by a preponderance of the evidence that she is unable to earn any wages in the same or other employment. Sections 8-40-201(16.5)(a) and 8-43-201, C.R.S. (2003); *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Yeutter v. Indus. Claim Appeals Office*, No. 18CA0498 (Apr. 11, 2019) 2019 COA 53 ¶ 26. Claimant must also prove the industrial injury was a significant causative factor in the PTD by demonstrating a direct causal relationship between the injury and the PTD. *Joslins Dry Goods Co. v. Indus. Claim Appeals Office*, 21 P.3d 866 (Colo. App. 2001); *Wallace v. Current USA, Inc.* W.C. No. 4-886-464 (ICAO, Dec. 24, 2014).

The term “any wages” means more than zero wages. *See Lobb v. Indus. Claim Appeals Office*, 948 P.2d 115 (Colo. App. 1997); *McKinney v. Indus. Claim Appeals Office*, 894 P.2d 42 (Colo. App. 1995). In weighing whether Claimant can earn any wages, the ALJ may consider various human factors, including Claimant’s physical

condition, mental ability, age, employment history, education and availability of work that Claimant could perform. *Weld County Sch. Dist. Re-12 v. Bymer*, 955 P.2d 550 (Colo. 1998); *Yeutter* 2019 COA 53 ¶ 26. The ALJ may also consider Claimant's ability to handle pain and the perception of pain. *Darnall v. Weld County*, W.C. No. 4-164-380 (ICAO. Apr. 10, 1998). The critical test is whether employment exists that is reasonably available to Claimant under her particular circumstances. *Weld County Sch. Dist. Re-12 v. Bymer, supra*; *Blocker v. Express Pers.* W.C. No. 4-622-069-04 (ICAO, July 1, 2013.). Whether Claimant proved inability to earn wages in the same or other employment presents a question of fact for resolution by the ALJ. *Best-Way Concrete Co. v. Baumgartner*, 908 P.2d 1194 (Colo. App. 1995).

As a matter of public policy, PTD benefits may be awarded even if Claimant has held, or currently holds, some type of post-injury employment where the evidence shows the claimant is not physically able to sustain the post-injury employment, or that the employment is unlikely to become available to the claimant in the future in view of the particular circumstances. *Joslins Dry Goods Co. v. Indus. Claim Appeals Office*, 21 P.3d 866 (Colo. App. 2001); *Mccormick v. Exempla Healthcare* W.C. No. 4-594-683-07 (ICAO, Apr. 1, 2014). A worker's ability to secure sheltered or occasional employment under rare or unusual circumstances does not preclude a determination of PTD. *In re Reynal*, W.C. No. 4-585-674-05 (ICAO, Dec. 10, 2012). If the evidence shows that the claimant is not physically able to sustain post-injury employment or the employment is "unlikely to become available to a claimant again in view of the particular circumstances," the ALJ need not conclude that Claimant was capable of earning wages. *Joslins Dry Goods Co. v. Indus. Claim Appeals Office*, 21 P.3d 866. 868 (Colo. App. 2001).

This ALJ finds and concludes Claimant has proven, by a preponderance of evidence, that due to the restrictions that flow directly from her work injury she is permanently and totally disabled. Most important, the ALJ credits Claimant's testimony as it relates to her development of symptoms and limitations after her work injury. This includes her limited ability to engage in activities of daily living, including physical activities necessary to obtain and maintain employment.

The ALJ also credits the opinions of PA Wetterstein and Dr. Paulsen which set forth Claimant's work restrictions due to her work injury.

Those restrictions include:

- Working a maximum of 3 hours per shift.
- Working no more than 3 days per week such as Tuesday, Thursday and Saturday.
- Claimant cannot work two straight days. There must be a day off between any two workdays.
- No lifting, pushing, or pulling greater than eight pounds.
- No repetitive bending.

The ALJ credits their opinions regarding Claimant's restrictions because they align with the medical record from Claimant's treating providers, Claimant's testimony,

and the restrictions issued by other providers, such as Dr. Harrington, who assessed and determined Claimant's permanent impairment. While Dr. Harrington's restrictions might not have been as restrictive when issued, they resembled the restrictions issued by PA Wetterstein and Dr. Paulsen at that time and before Claimant's restrictions were reduced from four to three hours for each workday. And, Dr. Harrington also restricted Claimant to no more than 2 hours per day of sitting or standing while at work which is in line with Claimant's severely restricted capacity to work.

The ALJ also credits and finds persuasive the testimony of Claimant's vocational expert, Gail Pickett, who credibly explained Claimant's physical restrictions and human factors that – collectively - support her opinion that Claimant is unemployable, and that she is simply working in a sheltered position. Those factors include, but are not limited to, the following:

- She considers Claimant's current part-time job to be sheltered employment because she is allowed to take an abnormal number of breaks, she can sit down at work, she only does the tasks that she can physically perform, she can enlist others to help her, and she goes home early.
- She also based her opinion that Claimant works in sheltered employment not available in the local labor market on Claimant's freedom to not complete her work without negative consequences, and her ability to select the days she wants to work.
- She is unaware of jobs in the economy that pay health insurance when a worker only works 12 hours per week.
- This is not a job that can be replicated in the economy.
- The job causes Claimant great pain, so she will be unable to continue it for the long term.
- Claimant only has a high school diploma, she has minimal skills, she has never held a job in the sedentary or light category of work, and she has only worked in retail establishments or in cleaning occupations which are not jobs that she will be able to do because of work restrictions.
- Her current work restrictions of having to have days off in between days makes it impossible for Claimant to locate alternative employment.
- Her labor market in the Colorado mountains, about which Ms. Pickett has personal experience because she owned a business in the area, has limited choices for employment.
- Claimant is an older worker at 54, and older workers experience are at a disadvantage.
- She cannot compete with younger workers who are better educated, who have work experiences in the sedentary category of work and who do not have severely limiting work restrictions.
- She suffers from embarrassing and inconvenient incontinence.
- The restrictions she used for her report were a work schedule of three days per week, four-hour workdays, with two days off in a row; changes in her work

environment to make it ergonomically correct; and eight pounds of lifting, with occasional bending only.

- Since the date of her report, Claimant's restrictions had changed so that her work schedule decreased to a three-hour shift, three days per week, and that Dr. Paulson had, in a February 4, 2020 report directed Claimant to take a break every hour, while the eight pound lifting and occasional bending restrictions remained the same.
- Claimant is unable to perform the duties of the job she held at the time of her injury.
- Claimant's current job, which involves markdowns in the dairy department and general merchandise department of the grocery store, does not exist in Claimant's labor market, and is sheltered employment.
- She is unaware of jobs in the economy that pay health insurance when a worker only works 12 hours per week.
- Claimant is not employable in another sheltered employment within her labor market.
- Her urinary issues, regardless of causation, severely impacts her ability to work due to embarrassment, odor and uncomfortableness of the situation.
- Use of an assistive device to walk would impact her ability to obtain and retain employment.
- The existence of a handicapped parking sticker could impact her employability if seen by a prospective employer when Claimant arrives to apply for a job.
- Claimant's limited computer skills and depression, as manifested by crying, would also impair her employability.
- She disagreed with Dr. Burris' opinion that Claimant should be able to self-catheterize at work. She concluded that it would be difficult to self-catheterize at work due to time constraints, hygiene issues, questions about ability to store a table and supplies and potential embarrassment.
- The job originally identified by vocational expert Katie Montoya at Ski Depot as a cashier was inappropriate for Claimant since she has no experience with the products and could not effectively sell them, she has to stand for long periods, there may be a unisex bathroom shared by customers, there are no shopping carts, and she would have to put items away, take items out, put the items on shelves and hang them on racks, all tasks she could not do.
- She was not surprised that Claimant did not get a call back from hiring agent for the Ski Depot at Granby because Claimant has no experience skiing.
- That Dr. Harrington gave more liberal restrictions does not change her opinions about employability.

The ALJ also credits that portion of Respondent's vocational expert, Katie Montoya, which supports a finding that Claimant is unemployable. This includes her testimony that she was unaware of any jobs in Claimant's local labor that Claimant could perform based on Claimant's most recent work restrictions.

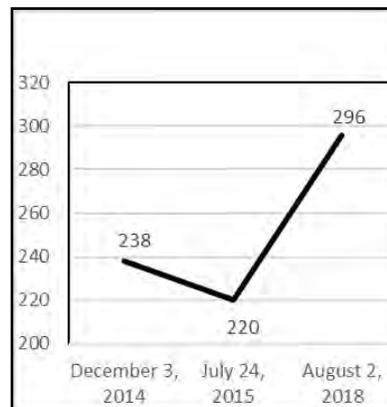
This ALJ does not find Dr. Burris’ opinions regarding Claimant’s restrictions which flow from the work injury to be credible or persuasive for many reasons. Dr. Burris was asked whether Claimant’s weight gain of over 50 pounds since her work injury was due to her work injury. Dr. Burris testified that Claimant’s weight gain was not due to her work injury. Dr. Burris testified that Claimant was “already on the pathway of gaining more weight” due to her knee replacement in 2014. The ALJ has reviewed the record to determine whether Dr. Burris’ conclusion is supported by the record or whether he “cherry-picked” the data to support his conclusion.

This ALJ’s review of the record revealed the following data:

- In December 2014, Claimant’s knee surgeon noted Claimant had made a full recovery after having a knee replacement. He specifically noted Claimant “had made excellent progress.” He also released Claimant to “full duty.” (*Exhibit M, p. 609*). Then, on December 3, 2014, Dr. Paulsen noted Claimant’s weight was 238 pounds. (*Exhibit Q, p. 789*).
- On July 24, 2015, the day after her work accident, Claimant went to the emergency room because of her work injury. At that visit, Claimant’s weight was noted to be 100 kilograms, i.e., 220 pounds. (*Respondent’s Exhibit K, p.62*).
- On August 2, 2018, Dr. Harrington noted Claimant’s weight was 296 pounds. (*Respondent’s Exhibit M, p.655*).

A simple table and chart with the data selected from the record by this ALJ demonstrates Claimant lost weight after she recovered from her knee injury. As a result, the data shows the exact opposite of what Dr. Burris claims. The data shows Claimant was on a pathway of losing weight rather than on a pathway of gaining weight.²

| Date | Pounds |
|------------------|--------|
| December 3, 2014 | 238 |
| July 24, 2015 | 220 |
| August 2, 2018 | 296 |



² This ALJ acknowledges the record also contains data regarding Claimant’s weight that differs from the data in the table and chart. The point, however, is that when an expert cherry-picks data, and does not say so, the overall reliability of their opinion – and credibility - is diminished.

Dr. Burris also testified about certain observations he made during his assessment and examination of Claimant and which he noted in his report. For example, he was asked by Respondent's counsel about the following statement in his 2019 report:

Pain behaviors present with wincing on range of motion exam today. She walks in from the waiting area without significant problems, however (emphasis added).

He was then asked to explain what he is talking about. Dr. Burris testified that:

So those were somewhat inconsistent, to see someone get up out of a chair and walk back, let's say, a hundred feet to the exam room and then during the examination having difficulty with just simple range of motion is typically not consistent (emphasis added).

He was then asked, "What if any impact did that have on your opinions that you formed as a result of this examination?"

Dr. Burris then stated:

Well, you have to be concerned that the pain symptoms that are presented when no one's watching versus when someone is asking them to move are inconsistent. So, I'm concerned that the symptoms, perhaps, are embellished (emphasis added).

The ALJ finds several problems with Dr. Burris' testimony outlined above. First, Claimant states she has pain because of her back injury. As a result, it is not unreasonable for Claimant to have back pain with certain range of motion maneuvers that test the limits of her range of motion.

Second, Dr. Burris suggests Claimant did not exhibit significant pain behaviors when she thinks no one is watching and while walking back to the examination room but does exhibit pain behaviors under formal examination. Yet the only maneuver Dr. Burris documents as causing Claimant back pain is "left lateral bending." Thus, if the only maneuver that caused Claimant to have low back pain was left lateral bending, why would Claimant have back pain while walking in an upright position back to the examination room?

Third, each time Dr. Burris seeks to discredit Claimant with his personal observations – which the ALJ finds ill supported - he uses a qualifier. For example:

- She walks in from the waiting room without "significant" problems. So, the ALJ finds Claimant still had problems walking from the waiting room to the examination room.
- The way she walked from the waiting room when compared to how she presented during the physical examination was "somewhat" inconsistent. As a result, the ALJ finds her walking and physical examination were also consistent.

- He was concerned that “perhaps” she was embellishing her symptoms. Dr. Burris, however, specifically noted in his November 2015, April 2018, and April 2019 IME reports that when he performed Waddell’s testing during each IME for inconsistencies, there were none. As a result, the court credits the lack of Waddell findings as noted in his report versus Dr. Burris’ haphazard assessment methods for determining whether Claimant might be embellishing her symptoms.

Based on the totality of the evidence, the ALJ finds Claimant to be credible and that she is not embellishing her symptoms.

Given the credible opinions of PA Wetterstein and Dr. Paulsen, both vocational experts and Claimant’s credible testimony, this ALJ finds and concludes Claimant has established by a preponderance of the evidence that due to the restrictions that flow directly from her work injury she is unable to earn any wages for another employer. While she is earning minimal wages at her current employer, the Employer is providing this job, with attendant health insurance benefits, as an act of charity and that the job is sheltered employment, an invented job, and not one that exists in the economy. Thus, much like the ruling in *Gruntmeir v. Tempel & Esgar, Inc.*, 730 P2d. 893 (Colo. App. 1986), this ALJ finds that Claimant is not precluded from receiving permanent, total disability benefits beginning on the date of MMI, April 18, 2018. As a result, the ALJ finds and concludes Claimant has established by a preponderance of the evidence that she is permanently and totally disabled.

This ALJ also finds and concludes that even if the urinary incontinence condition were not work-related, this ALJ would reach the same conclusion because this ALJ must consider Claimant’s overall physical and mental health, regardless of causation and this ALJ finds and concludes Claimant’s back injury is the significant causative factor for her work restrictions, the inability to obtain and maintain employment, and the resulting permanent total disability.

II. Whether Claimant established that her bladder condition is causally related to her industrial injury.

A DIME physician’s opinions over MMI and impairment carry presumptive weight under § 8-42-107(8)(b)(III), C.R.S.; see *Yeutter v. Indus. Claim Appeals Office*, No. 18CA0498 (Apr. 11, 2019) 2019 COA 53. Under the statute, “[t]he finding regarding [MMI] and permanent medical impairment of an independent medical examiner in a dispute arising under subparagraph (II) of this paragraph (b) may be overcome only by clear and convincing evidence.” *Id.* Subparagraph (II) is limited to parties’ disputes over “a determination by an authorized treating physician on the question of whether the injured worker has or has not reached [MMI].” § 8-42-107(8)(b)(II). “Nowhere in the statute is a DIME’s opinion as to the cause of a claimant’s injury similarly imbued with presumptive weight.” See *Yeutter*, 2019 COA 53 ¶ 18. Accordingly, a DIME physician’s opinion carries presumptive weight only over MMI and impairment. *Id.* ¶ 21.

Moreover, a pre-existing disease or susceptibility to injury does not disqualify a claim for medical benefits if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical

treatment. See *Duncan v. Indus. Claim Appeals Office*, 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *Enriquez v. Americold D/B/A Atlas Logistics*, W.C. No. 4-960-513-01, (ICAO, Oct. 2, 2015)

This ALJ is persuaded that Claimant's current severe and debilitating urinary incontinence is injury related based on the following evidence:

- Dr. Sorenson, a urologist (none of the other experts have this specialty) documents a new type of urinary incontinence, urge urinary incontinence, that did not exist before injury.
- Claimant credibly testified that the incontinence problem was mild and only occasional before her injury, while her problem after the injury became severe, constant, and progressively worse.
- On January 3, 2017, Dr. Shogan, who is Board Certified in Neurological Surgery, performed a records review. In his January 2017 report, Dr. Shogan mainly addressed whether the spinal cord untethering surgery proposed by Dr. Falci was reasonable and necessary to treat Claimant's symptoms from her work injury – which included her urinary incontinence. Dr. Shogan noted in his initial report that Claimant underwent a urologic evaluation that revealed the presence of diminished detrusor function and some stress incontinence. He concluded that those urological findings were most consistent with a possible lower motor neuron abnormality. As a result, he did not think the untethering surgery would relieve Claimant's symptoms, which included her urinary incontinence. Dr. Shogan did not, however, elaborate on the cause of the lower motor neuron abnormality that he thought was causing Claimant's incontinence.
- On February 1, 2017, Dr. Shogan performed an IME and physically examined Claimant. As part of his IME, Dr. Shogan was specifically asked to address whether Claimant's left leg weakness and incontinence were caused by her accident. Dr. Shogan concluded that:

It is my opinion that Ms. Harper's intermittent left leg weakness and her urinary incontinence are related to her work-related injury of July 23, 2015 (emphasis added). Although her left leg weakness seemed to come on several days after her injury, as did her incontinence, I believe that she may have sustained a musculoskeletal injury, as well as a possible sacral nerve root contusion. I believe that this is responsible for her left leg symptoms and her symptoms of incontinence.

- In the end, Dr. Shogan clarified that the lower motor neuron abnormality he mentioned in his initial report was caused by a contusion to Claimant's sacral nerve when she fell at work.
- Both neurosurgeons, Drs. Falci and Shogan, agreed at the time of the hearing before ALJ Turnbow that Claimant's urinary incontinence and left leg weakness were caused by her fall at work.

- Along with Dr. Shogan concluding Claimants urinary incontinence was caused when she fell and contused her sacral nerve, the Division Examiner, Khoi Pham, a neurologist, came to the same conclusion. Dr. Pham concluded that the contusion to Claimant's sacral nerve – which occurred when Claimant fell - was the only known medical cause for Claimant's urinary incontinence.
- Neither Dr. Burris nor Dr. Castro have credibly explained why Claimant's urinary incontinence drastically worsened - and she developed urge incontinence - after her work injury except to point to Claimant's weight gain after her injury, which this ALJ finds is related. Drs. Burris and Castro argue that Claimant's serious incontinence - urge incontinence - developed coincidentally after the injury, an opinion that is not credible under the facts and circumstances of this case.
- Dr. Paulsen, PA Wetterstein, Dr. Shogan, and Dr. Pham agree that the urinary incontinence condition is injury related.
- Dr. Pham's opinion that he could not find another explanation for Claimant's urinary incontinence other than trauma is not a failure of diagnosis or causation. Instead, this ALJ reasonably infers that Dr. Pham – who is a neurologist - considered alternative explanations for the condition and rejected them. In this regard, Dr. Pham concluded: "I had to rate the bladder dysfunction because other than the trauma history, I cannot find any other medical cause for this condition."

The ALJ does not find the opinions of Drs. Burris and Castro to be persuasive regarding the cause of Claimant's urinary incontinence. Although each doctor states that Claimant's urinary incontinence is unrelated to her work injury, they each failed to present credible and persuasive reasons why her condition is unrelated to her work accident. For example, Dr. Burris fails to offer a theory why the condition is not injury related; he simply concluded that "it is not clear if this issue is directly related to her work injury."

Dr. Castro argued that the condition was unrelated because Claimant had urinary incontinence before her injury (true, but only mild and, according to urologist Dr. Sorenson, only stress incontinence and not urge incontinence); that since the surgery did not improve her symptoms, he could not explain the symptoms; and that Claimant's bladder dysfunction was essentially a non-injury "plumbing problem." In this latter regard, Dr. Castro explained in his deposition that there are many causes of incontinence, but in this case "you've got more of a plumbing problem ... particularly in a female that's morbidly obese and has previous vaginal deliveries...it would be expected...in middle age that's very common." Neither Dr. Burris nor Dr. Castro explained why a catastrophic bladder dysfunction — urge incontinence — would begin to manifest itself within two weeks of the injury and how a contusion to the sacral nerve could not have occurred during the accident and could not have caused Claimant's urinary incontinence. In the end, they provided no persuasive and credible rationale for their opinions. Thus, their causation opinions are rejected.

As a result, the ALJ finds and concludes Claimant established by preponderance of the evidence that her urinary incontinence was caused by her compensable work accident.

III. Whether Claimant established that she is entitled to maintenance medical treatment.

Claimant has established by a preponderance of the evidence that she is entitled to a general award of maintenance medical treatment.

The need for medical treatment may extend beyond the point of MMI where claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Indus. Commission*, 759 P.2d 705 (Colo. 1988); *Hanna v. Print Expeditors Inc.*, 77 P.3d 863, 865 (Colo. App. 2003); *Hobirk v. Colorado Springs Sch. District #11*, W.C. No. 4-835-556-01 (ICAO, Nov. 15, 2012). An award for *Grover* medical benefits is neither contingent on a finding that a specific course of treatment has been recommended nor a finding that the claimant is receiving medical treatment. *Holly Nursing Care Ctr. v. Indus. Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1999); *Hastings v. Excel Elec.*, W. C. No. 4-471-818 (ICAO, May 16, 2002). The claimant must prove entitlement to *Grover* medical benefits by a preponderance of the evidence. *Lerner v. Wal-Mart Stores, Inc.*, 865 P.2d 915 (Colo. App. 1993); *Mitchem v. Donut Haus*, W.C. No. 4-785-078-03 (ICAO, Dec. 28, 2015). An award of *Grover* medical benefits should be general in nature. *Hanna v. Print Expeditors Inc.*, 77 P.3d 863 (Colo. App. 2003); *Anderson v. SOS Staffing Services*, W. C. No. 4-543-730, (ICAO, July 14, 2006).

As found, Dr. Harrington, in his August 2, 2018 report, concluded that for maintenance care, Claimant will need ongoing medications, including muscle relaxants, NSAIDS, Ibuprofen, nortriptyline and gabapentin. He did, however, caution Claimant to avoid chronic and daily opioid use.

In addition, Dr. Pham, in his DIME report, concluded that for maintenance care, Claimant should be allowed to see PA Wetterstein 3-4 times a year for a couple of years. Dr. Pham also recommended Claimant be allowed to see "Urology" for another opinion about her incontinence and other therapy recommendations.

Even Dr. Burris, Respondent's independent medical examiner, concluded Claimant will require maintenance medical treatment in the form of follow up visits with PA Wetterstein for medication management as well as a health club/recreation center membership for six months.

Lastly, in his deposition, Dr. Paulsen agreed with Dr. Pham that Claimant should be allowed to see PA Wetterstein for maintenance care three to four times a year for a couple of years.

As a result, the ALJ finds and concludes that Claimant has established by a preponderance of the evidence that she needs maintenance medical treatment to relieve her from the effects of her work injury and to maintain her at MMI for her back injury and urinary incontinence.

- IV. Whether the medical treatment set forth in Exhibit 16, is reasonable, necessary, and related to Claimant's work injury.**
- V. Whether Claimant is entitled to reimbursement for past expenditures for medical services and supplies.**

Claimant is requesting reimbursement and the provision of certain medical supplies, exercise equipment and durable medical equipment as set forth in Exhibit 16. The record, however, is not fully developed for all the items set forth in Exhibit 16.

For example, here it is not clear whether all the items in Exhibit 16 have been prescribed by an authorized treating physician. Section 8-43-404(7)(a), C.R.S. provides that "an employer or insurer shall not be liable for treatment provided pursuant to article 41 of Title 12, C.R.S. unless such treatment has been prescribed by an authorized treating physician." If the claimant obtains unauthorized medical treatment, the respondents are not required to pay for it. *In Re Patton*, W.C. Nos. 4-793-307 and 4-794-075 (ICAO, June 18, 2010); see *Yeck v. Indus. Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999).

It is also not clear from the record whether Claimant previously requested the Employer to provide any of the items listed in Exhibit 16 and that the Employer furnished none of the items as may be required by under Section 8-42-101(6).

Section 8-42-101(6)(a) and (b) provides:

(a) If an employer receives notice of injury and the employer or, if insured, the employer's insurance carrier, after notice of the injury, fails to furnish reasonable and necessary medical treatment to the injured worker for a claim that is admitted or found to be compensable, the employer or carrier shall reimburse the claimant, or any insurer or governmental program that pays for related medical treatment, for the costs of reasonable and necessary treatment that was provided. An employer, insurer, carrier, or provider may not recover the cost of care from a claimant where the employer or carrier has furnished medical treatment except in the case of fraud.

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

The parties also failed to adequately argue the interplay between Section 8-43-404(7)(a) and 8-42-101(6)(a) and (b). As a result, the record was not fully developed about the benefits at issue in Exhibit 16. Thus, the issues raised by Claimant and set forth in Exhibit 16 will not be addressed by this ALJ and will be reserved for future determination by the parties.

VI. What is the appropriate disfigurement award for Claimant due to her industrial injury?

As found, Claimant has a vertical surgical scar on her back on the upper lumbar area measuring about 3 ½ to 4 inches long and up to about three quarters of an inch wide. There is also a very faint red line about an inch and a half long.

As result, Claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles Claimant to additional compensation. Section 8-42-108 (1), C.R.S.

VII. Whether Respondent is barred by the doctrine of res judicata and collateral estoppel, from arguing that ALJ Kimberly Turnbow's previous findings regarding Claimant's urinary incontinence condition and need for a second lumbar surgery are not dispositive in the context of a challenge of Dr. Khoi Pham's Division IME opinion that Claimant is entitled to a permanent impairment rating for her incontinence condition.

In light the findings and conclusions above, resolution of this issue is superfluous.

ORDER

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

1. Claimant is permanently and totally disabled.
2. Claimant shall be paid permanent total disability benefits effective April 18, 2018, which is the date she reached MMI.
3. Based on the admission in the record, Claimant's TTD rate is \$675.06. As a result, Claimant's PTD rate is currently \$675.06.
4. Respondents shall receive and take a credit for any temporary or permanent partial disability benefits paid after MMI against any retroactive PTD benefits payable to Claimant.
5. Respondents shall provide Claimant maintenance medical benefits for her back injury and urinary incontinence.
6. Respondent shall pay Claimant \$1,500.00 for her disfigurement.
7. Respondent shall pay Claimant interest at the rate of 8% per annum on compensation benefits not paid when due.

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

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

DATED: June 11, 2020.

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that she suffered a compensable left shoulder injury during the course and scope of her employment with Employer on May 22, 2019.
2. Whether Claimant has established by a preponderance of the evidence that her medical treatment was reasonable, necessary and causally related to her May 22, 2019 left shoulder injury.
3. A determination of Claimant's Average Weekly Wage (AWW).

FINDINGS OF FACT

1. Claimant is a 65 year-old female who works for Employer as a Certified Nursing Assistant (CNA). On May 22, 2019 Claimant began her shift at 6:00 a.m. She explained that she injured her left shoulder while cleaning up after a patient in the shower room at approximately 7:00 a.m. The patient had been moved into the shower room on a mobile chair approximately three feet in height. Claimant remarked that the patient urinated and had a bowel movement on the floor. Claimant was standing up after cleaning the floor when she suffered the left shoulder injury.
2. Claimant detailed that she was in a squatting position, cleaning the floor underneath the chair with her right hand while holding onto the top of the chair with her left hand. She was in the squatting position for approximately one minute then stood up by using her left arm for balance and assistance. Claimant felt immediate pain in the left lateral biceps area. She continued working for the remainder of her shift and did not report a work injury to Employer on the date of the incident. Claimant reported her injury to Employer on May 23, 2020. Employer directed Claimant to report to the Workers' Compensation clinic in Thornton.
3. On May 28, 2019 Claimant presented to Monica Fanning-Schubert, NP at Thornton COMP. She reported that she felt pain after showering a patient at work but her symptoms worsened in the evening. Claimant detailed she "basically had her body weight on her arm when she was squatting down and then squatting back up" and was in this position for a minute or two. She reported pain in her lateral biceps area and complained of difficulty lifting above the shoulder level and with internal and external rotation. Claimant noted pain radiating from the biceps to the wrist. NP Schubert recommended physical therapy in addition to an MRI and determined that causation was unknown. NP Schubert assigned Claimant 10-pound temporary lifting restrictions for the left shoulder. The report was countersigned by Matthew Lugliani, M.D.

4. On June 10, 2019 Claimant underwent a left shoulder MRI. The MRI revealed the following findings: 1) moderate partial-thickness interstitial tear of the supraspinatus tendon; and 2) mild infraspinatus tendinosis without a tear.

5. On June 11, 2019 Claimant visited Dr. Lugliani for an examination. Claimant reported worsening left shoulder pain and that physical therapy had helped. Dr. Lugliani reviewed the MRI and referred Claimant for an orthopedic evaluation. He checked the "work-related" box on the M164 form but did not document any opinion or analysis in regard to causation. Claimant was working modified duty with Employer at the time.

6. Claimant visited Dr. Lugliani for a follow-up examination on June 25, 2019 with no change in symptoms. Dr. Lugliani continued to note on the M164 form that objective findings were consistent with Claimant's history and/or mechanism of injury.

7. By July 9, 2019 Dr. Lugliani remarked that Claimant was "pending surgery." His assessment remained "pain in the left shoulder" and "strain of musc/fasc/tend at shldr/up arm, left arm." Dr. Lugliani reiterated on the M164 form that objective findings were consistent with Claimant's history and/or mechanism of injury.

8. Claimant last visited Dr. Lugliani on August 14, 2019. Dr. Lugliani recounted that Claimant had suffered a previous work-related right rotator cuff tear and repair. She had permanent right arm restrictions that included no lifting in excess of 20 pounds, repetitive lifting in excess of 10 pounds, carrying in excess of 10 pounds, pushing and pulling in excess of 30 pounds and no overhead reaching. Dr. Lugliani noted that the June 10, 2019 left shoulder MRI had revealed a moderate partial thickness interstitial tear of the midportion of the supraspinatus insertion. He continued to diagnosis Claimant with "[s]train of musc/fasc/tend at shldr/up arm, left arm," Dr. Lugliani again noted on the M164 form that objective findings were consistent with Claimant's history and/or mechanism of injury.

9. On September 18, 2019 claimant underwent an independent medical examination with Carlos Cebrian, M.D. Dr. Cebrian issued a written report dated October 14, 2019. Claimant recounted her mechanism of injury and explained that she was holding the top of the shower chair with her left hand while squatting and cleaning the floor with her right hand. She stated that she was not having any problem with her legs and was able to use her legs when she stood up. Claimant remarked that she used her left arm to help her stand and felt immediate left shoulder pain. Dr. Cebrian performed a detailed causation analysis pursuant to the Level II Accreditation Course and Curriculum. He determined that Claimant's differential diagnosis was left shoulder pain with MRI findings of tendinosis and a partial-thickness interstitial tear of the supraspinatus. Dr. Cebrian explained that the MRI findings were common to persons of Claimant's age and the result of degeneration due to the normal cellular aging process and not any acute trauma. He summarized that it was not medically probable that Claimant's left shoulder complaints or symptoms were the result of the May 22, 2019 work event. Dr. Cebrian explained that the notion that Claimant's work activities caused her left shoulder symptoms was based merely on the fact that there was no

documented pre-existing injury or cause of symptomatology. He specified that no external event was necessary for the MRI findings and they could be explained by the aging process. Dr. Cebrian concluded that further treatment should be performed outside of the Workers' Compensation system.

10. On April 14, 2020 Claimant underwent an independent medical examination with Dr. John S. Hughes, M.D. Dr. Hughes remarked that the June 10, 2019 left shoulder MRI reflected a "3 X 5 mm moderate partial interstitial tear of the midportion of the supraspinatus insertion with mild to moderate underlying tendinosis without tendon retraction or muscle atrophy." Following his review of the subsequent medical documentation and examination of Claimant, Dr. Hughes diagnosed Claimant with a left shoulder strain/sprain with rotator cuff tear secondary to work activities on May 22, 2019. Dr. Hughes specifically disagreed with Dr. Cebrian and determined the forces and mechanism of injury described by Claimant and documented in the medical records were consistent with a rotator cuff tear. He commented that there was no documentation that Claimant had pre-existing left shoulder pathology. Dr. Hughes concluded that Claimant's medical treatment and the surgical recommendation were reasonable, necessary and related to the May 22, 2019 injury.

11. On May 12, 2020 the parties conducted the evidentiary deposition of Dr. Cebrian. He remarked that he specifically questioned Claimant regarding the use of her legs when standing during the May 22, 2019 work incident. Dr. Cebrian determined that, based on Claimant's described mechanism and a reenactment of the event at his independent medical examination, her arm was not completely straight and her elbow would have been bent so that the upper part of the arm extending from the shoulder would not have been "terribly high." He commented that Claimant denied any weakness or problems with her legs and she was able to use her legs to stand while using her arm for balance and assistance. Claimant never stated that she was doing any overhead work or using the left arm for anything other than stabilization. Dr. Cebrian noted that, based on Claimant's description of the top of the chair at 3 ½ feet in height, it would have been "a little above her head when she was squatting down."

12. In addressing the left shoulder MRI findings, Dr. Cebrian noted that Claimant's interstitial tear began inside the tendon and did not extend to the outer edge. However, most traumatic tears begin at the outer edge and then extend into the tendon. However, an interstitial tear in the intrasubstance of the tendon is typically degenerative in nature. Dr. Cebrian explained that a degenerative condition is one that is caused by progressive loss of elasticity of the tendon and cellular degeneration/loss due to age. He summarized that the MRI findings were typical for a 65-year old individual.

13. Dr. Cebrian concluded that Claimant's pathology and complaints were not related to any work activities. In reviewing Dr. Hughes' independent medical examination, Dr. Cebrian maintained his opinion and remarked that there was no documented analysis regarding causation from either Dr. Lugliani or in Dr. Hughes' independent medical examination. Dr. Cebrian further testified that Claimant's MRI

findings were minor and surgical repair of the tendon was not reasonable or necessary regardless of causation.

14. Claimant testified at the hearing in this matter. She noted that the chair she was holding on May 22, 2019 was approximately three feet in height. Claimant detailed that she was close to the chair while cleaning the floor but that her arm was fully extended and not bent. Claimant did not use her legs but instead used her arm to stand up. She then felt immediate pain in her left shoulder. Nevertheless, she was able to finish her shift and waited to see if the pain would subside.

15. Claimant's wage records were submitted into evidence. The documents do not delineate individual pay periods, but instead include check dates for pay periods commencing December 16, 2018. For the 20 weeks of pay prior to the date of injury, Claimant earned \$15,255.09 in gross wages. Divided by 20 weeks, Claimant earned an Average Weekly Wage (AWW) of \$762.75.

16. Claimant has failed to demonstrate that it is more probably true than not that she suffered a compensable left shoulder injury during the course and scope of her employment with Employer on May 22, 2019. Initially, Claimant explained that she injured her left shoulder while cleaning up after a patient in the shower room. Claimant detailed that on May 22, 2019 she was in a squatting position, cleaning the floor underneath the patient's chair with her right hand while holding onto the top of the chair with her left hand. While standing up, Claimant felt immediate pain in her left lateral biceps area. The records reveal that there is a dispute regarding the specific mechanism of Claimant's injury. The discrepancy involves the amount of force and position of Claimant's left arm when she lifted herself from the squatted position. The initial history suggests that Claimant placed all her weight on her left arm/shoulder to help herself up. Additionally, Claimant testified that her hand was located well above her head while standing up. Nevertheless, Claimant's testimony regarding the position of her arm in relation to the chair was inconsistent with the medical records and directly conflicts with what she represented and demonstrated to Dr. Cebrian during the independent medical examination. Because of the inconsistencies and the lack of a causal analysis by Drs. Hughes and Lugliani, the persuasive opinion of Dr. Cebrian reflects that Claimant's work activities on May 22, 2019 did not aggravate, accelerate or combine with a pre-existing condition to produce a need for medical treatment.

17. Claimant's June 10, 2019 left shoulder MRI reflected a moderate partial interstitial tear of the midportion of the supraspinatous insertion. Dr. Cebrian credibly testified that there was insufficient force to cause an acute injury to the rotator cuff based on Claimant's position and use of her arm while standing from a squatting position. The mechanism was minimal and the MRI showed no acute tear of the tendon. Rather, the MRI reflected a degenerative interstitial tear that Dr. Cebrian characterized as incidental and the result of the natural aging process. Dr. Cebrian persuasively noted that Claimant's interstitial tear began inside the tendon and did not extend to the outer edge. An interstitial tear is in the intrasubstance of the tendon and is typically degenerative in nature. In contrast, most traumatic tears begin at the outer edge and

then extend into the tendon. Dr. Cebrian specified that no external event was necessary for the MRI findings and they could be explained by the aging process.

18. In contrast, Dr. Hughes diagnosed Claimant with a left shoulder strain/sprain with rotator cuff tear secondary to work activities on May 22, 2019. Dr. Hughes specifically disagreed with Dr. Cebrian and determined the forces and mechanism of injury were consistent with a rotator cuff tear. Similarly, Dr. Lugliani repeatedly noted on the M164 form that objective findings were consistent with Claimant's history and/or mechanism of injury. However, Drs. Hughes and Lugliani specifically failed to consider that the MRI findings suggested a degenerative interstitial tear that began inside the tendon and did not extend to the outer edge. Notably, an interstitial tear is in the intrasubstance of the tendon and is typically degenerative in nature.

19. Although physicians provided Claimant with diagnostic testing, treatment and work restrictions based on her reported symptoms, the conclusion that Claimant suffered a compensable injury is not warranted. The lack of a scientific theory and causation analysis reveal that Claimant did not likely suffer a left shoulder injury while performing her job duties for Employer on May 22, 2019. Claimant's work activities on May 22, 2019 did not aggravate, accelerate or combine with her pre-existing condition to produce a need for medical treatment. Accordingly, Claimant's request for Workers' Compensation benefits is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. See *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and

bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson*, W.C. No. 4-589-645 (ICAO, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.*, 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner*, 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). *Soto-Carrion v. C & T Plumbing, Inc.*, W.C. No. 4-650-711 (ICAO, Feb. 15, 2007); *David Mailand v. PSC Industrial Outsourcing LP*, W.C. No. 4-898-391-01, (ICAO, Aug. 25, 2014).

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. See *Cotts v. Exempla, Inc.*, W.C. No. 4-606-563 (ICAO, Aug. 18, 2005). Rather, the symptoms could represent the “logical and recurrent consequence” of the pre-existing condition. See *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAO, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs*, W.C. No. 4-745-712 (ICAO, Oct. 27, 2008), simply because a claimant’s symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that “correlation is not causation,” and merely because a coincidental correlation exists between the claimant’s work and his symptoms does not mean there is a causal connection between the claimant’s injury and work activities.

7. The provision of medical care based on a claimant’s report of symptoms does not establish an injury but only demonstrates that the claimant claimed an injury. *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020). Moreover, a referral for medical care may be made so that the respondent would not forfeit its right to select the medical providers if the claim is later deemed compensable. *Id.* Because a physician provides diagnostic testing, treatment, and work restrictions based on a claimant’s reported symptoms does not mandate that the claimant suffered a compensable injury. *Fay v. East Penn manufacturing Co., Inc.*, W.C. No. 5-108-430-001 (ICAO, Apr. 24, 2020); cf. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337, 1339 (Colo. App. 1997) (“right to workers’ compensation benefits, including medical payments, arises only when an injured employee initially establishes, by a preponderance of the evidence, that the need for medical treatment was proximately

caused by an injury arising out of and in the course of the employment”). While scientific evidence is not dispositive of compensability, the ALJ may consider and rely on medical opinions regarding the lack of a scientific theory supporting compensability when making a determination. *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983); *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020).

8. As found, Claimant has failed to demonstrate by a preponderance of the evidence that she suffered a compensable left shoulder injury during the course and scope of her employment with Employer on May 22, 2019. Initially, Claimant explained that she injured her left shoulder while cleaning up after a patient in the shower room. Claimant detailed that on May 22, 2019 she was in a squatting position, cleaning the floor underneath the patient’s chair with her right hand while holding onto the top of the chair with her left hand. While standing up, Claimant felt immediate pain in her left lateral biceps area. The records reveal that there is a dispute regarding the specific mechanism of Claimant’s injury. The discrepancy involves the amount of force and position of Claimant’s left arm when she lifted herself from the squatted position. The initial history suggests that Claimant placed all her weight on her left arm/shoulder to help herself up. Additionally, Claimant testified that her hand was located well above her head while standing up. Nevertheless, Claimant’s testimony regarding the position of her arm in relation to the chair was inconsistent with the medical records and directly conflicts with what she represented and demonstrated to Dr. Cebrian during the independent medical examination. Because of the inconsistencies and the lack of a causal analysis by Drs. Hughes and Lugliani, the persuasive opinion of Dr. Cebrian reflects that Claimant’s work activities on May 22, 2019 did not aggravate, accelerate or combine with a pre-existing condition to produce a need for medical treatment.

9. As found, Claimant’s June 10, 2019 left shoulder MRI reflected a moderate partial interstitial tear of the midportion of the supraspinatous insertion. Dr. Cebrian credibly testified that there was insufficient force to cause an acute injury to the rotator cuff based on Claimant’s position and use of her arm while standing from a squatting position. The mechanism was minimal and the MRI showed no acute tear of the tendon. Rather, the MRI reflected a degenerative interstitial tear that Dr. Cebrian characterized as incidental and the result of the natural aging process. Dr. Cebrian persuasively noted that Claimant’s interstitial tear began inside the tendon and did not extend to the outer edge. An interstitial tear is in the intrasubstance of the tendon and is typically degenerative in nature. In contrast, most traumatic tears begin at the outer edge and then extend into the tendon. Dr. Cebrian specified that no external event was necessary for the MRI findings and they could be explained by the aging process.

10. As found, in contrast, Dr. Hughes diagnosed Claimant with a left shoulder strain/sprain with rotator cuff tear secondary to work activities on May 22, 2019. Dr. Hughes specifically disagreed with Dr. Cebrian and determined the forces and mechanism of injury were consistent with a rotator cuff tear. Similarly, Dr. Lugliani repeatedly noted on the M164 form that objective findings were consistent with Claimant’s history and/or mechanism of injury. However, Drs. Hughes and Lugliani specifically failed to consider that the MRI findings suggested a degenerative interstitial tear that began inside the tendon and did not extend to the outer edge. Notably, an

interstitial tear is in the intrasubstance of the tendon and is typically degenerative in nature.

11. As found, although physicians provided Claimant with diagnostic testing, treatment and work restrictions based on her reported symptoms, the conclusion that Claimant suffered a compensable injury is not warranted. The lack of a scientific theory and causation analysis reveal that Claimant did not likely suffer a left shoulder injury while performing her job duties for Employer on May 22, 2019. Claimant's work activities on May 22, 2019 did not aggravate, accelerate or combine with her pre-existing condition to produce a need for medical treatment. Accordingly, Claimant's request for Workers' Compensation benefits is denied and dismissed.

ORDER

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

Claimant's claim for Workers' Compensation benefits is denied and dismissed.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at <http://www.colorado.gov/dpa/oac/forms-WC.htm>.*

DATED: June 12, 2020.

DIGITAL SIGNATURE:


Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- I. The determination of Claimant's average weekly wage under Section 8-42-102(2), C.R.S., or Section 8-42-102(3), C.R.S., to establish a fair approximation of Claimant's wage loss and diminished earning capacity.

FINDINGS OF FACT

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

1. Claimant is a credible witness and her testimony is both persuasive and consistent with the wage and medical records in the case.
2. Claimant has been employed in Employer's bakery department since approximately August 20, 2016.
3. The number of hours Claimant worked each workday varied. In addition, on some days, Claimant would work overtime. (*Exhibit 1*)
4. Shortly before her injury, Claimant's base rate of pay was \$11.50, per hour, plus overtime.
5. But about one week before her injury, on approximately January 8, 2018, Claimant's base rate of pay was increased to \$12.00 per hour, plus overtime.
6. On January 16, 2018, Claimant suffered a compensable injury for which liability has been admitted.
7. The General Admission of Liability ("GA") admits for an AWW of \$431.19. (*Exhibit 1*)
8. According to the notes on the GA, Respondent calculated Claimant's AWW by using Claimant's wages from a 20-day period, December 25, 2017 to January 13, 2018, which totaled \$1,231.74. According the GA, the admitted "AWW of \$431.12 is more reflective of what she makes." (*See Exhibit C, pp. 39-45*)
9. But a review of Claimant's wage records shows that using the specific 20-day period selected by Respondent - and the wages earned during that period - is not a fair and accurate method to calculate Claimant's AWW. Respondent's calculation is not fair and accurate for several reasons. First, it appears Claimant did not work for the first four days of the 20-day period used by Respondent to calculate Claimant's AWW.¹ Second, around two-thirds of the days used by Respondent to calculate Claimant's AWW did not include Claimant's increased hourly rate of pay in effect on the day of her injury. As a result, the information used by Respondent led to the understatement of Claimant's AWW.

¹ It looks like Claimant did not work on Christmas, 12/25/17, but was paid the equivalent of 3 hours, which was designated at "LHCHS" time and not "REG" - for regular time - and not "OT" - for overtime.

10. The exhibits, and Claimant's credible testimony, established that in 2017, Claimant's total earnings were \$25,058.86. (*Exhibit A*) However, in 2017, Claimant missed about 4½ weeks of work, towards the end of the year, for a non-work-related health problem.
11. Claimant argues that a fair approximation of her AWW would be to take her total earnings for 2017, which were \$25,058.86, and divide them by 48 weeks, because Claimant missed about a month from work in 2017. That method leads to an AWW of \$522.06.
12. Respondent argues that Claimant's admitted AWW is correct and rejects the calculation other than the one prepared by the adjuster. Alternately, Respondent argues that if one divides the total earnings of 2017 by 52 weeks, the proper AWW is \$481.90.
13. Claimant's wage records reveal she missed work from November 27, 2017, through December 28, 2017, which is 4 weeks and 4 days.² (*Exhibit A, pg. 2*) This is consistent with Claimant's testimony that she missed this time due to a personal medical problem. However, there was no credible and persuasive evidence presented that Claimant consistently developed a non-work-related health problem every year that caused her to miss a block of approximately 4½ weeks of work each year. In other words, there was no evidence submitted that Claimant consistently took an unexpected 4½ week sabbatical, or extra vacation, every year. Therefore, dividing Claimant's 47½ weeks of earnings during 2017, by 52 weeks, is not a fair and accurate method to calculate Claimant's AWW.
14. Dividing her total earnings in 2017 by 47½ weeks results in an average weekly wage (AWW) of \$527.55.
15. But the purpose of Section 8-42-102(2), C.R.S. and 8-42-102(3), C.R.S. is to establish a fair approximation of Claimant's wage loss and diminished earning capacity due to the work accident. Moreover, the proposed AWW calculations set forth by Claimant and Respondent both fail to fairly approximate Claimant's wage loss and diminished earning capacity.
16. During 2017, Claimant worked consistently from January 1, 2017 through November 26, 2017 before she took time off for an unrelated medical condition. That period is exactly 47 weeks.
17. However, using Claimant's total earnings from 2017 does not fairly approximate her wage loss from this injury because:
 - i. During the first half of 2017, Claimant was only being paid \$11.00 per hour,
 - ii. During the second half of 2017, Claimant was only being paid \$11.50 per hour,

² The wage records show Claimant was paid 5.42 hours of sick time, totaling, \$62.33, for November 27, 2017. It also looks like Claimant was paid 3 hours of holiday pay, totaling \$34.50, for December 25, 2017, for Christmas. (*See Respondent's Exhibit A, bate stamp 002.*)

- iii. From approximately November 27, 2017, through the remainder of 2017 she missed most of those days due to an unrelated health condition, but was paid "other earnings" in December, and
 - iv. At the time of her injury in January 2018, Claimant was being paid \$12.00 per hour.
18. Thus, the best way to fairly approximate Claimant's wage loss and diminished earning capacity because of her work injury is to:
- i. Use the actual hours claimant worked during the 47 weeks she worked consistently in 2017,
 - ii. Adjust her 2017 earnings by using the rate of pay in effect on the date she was injured, which is \$12.00 per hour, plus overtime, and
 - iii. Divide her adjusted earnings for the 47-week period by 47.
19. As a result, the total adjusted earnings calculation based on the hours Claimant worked in 2017, during the 47-week period from January 1, 2017, through November 26, 2017, based on \$12.00 per hour, plus overtime, is as follows:
- i. Claimant worked a total of 1,942.83 hours during the 2017 period. At \$12.00 per hour, Claimant would have earned \$23,313.96.
 - ii. Of the 1,942.83 hours, 209.20 were overtime. Based on an additional \$6.00 per hour for her overtime hours, Claimant would have been paid \$1,255.20.
 - iii. Claimant's "other earnings" during that period were \$635.52.
 - iv. As result, Claimant's adjusted income for that period is \$25,204.68.
 - v. Dividing Claimants' adjusted income of \$25,204.68 by 47 weeks equals \$536.27.
20. Based on the unique circumstances of this case, a fair approximation and determination of Claimant's AWW is \$536.27.
21. An AWW of \$536.27 is a fair approximation of Claimant's wage loss and diminished earning capacity due to her work injury.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge draws these conclusions of law:

General Provisions

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a

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

The ALJ's factual findings concern only evidence dispositive of the issues involved. The ALJ has not addressed every piece of evidence leading to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

Substantial Evidence

An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office*, 240 P.3d 429 (Colo. App. 2010); *Leeway v. Indus. Claim Appeals Office*, 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office*, 131 P.3d 1172 (Colo. App. 2005).

Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by evidence which would warrant a reasonable belief in the existence of facts supporting a particular finding. See *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions therein. See *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo. App. 2001).

The ALJ makes the rational choice to accept Claimant's testimony and the plausible inferences drawn therefrom. A claim may be supported by lay testimony alone. See *Lymburn v Symbois Logic*, 952 P.2d 831 (Colo. App. 1997).

I. The determination of Claimant's average weekly wage under Section 8-42-102(2), C.R.S., or 8-42-102(3), C.R.S. to establish a fair approximation of Claimant's wage loss and diminished earning capacity.

Section 8-42-105(1), C.R.S., provides that a Claimant's TTD rate is sixty-six and two-thirds percent of her AWW.

Section 8-42-102(2), C.R.S., requires the ALJ to base the claimant's Average Weekly Wage (AWW) on his or her earnings at the time of injury. But under certain circumstances the ALJ may determine the claimant's AWW from earnings received on a date other than the date of injury. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Specifically, §8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter

the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp., supra*.

Based on a totality of the evidence presented at hearing, and the unique facts of this case, the ALJ finds and concludes Claimant has established by a preponderance of the evidence that her AWW is \$536.27 under §8-42-102(3), C.R.S.

The ALJ finds and concludes that an AWW of \$536.27 is a fair approximation of Claimant's wage loss and diminished earning capacity because of her work injury.

ORDER

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

- A. Claimant's average weekly wage is \$536.27.
- B. Claimant's TTD and TPD rates from the date of her injury ongoing shall be based on this average weekly wage.
- C. Respondent shall pay to Claimant interest at the rate of 8% per annum on all amounts of compensation not paid when due.

Any issues not expressly decided herein are reserved to the parties for future determination.

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

DATED: June 18, 2020.

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-116-190-001**

ISSUE

Whether Claimant has made a “proper showing” for a change of physician from Authorized Treating Physician (ATP) Robert L. Broghammer, M.D. pursuant to §8-43-404(5)(a), C.R.S.

FINDINGS OF FACT

1. Claimant worked for Employer as a Registered Nurse. Her job duties involved assessing patients, administering treatment and helping with activities of daily living.

2. On May 12, 2019 Claimant suffered an admitted industrial injury to her left upper back and neck areas. Claimant detailed that she and a physical therapist had been attempting to help a patient out of bed after surgery. However, she immediately developed pain in the left shoulder and neck areas. She subsequently experienced double vision and frontal headaches.

3. At the time of her admitted May 12, 2019 work injury, Claimant had been receiving medical maintenance treatment for a June 12, 2018 admitted work injury. Claimant received treatment for the June 12, 2018 event through Centura Centers for Occupational Medicine (CCOM). Robert L. Broghammer, M.D. was her Authorized Treating Physician (ATP) and rendered care through approximately 24 appointments. In his May 24, 2019 report Dr. Broghammer recommended the opening of a new claim based on the May 12, 2019 incident for an acute aggravation of the prior injury arising from a new distinct lifting event.

4. In a January 16, 2020 visit Dr. Broghammer reviewed Claimant’s course of treatment for her May 12, 2019 admitted industrial injuries. Claimant continued to report left neck and shoulder pain. Dr. Broghammer noted that on June 4, 2019 Claimant reported that she had been suffering headaches that required an emergency room visit. He remarked that the headaches were unlikely related to her May 12, 2019 work incident. Dr. Broghammer noted that Claimant subsequently visited Samuel Y. Chan, M.D. for EMG/nerve conducted studies that did not reveal anything related to the cervical spine. He also commented that Claimant received facet injections and underwent chiropractic massage therapy. Because of Claimant’s thorough work-up without objective findings, Dr. Broghammer noted in his December 27, 2019 report that Claimant was essentially at Maximum Medical Improvement (MMI). Nevertheless, Dr. Broghammer requested a functional capacity evaluation prior to placing her at MMI to assess a safe return to work.

5. Despite Dr. Broghammer's opinion that Claimant's headaches were unlikely related to her May 12, 2019 industrial injuries, Claimant sought a cervical MRI. On January 3, 2020 Claimant underwent the MRI.

6. In his January 16, 2020 report Dr. Broghammer explained that the cervical MRI revealed an "annular tear at one level with a large disc osteophyte complex eccentric to one side." He informed Claimant that "her lack of radicular symptoms and negative EMGs would suggest that these are red herring's." Instead, the MRI findings were "likely chronic and degenerative in nature" and not likely caused by lifting a patient. However, Claimant disagreed and suggested the annular tears could be caused by traumatic injuries.

7. Based on a referral from Dr. Broghammer, Claimant visited Orthopedic Surgeon Bryan Castro, M.D. on January 31, 2020. Dr. Castro supported Dr. Broghammer's opinion that a cervical MRI was not medically necessary. Dr. Castro concluded that the cervical findings on MRI were chronic and unrelated to the May 12, 2019 work injury. He specifically noted that Claimant had good range of motion in the neck and her MRI showed a "chronic degenerative problem." Dr. Castro agreed with Dr. Broghammer that Claimant did not have radiculopathy and discharged her because she was not a surgical candidate.

8. On February 10, 2020 Claimant returned to Dr. Chan for an examination. He documented that Claimant suffered left-sided shoulder pain and cervical spine pain as a result of her June 12, 2018 work injury. Dr. Chan noted that, as Claimant helped a patient to sit up in bed, she developed pain from the left-sided cervical spine to the left shoulder girdle region. She had undergone chiropractic care, dry needling, trigger point injections and a physical therapy program. He remarked that she still had pain complaints and "headaches," Dr. Chan also noted that Claimant had "a history of migraine headaches for which she is being seen by Dr. Oh."

9. In reviewing the cervical MRI Dr. Chan noted that the imaging "show[ed] a-level diskogenic disease. In the C6-7 level, it appears to be chronic in origin, as there is actually a disk osteophyte complex." He remarked that it was unclear whether the MRI finding constituted a pain generator. Dr. Chan commented that Claimant was "rather concerned over the MRI findings."

10. On February 13, 2020 Dr. Broghammer responded to an inquiry from Insurer about whether the transforaminal epidural steroid injections recommended by Dr. Chan were related to Claimant's May 12, 2019 industrial injury. Dr. Broghammer agreed with Dr. Chan that the necessity for the injections was the result of the work injury. However, he reiterated that Claimant's annular tear was more likely than not unrelated to the admitted May 12, 2019 injury. Instead, the tear was caused by normal wear and tear as well as the aging and degenerative processes.

11. On February 27, 2020 Dr. Chan administered a transforaminal epidural steroid injection. He determined that the injection trial offered no diagnostic or therapeutic benefit.

12. On April 21, 2020 Dr. Chan discharged Claimant and noted no additional care was reasonable or necessary. In his discharge note, Dr. Chan remarked that EMGs of both upper extremities were negative for cervical radiculopathy and the MRI findings were most likely incidental rather than a pain generator. Although Claimant requested additional injections, Dr. Chan denied the procedure. He noted "I do not see the value of such, given the fact that the patient has noted no improvement at all from the previous injections.... I would not suggest any further injection therapy for [Claimant] at this juncture."

13. On April 28, 2020 Claimant returned to Dr. Broghammer for an evaluation. Dr. Broghammer echoed the opinion of Dr. Chan and commented that Claimant did not have any follow-up visits with Dr. Chan for injection therapy. He documented that Claimant's cervical MRI was evaluated by an orthopedic surgeon who did not recommend surgery. Dr. Broghammer also remarked that Claimant received a multitude of treatment modalities without any subjective benefit. Although Claimant requested another injection, Dr. Broghammer agreed with Dr. Chan that "given the lack of benefit from any therapeutic modalities thus far I do not think any further treatment is medically necessary or warranted."

14. Dr. Broghammer testified at the hearing in this matter. He explained that Claimant reached MMI as of the April 28, 2020 visit. Nevertheless, he again recommended a Functional Capacity Evaluation (FCE) to assess safe working parameters. The FCE was scheduled for June 3, 2020. Dr. Broghammer remarked that he would subsequently evaluate Claimant for permanent impairment.

15. Claimant testified at the hearing in this matter. She explained that she wanted a change of physician from Dr. Broghammer. She specified that Dr. Broghammer ordered chiropractic and massage therapy treatment but she only obtained minimal improvement. Claimant also remarked that her treatment had been unreasonably delayed. She specifically noted that it took seven months to obtain a cervical MRI. Claimant felt she was entitled to receive an MRI earlier in her claim. She also commented that she suffers from headaches and other symptoms but Dr. Broghammer was dismissive of her complaints. Claimant summarized that she has poor communication and lacks an effective doctor-patient relationship with Dr. Broghammer.

16. Dr. Broghammer testified that he did not obtain an earlier cervical MRI despite Claimant's requests because he did not believe any cervical symptoms or findings would be consistent with the mechanism of injury to Claimant's left shoulder. He also noted prior EMGs were negative for any radicular findings. Based on a lack of radiculopathy symptoms, Dr. Broghammer determined that a cervical MRI was not medically necessary.

17. Dr. Broghammer also explained that he did not think Claimant's headaches were consistent with the mechanism of her May 12, 2019 lifting injury. He remarked that she had a pre-existing history of migraines. Nevertheless, due to her ongoing complaints, he referred her to a specialist and deferred to that doctor's opinion regarding causation of the headaches.

18. The record reveals that Claimant has failed to make a “proper showing” for a change of physician from ATP Dr. Broghammer pursuant to §8-43-404(5)(a), C.R.S. Initially, Claimant suffered an admitted industrial injury to her left upper back and neck areas on May 12, 2019. Claimant seeks a change of physician because Dr. Broghammer was dismissive of her complaints and her care was delayed. Specifically, Dr. Broghammer waited seven months to obtain a cervical MRI. Claimant felt she was entitled to receive an MRI earlier in her claim. However, Dr. Broghammer persuasively testified that he did not obtain an earlier cervical MRI despite Claimant’s requests because he did not believe any cervical symptoms or findings would be consistent with the mechanism of injury to Claimant’s left shoulder. He also noted prior EMGs were negative for any radicular findings. In fact, the MRI revealed an annular tear that Dr. Broghammer characterized as likely chronic and degenerative in nature and not likely caused by lifting a patient. The opinions of surgeon Dr. Castro and pain management specialist Dr. Chan supported Dr. Broghammer’s opinion. Dr. Castro specifically concluded that the cervical findings on MRI were chronic and unrelated to the May 12, 2019 work injury.

19. Claimant also commented that she suffers from headaches and other symptoms but Dr. Broghammer was dismissive of her complaints. Although Dr. Broghammer did not initially agree that Claimant’s headaches were caused by a lifting injury, he made appropriate referrals to a neurologist and deferred to the opinions of that specialist. Furthermore, Dr. Chan noted that Claimant had a history of migraine headaches and was receiving treatment.

20. Claimant has failed to produce persuasive evidence that she reasonably developed a mistrust of Dr. Broghammer. Claimant’s perceived dissatisfaction is not consistent with the reasonable care and referrals provided by Dr. Broghammer during the course of her claim. She has also failed to produce sufficient evidence that Dr. Broghammer provided inadequate care or otherwise rendered unreasonable care. Disagreement and dissatisfaction with Dr. Broghammer’s diagnosis are insufficient to constitute a proper showing warranting a change of physician. Accordingly, considering Claimant’s need for reasonable and necessary medical treatment while protecting Respondents’ interest in being apprised of the course of treatment for which it may ultimately be liable, Claimant’s request for a change of physician is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the “Workers’ Compensation Act of Colorado” (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers’ Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers’ Compensation case are not interpreted liberally in favor of either

the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. See *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. A claimant is not entitled to medical treatment by a particular physician. *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714 (Colo. 1994); *Vigil v. City Cab Co.*, W.C. No. 3-985-493 (ICAO, May 23, 1995). Section 8-43-404(5)(a), C.R.S. permits the employer or insurer to select the treating physician in the first instance. Once the respondents have exercised their right to select the treating physician, the claimant may not change the physician without the insurer's permission or "upon the proper showing to the division." §8-43-404(5)(a), C.R.S.; *In Re Tovar*, W.C. No. 4-597-412 (ICAO, July 24, 2008). Because §8-43-404(5)(a), C.R.S. does not define "proper showing" the ALJ has discretionary authority to determine whether the circumstances warrant a change of physician. *Jones v. T.T.C. Illinois, Inc.*, W.C. No. 4-503-150 (ICAO, May 5, 2006). The ALJ's decision regarding a change of physician should consider the claimant's need for reasonable and necessary medical treatment while protecting the respondent's interest in being apprised of the course of treatment for which it may ultimately be liable. *Id.* An ALJ is not required to approve a change of physician for a claimant's personal reasons including "mere dissatisfaction." *In Re Mark*, W.C. No. 4-570-904 (ICAO, June 19, 2006).

5. As found, the record reveals that Claimant has failed to make a "proper showing" for a change of physician from ATP Dr. Broghammer pursuant to §8-43-404(5)(a), C.R.S. Initially, Claimant suffered an admitted industrial injury to her left upper back and neck areas on May 12, 2019. Claimant seeks a change of physician because Dr. Broghammer was dismissive of her complaints and her care was delayed. Specifically, Dr. Broghammer waited seven months to obtain a cervical MRI. Claimant felt she was entitled to receive an MRI earlier in her claim. However, Dr. Broghammer persuasively testified that he did not obtain an earlier cervical MRI despite Claimant's requests because he did not believe any cervical symptoms or findings would be consistent with the mechanism of injury to Claimant's left shoulder. He also noted prior EMGs were negative for any radicular findings. In fact, the MRI revealed an annular tear that Dr. Broghammer characterized as likely chronic and degenerative in nature and not likely caused by lifting a patient. The opinions of surgeon Dr. Castro and pain management specialist Dr. Chan supported Dr. Broghammer's opinion. Dr. Castro

specifically concluded that the cervical findings on MRI were chronic and unrelated to the May 12, 2019 work injury.

6. As found, Claimant also commented that she suffers from headaches and other symptoms but Dr. Broghammer was dismissive of her complaints. Although Dr. Broghammer did not initially agree that Claimant's headaches were caused by a lifting injury, he made appropriate referrals to a neurologist and deferred to the opinions of that specialist. Furthermore, Dr. Chan noted that Claimant had a history of migraine headaches and was receiving treatment.

7. As found, Claimant has failed to produce persuasive evidence that she reasonably developed a mistrust of Dr. Broghammer. Claimant's perceived dissatisfaction is not consistent with the reasonable care and referrals provided by Dr. Broghammer during the course of her claim. She has also failed to produce sufficient evidence that Dr. Broghammer provided inadequate care or otherwise rendered unreasonable care. Disagreement and dissatisfaction with Dr. Broghammer's diagnosis are insufficient to constitute a proper showing warranting a change of physician. Accordingly, considering Claimant's need for reasonable and necessary medical treatment while protecting Respondents' interest in being apprised of the course of treatment for which it may ultimately be liable, Claimant's request for a change of physician is denied and dismissed.

ORDER

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

1. Claimant's request for a change of physician is denied and dismissed.
2. Any issues not resolved in this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative

Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at <http://www.colorado.gov/dpa/oac/forms-WC.htm>.*

DATED: June 19, 2020.

DIGITAL SIGNATURE:


Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- I. Whether Claimant proved by a preponderance of the evidence that on July 25, 2019, he sustained a left foot injury arising out of and in the course and scope of his employment with the Employer; and
- II. Whether Claimant proved by a preponderance of the evidence that the medical treatment, including left foot surgery, he received for his left foot is reasonable, necessary, and related to his industrial injury.

STIPULATIONS

- The parties stipulate that if the claim is found compensable Claimant's average weekly wage is \$1,114.92. The parties also stipulate Claimant would have a right to temporary partial disability benefits from July 26, 2019, through December 12, 2019, and that Claimant would have a right to temporary total disability benefits from December 13, 2019, through March 25, 2020, subject to any statutory offsets.

FINDINGS OF FACT

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

1. This claim involves a July 25, 2019 injury to Claimant's left foot.
2. Claimant has a history of left foot problems. Back in December 2003, Claimant was diagnosed with bilateral plantar fasciitis and provided heel cups. (*Respondents' Exhibit B, pages 43-45.*) In April and May 2004, Claimant continued to have issues with bilateral plantar fasciitis, and his doctor recommend Claimant ask his employer for desk work while he heals. (*Respondents' Exhibit B, pages 39-41.*) In August 2004, Claimant had bilateral plantar fascia injections. (*Respondents' Exhibit B, page 37.*) Four years later, in August 2008, Claimant reported he twisted his left foot and had some persistent pain in his foot and 5th metatarsal. X-rays were normal. (*Respondents' Exhibit B, pages 29-31.*) At the end of September 2008, Claimant returned to his doctor and was given a CAM boot for his persistent left foot pain. (*Respondents' Exhibit B, pages 27-28.*) In July 2015, about seven years later, Claimant reported left foot pain after stepping on a board wrong. X-rays were normal. Claimant started wearing a CAM boot again. Claimant was told to return for follow up appointment if he did not get better. Claimant did not return for follow up treatment. *Respondents' Exhibit B, pages 24-26.*)
3. In May of 2017, Claimant sought treatment for his left foot after twisting his left foot while picking up mulch. Left foot x-rays did not reveal any injury. Claimant was

prescribed a CAM boot again. He was also advised to follow up he did not get better. Claimant did not return for additional care. (*Respondents' Exhibit B, pages 21-23.*)

4. Claimant testified that in the two years before July 2019, he did not have any pain, symptoms, or other issues with his left foot. Claimant testified he did not have any limitations or restrictions because of his left foot and that he was able to work full duty without issue prior to July 25, 2019. Claimant's testimony is consistent with his medical records that document prior foot injuries – with the last one being in 2017 – that resolved.
5. Claimant testified he has worked as a concrete truck driver/operator for the Employer since September 2018. Claimant's jobs duties require him to drive a concrete truck and to pour concrete. Claimant testified he works a heavy-duty job. Claimant's concrete truck has a steel chute arm that weighs over 50 pounds. Claimant's job duties require him to clean his truck at the end of his work shift.
6. On July 25, 2019, Claimant was cleaning out his concrete truck at the Employer's wash station, which he does at the end of each workday. To reach a control switch for his truck, Claimant had to maneuver around concrete, dirt, sand, water, and other debris that had collected at the wash station. Claimant stepped around the debris and placed his left foot on an uneven ledge, about 12 inches off the ground. As Claimant transferred his weight to step up on the ledge, he felt (and heard) a pop and had immediate pain in his left foot. Claimant testified he could not put any pressure on his foot. Claimant testified he reported his injury to the Employer right away.
7. As to the ledge, Claimant testified the ledge is uneven and had concrete and other debris all over the top of it. Pictures of the ledge submitted by Respondents corroborate Claimant's testimony. The pictures show the ledge is about 12 inches off the ground. The pictures also demonstrate and confirm that the ledge is uneven and appears to be covered in concrete and other debris. The ledge also slopes down from right to left. And water, concrete, and other debris is present on the ground. (*See Respondents' Exhibit F, pages 134-136.*) Claimant testified that on a typical day he steps up onto the ledge to release his chute, which must be stored up while driving. Claimant testified he must physically release his chute to wash it out. And that he must step on the ledge in order to release his chute before cleaning.
8. On July 26, 2019, Claimant treated with Tom Vanderhorst, M.D., - who specializes in family medicine - and reported that on July 25, 2019, at about 4:00 p.m., he was cleaning out his work truck when he stepped up on a ledge about 12 inches off the ground. Claimant reported he had his forefoot on the edge of the concrete as he stepped up and felt a pop associated with a sudden onset of pain in his left plantar foot. Claimant reported that since then he has had pain with any weight bearing and has to limp significantly. On physical examination, Dr. Vanderhorst noted significant tenderness to palpation of the plantar fascia mid to calcaneal aspect primarily. Dr. Vanderhorst noted increased pain with any passive or active stretch. There is not, however, any indication that he performed a thorough foot examination that included assessing Claimant's peroneal tendons on the lateral side of Claimant's foot. He did, however, provide Claimant a preliminary diagnosis of acute left plantar fasciitis and placed Claimant on work restrictions. But because he is not a foot and ankle specialist,

Dr. Vanderhorst immediately referred Claimant to a podiatrist, James Davis, DPM, for a more thorough assessment and evaluation of Claimant's foot pain. (*Claimant's Exhibit 6, pages 8-11.*)

9. On July 30, 2019, the Employer completed a First Report of Injury, noting Claimant was washing out a mixer truck and stepped up onto a ledge and felt a pop in his foot. (*Claimant's Exhibit 1, page 1.*)
10. On August 2, 2019, Claimant returned to Dr. Vanderhorst. Dr. Vanderhorst noted that despite referring Claimant to a podiatrist for a consultation, the carrier had yet to authorize the evaluation with a specialist. At this visit, Claimant reported persistent left foot symptoms, including pain primarily at the calcaneal aspect of his sole. Claimant reported wearing a left ankle boot, which does help control his symptoms. On physical examination, Dr. Vanderhorst also noted Claimant had mild **lateral midfoot discomfort**, as well as tenderness at the calcaneal aspect of the plantar fascia (emphasis added). But, despite Claimant having lateral foot pain, Dr. Vanderhorst failed to evaluate Claimant's peroneal tendons. On the other hand, he had referred Claimant to Dr. Davis - a foot and ankle specialist - for a more thorough evaluation and assessment. As a result, Dr. Vanderhorst maintained Claimant's treatment plan and work restrictions, while waiting for Dr. Davis' assessment. *Claimant's Exhibit 6, pages 12-13.*
11. On August 19, 2019, Claimant was finally evaluated by Dr. Davis – a foot and ankle specialist. Claimant reported to Dr. Davis that he felt immediate pain in the center of his arch. Claimant reported his pain is localized to the lateral aspect of the cuboid and central arch. On physical examination, Dr. Davis noted mild swelling along the lateral aspect of the foot, pain with palpation along the peroneal tendons to the lateral aspect of the cuboid, which directly reproduced Claimant's symptoms. Dr. Davis added that resisted motion of the peroneal tendons directly reproduced Claimant's symptoms. Dr. Davis noted only minimal pain with palpation of the plantar fascial insertion on the calcaneus. So, although Claimant generally described his pain as coming from the bottom of his foot, when the symptoms were reproduced during his clinical examination, they were coming more towards the lateral side of his foot.¹ Left foot x-rays revealed an accessory os peroneum to the lateral aspect of the cuboid and a questionable transverse lucency along the proximal aspect of the os peroneum. Dr. Davis opined Claimant's injury led to irritation and injury of the os peroneum. Dr. Davis also thought there may be a small fracture of the os peroneum. Dr. Davis diagnosed Claimant with left foot os peroneum and peroneal tendonitis. Dr. Davis recommended immobilization for three weeks and therapy. *Claimant's Exhibit 7, pages 23-27.*
12. On August 22, 2019, Respondents filed a Notice of Contest. (*Claimant's Exhibit 3, page 3.*)
13. On September 10, 2019, Respondents' retained Timothy O'Brien, M.D., to perform a records review. Dr. O'Brien opined Claimant's left foot pain is a manifestation of his

¹ The ALJ does not find this to be a new condition. The ALJ finds that this merely demonstrates Claimant's inability to determine the exact source and pathological cause of his underlying foot pain that was caused by stepping on the ledge. The ALJ also finds Dr. Vanderhorst also had the same problem. He could not identify the source of Claimant's foot pain that was caused by stepping on the ledge.

personal health and not a work-related injury. Dr. O'Brien opined Claimant did not sustain a traumatic plantar fasciitis because traumatic plantar fasciitis does not exist. Without getting the exact details from Claimant about the work incident, Dr. O'Brien opined Claimant's mechanism of injury did not generate enough force to cause an injury. Dr. O'Brien opined Claimant's plantar fasciitis is a manifestation of his age, genetic makeup, nicotine abuse, and obesity. Dr. O'Brien also opined Claimant's symptoms, specifically his lateral left foot pain, was non-organic and was therefore related to secondary gain issues related to Claimant having a workers' compensation claim. Dr. O'Brien diagnosed Claimant with a left calcaneal contusion. In other words, Dr. O'Brien said there was no pathology to account for Claimant's symptoms and was either insinuating or stating Claimant was making up having any symptoms on the lateral side of his left foot to perpetuate a false workers' compensation claim. (*Respondents' Exhibit A, pages 14-20.*)

14. On September 9, 2019, Claimant treated with Dr. Davis and reported some improvement with wearing the boot but that he continues to have pain with walking. On physical examination, Dr. Davis noted less swelling along the foot and pain with palpation of the peroneus longus tendon to the lateral cuboid. Dr. Davis noted Claimant's symptoms are somewhat improved. Dr. Davis recommended Claimant stay in the boot for three more weeks. (*Claimant's Exhibit 7, pages 28-32.*)
15. On September 13, 2019, Claimant returned to Dr. Vanderhorst and reported that on August 19, he treated with Dr. Davis, who suggested Claimant had "a questionable transverse lucency along the proximal aspect of the os peroneum." Dr. Vanderhorst noted Dr. Davis' findings and treatment recommendations. Claimant reported pain on the inferior/lateral aspect of his ankle. On physical examination, Dr. Vanderhorst noted maximal tenderness laterally at the os peroneum, along with minimal tenderness along the peroneal tendon and lateral malleolus. Dr. Vanderhorst maintained Claimant's treatment plan and work restrictions. (*Claimant's Exhibit 6, pages 14-16.*)
16. On September 24, 2019, Claimant treated with Dr. Davis and reported no improvement in his pain and other symptoms since his last visit. Pointing to his left foot, Claimant reported pain that radiates along the lateral foot as well as plantar foot in the distribution of the peroneus longus tendon. On physical examination, Dr. Davis noted continued swelling along the peroneal tendons laterally to the cuboid, corresponding to the os peroneum area and the peroneus longus tendon. Again, Dr. Davis also found upon examination that resisted motion to this area directly reproduced Claimant's symptoms. Dr. Davis diagnosed Claimant with os peroneum and peroneal tendonitis. Dr. Davis related Claimant's symptoms to inflammation along the peroneus longus tendon sheath. Dr. Davis discussed treatment options, including continuing with the boot, fiberglass cast immobilization, and/or surgery. Dr. Davis recommended a left foot MRI and discussed possible surgery. (*Claimant's Exhibit 7, pages 33-38.*)
17. On September 27, 2019, Claimant underwent a left ankle MRI, which revealed mild tendinosis of the distal Achilles tendon, mild tendinosis of the plantar aponeurosis at its insertion onto the calcaneus, greatest medially (no tear), and small osteochondral lesions in the medial and lateral talar dome. On October 1, 2019, Cameron Bahr, M.D., who reviewed the MRI, wrote an addendum after speaking with Dr. Davis. In his addendum, Dr. Bahr noted there is mild edema in the slightly elongated os perineum but

no appreciable fracture, slight irregularity and thinning of the peroneus longus tendon near the os peroneum with likely longitudinal split tear in this location (no full thickness tear). (*Claimant's Exhibit 8, pages 62-64.*)

18. On October 1, 2019, Claimant returned to Dr. Davis, who noted he reviewed the MRI and discussed his MRI findings with Dr. Bahr. Dr. Davis opined the MRI showed edema within the os peroneum and a longitudinal rupture of the peroneus longus tendon at its attachment, which was not noted on the initial MRI report. Dr. Davis added that Dr. Bahr agreed with his assessment. On physical examination, Dr. Davis noted consistent findings with his prior exams. Dr. Davis opined, "Given the large nature of the accessory bone as well as the longitudinal rupture and lack of improvement with previous immobilization, I feel as though the patient would best be served by surgical intervention." Dr. Davis recommended removal and excision of the os peroneum with repair of the peroneus brevis tendon. Dr. Davis requested authorization for surgery. (*Claimant's Exhibit 7, pages 39-44.*)
19. On October 9, 2019, Dr. Vanderhorst noted Claimant's history and Dr. Davis' most recent findings. Dr. Vanderhorst opined Claimant's injury is not work-related because Claimant's "onset of pain occurred with a normal activity of living, simply stepping up onto an edge without unusual forces." Dr. Vanderhorst added that "os peroneum is present in 20% of the population and predisposes to peroneal tendon changes. Dr. Vanderhorst placed Claimant at maximum medical improvement. (*Claimant's Exhibit 6, pages 20-22.*)
20. On October 11, 2019, Claimant completed a Workers' Compensation Claim form and reported that on July 25, 2019, he was washing out his truck when he stepped up on a ledge and felt a pop on the bottom of his foot. Claimant reported the injury to Mike Galbraith. (*Claimant's Exhibit 2, page 2.*)
21. On December 10, 2019, Claimant filed an Application for Hearing on compensability, reasonable and necessary medical benefits, average weekly wage, and temporary disability benefits. (*Claimant's Exhibit 4, pages 4-5.*)
22. On December 16, 2019, Claimant returned to Dr. Davis and reported continued left foot pain and discomfort along the peroneal tendons and the os peroneum. Dr. Davis noted consistent findings on physical examination and Claimant's lack of improvement despite conservative care. Dr. Davis recommended proceeding with surgery. (*Claimant's Exhibit 7, pages 45-50.*)
23. On December 18, 2019, Dr. Davis performed left foot surgery, including repair of the peroneal flexor tendon and open treatment of the os peroneum sesamoid fracture. Dr. Davis noted a large nodular mass along the plantar lateral aspect of the cuboid within the peroneus longus tendon, which he debrided, and he removed a large sesamoid bone from the tendon. Dr. Davis also repaired a longitudinal split ruptured peroneus tendon. *Claimant's Exhibit 7, pages 51-53.* On December 31, 2019, Claimant returned to Dr. Davis, who noted Claimant is doing well since the surgery. Dr. Davis fit Claimant for a cast. (*Claimant's Exhibit 7, pages 54-55.*)
24. On January 2, 2020, Respondents filed a Response to Claimant's Application for Hearing and endorsed the same issues. (*Claimant's Exhibit 5, pages 6-7.*)

25. On January 9, 2020, Claimant treated with Dr. Davis, who noted Claimant was doing well after surgery. Dr. Davis recommended Claimant start range of motion exercises. Dr. Davis recommended Claimant continue with no weight bearing on his left foot. (*Claimant's Exhibit 7, pages 56-57.*)
26. On January 28, 2020, Claimant underwent an IME with Dr. O'Brien, Respondents' retained expert. Dr. O'Brien reviewed additional records and performed a physical examination. Dr. O'Brien maintained his opinion that Claimant did not sustain a work injury. Dr. O'Brien disagreed with Dr. Davis' interpretation of the left foot MRI. Dr. O'Brien relates all of Claimant's left foot symptoms and MRI findings to his preexisting condition, not a work injury. (*Respondents' Exhibit A, pages 4-13.*)
27. On February 3, 2020, Claimant treated with Dr. Davis, who recommended Claimant ease out of the boot and start nonstrenuous activity. *Claimant's Exhibit 7, pages 58-59.* On February 24, 2020, Claimant treated with Dr. Davis, who noted Claimant continues to do well post-surgery. Dr. Davis recommended Claimant start formal physical therapy. (*Claimant's Exhibit 7, pages 60-61.*)
28. On April 9, 2020, Dr. O'Brien issues a third report based on his review of more medical records. Dr. O'Brien maintained his opinions. (*Respondents' Exhibit A, pages 1-3.*)
29. At Hearing, Dr. O'Brien testified consistent with his prior IME reports. Dr. O'Brien testified that in late July and early August 2019 Claimant was suffering from plantar fasciitis. Dr. O'Brien testified Claimant's plantar fasciitis symptoms are a direct result of who he is physiologically and did not result from any work injury. Dr. O'Brien testified Claimant did not sustain an injury on July 25, 2019. Dr. O'Brien testified no evidence exists that Claimant sustained any acute trauma or injury on July 25, 2019. Dr. O'Brien testified an os peroneum is a bone embedded in a tendon on the outside of the foot between the heel and the toes. Dr. O'Brien testified Claimant's left foot MRI was normal for someone his age. Dr. O'Brien testified he disagrees with Dr. Davis' diagnosis and surgery. Dr. O'Brien testified that Claimant did not have a fracture because there was no tendon rupture and no evidence of any bleeding. Dr. O'Brien testified Dr. Davis over read the MRI and should not have done surgery. Dr. O'Brien testified that it is not uncommon for degenerative, preexisting conditions like Claimant's to wax and wane over time. Dr. O'Brien testified Claimant's need for treatment is solely related to his personal medical conditions.
30. The ALJ Does not find Dr. O'Brien's opinions as explained in his reports and his testimony to be credible or persuasive for many reasons. First, Dr. O'Brien states in his report that:

There is not enough energy generated as the result of stepping up onto a step (which is essentially a daily activity) to result in new tissue breakage or yielding. (*Respondents' Exhibit A, page 11.*)

Despite Dr. O'Brien's conclusory statement, he did not provide:

- i. the amount of energy generated by Claimant while performing the task he was doing at the time of the incident,
- ii. the amount of energy necessary to lead to new tissue breakage or yielding, or

- iii. the amount of energy necessary to lead to new tissue breakage or yielding in a Claimant who has preexisting, but asymptomatic foot problems.

He also stated that:

There was no unusual or challenging aspect of his environment such as ice or oil upon the surface upon which he was stepping or disrepair of the step upon which he was stepping.

(Respondents' Exhibit A, page 9.)

That said, pictures presented at hearing by Respondents show that the ledge on which Claimant stepped when he injured his foot was unusual and challenging. The ledge was uneven and had an irregular surface - because it had dried concrete and debris on it. *(Respondents' Exhibit F, p. 136.)* Moreover, how Claimant would have had to have stepped on the ledge – with an irregular surface – differs from going up a normal set of steps. Here, Claimant had to step on an isolated ledge - like a balance beam – that had an irregular surface.

Dr. O'Brien also stated that:

Because there was no new tissue breakage or yielding (there was never any objective evidence of redness, bruising, or swelling and thus no objective evidence of tissue breakage or yielding and certainly this would have been expected if there had been an acute plantar fascial rupture) concepts such as end of healing and permanent partial disability are not applicable in this case. *(Respondents' Ex. A, page. 9.)*

But Claimant was not diagnosed by Dr. Davis with a plantar fascial rupture. Claimant, was, however diagnosed with the following conditions involving his left foot:

- i. Os peroneum syndrome, left foot,
- ii. Peroneal tendon rupture, left foot, and
- iii. Sesamoid fracture,

31. Dr. O'Brien also stated that Claimant:

[H]as a history of diffuse lateral foot pain that he has experienced over the course of years. More often than not, these subjective complaints of pain are found with the complete absence of any objective evidence of tissue breakage or yielding. X-rays were normal. He had no swelling or bruising or any physical sign of trauma or inflammation. Therefore, just as my Independent Medical Evaluation Report proved, Mr. Archuleta's subjective complaints of pain are more often than not devoid of any supportive objective clinical evidence. *(Respondents' Exhibit A, page 3.)*

32. The ALJ has found, through its own analysis of the record, that just because Dr. O'Brien states there are no objective clinical findings to support Claimant's contention that he suffered a compensable injury at work does not make it so. The record contains several objective clinical, x-ray, MRI, and surgical findings that support Claimant's contention that he suffered a compensable injury to his left foot after he developed the immediate

onset of significant left foot pain upon stepping up on the uneven ledge. These findings include, but are not limited to, the following:

- Dr. Davis noted Claimant's pain was localized to the lateral aspect of the cuboid as well as the central arch area.
- Dr. Davis noticed swelling along the lateral aspect of Claimant's foot.
- Dr. Davis noted Claimant had pain with palpation along the peroneal tendons to the lateral aspect of the cuboid. He also noted that the palpation "does directly reproduce symptoms." He further noted Claimant had only minimal pain with palpation of the plantar fascial insertion of the calcaneus.
- He also noted that "resisted motion of the peroneal tendons again directly reproduced Claimant's symptoms."
- Dr. Davis also took and reviewed x-rays. He noted that the x-rays showed a possible transverse lucency along the proximal aspect of the os peroneum.
- Dr. Davis also requested Claimant undergo an MRI. Based on his reading of the actual MRI films, he concluded there was edema within the os peroneum and a longitudinal rupture of the peroneus longus tendon at its attachment. Dr. Davis discussed his review of the MRI findings with the radiologist - and upon further review - the radiologist agreed with Dr. Davis' assessment.
- Lastly, Dr. Davis performed surgery in December 2019. In his surgical report, he identified the following objective pathology during surgery:
 - The peroneal tendon sheath was then opened, and the tendons were inspected. The peroneus brevis tendon was noted to be intact without deficit.
 - He did have a large nodular mass along the plantar lateral aspect of the cuboid within the peroneus longus tendon. This was then debrided, and a large sesamoid bone was then removed from the tendon itself. The bone was removed in toto.
 - The residual peroneus tendon was then inspected, and he did have a longitudinal split rupture extending proximally - which he repaired.

33. Rather than provide an expert opinion within the confines of his expertise - Dr. O'Brien veered from his lane of expertise and began casting aspersions regarding the character of Claimant, the radiologist, and Dr. Davis. In essence, he sought to provide character evidence instead of causation evidence.

For example, regarding Claimant, Dr. O'Brien stated:

Nonorganic pain, especially in the presence of a Workers' Compensation claim, in my experience in all occasions is being generated by the secondary gain aspects inherent to the those claims. In other words, by the date of Podiatrist VanderHorst's evaluation on August 23, 2019, Mr. Archuleta's pain is no longer being generated by an anatomic or physiologic path, but rather is being generated by virtually the fact that he has a Workers' Compensation claim that he is attempting to adjudicate. The pain on August 23, 2019, which is definitely migratory in nature, is therefore claim-based but not anatomically based.

According to Dr. O'Brien's reports and testimony, he wants the ALJ to find:

- i. Claimant was not satisfied with recovering from his initial foot injury. As a result, Claimant decided to make up a non-existent foot problem, in a new area of his foot, and have surgery for a non-existent foot problem.
- ii. Claimant had surgery for a non-existent foot problem so he could stay off work longer and not get paid – rather than go to work and get paid.
- iii. The radiologist was coerced into amending his report to indicate there was a tear or rupture of Claimant's peroneal tendon, when in fact there was none.
- iv. The surgery performed by Dr. Davis was not reasonably necessary, because Claimant's peroneal tendon was not torn or ruptured and the tendon and os peroneum were not causing Claimant any symptoms.
- v. Dr. Davis misrepresented his findings during his examinations and surgery. In essence, Dr. Davis found no clinical findings to support his assessment that Claimant had a ruptured peroneal tendon.
- vi. Or, in the alternative, Claimant suffered a new injury after the initial work injury, while spending most of the time walking in an immobilization boot.

The ALJ, however, will not make such findings based on the evidence in this case. As Claimant credibly testified, he had surgery so he could go back to work – not stay home from work. Based on the credible testimony of Claimant, the reports of Dr. Davis, and the medical record as a whole – the ALJ rejects Dr. O'Brien's opinions and does not find his opinions to be credible or persuasive.

34. The ALJ also does not find Dr. Vanderhorst's opinion on causation to be persuasive. Like Dr. O'Brien, he concluded Claimant stepping on the ledge did not create any unusual forces. But, like Dr. O'Brien, it does not appear Dr. Vanderhorst knew what forces were involved in Claimant's activities, the irregular surface, or the exact way Claimant stepped on the ledge. He also failed to analyze how such action did not aggravate or accelerate any underlying preexisting condition.

35. The ALJ does credit and find persuasive the findings and opinions of Dr. Davis regarding Claimant's condition, the work related cause of the condition, and the need for medical treatment - which included surgery - to cure and relieve Claimant from the effects of his work injury. Dr. Davis' opinions align with Claimant's testimony, his clinical findings on examination, the radiological, x-ray, MRI findings, and ultimately his surgical findings.
36. The issue here is whether Claimant's injury arose out of his employment. Claimant contends he sustained a compensable, left foot injury when he planted his left foot on the uneven ledge while maneuvering around some concrete and other debris to operate and wash his work truck. Claimant contends that his injury is inherent in his work activities and should be analyzed under the "employment risk" category of injuries, not the "neutral risk" or "personal risk" categories. Claimant contends his injury is not idiopathic and not caused by his preexisting condition. Rather, Claimant asserts he suffered a new discreet injury due to his work accident or that the work accident aggravated, accelerated, and/or combined with his preexisting condition to cause his injury and need for treatment.
37. Respondents contend Claimant's injury is strictly personal and thus should be analyzed under the "personal risk" category of injuries. Respondents argue Claimant's injury was caused by a preexisting condition. Respondents argue Claimant's July 25, 2019 mechanism of injury was insufficient to cause an injury.
38. The ALJ finds that on July 25, 2019, Claimant sustained a compensable, left foot injury. The ALJ finds Claimant's injury arose out of his employment. The ALJ finds Claimant's injury should be analyzed under the "employment risk" category of injuries. At the time of his injury, Claimant was in the process of cleaning out his work truck. To access his controls and the chute on his truck, Claimant had to maneuver around concrete, dirt, water, and other debris that had collected at the wash station. Claimant stepped up on the concrete ledge to reach the control panel on his truck and to lower the chute on his truck so that he could clean it. At the time of his injury, Claimant was performing an essential function of his job. But for his job duties, Claimant would not have been at the wash station washing out his work truck, a required part of his employment.
39. The ALJ finds Claimant injured his left foot when he stepped up on the uneven, concrete ledge. The ALJ finds this mechanism of injury sufficient to cause Claimant's left foot injury. The ALJ finds Claimant's injury was not precipitated by a preexisting condition. The ALJ finds Claimant's July 25, 2019 injury is either a new and discreet injury or that it aggravated, accelerated, and combined with his preexisting condition to cause his injury, the need for medical treatment - including surgery- and his disability.
40. The ALJ finds Claimant proved by a preponderance of the evidence that on July 25, 2019, he sustained a left foot injury arising out of and in the course and scope of his employment with the Employer. The ALJ finds the medical treatment, including the December 18, 2019 surgery, Claimant has undergone for his left foot reasonable, necessary, and related to his compensable, July 25, 2019 industrial injury.
41. The Claimant's injury also prevented him from performing his regular job duties.

CONCLUSIONS OF LAW

- A. The purpose of the Workers' Compensation Act (Act), § 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the right of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S.
- B. A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc., v. Indus. Claim. Apps. Office*, 5 P.3d 385 (Colo. App. 2000).
- C. When determining credibility, the fact finder should consider, among other things, the consistency, or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Ins. Co. v. Cline*, 57 P.2d 1205, 1209 (Colo. 1936); CJI, Civ. 3:17 (2013).

COMPENSABILITY

- D. A compensable injury is one that arises out of and occurs within the course and scope of employment. § 8-41-301(1)(b), C.R.S. An injury occurs in the course of employment when it was sustained within the appropriate time, place, and circumstances of an employee's job function. *Wild West Radio v. Indus. Claim Apps. Office*, 905 P.2d 6 (Colo. App. 1995). An injury arises out of employment when there is a sufficient causal connection between the employment and the injury. *City of Brighton v. Rodriguez*, 318 P.3d 496, 502 (Colo. 2014). An injury arises out of employment when it has its origin in an employee's work-related functions and is sufficiently related to those functions so as to be considered part of employment. *Id. at 502*. Where the claimant's entitlement to benefits is disputed, the claimant has the burden to prove, by a preponderance of the evidence, a causal relationship between the work injury and the condition for which benefits are sought. *Snyder v. Indus. Claim Apps. Office*, 942 P.2d 1337 (Colo. App. 1997).
- E. In *City of Brighton v. Rodriguez, supra*, the Supreme Court addressed whether an unexplained fall at work satisfies the "arising out of" test. The court identified three categories of risks that cause injuries to employees: (1) employment risk directly tied to the work itself; (2) personal risks, which are inherently personal; and (3) neutral risks, which are neither employment nor personal. The first category of risks encompasses risks inherent to the work environment and are compensable, whereas the second category of risks is not compensable, unless an exception applies. The court also defined the category of personal risks to encompass so-called idiopathic injuries, which are considered "self-originated" injuries that spring from a personal risk of the claimant,

such as heart disease, epilepsy, or similar conditions. The third category, neutral risks, are compensable if the application of a “but for” test shows any employee would have been injured simply by virtue of being at work. The court was careful to point out that the “but for” test does not relieve the claimant the burden of proving causation, nor does it suggest that all injuries occurring at work are compensable. When a claimant’s injury is “precipitated” by a preexisting condition, the injury is not compensable unless a “special hazard” of employment increased the probability or severity of the injury. *National Health Laboratories v. Indus. Claim Apps. Office*, 844 P.2d 1259 (Colo. App. 1992); *Gates Rubber Co. v. Indus. Comm’n*, 705 P.2d 6 (Colo. App. 1985). The classic case is the employee who suffers an epileptic seizure at work that causes him to fall from a scaffold or ladder. E.g., *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989).

- F. An aggravation of a preexisting condition is compensable. *Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. 1990). If a direct causal relationship exists between the mechanism of injury and resultant disability, the injury is compensable if it caused a preexisting condition to become disabling. *Duncan v. Indus. Claim Apps. Office*, 107 P.3d 999 (Colo. App. 2004). However, there must be some affirmative causal connection beyond a mere assumption that the asserted mechanism of injury was sufficient to have caused an aggravation. *Brown v. Indus. Comm’n*, 447 P.2d 694 (Colo. 1968). It is not sufficient to show that the asserted mechanism could have caused an aggravation, but rather Claimant must show that it is more likely than not that the mechanism of injury did, in fact, cause an aggravation. *Id.*
- G. Pain is a typical symptom from the aggravation of a pre-existing condition, and if the pain triggers the claimant’s need for medical treatment, the claimant has suffered a compensable injury. *Merriman v. Indus. Comm’n*, 210 P.2d 448 (Colo. 1949); *Dietrich v. Estes Express Lines*, W.C. No. 4-921-616-03 (September 9, 2016). But the mere fact that a claimant experiences symptom at work does not necessarily mean the employment aggravated or accelerated the pre-existing condition. *Finn v. Indus. Comm’n*, 437 P.2d 542 (Colo. 1968); *Cotts v. Exempla*, W.C. No. 4-606-563 (August 18, 2005). Rather, the ALJ must determine whether the need for treatment was the proximate result of an industrial aggravation or is merely the direct and natural consequence of the pre-existing condition. *F.R. Orr Const. v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Carlson v. Joslins Dry Goods Company*, W.C. No. 4-177-843 (March 31, 2000).
- H. The critical question here is whether the conditions of Claimant’s employment caused a new and discreet injury or aggravated, accelerated, and combined with his preexisting condition to cause his left foot injury and need for treatment. Claimant contends his need for treatment was the proximate result of the industrial injury. Respondents argue Claimant’s need for treatment is merely the direct and natural consequence of his preexisting condition. The ALJ finds Claimant’s injury should be analyzed under the “employment risk” category of injuries.
- I. In *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990), the claimant suffered from a cancerous condition that compromised the strength of the humerus bone in his arm. While at work, the sudden opening of a door caused Claimant to quickly move his arm. That sudden movement, combined with the weakened condition of the bone, led to the fracture of his arm. The Court determined the claimant’s injury should be analyzed

under the “employment risk” category, not the “personal risk” or “neutral risk” categories. The Court determined the sudden opening of the door, not the cancerous condition, caused the claimant’s injury and need for treatment. As a result, the claimant’s injury inherently fell under the “employment risk” category of injuries. *Vicory*, 825 P.2d at 1168-1169.

- J. In the matter of *Gary Enriquez v. Americold d/b/a Atlas Logistics*, W.C. No. 4-960-513 (October 2, 2015), the ICAO upheld an ALJ’s finding that the claimant sustained a compensable knee injury when he stepped off a nine inch high pallet jack. Much like the Court in *Vicory*, the ICAO analyzed Claimant’s injury under the “employment risk” category, finding the claimant’s injury was inherent to his employment.
- K. More recently, in *Cambria v. Flatiron Construction*, W.C. No. 5-066-531 (May 7, 2019), the ICAO upheld an ALJ’s determination that the claimant sustained a compensable knee injury when he was carrying a 20-pound metal cage, stepped forward with his right leg to put down the cage, and felt a pop in his knee. The claimant had a history of right knee problems, including a 2014 right knee surgery. The ALJ determined the claimant’s injury aggravated, accelerate, and combined with the claimant’s preexisting condition to produce a disability and need for treatment. The ALJ determined the claimant’s injury was inherent to his work activities an analyzed the claim under the “employment risk” category of injuries, determining the claimant’s injury was not precipitated by a preexisting condition. The ICAO affirmed the ALJ’s determination that the claimant sustained a compensable knee injury.
- L. As found, this claim, like the claims in *Vicory*, *Enriquez*, and *Cambria*, should be analyzed under the “employment risk” category of injuries. At the time of his injury, Claimant was in the process of cleaning out his work truck, which he does every day as required by the Employer. Claimant maneuvered around some concrete, dirt, water, and other debris and stepped up on an uneven, concrete ledge to access the control panel for his truck. It as the action of stepping on the uneven ledge that proximately caused Claimant’s injury and necessitated the need for medical treatment and caused his disability. At the time of his injury, Claimant was performing an essential function of his employment. Claimant’s injury is inherent to his employment duties, and, but for Claimant’s work duties, he would not have been injured. Claimant’s injury is either a new and discreet injury or it aggravated, accelerated, and combined with his prior condition to cause an injury and need for treatment. As found, Claimant’s injury is not strictly personal. Claimant’s injury was not precipitated by a preexisting condition. Claimant proved by a preponderance of the evidence that on July 25, 2019, he sustained a compensable left foot injury arising out of and in the course and scope of his employment with the Employer.

MEDICAL BENEFITS

- M. Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. § 8-42-101, C.R.S. Nevertheless, the right to workers’ compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the

employment. § 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Apps. Office*, 12 P.3d 844, 846 (Colo. App. 2000). Claimant must establish the causal connection with reasonable probability but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Indus. Comm'n*, 491 P.2d 106 (Colo. App. 1971); *Indus. Comm'n v. Royal Indemnity Co.*, 236 P.2d 2993. A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Indus. Comm'n v. Jones*, 688 P.2d 1116 (Colo. 1984); *Indus. Comm'n v. Royal Indemnity Co.*, *supra*, 236 P.2d at 295-296. All results flowing proximately and naturally from an industrial injury are compensable. See *Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970).

- N. As found, Claimant proved by a preponderance of the evidence that the medical treatment, including December 18, 2019 left foot surgery, he received through the authorized providers is reasonable, necessary, and related to his compensable July 25, 2019 industrial injury. The medical treatment provided to Claimant was to cure and relieve him from the effects of his compensable work injury.

ORDER

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

1. On July 25, 2019, Claimant sustained a compensable left foot injury arising out of and in the course and scope of his employment with the Employer.
2. The medical treatment, including December 18, 2019, left foot surgery Claimant received through his authorized providers is reasonable, necessary, and related to his compensable industrial injury.
3. Respondents shall pay for Claimant's medical treatment, including December 18, 2019 left foot surgery, subject to the Division of Workers' Compensation Medical Fee Schedule.
4. Claimant's average weekly wage is \$1,114.92.
5. Respondents shall pay Claimant temporary partial disability benefits from July 26, 2019, through December 12, 2019.
6. Respondents shall pay Claimant temporary total disability benefits from December 13, 2019, through March 25, 2020.
7. Respondents shall pay eight percent (8%) per annum interest on all benefits not paid when due.

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

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

DATED: June 22, 2020

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-102-365-001**

ISSUES

Whether the claimant has demonstrated, by a preponderance of the evidence, that he suffered an occupational disease arising out of and in the course and scope of his employment with the employer.

If the claimant proves a compensable occupational disease, whether the claimant has demonstrated, by a preponderance of the evidence, that medical treatment he has received was authorized.

If the claimant proves a compensable occupational disease, whether the claimant has demonstrated, by a preponderance of the evidence, that medical treatment he has received was reasonable medical treatment necessary to cure and relieve the claimant from the effects of the occupational disease.

If the claimant proves a compensable occupational disease, whether the claimant has demonstrated, by a preponderance of the evidence, that he is entitled to temporary total disability (TTD) benefits beginning May 4, 2019 and ongoing.

At hearing, the parties stipulated that if the claim is found compensable, the claimant's average weekly wage is \$1,987.71, resulting in the maximum TTD rate of \$987.84.

FINDINGS OF FACT

1. The claimant began working for the employer in February 2017. In March 2019, the claimant was working as a supervisor. The claimant testified that his position involved manual labor.

2. The claimant's coworker, Mr. H[Redacted], described the nature of the work performed by the claimant. Mr. H[Redacted] testified that the claimant's job duties included doing rig up, rig down, and paperwork. Mr. H[Redacted] explained that "rig up" entailed hauling and installing iron pieces called "chiksens". Mr. H[Redacted] estimated that these chiksens weigh between 45 and 50 pounds each. Installation involves attaching the chiksen to a piece of iron and hammering it to make the connection. This is done approximately four to five inches above the ground. In addition to installing chiksens in this way, the claimant would also carry pieces of iron that varied in length from five feet to 15 feet. Mr. Davis testified that he observed the claimant performing the job duties described above. Mr. H[Redacted] explained that while he was training to become a supervisor, he was supervised by the claimant.

3. The claimant testified that when he was involved in installing chiksen, it was necessary to "hammer down as hard as you can." With regard to hauling chiksen and other iron, it was necessary to reach from shoulder height to grab the iron.

4. The claimant testified that on March 7, 2019 he was working at a job location in Rock Springs, Wyoming. On that date, the claimant assisted with the “rig down” portion of the job duties. The claimant testified that at some point during that shift he had difficulty moving his right ring and small fingers. In addition, he could not use his computer keyboard while completing paperwork. That night, he developed pain in his entire right arm.

5. The next morning, March 8, 2019, the claimant sent a text message to his supervisor, Dallas S[Redacted], in which he stated that he needed to see a doctor. In that same text, the claimant described his symptoms as “[l]ost feeling and movement in half of my right hand and my last two fingers along with terrible pain from my elbow to my wrist.” When Mr. S[Redacted] asked, via text, if the claimant believed it was work related the claimant responded “[l]m not sure. It just happened suddenly.”

6. Mr. S[Redacted] testified that he was contacted by the claimant by text regarding his right arm symptoms. In addition, he spoke with the claimant by telephone. Mr. S[Redacted] also noted that the claimant reported to him that on March 7, 2019, the claimant did not do much of the rig up activities. Mr. S[Redacted] testified that it is typical for a supervisor, like the claimant, to only complete the paperwork related to a rig up.

7. Following his communication with the claimant, Mr. S[Redacted] made arrangements with the employer to schedule medical treatment for the claimant. In addition, Mr. S[Redacted] transported the claimant for that treatment at an urgent care clinic in Rock Springs on March 8, 2019. On that date, the claimant was seen by Dr. Darcy Turner. The claimant reported that the day before he was “just standing there” at work when his right arm went numb below the elbow. The claimant also reported pain into his fingers and difficulty gripping with his right hand. Dr. Turner diagnosed a lesion of the right ulnar nerve and prescribed prednisone.

8. The claimant testified that his regularly scheduled “hitch” in Wyoming was ending March 10, 2019, and he returned to his home in Grand Junction, Colorado on March 11, 2019.

9. Upon his arrival in Grand Junction, the claimant did not pursue treatment with a designated medical provider. Instead, the claimant sought medical treatment with his personal care provider, Dr. Charles Rademacher. The claimant was seen by Dr. Rademacher on March 12, 2019 and reported the inability to extend the fourth and fifth fingers on his right hand. In addition, the prednisone was causing swelling in the claimant’s right hand. The claimant reported to Dr. Rademacher that he did not recall any trauma to his right hand. Dr. Rademacher diagnosed atraumatic acute right ulnar neuritis and referred the claimant for an orthopedic consultation.

10. Beginning on March 12, 2019, all of the claimant’s medical treatment has been paid for by his personal health insurance.

11. On March 18, 2019, the claimant was seen by Dr. Bjorn Irion with Western Orthopedics and Sports Medicine. At that time, Dr. Irion noted that the claimant had right elbow, wrist, and hand symptoms “without any known injury.” The symptoms included

pain, numbness, tingling, swelling, weakness, and decreased range of motion. The claimant reported that his symptoms started when he “was resting his forearms on a metal bar”. Dr. Irion reviewed radiographs of the claimant’s right elbow that showed normal alignment and no acute osseous abnormality. Dr. Irion diagnosed right ulnar neuritis and referred the claimant to occupational therapy. In addition, he prescribed gabapentin.

12. Thereafter, Dr. Irion referred the claimant to Dr. James Rose, a hand and upper extremity surgeon. The claimant was first seen by Dr. Rose on March 29, 2019. The claimant reported right elbow symptoms that included pain, numbness, tingling, swelling, weakness, and decreased range of motion. Dr. Rose diagnosed right cubital tunnel syndrome and recommended surgical intervention. At that time, Dr. Rose also addressed the possibility of nerve conduction studies. However, it was noted that such testing could take six to eight weeks. The claimant elected to undergo surgery.

13. On April 16, 2019, Dr. Rose performed a right ulnar release. In the surgical record, Dr. Rose noted that the claimant’s father had symptoms resulting in bilateral cubital tunnel releases.

14. Following the ulnar release surgery, the claimant was seen by Dr. Rose on April 29, 2019. On that date, the claimant reported that his symptoms were unchanged following the surgery. Dr. Rose referred the claimant to neurologist Dr. Joel Dean for nerve conduction studies.

15. The claimant was seen by Dr. Dean on May 2, 2019. On that date, Dr. Dean administered electromyography (EMG) and nerve conduction studies (NCS) on the claimant’s right upper extremity. Based upon the results, Dr. Dean opined that the claimant had severe right ulnar neuropathy at the elbow. Dr. Dean noted that the claimant experienced instant bilateral arm numbness when wearing a backpack. Dr. Dean indicated that it was possible the claimant had an accessory cervical rib and thoracic outlet syndrome (TOS). As a result, Dr. Dean ordered an x-ray of the claimant’s cervical spine.

16. On May 2, 2019, an x-ray of the claimant’s cervical spine was performed. The radiologist noted mild degenerative changes at the C3-C4 and C5-C6 levels. In addition, the x-ray showed asymmetry of the right thoracic outlet when compared to the left. The radiologist also noted crowding of the clavicle and the first rib.

17. On May 17, 2019, the claimant was seen by Dr. Rose. On that date, Dr. Rose noted Dr. Dean’s mention of TOS. Dr. Rose agreed that the claimant’s cervical spine x-ray showed “some bony fullness around the right first rib”. Dr. Rose ordered x-rays and a magnetic resonance image (MRI) of the claimant’s chest. In addition, he referred the claimant to Dr. Robert Brooks.

18. On May 21, 2019, a chest x-ray was performed and showed no cervical ribs. On June 4, 2019, an MRI of the claimant’s brachial plexus showed joint spurring at the C5-C6 level causing mild to moderate right sided neural foraminal stenosis. The radiologist noted similar findings at the C4-C5 level. The radiologist identified this as a negative MRI of the brachial plexus.

19. The claimant was first seen by Dr. Brooks on June 25, 2019. At that time, Dr. Brooks noted that the claimant's imaging studies were indicative of neurogenic TOS as evidenced by an asymmetrical right clavicle and a first rib. Dr. Brooks diagnosed right neurogenic TOS and recommended surgical intervention of a right first rib resection.

20. On July 1, 2019, Dr. Brooks performed a first and second rib excision on the right. On August 14, 2019, the claimant returned to Dr. Brooks. At that time, the claimant reported that he had not improved and continued to have numbness in his right shoulder, armpit, chest, and down into his elbow. He also reported continued moderate pain from his right wrist to his fingers. Dr. Brooks referred the claimant back to Dr. Rose.

21. On August 26, 2019, the claimant returned to Dr. Rose and reported that he was slowly improving. However, the claimant also reported that he continued to have clawing, weakness, and numbness "in the ulnar distribution" of his right arm. Dr. Rose noted that the claimant had been referred back to him to consider additional ulnar releases. Dr. Rose opined that further nerve compression at the level of the ulnar tunnel was not warranted.

22. The claimant returned to Dr. Rose on October 7, 2019 and reported continuing numbness in his right fourth and fifth fingers and into his forearm. On that date, Dr. Rose ordered an MRI of the claimant's cervical spine "to rule out any proximal cause of [the claimant's] ulnar neuropathy."

23. On October 16, 2019, an MRI of the claimant's cervical spine showed mild to moderate right neural foraminal narrowing with a posterior disc osteophyte complex at the C5-C6 level, with abutment of the ventral spinal cord.

24. Subsequently, Dr. Bell referred the claimant to spine surgeon, Dr. Kirk Clifford. On November 4, 2019, the claimant was seen by Dr. Clifford's physician's assistant, Jason Bell. On that date the claimant reported that that he began to experience numbness in his right ring and small fingers in March, "without any specific inciting mechanism". Mr. Bell noted the recent MRI results and the disc bulge at the C5-C6 level. Mr. Bell opined that surgical intervention would be beneficial to the claimant. However, Mr. Bell indicated that before pursuing surgery the claimant would need to lose weight and stop smoking.

25. On December 2, 2019, the claimant returned to Mr. Bell and indicated that he was ready to proceed with surgery. Mr. Bell noted that authorization would be submitted for a single level disc replacement.

26. On December 14, 2019, the claimant attended an independent medical examination (IME) with Dr. Robert Messenbaugh. In connection with the IME, Dr. Messenbaugh reviewed the claimant's medical records, obtained a history from the claimant, and completed a physical examination. In his IME report, Dr. Messenbaugh opined that the claimant's right hand and upper extremity symptoms (including the diagnosis of TOS) were developed from repetitive lifting, pushing and pulling at his job on March 7, 2019. In support of this opinion, Dr. Messenbaugh noted that the claimant did not experience these symptoms until he performed his job duties on March 7, 2019. In

addition, Dr. Messenbaugh stated that the type of repetitive activity the claimant engaged in on March 7, 2019 is known to cause TOS. Dr. Messenbaugh further opined that the claimant did not injure his cervical spine on Marcy 7, 2019.

27. Dr. Messenbaugh's testimony by deposition was consistent with his written report. Dr. Messenbaugh testified that it is his opinion that the claimant's job duties are consistent with the development of TOS. Dr. Messenbaugh also reiterated that he does not believe that the claimant has cervical spine symptomatology. During his deposition, Dr. Messenbaugh learned that the claimant's symptoms did not occur while he was engaged in physically vigorous activities. Dr. Messenbaugh noted that would be of some concern, but would not change his opinion regarding the cause of the claimant's TOS symptoms.

28. On December 19, 2019, Dr. Kirk Clifford performed a C5-C6 anterior cervical discectomy and artificial disc replacement.

29. On January 17, 2020, Dr. Rose authored a medical record in response to the opinions expressed by Dr. Messenbaugh in the IME report. In that record, Dr. Rose opined that the cervical disc herniation was caused by the claimant's job duties. In support of that opinion, Dr. Rose noted "the immediacy of the [the claimant's] symptoms directly after heavy overhead work" and the MRI findings of a disc herniation.

30. At the request of the respondents, Dr. Tashof Bernton reviewed the claimant's medical records and issued a report regarding that review on April 27, 2020. In that report, Dr. Bernton opined that there was no occupational cause of the claimant's symptoms. In support of this opinion, Dr. Bernton noted that the claimant's diagnosis is "sudden onset of ulnar weakness." Dr. Bernton also noted that the cervical spine MRI showed issues at the C5-C6 level, which is not the dermatomal pattern for the ulnar nerve. Rather, the ulnar nerve is innervated by C8 and T1. The claimant's cervical spine MRI showed no pathology at the C8-T1 levels. Dr. Bernton further opined that the claimant's history is not consistent with a TOS diagnosis. However, at the time of his report, Dr. Bernton did not have access to Dr. Dean's EMG/NCS testing report. He requested an opportunity to review that report.

31. Dr. Berton wrote a second report on April 28, 2020, after reviewing additional records. In that report, Dr. Berton stated that the "data certainly indicates the patient has a severe ulnar neuropathy." Dr. Bernton also opined that the claimant may have Parsonage-Turner syndrome, a post-infectious or autoimmune condition. Dr. Bernson further noted that the claimant's condition is not work related.

32. Dr. Bernton's testimony by deposition was consistent with his written reports. Dr. Bernton testified that the onset of the claimant's symptoms were atypical for ulnar neuropathy. Dr. Bernton explained that typically these symptoms will begin to develop gradually and over time. However, the claimant describes a sudden onset of his symptoms. Dr. Bernton also testified that the claimant's symptom onset is not consistent with a diagnosis of TOS. Dr. Bernton testified that it is his opinion that the claimant's symptoms/diagnoses were not caused by the claimant's work activities.

33. Dr. Rose testified by deposition. He testified that Dr. Irion referred the claimant to him because of hand numbness and elbow pain. Dr. Rose also testified that he recommended that the claimant undergo surgery because of the amount of muscle wasting present in the claimant's right hand. Dr. Rose felt that the muscle loss could become irreversible if surgery was not pursued quickly. As a result, he did not recommend waiting six to eight weeks to get the claimant in to see a neurologist. However, Dr. Rose agreed in his testimony that the surgery he performed did not resolve the claimant's symptoms, and as a result he made the referral to Dr. Dean. Dr. Rose also noted that the claimant reported to him that his father had similar symptoms of bilateral numbness in his ring and small fingers.

34. Dr. Dean also testified by deposition. Dr. Dean testified that the claimant was referred to him by Dr. Rose. Dr. Dean also testified that the testing he performed does not address the cause of the claimant's symptoms. Rather the testing is used to assess where in the claimant's right upper extremity the weakness was coming from; his neck, shoulder, elbow, or wrist.

35. Dr. Clifford testified by deposition. Dr. Clifford testified that even after the ulnar release and the TOS related rib resection, the claimant had clawing of his right hand, with atrophy and wasting. Dr. Clifford proposed disc replacement surgery because of the disc herniation at the C5-C6 level. Dr. Clifford also testified that the claimant's development of bone spurs in conjunction with a disc herniation would develop over months or years.

36. In October 2019, the claimant began receiving long term disability in the amount of \$3,276.00 per month. This is equal to an average of \$756.00 per week.¹

37. The ALJ credits the medical records and the opinions of Dr. Bernton (and over the contrary opinions of Dr. Messenbaugh) and finds that the claimant has failed to demonstrate that it is more likely than not that he suffered an occupational disease arising out of and in the course and scope of his employment with the employer.

CONCLUSIONS OF LAW

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

¹ \$3,276.00 multiplied by 12 months equals \$39,312.00, then divided by 52 weeks equals \$756.00.

Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

4. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. See *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); see also *Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with a preexisting disease or infirmity to produce disability or need for treatment." See *H & H Warehouse v. Vicory, supra*.

5. The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place, and cause. *Campbell v. IBM Corporation*, 867 P.2d 77 (Colo. App. 1993). "Occupational disease" is defined by Section 8-40-201(14), C.R.S. as:

[A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

6. A claimant is required to prove by a preponderance of the evidence that the alleged occupational disease was directly or proximately caused by the employment or working conditions. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251, 252 (Colo. App. 1999). Moreover, Section 8-40-201(14), C.R.S. imposes proof requirements in addition to those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819, 824 (Colo. 1993). A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the

disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.*

7. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. See *Cotts v. Exempla, Inc.*, W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the “logical and recurrent consequence” of the pre-existing condition. See *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, April 10, 2008). Simply because a claimant’s symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. See *Scully v. Hooters of Colorado Springs*, W.C. No. 4-745-712 (ICAP, October 27, 2008).

8. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that he suffered an occupational disease arising out of, and in the course and scope of his employment with the employer. The ALJ concludes that the development of the claimant’s symptoms were not a natural incident of the claimant’s work job duties. As found, the medical records and the opinions of Dr. Bernton are credible and persuasive.

ORDER

It is therefore ordered that the claimant’s claim for workers’ compensation benefits related to an alleged occupational disease (with an onset date of March 7, 2019) is denied and dismissed. Therefore, all other issues before the ALJ (authorized, reasonable, necessary, and related medical benefits, TTD benefits) are moot.

Dated this 24th day of June 2020.



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

Whether the claimant has demonstrated, by a preponderance of the evidence, that the left total shoulder replacement, as recommended by Dr. Kennan Vance, is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted work injury.

FINDINGS OF FACT

1. The claimant began working for the employer in 2006. The employer delivers freight to various locations. The claimant's job duties included unloading and reloading freight to be delivered. The claimant testified that the items he would load and reload varied in weight from 25 pounds to over 2,000 pounds. In addition, the claimant performed some of the delivery driving.

2. On July 15, 2019, the claimant was engaged in unloading a trailer of freight, that included kayaks¹. While he was reaching overhead to pull down two kayaks, a third kayak began to slip behind him and struck the claimant in the upper back. The point of impact was between his shoulder blades and to the left. While this occurred, the claimant reached out with his left arm to brace himself against the wall of the trailer and felt a pop. The claimant estimated that the kayak that struck him weighed approximately 80 pounds.

3. The claimant reported this incident to the employer and was referred to Dr. Craig Stagg for medical treatment. The claimant was first seen by Dr. Stagg on July 18, 2019. On that date, the claimant reported left shoulder pain with intermittent tingling into the fingers on his left hand. Dr. Stagg diagnosed a cervical strain and a left shoulder strain. At that time, he ordered x-rays of the claimant's cervical spine and left shoulder. In addition, he referred the claimant to Dr. Kennan Vance for an orthopedic consultation and to physical therapy.

4. On July 18, 2019, an x-ray of the claimant's left shoulder showed glenohumeral degenerative joint disease, with joint space narrowing and marginal osteophytes. An x-ray of the claimant's cervical spine was taken on that same date, and showed degenerative disc disease.

5. On July 19, 2019, the claimant returned to Dr. Stagg because his pain symptoms had increased. Dr. Stagg noted that the claimant might have radiculopathy and/or a rotator cuff tear. Dr. Stagg recommended that the claimant seek treatment at the emergency department (ED) to address his pain symptoms.

¹ The ALJ notes that the medical records often refer to the claimant being struck by a canoe, rather than a kayak. The ALJ is persuaded that the claimant uses the terms kayak and canoe interchangeably.

6. On that same date, the claimant received medical treatment in the ED at Community Hospital and was seen by Lynda Steinbach, FNP. Ms. Steinbach provided the claimant with a sling and prescribed Flexeril to address the claimant's pain symptoms.

7. On July 24, 2019, the claimant was seen in Dr. Stagg's practice by James Harkreader, NP. At that time, the claimant reported pain of 8 out of 10, with tingling and numbness in his left fingers. Mr. Harkreader noted the x-ray results and noted degenerative joint disease in the claimant's acromioclavicular (AC) joint. Mr. Harkreader opined that the claimant likely had cervical radiculopathy and ordered magnetic resonance imaging (MRI) of the claimant's cervical spine and left shoulder.

8. On July 25, 2019, the claimant was seen by Dr. Vance. At that time, he reported left shoulder pain, numbness, tingling, popping, decreased range of motion, and sleep disturbance. Dr. Vance diagnosed impingement syndrome and a possible rotator cuff tear. Although Dr. Vance considered administering an injection on that date, he elected to wait for the MRI results.

9. On July 30, 2019, an MRI of the claimant's left shoulder showed a complete full-thickness tear of the supraspinatus tendon, moderate atrophy of the supraspinatus tendon, tendinopathy and low grade partial thickness tearing of the infraspinatus tendon, and severe acromioclavicular osteoarthritis.

10. On August 8, 2019, the claimant returned to Dr. Vance. At that time, Dr. Vance noted that the left shoulder MRI showed a full thickness rotator cuff tear. Dr. Vance recommended the claimant undergo a left shoulder arthroscopy with rotator cuff repair. However, he opted to wait for one month for the claimant to quit smoking. On that same date, Dr. Vance requested authorization for a left shoulder arthroscopy with rotator cuff repair.

11. On August 14, 2019, the claimant was seen by Mr. Harkreader who noted the full thickness tear indicated by the left shoulder MRI. Mr. Harkreader recommended the claimant continue to use Tylenol and Motrin treat his pain symptoms. Mr. Harkreader also noted that the claimant would not return to physical therapy until after his surgery.

12. On August 27, 2019, Dr. Vance performed arthroscopic surgery. However, once the surgery began, Dr. Vance noted significant arthritic changes with complete loss of cartilage on the humeral side, and extensive degenerative tearing of the labrum. As a result, Dr. Vance did not repair the claimant's rotator cuff. Instead, the surgery was deemed diagnostic in nature. Dr. Vance removed a loose body of the ossified labrum and completed extensive intra-articular debridement.

13. The claimant returned to Dr. Vance on August 11, 2019. In the medical record of that date, Dr. Vance noted that the claimant's rotator cuff was "minimally torn", so it was not repaired. Dr. Vance also noted that during the surgery he observed "bone on bone arthritis" and recommended a total shoulder replacement. An authorization request was submitted on that same date.

14. On September 18, 2019, the respondent's third party administrator, Sedgwick Claims Management Services, filed a General Admission of Liability (GAL) regarding the claimant's July 15, 2019 work injury.

15. On September 20, 2019, Sedgwick sent a letter to Dr. Vance asking a number of questions related to the recommended shoulder replacement surgery. In his undated response, Dr. Vance addressed each question. In that letter, Dr. Vance noted that the goal of the surgery was to relieve the claimant's pain symptoms and improve his function. Dr. Vance also noted that the claimant had failed conservative treatment. Dr. Vance identified that conservative treatment as "activity modification, home exercise program, oral NSAIDs, opioids, and arthroscopy." Subsequently, the respondent denied authorization for the surgery.

16. On November 5, 2019, the claimant attended an independent medical examination (IME) with Dr. Lawrence Lesnak. In connection with the IME, Dr. Lesnak reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In his IME report, Dr. Lesnak opined that the claimant may have suffered a minor strain/sprain injury on July 15, 2019, and that minor injury has resolved. Dr. Lesnak noted that the claimant has significant osteoarthritis in his left shoulder. It is Dr. Lesnak's opinion that the condition of the claimant's left shoulder is chronic and not the result of an acute injury. Dr. Lesnak noted that shoulder replacement may be reasonable treatment of the claimant's left shoulder, but that treatment is unrelated to the minor injury the claimant sustained on July 15, 2019. Dr. Lesnak's testimony was consistent with his written report.

17. On December 4, 2019, the claimant was seen by Dr. Stagg. On that date, Dr. Stagg agreed with Dr. Lesnak that the findings on x-ray and MRI predated the claimant's work injury. However, Dr. Stagg also noted that prior to July 15, 2019, the claimant was working full duty with no left upper extremity issues.

18. The claimant credibly testified that prior to July 15, 2019, he had no issues performing his job duties. The claimant also credibly testified he had no treatment to his left shoulder prior to July 15, 2019. With regard to his current symptoms, the claimant testified that it is "virtually impossible" for him to raise his left arm, or reach his left arm behind his back. The claimant also testified that he cannot use his left arm without pain.

19. It is undisputed that the condition of the claimant's left shoulder should be treated with a total shoulder replacement. The conflict arises with regard to whether that surgery is related to the claimant's July 15, 2019 work injury. Upon review of all of the evidence and testimony presented, the ALJ finds that the claimant's need for a total left shoulder replacement is related to the admitted work injury.

20. The ALJ credits the claimant's testimony, the medical records, and the opinions of Dr. Vance over the contrary opinions of Dr. Lesnak. The ALJ finds that the claimant's asymptomatic preexisting left shoulder arthritis became symptomatic because of the July 15, 2019 injury at work. Based upon the testimony of the claimant and the

medical records, the ALJ finds that when the claimant was struck in the upper back on July 15, 2019, his preexisting left shoulder condition was aggravated and accelerated, necessitating medical treatment. Therefore, the ALJ finds that the claimant has demonstrated that it is more likely than not that the recommended left shoulder surgery is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted work injury.

CONCLUSIONS OF LAW

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

2. The ALJ’s factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness’s testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

4. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

5. The Colorado Workers’ Compensation Medical Treatment Guidelines (MTG) are regarded as accepted professional standards for care under the Workers’ Compensation Act. *Rook v. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005). The statement of purpose of the MTG is as follows: “In an effort to comply with its legislative charge to assure appropriate medical care at a reasonable cost, the director of the Division has promulgated these ‘Medical Treatment Guidelines.’ This rule provides a system of evaluation and treatment guidelines for high cost or high frequency categories

of occupational injury or disease to assure appropriate medical care at a reasonable cost.” WCRP 17-1(A). In addition, WCRP 17-5(C) provides that the MTG “set forth care that is generally considered reasonable for most injured workers. However, the Division recognizes that reasonable medical practice may include deviations from these guidelines, as individual cases dictate.”

6. While it is appropriate for an ALJ to consider the MTG while weighing evidence, the MTG are not definitive. See *Jones v. T.T.C. Illinois, Inc.*, W.C. No. 4-503-150 (May 5, 2006); *aff’d Jones v. Industrial Claim Appeals Office* No. 06CA1053 (Colo. App. March 1, 2007) (not selected for publication) (it is appropriate for the ALJ to consider the MTG on questions such as diagnosis, but the MTG are not definitive); see also *Burchard v. Preferred Machining*, W.C. No. 4-652-824 (July 23, 2008) (declining to require application of the MTG for carpal tunnel syndrome in determining issue of PTD); see also *Stamey v. C2 Utility Contractors et al*, W.C. No. 4-503-974 (August 21, 2008) (even if specific indications for a cervical surgery under the MTG were not shown to be present, ICAO was not persuaded that such a determination would be definitive).

7. As found, the claimant has demonstrated by a preponderance of the evidence that the left total shoulder replacement, as recommended by Dr. Kennan Vance, is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted work injury. As found, the claimant’s preexisting asymptomatic left shoulder arthritis became symptomatic because of the July 15, 2019 injury at work. As found, the claimant’s testimony, the medical records, and the opinions of Dr. Vance are credible and persuasive.

ORDER

It is therefore ordered that respondent shall pay for the recommended total left shoulder arthroplasty, pursuant to the Colorado Medical Fee Schedule.

Dated this 30th day of June 2020.



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

- I. Whether Respondent overcame the DIME physician's opinion by clear and convincing evidence that Claimant is not at MMI.
- II. Whether the surgery recommended by Dr. Faulkner is reasonable, necessary, and related to Claimant's compensable injury.
- III. Whether Dr. Faulkner is an authorized treating physician.

FINDINGS OF FACT

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

1. Claimant sustained an admitted injury to her right shoulder / upper extremity on February 15, 2019. At the time of her injury, Claimant was 63 years old.
2. Claimant was working for Employer where she had worked for about 7 years. Her job duties mainly included working in food service for the Employer - school district.
3. Claimant testified credibly that on February 15, 2019 she suffered an injury to her right upper extremity when she tried to lift a tray full of meat weighing around 25-30 pounds. This was on a Friday.
4. Claimant testified credibly that other than some minor aches and pains from work, she had never had any issues with her right upper extremity, nor had she sought medical treatment for her right upper extremity before the work injury.
5. The following Tuesday, Claimant obtained treatment at Midtown Occupational Health Services, with Sadie Sanchez, M.D. The treatment notes from that visit say Claimant was:

[T]ransferring a large tray filled with meat. When attempting to lift the tray she felt a "pop" with her right shoulder. She put the tray right down and tried to rub her shoulder and attempt to lift the tray again. She did manage to transfer it a few feet to where it needed to be but felt like her shoulder was "wobbly" and hurt. She kept working without any heavy lifting but was noted to be in pain by a co-worker. She went home and has been applying heat and topical pain meds. She hoped it would resolve on its own. She returned to work today and was attempting to accommodate doing more activities. (*R. Ex. B, p. 7.*)
6. At the first visit, Dr. Sanchez performed a basic shoulder examination and simply assessed Claimant's general range of motion in various planes. She did not document that she performed any specific tests to assess Claimant's rotator cuff or biceps tendon. Her assessment included a right shoulder and biceps strain. She

also documented Claimant had moderate to high levels of shoulder pain. Dr. Sanchez referred Claimant to physical therapy and prescribed medications. Lastly, she noted "So I do not feel that a significant injury is expected to result from the MOI [mechanism of injury] as highlighted above." (*R. Ex. B, p. 9.*)

7. Claimant returned to Dr. Sanchez. She noted:

The patient has moderate to high levels of pain with movement of her shoulder. She continues to have decreased ROM on the right, possibly due to self-limitation due to pain. The patient's complaints appear to lead one to consider a rotator cuff problem. However, I reviewed her MOI and she confirms that she was only lifting the tray of food at waist level. I also reviewed her job description again and she is only expected to lift 20 lbs. unaided. Therefore, it is difficult for me to entertain anything more than a simple shoulder strain, but she is not responding to treatment as anticipated. To this end, I would like to refer the patient to Dr. Lesnak, PMR, for further evaluation and to do a more thorough causative analysis. (*R. Ex. B, p. 12.*)

8. On April 8, 2019, Dr. Lesnak examined Claimant. On exam, he found she:

[E]xhibited severe guarding with even attempted passive range of motion of her right shoulder. Was unable to perform rotator cuff impingement signs on the right because of her severe guarding/fear of pain. She was only willing to actively forward flex her right shoulder to approximately 80 degrees and abduct to approximately 45 degrees. The patient exhibited multiple pain behaviors throughout today's evaluation and appeared to have extremely low tolerance to any type of external pain stimuli. She appeared to be "fearful" of any type of movement of her right shoulder during my evaluation today." (*R. Ex. C, p. 35.*)

9. Dr. Lesnak recommended further testing, to include electrodiagnostic testing and an MRI. In discussing the matter with Claimant, Dr. Lesnak noted:

[T]here is a very high probability given her age (63 years old), there will be some degenerative changes seen on the MRI. The MRI would specifically be to evaluate for any potential injury-related pathology involving her right shoulder that could be related to her previously reported occupational injury and correlate with her symptomatology. Please note that when I initially explained this to the patient, the patient remarked that since she has never had right shoulder symptoms before, any pathology on an MRI would have to be related to her injury. I explained to her that this is not the case and at least 50-75% of all patients over the age of 50 have significant degenerative changes seen on shoulder MRIs." *R. Ex. C, p. 37.*

10. Shortly after her appointment with Dr. Lesnak, Claimant underwent an MRI. The MRI showed:

- i. a complete supraspinatus tendon tear with 2 cm of retraction,

- ii. infraspinatus tendinosis and undersurface low-grade partial-thickness tearing,
- iii. torn and retracted biceps tendon, and
- iv. an undersurface high-grade partial-thickness tear of the subscapularis tendon. (See: *R. Ex. E, p. 51.*)

11. Claimant returned to Dr. Sanchez. Dr. Sanchez reviewed the MRI and noted:

[T]his extensive type of injury does not correlate with her MOI and job description. She denied having anything other than minor shoulder pain in the past from heavy lifting at work. I explained to her that she will be referred to Dr. Faulkner for a causation analysis and determination of need for further treatment. She understands that regardless that this likely will require surgery. (*R. Ex. B, p. 17.*)

12. Consistent with her report, Dr. Sanchez completed documentation showing she referred Claimant to Dr. Faulkner for examination, diagnosis, causality analysis, and treatment. (*R. Ex. B, p. 15.*) As a result, Dr. Faulkner is authorized to treat Claimant.

13. As for MMI, Dr. Sanchez said that: "MMI date unknown at this time because pending surgical evaluation." (*R. Ex. B, p. 15.*) Thus, Dr. Sanchez referred Claimant to Dr. Faulkner, an orthopedic surgeon, for him to examine Claimant and determine:

- i. the cause of her shoulder condition,
- ii. if surgery was reasonable and necessary, and
- iii. to treat Claimant surgically if he determined her shoulder condition and need for surgery were related to her industrial accident.

14. On April 29, 2019, Claimant saw Dr. Faulkner. After examining Claimant and reviewing the MRI, Dr. Faulkner concluded:

While this is not a typical mechanism of injury for a rotator cuff tear, it is more likely than not and this was an acute on chronic injury. She has no rotator cuff atrophy to indicate this was a more chronic tear.

Dr. Faulkner recommended right shoulder arthroscopic surgery, subacromial decompression, rotator cuff repair, subscapular repair, and possible biceps tenotomy. (*R. Ex. F, p. 56*)

15. Dr. Faulkner concluded that Claimant's work injury was an acute incident superimposed on Claimant's preexisting shoulder pathology. His conclusion stems from his finding that Claimant's rotator cuff did not have signs of atrophy, which would have been present if she had a chronic – preexisting - rotator cuff tear.

16. Dr. Mark Failing performed an IME on behalf of Respondent. His medical opinion on causation is essentially that it is medically probable that Claimant sustained a ruptured long head of the biceps tendon, but the tear to the rotator cuff was not

caused by lifting the heavy tray of meat at work based on the mechanism of injury described by Claimant. (C. Ex. 4, Pg. 22)

17. Claimant returned to Dr. Sanchez and was placed claimant at MMI on July 10, 2019. In her MMI report, Dr. Sanchez stated, "I am obligated to follow the recommendations of the IME unless I disagree materially with the IME." Dr. Sanchez did not assign any impairment rating, work restrictions, or maintenance care, even though the Respondent's IME did say the biceps tendon rupture was related. She also failed to explain in any meaningful way why she chose to follow the findings of the IME physician, Dr. Failinger, versus Dr. Faulkner - the surgeon to whom she referred Claimant for evaluation and treatment. (C. Ex. 7, Pg. 118-120).

18. Claimant requested Dr. John Hughes to perform a record review of her case and give an opinion on causation and the reasonableness, necessity, and relatedness of the surgical request to repair Claimant's biceps tendon and rotator cuff. Dr. Hughes concluded that the activity described by Claimant in lifting the tray of meat injured Claimant's biceps tendon and rotator cuff. He described how Claimant lifting the tray of meat did exert force through her rotator cuff. He stated that:

The rotator cuff tendon complex contracts forcefully to counteract musculature acting on the humerus in a superior direction. This places tension on the rotator cuff complex and can lead to a tear as has been manifested in this particular instance. As a result, it is my opinion that both the rotator cuff complex and the biceps tendon were torn on February 15, 2019.

19. Thus, Dr. Hughes concluded that Claimant is not at MMI and endorsed the surgical treatment recommendations made by Dr. Faulkner. (C. Ex. 3, Pg. 13)

20. Claimant later underwent a Division IME with Dr. Timothy Hall. His clinical diagnoses included both a biceps tendon tear and rotator cuff tears of the right shoulder. As for causation, Dr. Hall also stated:

It is clear there is a temporal relationship with respect to this activity at her work and her present symptoms. It is not a common mechanism of injury for regarding the rotator cuff tear. It is certainly a reasonable mechanism of injury for the biceps tendon. I do not see how one can separate those two out in this context since it is probably that both are creating symptoms for her. (C. Ex. 2, Pg. 6-8.)

21. Dr. Hall also stated that he agreed with Dr. Hughes' analysis regarding how Claimant injured her rotator cuff while lifting the tray of meat. Dr. Hall stated and concluded:

I agree with Dr. Hughes' analysis at this situation regarding rotator cuff serving as stabilizers of the humeral head putting them under strain in this situation. This in combination with the temporal relationship and the lack of symptoms of this type prior lead to my opinion that these ongoing symptoms and her need for surgery is the direct consequence of this date of injury.

22. Dr Hall's conclusion is that Claimant's need for surgery is "the direct consequence of this date of injury." He concluded Claimant is not at MMI and the torn rotator cuff relates to her industrial injury. (*C. Ex. 2, Pg. 6-8*)
23. Respondent applied for Hearing to overcome the opinion of the DIME, Dr. Timothy Hall, over Claimant's MMI status.
24. Dr. Failinger testified at hearing. His hearing testimony followed his prior reports.
25. Dr. Failinger contends – in one portion of his analysis – that the activity described by Claimant would not engage the rotator cuff at all. As a result, Claimant could not have injured her rotator cuff as alleged.
26. Based on a portion of Dr. Failinger's opinion, Respondents contend in their proposed order that it is:

Highly [un]likely and free from substantial doubt that claimant's rotator cuff injury resulted from the described mechanism of injury, given the anatomical function of the rotator cuff tendons involved. Given Dr. Hall's incorrect understanding of the anatomy and biomechanical function of the involved rotator cuff tendons, it is highly probable that Dr. Hall's opinion that claimant is not at MMI is incorrect.

The difference in Dr. Hall's conclusion and Dr. Failinger's conclusion is not simply a difference in medical opinions. Rather, it is a dispute regarding the fundamental function and use of the rotator cuff. As found above, Dr. Failinger's conclusions that the rotator cuff tendons involved could not, as a matter of basic scientific anatomy, be injured in the mechanism of injury in this matter rises above a difference of opinion, especially in light of Dr. Hall's reliance on a subjective temporal relationship and Dr. Hughes' incorrect and inaccurate understanding of the anatomy involved.

27. Respondents, however, fail to mention that it was not only Drs. Hughes and Hall that relied on the temporal relationship and the anatomy of the rotator cuff in assessing causation. Claimant's authorized treating surgeon, Dr. Faulkner, also relied on the temporal relationship between the time of the accident and the onset of Claimant's rotator cuff symptoms as well as the anatomy of the rotator cuff. In his succinct opinion, Dr. Faulkner concluded that:

While this is not a typical mechanism of injury for a rotator cuff tear, it is more likely than not this was an acute on chronic injury. She has no rotator cuff atrophy to indicate this was a more chronic tear. (*Claimant Ex. 6, Pg. 40*).

28. Dr. Faulkner astutely observed and concluded that if Claimant's complete rotator cuff tear were preexisting, as concluded by Dr. Failinger, Claimant's rotator cuff would have shown atrophy – which it did not. As a result, the lack of any atrophy signifies the complete tear demonstrated on the MRI occurred recently and was not a long standing and preexisting condition as suggested by Dr. Failinger.

29. The ALJ does not find Dr. Failinger's ultimate conclusions to be persuasive for many reasons. For example, it is not clear whether Dr. Failinger is using two different causation standards in this case. One for Claimant's biceps tendon and a second for her rotator cuff.

For instance, based on the mechanism of injury described by Claimant in his office, Dr. Failinger contended that:

[I]t would be *extremely difficult, if not impossible*, to tear a biceps tendon unless there is a significantly diseased tendon (emphasis added).

30. He then says that because her biceps tendon was diseased, it was possible for her tendon to tear when she lifted the tray of meat – which it did. So, in assessing the biceps tendon, he determined that lifting a 25-30-pound tray of meat will not cause a healthy biceps tendon to tear but can – and did - cause Claimant's diseased tendon to tear.

Then, when assessing Claimant's rotator cuff, Dr. Failinger opined:

At the waist level, and with her demonstration to me of how she lifted the tray, she did not *significantly* reach up with her right shoulder, which would indicate no *significant stresses* were placed on the rotator cuff on 02-15-2019 when the work incident occurred (emphasis added).

That said, Dr. Failinger concluded that the diseased tendons of Claimant's rotator cuff could not have been injured because Claimant did not "*significantly*" reach up with her right shoulder and did not place "*significant stresses*" on her rotator cuff tendons (emphasis added).

As a result, Dr. Failinger did not require Claimant to exert significant stress to injure her diseased biceps tendon but did require Claimant to exert significant stress to injure her diseased rotator cuff tendons.

31. Despite applying the two tests as outlined above, Dr. Failinger then stated:

With the mechanism she showed me, which involves keeping her elbows bent and transferring the meat from one table to the next without even raising up to her shoulder to any significant degree, she would not have, with reasonable medical probability, placed her arms in a position that would have recruited her rotator cuff (which was already torn) to cause further acceleration of disease.

32. So in one section of his report Dr. Failinger says Claimant did not recruit her rotator cuff at all and in another section he says she did, but not significantly. As a result, the false dichotomy on which his opinion is based fails when he concedes that Claimant would have engaged her rotator cuff to some extent while lifting the tray of meat.

33. Moreover, Dr. Failinger focused on the method Claimant demonstrated in his office in picking up the tray of meat. Yet the extent of the demonstration is not clear. For example, there is no indication regarding the height of the table from which Claimant

picked up the tray of meat and if that was replicated. Plus, the tray of meat was about 4 inches deep. If the tray had a lip around the top edge, Claimant might have lifted the tray from the lip or edges which were 4 inches higher. She might also have not lifted the tray in an underhand method with her elbows against her body, but with her elbows and arms away from her body. This might have required her to raise her hands and arms 4 inches higher thereby engaging or recruiting more of her rotator cuff. In the end, the lack of detail in the demonstration noted by Dr. Failinger erodes the quality and persuasiveness of his ultimate conclusion.

34. As a result, the ALJ does not find Dr. Failinger's opinion about Claimant's rotator cuff injury to be persuasive when compared to the totality of the evidence and Claimant's credible testimony.
35. The Claimant is found to be credible. Claimant's statements to medical providers and her testimony at hearing aligns with her medical records. Moreover, except for some minor aches and pains from work, Claimant did not have any shoulder problems that required medical treatment until her work accident of February 15, 2019.
36. Respondent contends Dr. Hall's opinion relies mainly on the subjective temporal relationship between the date of injury and Claimant's subjective symptoms. That said, this is not merely a case of mere temporal proximity, but of near temporal synchrony combined with the credible and persuasive expert opinions of Drs, Faulkner, Hughes, and Hall, explaining how Claimant's injury to her rotator cuff – while not typical – was more likely than not caused by her lifting injury.¹
37. The ALJ finds Dr. Hall's opinion to be credible and persuasive. His opinion tracks Drs. Faulkner and Hughes'. His opinion also fits with the medical record regarding Claimant's description of the onset of her symptoms and the extent of her symptoms that started while lifting the 25-30-pound tray of meat.
38. Before her injury, Claimant's biceps tendon and rotator cuff were diseased and had degenerated. Even so, such conditions were not symptomatic until her work injury. As a result, Claimant's work injury aggravated her preexisting and asymptomatic biceps tendon and rotator cuff condition and necessitated the need for medical treatment.
39. Claimant's job required her to lift a heavy tray of meat that weighed around 30 pounds. And it was the lifting of the tray of meat that caused Claimant to develop a torn biceps tendon and torn rotator cuff. The torn biceps tendon and torn rotator cuff caused Claimant to develop pain and decreased function of her shoulder and arm. The treatment recommended by Dr. Faulkner is to cure Claimant from the effects of her work injury by reducing her pain and increasing her function. As a result, Claimant is not at MMI.
40. Respondents appear to contend Claimant's psychological conditions preclude a finding that she suffered a work injury or that surgery is reasonable and necessary.

¹ See *Wilson v. City of Lafayette*, 07CV02248PABBNB, 2010 WL 728336, at *8 (D. Colo. Feb. 25, 2010) (To the extent certain events occur nearly simultaneously, the causal connection between them becomes quite strong.)

Dr. Timothy Shea, a neuropsychologist, evaluated Claimant. He diagnosed Claimant with the following:

- i. Pain disorder with related psychological factors,
- ii. Adjustment disorder with depressed mood and anxiety,
- iii. Increased irritability and anger, and
- iv. Insomnia due to other medical conditions (pain > mood)

41. The psychological diagnoses, however, as found by Dr. Shea flow from Claimant's injury to her biceps tendon and rotator cuff. As a result, the psychological diagnoses do not negate the fact that Claimant suffered a compensable injury and is in need of the surgery recommended by Dr. Faulkner to cure her from the effects of the work injury. Instead, the diagnoses establish Claimant needs more treatment to cure her from the effects of her work injury.

42. Because of her shoulder injury, Claimant has chronic pain and limited range of motion. The shoulder surgery recommended by Dr. Faulkner – an authorized treating physician - is reasonable and necessary to cure Claimant from the effects of her work injury.

43. Respondents have failed to overcome Dr. Hall's opinion on MMI by clear and convincing evidence. Thus, Claimant is not at MMI.

CONCLUSIONS OF LAW

Based on these findings of fact, the Judge draws these conclusions of law:

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the

weight to be accorded to expert testimony, and draw plausible inferences from the evidence.” See *Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency, or inconsistency of the witness’s testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers’ compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Respondent overcame the DIME physician’s opinion by clear and convincing evidence that that Claimant is not at MMI.

MMI exists when “any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition.” Section 8-40-201(11.5), C.R.S. A DIME physician’s finding that a party has or has not reached MMI is binding on the parties unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(III), C.R.S.; *Magnetic Eng’g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000); *Kamakele v. Boulder Toyota-Scion*, W.C. No. 4-732-992 (ICAO, Apr. 26, 2010).

MMI is mainly a medical determination involving diagnosis of the claimant’s condition. *Berg v. Indus. Claim Appeals Office*, 128 P.3d 270 (Colo. App. 2005); *Monfort Transp. v. Indus. Claim Appeals Office*, 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant’s medical condition are causally related to the industrial injury. *Martinez v. Indus. Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007); *Powell v. Aurora Public Sch.* W.C. No. 4-974-718-03 (ICAO, Mar. 15, 2017). A finding that the claimant needs more medical treatment (including surgery) to improve his injury-related medical condition by reducing pain or improving function conflicts with a finding of MMI. *MGM Supply Co. v. Indus. Claim Appeals Office*, 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Indus. Claim Appeals Office*, 794 P.2d 1090 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.*, W.C. No. 4-320-606 (ICAO, Mar. 2, 2000). Similarly, a finding that other diagnostic procedures offer a reasonable prospect for defining the claimant’s condition or suggesting further treatment conflicts with a finding of MMI. *Abeyta v. WW Construction Management*, W.C. No. 4-356-512 (ICAO, May 20, 2004);

The party seeking to overcome the DIME physician’s finding on MMI bears the burden of proof by clear and convincing evidence. *Magnetic Eng’g, Inc. v. Indus. Claim Appeals Office*, *supra*. “Clear and convincing evidence” is evidence that shows that it is “highly probable” the DIME physician’s rating is incorrect. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998); *Lafont v. WellBridge D/B/A*

Colorado Athletic Club W.C. No. 4-914-378-02 (ICAO, June 25, 2015). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc.*, W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). Assuming each opinion is well reasoned, the mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. See *Javalera v. Monte Vista Head Start, Inc.*, W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); see *Shultz v. Anheuser Busch, Inc.*, W.C. No. 4-380-560 (ICAO, Nov. 17, 2000). It is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on MMI. *Oates v. Vortex Indus.*, WC 4-712-812 (ICAO, Nov. 21, 2008); *Licata v. Wholly Cannoli Café* W.C. No. 4-863-323-04 (ICAP, July 26, 2016).

Respondent has failed to overcome the DIME's determination of not at MMI by the standard of clear and convincing evidence. They have also failed to overcome his opinion that the tears to Claimant's rotator cuff relate to her industrial injury. Except for some minor aches and pains from work, Claimant testified credibly that other than some occasional aches and pains from work, she was not experiencing any significant issues with her right shoulder and upper extremity before the industrial injury, and no credible and persuasive evidence was offered to contradict this position. Claimant reported the injury and sought medical treatment promptly. Her description of the pain, a "pop" in her shoulder, reflects an injury to her biceps tendon and rotator cuff. She has been consistent with her description of the accident and her reports of pain (using a pain scale) appear to be reasonable based on the MRI findings and with this type of injury. There is a lack of credible and persuasive evidence to suggest that Claimant is intentionally inflating or magnifying her symptoms. Her credibility is also enforced because she had worked for Employer for 7 years before the accident and continued to work throughout the claim, despite her pain and symptoms.

Moreover, the psychological evidence submitted at hearing reveals the degree to which the injury is impacting Claimant. As a result, the psychological evidence does not negate the need for medical treatment and surgery, but instead it establishes the need for additional medical treatment to cure Claimant from the effects of her work injury.

Ultimately, Dr. Hall, the DIME physician, agreed with Dr. Faulkner, the authorized surgeon, and Claimant's IME, Dr. Hughes, that the rotator cuff relates to the February 15, 2019 work injury and Claimant will need surgery before reaching MMI.

The primary dissent comes from Respondent's IME, Dr. Failinger. He concedes that the biceps tendon tear was likely caused by the industrial accident, but the rotator cuff was not because of a mechanism of injury argument. His opinion is found to be not entirely credible. He glosses over, as suggested by the DIME, that the temporal correlation of the injury and the subsequent symptoms supports a causation analysis in this case. This finding is bolstered by a lack of shoulder symptoms, disability, and treatment before the industrial accident. At most, this amounts to a simple difference of medical opinion about the mechanism of injury. This does not meet the standard of clear and convincing evidence in this case.

The opinion of the ATP, Dr. Sadie Sanchez, is also found to not be entirely credible. Based on what looks like a lack of experience or expertise, Dr. Sanchez first referred Claimant to Dr. Lesnak for treatment and a causation assessment. Dr. Lesnak referred Claimant for psychological treatment and an MRI. For some unknown reason, Claimant did not return to Dr. Lesnak and he did not issue a report addressing the cause of Claimant's shoulder condition. Later, and based on the MRI findings, Dr. Sanchez referred Claimant to an orthopedic surgeon, Dr. Faulkner. The referral to Dr. Faulkner was for a causation assessment of Claimant's shoulder condition, a surgical evaluation, and to provide surgical treatment if the condition was related. Despite Dr. Faulkner concluding Claimant's shoulder condition relates to her compensable work injury, Dr. Sanchez noted that she felt obligated to adopt the opinion of Dr. Failinger, Respondent's IME.

Even if Dr. Sanchez' report is taken at face value, she seems to ignore the fact that Dr. Failinger did conclude that the biceps tendon tear is related to the work injury. Despite such finding, she released Claimant with no impairment, restrictions, or maintenance care of any type without setting forth the basis for each determination. In the end, she appeared to be making claim adjusting decisions instead of medical decisions.

Thus, the ALJ finds and concludes the Respondent has failed to overcome the opinion of Dr. Hall by clear and convincing evidence. As a result, Claimant is not at MMI.

II. Whether the surgery recommended by Dr. Faulkner is reasonable, necessary, and related to Claimant's compensable injury.

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. Whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs Sch. District #11*, W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012). Our courts have held that to consider a service a "medical benefit" it must be provided as medical or nursing treatment, or incidental to obtaining such treatment. *Country Squires Kennels v. Tarshis*, 899 P.2d 362 (Colo. App. 1995). A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the claimant's physical needs. *Bellone v. Indus. Claim Appeals Office*, 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines, Inc.*, W.C. No. 4-517-537, (ICAO, May 31, 2006). A service is incidental to the provision of treatment if it enables the claimant to obtain treatment, or if it is a minor concomitant of necessary medical treatment. *Country Squires Kennels v. Tarshis*, 899 P.2d 362 (Colo. App. 1995); *Karim al Subhi v. King Soopers, Inc.*, W.C. No. 4-597-590, (ICAO. July 11, 2012). The determination of whether services are medically necessary, or incidental to obtaining such service, is a question of fact for the ALJ. *Bellone v. Indus. Claim Appeals Office*, 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines, Inc.*, W.C. No. 4-517-537, (ICAO, May 31, 2006).

As found, Claimant suffered a compensable injury involving her right upper extremity. Her injury caused a torn biceps tendon and torn rotator cuff. As a result of

her compensable injury, Claimant has developed significant and chronic right shoulder pain and limited range of motion. The pain and limited range of motion is also disabling. As a result of her injury, Dr. Faulkner has prescribed a right shoulder arthroscopic surgery, subacromial decompression, rotator cuff repair, subscapular repair, and possible biceps tenotomy.

The ALJ finds and concludes Claimant has established by a preponderance of the evidence that the shoulder surgery recommended by Dr. Faulkner is reasonable and necessary to cure Claimant from the effects of her work injury.

III. Whether Dr. Faulkner is an authorized treating physician.

Authorization to provide medical treatment refers to a medical provider's legal authority to provide medical treatment to the claimant with the expectation that the provider will be compensated by the insurer for treatment. *Bunch v. Indus. Claim Appeals Office*, 148 P.3d 381 (Colo. App. 2006); *One Hour Cleaners v. Indus. Claim Appeals Office*, 914 P.2d 501 (Colo. App. 1995); *In re Bell*, W.C. No. 5-044-948-01 (ICAO, Oct. 16, 2018). Authorized providers include those medical providers to whom the claimant is directly referred by the employer, as well as providers to whom an ATP refers the claimant in the normal progression of authorized treatment. *Town of Ignacio v. Indus. Claim Appeals Office*, 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). Whether an ATP has made a referral in the normal progression of authorized treatment is a question of fact for the ALJ. *Kilwein v. Indus. Claim Appeals Office*, 198 P.3d 1274, 1276 (Colo. App. 2008); *In re Bell*, W.C. No. 5-044-948-01 (ICAO, Oct. 16, 2018); *In re Patton*, W.C. Nos. 4-793-307 and 4-794-075 (ICAO, June 18, 2010)

As found, Dr. Sanchez - Claimant's authorized treating physician - referred Claimant to Dr. Faulkner for purposes of examination, diagnosis, and treatment. As a result, the ALJ finds and concludes Dr. Faulkner is authorized to treat Claimant.

Thus, the ALJ finds and concludes that the Respondent shall pay for Dr. Faulkner to perform the arthroscopic surgery, subacromial decompression, rotator cuff repair, subscapular repair, and possible biceps tenotomy.

ORDER

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

1. Respondent has failed to overcome the DIME's determination of not at MMI. Thus, Claimant is not at MMI.
2. Respondent shall pay for reasonable, necessary, and related medical treatment to bring Claimant to MMI for her torn biceps tendon and torn rotator cuff.
3. Dr. Faulkner is an authorized treating physician.
4. Respondent shall pay for Claimant to undergo surgery with Dr. Faulkner – subject to the Colorado Workers' Compensation fee

schedule. The surgery consists of a right shoulder arthroscopic surgery, subacromial decompression, rotator cuff repair, subscapular repair, and possible biceps tenotomy.

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

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

DATED: June 30, 2020.

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUE

Whether Claimant has produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of John S. Hughes, M.D. that he did not warrant a permanent psychological impairment rating for Post-Traumatic Stress Disorder (PTSD) and reached Maximum Medical Improvement (MMI) on May 17, 2019 as a result of his October 28, 2018 industrial injury.

FINDINGS OF FACT

1. Claimant worked as a Patrol Officer for Employer. On October 28, 2018 Claimant and other officers were attempting to secure the perimeter around a house where there had been a reported shooting. While Claimant was moving to secure the rear of the house, the suspect began shooting at him. One of the bullets struck Claimant in the lower left leg.

2. Claimant detailed that on October 28, 2018 he was ambushed by a suspect who was shooting at him from a house. He testified that "I thought I was dead" and "could feel three bullets go by my head." Claimant remarked that he "was on the ground and dirt was coming into his face as the bullets hit the ground around his head." Before he could move he was shot in the left leg. Claimant recounted that he saw blood gushing from his leg. He got up while there was still gunfire "thinking that he would rather get shot getting out of there than die on the front lawn of the house where he was shot." After Claimant was able to get out of the yard he "saw blood gushing from his leg and he couldn't find his tourniquet." Another officer was able to apply a tourniquet and stop the bleeding.

3. Claimant was transported to Denver Health and received treatment in the emergency department. X-rays revealed a comminuted fracture of the left upper fibular shaft with multiple displaced bony fragments seen to be most prominent along the posterior aspect along with multiple bullet fragments embedded in soft tissues in the left upper calf.

4. Claimant selected Concentra Medical Centers as his Authorized Treating Physician (ATP). He treated with Amanda Cava, M.D. and Jonathan Joslyn, PA-C. Claimant was referred to orthopedic surgeon Stuart Myers, M.D. for treatment. Dr. Myers diagnosed Claimant with a proximal fibular fracture and resulting peroneal nerve palsy.

5. Claimant testified that in December 2018 he was assigned to a desk job on limited duty. Although he wanted to get back to patrol working on the streets he had concerns about whether he could perform his job duties.

6. In the spring of 2019 Claimant sought psychological counseling provided by Employer. At his April 5, 2019 visit with Dr. Trey Cole Claimant reported that he was not experiencing anxiety or flashbacks. Claimant commented he had returned to the shooting range and had no problems with shooting. Nevertheless, Claimant later noted he was startled during one of his visits to the range when a person near him began firing a .357 magnum.

7. On May 17, 2019 Dr. Cava determined Claimant had reached Maximum Medical Improvement (MMI) with no permanent work restrictions. She assigned Claimant a 17% lower extremity impairment rating, consisting of 13% for range of motion deficits and 5% for a peroneal nerve injury.

8. Respondents filed a Final Admission of Liability (FAL) consistent with Dr. Cava's MMI and permanent impairment determinations. Claimant challenged the FAL and requested a Division Independent Medical Examination (DIME).

9. On July 1, 2019 Respondent sent a letter to Dr. Cava requesting clarification as to why she did not assign Claimant a rating for psychological impairment and other body parts. On July 5, 2019 Dr. Cava responded in part that Claimant "adjusted very well after his injury. He did not appear to have any difficulty reassimilating to his position at work. He appeared excited to return to his prior duty. He did not express psychological concerns. He does not have a psychological diagnosis."

10. On August 28, 2019 Claimant's counsel contacted Elizabeth Sather, Psy.D. to evaluate Claimant for Post Traumatic Stress Disorder (PTSD). Claimant first saw Dr. Sather on September 11, 2019. After the second visit Dr. Sather issued a "Diagnostic Assessment" report on September 20, 2019. She concluded that Claimant suffered from PTSD.

11. On December 18, 2019 Claimant underwent a DIME with John S. Hughes, M.D. Dr. Hughes noted that he reviewed medical records including Dr. Sather's diagnostic assessment report. He remarked that Dr. Sather had concluded that Claimant "manifested symptoms consistent with [PTSD]." Dr. Hughes ultimately disagreed with Dr. Sather and concluded that Claimant did not have a "permanent psychiatric impairment stemming from PTSD." He specified that Claimant did not exhibit symptoms consistent with PTSD at the DIME appointment and none of his authorized treating physicians considered him for PTSD during the course of treatment. Dr. Hughes agreed with Dr. Cava that Claimant reached MMI on May 17, 2019. He assigned Claimant a 32% left lower extremity permanent impairment that converted to a 13% whole person rating.

12. On January 13, 2020 Respondent filed a Final Admission of Liability (FAL) consistent with Dr. Hughes' MMI and impairment determinations. Respondent also acknowledged that Claimant was entitled to receive reasonable, necessary and related medical maintenance benefits.

13. On February 4, 2020 Claimant filed an application for hearing to overcome Dr. Hughes' DIME opinion regarding MMI and permanent impairment. Claimant also contacted Dr. Sather to request an appointment to resume treatment after not visiting her for almost five months.

14. On May 20, 2020 the parties conducted the pre-hearing evidentiary deposition of Dr. Sather. Dr. Sather commented that she met with Claimant on five occasions. She reported Claimant's description of the October 28, 2018 shooting. Claimant also noted the effects from the shooting incident, including reliving the event, experiencing flashbacks and suffering distressing dreams that woke him up at night. Dr. Sather explained that Claimant relived the experience and the sensation of being shot in the leg. Claimant specifically noted numerous occasions of hyper-arousal and is easily startled. Dr. Sather remarked that Claimant's anxiety is exacerbated by any call that requires him to approach a house.

15. Dr. Sather concluded that, based on the criteria in the Diagnostic and Statistic Manual of Mental Disorders, Claimant suffers from PTSD with a DSM code of 43.10 as a result of the work-related incident on October 28, 2018. In considering the specific elements for a PTSD diagnosis, Dr. Sather commented that the first criteria involve exposure to a life threatening event. Dr. Sather noted that the second criteria includes nightmares, dreams, flashbacks and intrusive thoughts that are the result of hyper-vigilance. The third element is avoidance of people and social situations. Dr. Sather remarked that the fourth criteria includes changes in thoughts or mood such as self-questioning or irritability. The fifth criteria involves changes in arousal, the inability to sleep, becoming scared by loud noises and trouble concentrating. Finally, Dr. Sather explained that symptoms must exceed one month in duration. Citing specific incidents described by Claimant, Dr. Sather determined that he satisfied the criteria for a PTSD diagnosis. Based on her diagnosis, Dr. Sather concluded that Claimant was not at MMI. She recommended additional treatment modalities including office visits twice per month, week-long residential programs and Eye Movement Desensitization Retraining (EMDR). Despite Dr. Sather's diagnosis, she acknowledged that she never reviewed any of Claimant's treatment records from his Workers' Compensation claim, records from Dr. Cole or any summary of Claimant's treatment history.

16. Claimant testified at the hearing in this matter. He explained that after the October 28, 2018 shooting he recuperated at his mother's residence. Claimant remarked that he initially isolated himself from his friends, mostly stayed in his room, often cried and had repetitive nightmares that recreated the scenario of his injury. He reported having approximately 50 or 60 of the nightmares. Claimant commented that the nightmares initially occurred consistently, but decreased in frequency. Moreover, although Claimant initially secluded himself somewhat, his condition improved and he began dating. On cross examination, Claimant acknowledged that he denied having nightmares or flashbacks when he visited Dr. Cole. Claimant also conceded that none of his authorized medical providers referred him for psychological treatment.

17. Claimant's mother Patricia Duhalde testified that after the shooting Claimant appeared more concerned than usual and would not often leave the house.

He specifically demonstrated more concern for his sister's safety. Moreover, Claimant's girlfriend Branislova Cloud testified that Claimant appeared more lethargic and easily startled after the October 28, 2018 shooting.

18. Claimant has failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Hughes that he did not warrant a permanent psychological impairment rating for PTSD and reached MMI on May 17, 2019 as a result of his October 28, 2018 industrial injury. Initially, On October 28, 2018 Claimant and other officers were attempting to secure the perimeter around a house where there had been a reported shooting. While Claimant was moving toward the rear of the house, the suspect began shooting at him. One of the bullets struck Claimant in the lower left leg. Claimant subsequently underwent treatment for his left leg injuries and received psychological counseling. On May 17, 2019 ATP Dr. Cava determined Claimant reached MMI with no permanent work restrictions. She assigned Claimant a 17% lower extremity impairment rating, consisting of 13% for range of motion deficits and 5% for a peroneal nerve injury. On July 5, 2019 Dr. Cava responded to a letter from Respondent requesting clarification as to why she did not assign Claimant a rating for psychological impairment and other body parts. Dr. Cava explained that Claimant "adjusted very well after his injury. He did not appear to have any difficulty reassimilating to his position at work. He appeared excited to return to his prior duty. He did not express psychological concerns. He does not have a psychological diagnosis." Respondent filed a FAL consistent with Dr. Cava's MMI and impairment determinations.

19. Claimant challenged the FAL and contacted Dr. Sather to evaluate him for PTSD. She concluded that Claimant suffered from PTSD as a result of the October 28, 2018 shooting. On December 18, 2019 Claimant underwent a DIME with Dr. Hughes. Dr. Hughes considered Claimant's medical records and reviewed Dr. Sather's diagnostic assessment report. He disagreed with Dr. Sather and concluded that Claimant did not have a "permanent psychiatric impairment stemming from PTSD." He specified that Claimant did not exhibit symptoms consistent with PTSD at the DIME appointment and none of his authorized treating physicians considered him for PTSD during the course of treatment. Dr. Hughes agreed with Dr. Cava that Claimant reached MMI on May 17, 2019. He assigned Claimant a 32% left lower extremity impairment that converted to a 13% whole person rating.

20. Claimant contends that Dr. Hughes erroneously failed to assign him an impairment rating for PTSD and he has thus not reached MMI. Claimant's assertion is primarily based on Dr. Sather's opinion that he suffers from PTSD as a result of the October 28, 2018 shooting. During a pre-hearing evidentiary deposition Dr. Sather explained that she met with Claimant on five occasions and he reported reliving the shooting event, experiencing flashbacks and suffering distressing dreams that woke him up at night. Claimant specifically noted numerous occasions of hyper-arousal and is easily startled. Based on the criteria in the Diagnostic and Statistic Manual of Mental Disorders, Dr. Sather concluded that Claimant suffers from PTSD with a DSM code of 43.10 as a result of the work-related incident on October 28, 2018.

21. Despite Dr. Sather's analysis, Claimant has failed to demonstrate that Dr. Hughes improperly applied the *AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised)* (*AMA Guides*) or otherwise erred in concluding that Claimant reached MMI with no psychological impairment. Dr. Sather's disagreement about whether Claimant suffers from PTSD is insufficient to demonstrate that Dr. Hughes' conclusion was clearly erroneous. Notably, because Dr. Sather confirmed that she did not have the benefit of reviewing Claimant's treatment history under this claim, she had an incomplete clinical picture of Claimant's psychological condition. Furthermore, none of Claimant's authorized treating physicians felt he needed treatment for PTSD or had any PTSD related permanent impairment. Claimant's treatment records also did not note any nightmares, flashbacks or anxiety. Specifically, ATP Dr. Cava noted that Claimant adjusted well after the shooting, did not express psychological concerns and did not have a psychological diagnosis. It was thus reasonable for Dr. Hughes to conclude that Claimant did not warrant a permanent impairment for PTSD or require any curative treatment to relieve the effects of PTSD. Accordingly, Claimant has failed to produce unmistakable evidence free from serious or substantial doubt that Dr. Hughes' MMI and impairment determinations were erroneous.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. See *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *CJI*, Civil 3:16 (2007).

4. In ascertaining a DIME physician's opinion, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office*, 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician's

determination regarding MMI and permanent impairment consists of his initial report and any subsequent opinions. *In Re Dazzio*, W.C. No. 4-660-149 (ICAO, June 30, 2008); see *Andrade v. Industrial Claim Appeals Office*, 121 P.3d 328 (Colo. App. 2005).

5. A DIME physician's opinions concerning MMI and impairment carry presumptive weight pursuant to §8-42-107(8)(b)(III), C.R.S.; see *Yeutter v. Industrial Claim Appeals Office*, No. 18CA0498 (Apr. 11, 2019) 2019 COA 53. The statute provides that "[t]he finding regarding [MMI] and permanent medical impairment of an independent medical examiner in a dispute arising under subparagraph (II) of this paragraph (b) may be overcome only by clear and convincing evidence." *Id.* Subparagraph (II) is limited to parties' disputes over "a determination by an authorized treating physician on the question of whether the injured worker has or has not reached [MMI]." §8-42-107(8)(b)(II). "Nowhere in the statute is a DIME's opinion as to the cause of a claimant's injury similarly imbued with presumptive weight." See *Yeutter*, 2019 COA 53 ¶ 18. Accordingly, a DIME physician's opinion carries presumptive weight only with respect to MMI and impairment. *Id.* at ¶ 21.

6. "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc.*, W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.*, W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); see *Shultz v. Anheuser Busch, Inc.*, W.C. No. 4-380-560 (ICAO, Nov. 17, 2000).

7. A DIME physician is required to rate a claimant's impairment in accordance with the *AMA Guides*. §8-42-107(8)(c), C.R.S.; *Wilson v. Industrial Claim Appeals Office*, 81 P.3d 1117, 1118 (Colo. App. 2003). However, deviations from the *AMA Guides* do not mandate that the DIME physician's impairment rating was incorrect. *In Re Gurrola*, W.C. No. 4-631-447 (ICAO, Nov. 13, 2006). Instead, the ALJ may consider a technical deviation from the *AMA Guides* in determining the weight to be accorded the DIME physician's findings. *Id.* Whether the DIME physician properly applied the *AMA Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In Re Goffinett*, W.C. No. 4-677-750 (ICAO, Apr. 16, 2008).

8. MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office*, 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office*, 942 P.2d 1358 (Colo. App. 1997).

9. As found, Claimant has failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Hughes that he did not warrant a permanent psychological impairment rating for PTSD and reached MMI on May 17, 2019 as a

result of his October 28, 2018 industrial injury. Initially, On October 28, 2018 Claimant and other officers were attempting to secure the perimeter around a house where there had been a reported shooting. While Claimant was moving toward the rear of the house, the suspect began shooting at him. One of the bullets struck Claimant in the lower left leg. Claimant subsequently underwent treatment for his left leg injuries and received psychological counseling. On May 17, 2019 ATP Dr. Cava determined Claimant reached MMI with no permanent work restrictions. She assigned Claimant a 17% lower extremity impairment rating, consisting of 13% for range of motion deficits and 5% for a peroneal nerve injury. On July 5, 2019 Dr. Cava responded to a letter from Respondent requesting clarification as to why she did not assign Claimant a rating for psychological impairment and other body parts. Dr. Cava explained that Claimant “adjusted very well after his injury. He did not appear to have any difficulty reassimilating to his position at work. He appeared excited to return to his prior duty. He did not express psychological concerns. He does not have a psychological diagnosis.” Respondent filed a FAL consistent with Dr. Cava’s MMI and impairment determinations.

10. As found, Claimant challenged the FAL and contacted Dr. Sather to evaluate him for PTSD. She concluded that Claimant suffered from PTSD as a result of the October 28, 2018 shooting. On December 18, 2019 Claimant underwent a DIME with Dr. Hughes. Dr. Hughes considered Claimant’s medical records and reviewed Dr. Sather’s diagnostic assessment report. He disagreed with Dr. Sather and concluded that Claimant did not have a “permanent psychiatric impairment stemming from PTSD.” He specified that Claimant did not exhibit symptoms consistent with PTSD at the DIME appointment and none of his authorized treating physicians considered him for PTSD during the course of treatment. Dr. Hughes agreed with Dr. Cava that Claimant reached MMI on May 17, 2019. He assigned Claimant a 32% left lower extremity impairment that converted to a 13% whole person rating.

11. As found, Claimant contends that Dr. Hughes erroneously failed to assign him an impairment rating for PTSD and he has thus not reached MMI. Claimant’s assertion is primarily based on Dr. Sather’s opinion that he suffers from PTSD as a result of the October 28, 2018 shooting. During a pre-hearing evidentiary deposition Dr. Sather explained that she met with Claimant on five occasions and he reported reliving the shooting event, experiencing flashbacks and suffering distressing dreams that woke him up at night. Claimant specifically noted numerous occasions of hyper-arousal and is easily startled. Based on the criteria in the Diagnostic and Statistic Manual of Mental Disorders, Dr. Sather concluded that Claimant suffers from PTSD with a DSM code of 43.10 as a result of the work-related incident on October 28, 2018.

12. As found, despite Dr. Sather’s analysis, Claimant has failed to demonstrate that Dr. Hughes improperly applied the *AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised)* (*AMA Guides*) or otherwise erred in concluding that Claimant reached MMI with no psychological impairment. Dr. Sather’s disagreement about whether Claimant suffers from PTSD is insufficient to demonstrate that Dr. Hughes’ conclusion was clearly erroneous. Notably, because Dr. Sather confirmed that she did not have the benefit of reviewing Claimant’s treatment history under this claim, she had an incomplete clinical picture of Claimant’s psychological condition. Furthermore, none of Claimant’s authorized treating physicians felt he

needed treatment for PTSD or had any PTSD related permanent impairment. Claimant's treatment records also did not note any nightmares, flashbacks or anxiety. Specifically, ATP Dr. Cava noted that Claimant adjusted well after the shooting, did not express psychological concerns and did not have a psychological diagnosis. It was thus reasonable for Dr. Hughes to conclude that Claimant did not warrant a permanent impairment for PTSD or require any curative treatment to relieve the effects of PTSD. Accordingly, Claimant has failed to produce unmistakable evidence free from serious or substantial doubt that Dr. Hughes' MMI and impairment determinations were erroneous.

ORDER

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

1. Claimant has failed to overcome Dr. Hughes' DIME opinion that Claimant did not have a permanent psychiatric impairment relating to PTSD and reached MMI on May 17, 2019.
2. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at <http://www.colorado.gov/dpa/oac/forms-WC.htm>.*

DATED: July 2, 2020.

DIGITAL SIGNATURE:


Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUE

Whether Respondents have produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of Bryan Counts, M.D. that Claimant suffered a 27% whole person impairment rating as a result of his July 27, 2015 industrial occupational disease.

FINDINGS OF FACT

1. Claimant worked as a Firefighter/EMT for Employer for 35 years. He retired on June 12, 2013. On July 27, 2015 Claimant was diagnosed with cancer at the base of his tongue. On October 14, 2015 Sarvjit Gill, M.D. performed a tumor resection and lymph node dissection. Claimant subsequently underwent 26 rounds of radiation treatment.

2. Respondents initially disputed the compensability of Claimant's claim concerning squamous cell carcinoma arising under §8-41-209, C.R.S. However, on June 7, 2017 ALJ Mottram determined that Claimant suffered the compensable occupational disease of cancer under §8-41-209, C.R.S. and ordered Respondents to pay Workers' Compensation benefits. The Colorado Court of Appeals affirmed the order on June 28, 2018.

3. Claimant received primary care treatment from Sander Orent, M.D. and various other providers. On May 6, 2019 Claimant was referred to Authorized Treating Physician (ATP) Alisa Koval, M.D. for a Maximum Medical Improvement (MMI) determination and permanent impairment evaluation. She concluded that he had reached MMI.

4. On June 19, 2019 Dr. Koval assigned Claimant a combined 41% whole person permanent impairment rating consisting of the following: 18% **for** cervical range of motion; 10% for correction of thyroid insufficiency; 10% respiration class 1 for a recognized passage defect; 5% for mastication & deglutition due to a diet limited to semi-solid or soft foods and; 1.5% for decreased sensation in the greater auricular nerve in Claimant's anterior neck. In specifically addressing Claimant's cervical range of motion impairment Dr. Koval commented that he suffered a significant loss of range of motion in the cervical spine "due to extensive ENT surgery for squamous cell carcinoma at the base of the tongue." She detailed that the cervical range of motion loss was required "to reflect [Claimant's] impairment accurately, as his neck anatomy was significantly altered by surgery and radiation."

5. On September 5, 2019 Lawrence Lesnak, D.O. performed a medical records review, prepared a report and identified multiple errors in Dr. Koval's impairment rating. Relying on the *AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised)* (*AMA Guides*).Dr. Lesnak explained that Dr. Koval erred when she awarded

Claimant an 18% whole person impairment for cervical range of motion deficits. The *AMA Guides* only allow range of motion impairment ratings when a doctor establishes a corresponding Table 53 diagnosis. Furthermore, the Division of Workers' Compensation *Impairment Rating Tips (Rating Tips)* provide for a range of motion impairment only in unusual cases when there is established severe shoulder pathology accompanied by treatment of the cervical musculature and the isolated cervical range of motion impairment is well justified by the clinician. The *Rating Tips* also note that "otherwise, there are no exceptions to the requirement for a corresponding Table 53 rating." Dr. Lesnak commented that assigning a cervical spine range of motion impairment to Claimant constituted error because he did not qualify for a Table 53 cervical spine rating or suffer severe shoulder pathology.

6. Dr. Lesnak also remarked that Dr. Koval erred when she awarded Claimant a 1.5% impairment for decreased sensation in the greater auricular nerve in his anterior neck. He commented that the *AMA Guides* require a "named" nerve or named nerve root involvement to support an impairment rating for sensory abnormalities. Dr. Lesnak noted that none of the medical records "suggest that [Claimant] could have even remotely sustained a greater auricular nerve abnormality as a result of the surgical procedure that was performed." He further commented that Dr. Koval erred when she awarded Claimant a 10% rating for a Class 1 Respiration impairment for a recognized passage defect. Dr. Lesnak specified that there is no reported evidence in the medical records of any abnormalities that suggest any type of respiratory condition related to the occupational injury claim. Moreover, Dr. Koval erred when she awarded Claimant a 5% rating for Mastication & Deglutition for diet limitations to semi-solid or soft foods because Claimant eats "any and all foods without a significant amount of difficulty." Finally, Dr. Lesnak agreed that Dr. Koval properly rated Claimant's thyroid impairment because it appeared that he began to develop hypothyroidism within the first year following his surgical procedure and radiation therapy could possibly induce hypothyroidism.

7. Respondents disagreed with Dr. Koval's conclusions and requested a Division Independent Medical Examination (DIME). The DIME was performed by Bryan Counts, M.D. on November 14, 2019.

8. On December 3, 2019 Dr. Counts issued his DIME report. He concluded that Claimant reached MMI on May 6, 2019 and suffered a 27% whole person impairment. Relying on the *AMA Guides*, his rating consisted of the following: 5% for respiratory impairment due to difficulty swallowing with aspiration; 5% for hypothyroidism; 17% for cervical range of motion deficits; and 2% for spinal nerve impairment based on injury to the great auricular nerve.

9. Dr. Counts included a 17% cervical range of motion impairment even though he acknowledged that the *AMA Guides* do not allow for a cervical range of motion rating in the absence of a Table 53 diagnosis. Dr. Counts also recognized that the *Rating Tips* allow for a cervical range of motion rating without a Table 53 diagnosis in the unusual case of established severe shoulder pathology accompanied by treatment of the cervical musculature. While recognizing that Claimant did not have a specific cervical spinal condition under Table 53, Dr. Counts nevertheless measured Claimant's range of

motion loss because it was “very significantly reduced due to radiation therapy and possibly as a surgical dissection of the neck.” He concluded that Claimant “certainly meets the criteria of neck pain over six months and the pain is musculoskeletal in nature.” Furthermore, Dr. Counts included a cervical range of motion impairment rating because Dr. Koval had included a cervical range of motion rating and he “consulted with the Division of Workers’ Compensation and their medical director felt that it is appropriate in this instance to include the neck range of motion, with or without a Table 53 spine diagnosis.”

10. Dr. Counts explained that he assigned a 5% rating for respiratory impairment due to difficulty swallowing with aspiration. He detailed that Table 5 of the *AMA Guides* addresses the respiratory component of the ENT system. Class 1 permits a 0-10% impairment rating. Dr. Counts explained that Claimant’s “dyspnea occurs only with difficulty swallowing, particularly with aspiration. His swallowing studies have demonstrated food getting hung up at the level of the hypopharynx. Thus a 5% rating is most appropriate.” He also commented that he assigned a 2% rating for spinal nerve impairment based on bilateral injury to the greater auricular nerve. He detailed that he assigned the 3% maximum for “loss of function due to sensory deficit, pain or discomfort.” He chose 3% for both sides because it is “quite troublesome” for Claimant. Dr. Counts determined that “Grade 2 fits the best, since the diminished sensation alone rarely would interfere with activity.” He thus assigned a 1% rating for each side of the greater articular nerve. Combining the two sides yielded a total 2% rating for spinal nerve impairment.

11. On December 9, 2019 Dr. Lesnak reviewed Dr. Counts’ DIME report. He prepared a report and identified multiple errors in Dr. Counts’ impairment rating. Dr. Lesnak specified that Dr. Counts erred when he assigned Claimant a 17% whole person impairment for abnormal cervical spine range of motion without a Table 53 diagnosis or significant shoulder pathology. He remarked that Dr. Counts also erred when he assigned Claimant a 2% spinal nerve rating for an injury to the great auricular nerve because there was no medical evidence that Claimant sustained any injury or residual abnormality involving the greater auricular nerve.

12. Dr. Lesnak testified at the hearing in this matter. He maintained that Dr. Counts erred in assigning Claimant a 27% whole person permanent impairment rating. Dr. Lesnak explained that Dr. Counts erred when he rated Claimant with 17% cervical range of motion impairment. The inclusion of a cervical spine range of motion rating did not comply with the *AMA Guides* because they only allow cervical range of motion impairment ratings if associated with a Table 53 cervical spine disorder. Furthermore, the *Rating Tips* only permit a cervical range of motion impairment without a Table 53 rating when there is severe shoulder pathology. Dr. Lesnak remarked that Claimant did not present with a Table 53 cervical spine disorder and there was no evidence of any shoulder joint pathology related to his occupational injury. Dr. Counts also erred because he did not act “independently” when he “consulted” with the Division of Workers’ Compensation to assign a permanent impairment rating.

13. Dr. Lesnak also detailed that Dr. Counts erroneously included a 2% whole person impairment for abnormalities involving the greater auricular nerves. He testified that

general decreased sensation in the cutaneous skin nerves is not ratable under the *AMA Guides* because they require identification of a specific named nerve or nerve root to support a rating. Dr. Lesnak detailed that the greater auricular nerve enervates the jaw and ear. Claimant only reported some decreased sensation in his anterior neck, possibly involving cutaneous skin nerves. Also, Claimant's surgery did not cut or affect his greater auricular nerve and there was no evidence of radiation damage. Finally, Dr. Lesnak explained that Dr. Counts erred when he included a 5% respiration impairment for a recognized passage defect. He commented that, although Claimant experienced trouble swallowing, any difficulties did not constitute a passage defect according to the *AMA Guides*.

14. Ronald Swarsen, M.D. testified at hearing in this matter. He explained that he reviewed some of Claimant's medical records but acknowledged he did not review Dr. Lesnak's second report that addressed errors in Dr. Counts' DIME report. Dr. Swarsen admitted that the *AMA Guides* require a Table 53 diagnosis and rating in order to assign a range of motion impairment and recognized that no Table 53 diagnosis exists in this case. He noted that the *Rating Tips* allow an exception for cervical range of motion impairment ratings without a Table 53 diagnosis in cases of severe shoulder injuries but admitted that Claimant did not suffer severe shoulder pathology. Nevertheless, Dr. Swarsen suggested that doctors could apply similar logic associated with the severe shoulder pathology exception to other situations and rate range of motion without a Table 53 diagnosis if the *AMA Guides* do not specifically address that situation. However, on cross-examination, Dr. Swarsen acknowledged that the *Rating Tips* specifically state that no other exceptions apply to the requirement for a Table 53 diagnosis.

15. Claimant testified at the hearing in this matter. He acknowledged he can eat everything and is not limited to semisolid or soft foods. Claimant explained that radiation affected his salivary glands and food does not go down smoothly but can get caught until he drinks.

16. Dr. Counts testified at hearing in this matter. He acknowledged that the *AMA Guides* do not allow a cervical spine range of motion impairment rating absent an underlying Table 53 cervical spine diagnosis. He also recognized that the *Rating Tips* allow for an exception to rate cervical spine range of motion impairment without a Table 53 diagnosis in cases of severe shoulder pathology. Dr. Counts determined that Claimant did not present with a Table 53 diagnosis and the *Rating Tips* exception did not apply because Claimant exhibited normal shoulder function. He testified that red and yellow flags went up when he saw that Dr. Koval rated Claimant's cervical range of motion impairment. Dr. Counts thus contacted the Division of Workers' Compensation for assistance. He emailed Courtney Harris and she forwarded the message to Auditor and physical therapist David Indovina at the Division. Dr. Counts provided Mr. Indovina with a factual summary but did not send any medical records. Mr. Indovina reviewed the matter with the Division's Associate Medical Director X.J. Ethan Moses, M.D. Mr. Indovina subsequently told Dr. Counts that he could include a Table 53 rating or a cervical range of motion impairment without a Table 53 rating

17. Dr. Counts explained that he did not consider Mr. Indovina's suggestion an order from the Division and decided a Table 53 impairment rating was not appropriate. He commented that Claimant's condition did not support a Table 53 diagnosis because, even though he received treatment for soft tissue lesions of the neck, he did not suffer an injury to his cervical spine, cervical discs, or nerve roots associated with his cervical spine. Nevertheless, Dr. Counts assigned a 17% range of motion impairment rating without a Table 53 diagnosis. Finally, Dr. Counts testified that he included a 2% rating for Claimant's greater auricular nerve because Claimant identified problems in his neck on his pain diagram. He also noted possible auricular nerve impairment during his physical examination.

18. Respondents have produced clear and convincing evidence to overcome the DIME opinion of Dr. Counts that Claimant suffered a 27% whole person impairment rating as a result of his July 27, 2015 industrial occupational disease. Specifically, Respondents have demonstrated that Dr. Counts incorrectly assigned Claimant a 17% whole person impairment for cervical range of motion deficits. The instructions in the *AMA Guides* only allow range of motion impairment in conjunction with a corresponding Table 53 diagnosis. Furthermore, the *Rating Tips* allow one exception in unusual cases when there is established severe shoulder pathology accompanied by treatment of the cervical musculature, and the isolated cervical range of motion impairment is well justified by the clinician. "Otherwise, there are no exceptions to the requirement for a corresponding Table 53 rating."

19. Dr. Lesnak persuasively explained that Dr. Counts' erroneously assigned Claimant a 17% cervical spine range of motion rating. He specified that Claimant did not present with a Table 53 cervical spine disorder and there was no evidence of any shoulder joint pathology related to his occupational injury. Moreover, Dr. Counts acknowledged that Claimant did not present with a Table 53 diagnosis and the *Rating Tips* exception did not apply because he exhibited normal shoulder function. Dr. Counts detailed that Claimant's condition did not support a Table 53 diagnosis because, even though he received treatment for soft tissue lesions of the neck, he did not suffer an injury to his cervical spine, cervical discs, or nerve roots associated with his cervical spine.

20. Dr. Swarson agreed with Dr. Counts' DIME opinion that Claimant was entitled to receive a 17% whole person impairment for cervical range of motion deficits. However, he admitted that the *AMA Guides* require a Table 53 diagnosis in order to assign a range of motion impairment but recognized that no Table 53 diagnosis exists in this case. He also noted that the *Rating Tips* allow an exception for cervical range of motion impairment ratings without a Table 53 diagnosis in cases of severe shoulder injuries but admitted that Claimant did not suffer severe shoulder pathology. Nevertheless, Dr. Swarson suggested that doctors could apply similar logic associated with the severe shoulder pathology exception to other situations and rate range of motion without a Table 53 diagnosis. However, on cross-examination, Dr. Swarson acknowledged that the *Rating Tips* specifically state that no other exceptions apply to the requirement for a Table 53 diagnosis.

21. The *AMA Guides* require a Table 53 diagnosis and rating in order to assign a range of motion impairment and the *Rating Tips* allow an exception for cervical range of motion impairment ratings without a Table 53 diagnosis only in cases of severe shoulder injuries. The unambiguous language of the *AMA Guides* and *Rating Tips*, in conjunction with the persuasive testimony of Dr. Lesnak, reflect that Dr. Counts erroneously assigned Claimant a 17% whole person impairment rating for cervical range of motion deficits. Furthermore, Dr. Counts acknowledged that Claimant's condition did not support a Table 53 diagnosis. Accordingly, Respondents have produced unmistakable evidence free from serious or substantial doubt that Dr. Counts incorrectly assigned Claimant a 17% whole person impairment rating for cervical range of motion deficits.

22. Because Respondents have overcome Dr. Counts' cervical range of motion rating by clear and convincing evidence, the determination of Claimant's correct rating is a matter of fact based upon the lesser burden of a preponderance of the evidence. In addition to the 17% cervical range of motion rating, Dr. Counts assigned Claimant a 5% rating for respiratory impairment due to difficulty swallowing with aspiration; 5% for hypothyroidism; and 2% for spinal nerve impairment based on injury to the great auricular nerve. Initially, Respondents do not dispute that Claimant is entitled to a 5% impairment for hypothyroidism. Under the *AMA Guides*, a Class I impairment may range from 0% - 10% when continuous thyroid therapy is required for correction of thyroid insufficiency and there is no objective physical or laboratory evidence of inadequate replacement therapy. Dr. Counts chose to rate Claimant with a 5% impairment because Claimant has no symptoms of hypothyroidism. Dr. Lesnak and Dr. Koval also rated Claimant for thyroid impairment because Claimant developed hypothyroidism within the first year following his surgical procedure and radiation therapy could induce hypothyroidism. Accordingly, Claimant is entitled to a 5% whole person impairment rating for hypothyroidism.

23. Claimant has established that it is more probably true than not that Dr. Counts properly assigned Claimant a 5% rating for respiratory impairment due to difficulty swallowing with aspiration. The *AMA Guides* define respiration as the act or function of breathing and permanent impairment produced by defects of the air passages, such as obstruction, "evidenced primarily by dyspnea." *AMA Guides*, Table 5, p. 181, Class 1 allows for a 0%-10% rating due to a recognized air passage defect. Dr. Counts detailed that Table 5 of the *AMA Guides* addresses the respiratory component of the ENT system and Class 1 permits a 0-10% impairment rating. He noted that Claimant's "dyspnea occurs only with difficulty swallowing, particularly with aspiration. His swallowing studies have demonstrated food getting hung up at the level of the hypopharynx." Dr. Counts thus determined that a 5% rating was appropriate. Notably, ATP Dr. Koval also assigned a class 1 respiration rating for a recognized passage defect.

24. In contrast, Dr. Lesnak explained that Dr. Counts erred when he included a 5% respiration impairment for a recognized passage defect. He specified that there was no evidence of any abnormalities or physical passage defect that suggested any type of respiratory condition related to the occupational injury claim. Dr. Lesnak commented that, although Claimant experienced trouble swallowing, any difficulties did not constitute a passage defect according to the *AMA Guides*. However, despite Dr. Lesnak's opinion, the

record reflects that Dr. Counts properly assigned Claimant a 5% respiration impairment for a recognized passage defect. Claimant explained that radiation affected his salivary glands and food does not go down smoothly but can get caught until he drinks. Furthermore, Dr. Counts noted that Claimant has difficulty swallowing and food becomes stuck at the level of the hypopharynx. Claimant's difficulty swallowing causes him to experience breathing difficulties. Accordingly, Claimant is entitled to a 5% whole person impairment rating for a respiratory impairment due to difficulty swallowing with aspiration.

25. Claimant has demonstrated that it is more probably true than not that Dr. Counts properly assigned Claimant a 2% whole person impairment for abnormalities involving the greater auricular nerves. Dr. Counts explained that he assigned a 2% rating for spinal nerve impairment based on bilateral injury to the greater auricular nerve. He detailed that he assigned the 3% maximum for "loss of function due to sensory deficit, pain or discomfort." He chose 3% for both sides because it is "quite troublesome" for Claimant. Dr. Counts determined that "Grade 2 fits the best, since the diminished sensation alone rarely would interfere with activity." He thus assigned a 1% rating for each side of the greater articular nerve. Combining the two sides yielded a total 2% rating for spinal nerve impairment.

26. In contrast, Dr. Lesnak remarked that "[t]here is no medical evidence whatsoever to suggest that the patient sustained any injuries or has any residual abnormalities involving either greater auricular nerve whatsoever." Dr. Lesnak concluded that any abnormalities involving the cutaneous skin region are not ratable according to the *AMA Guides* because there must be a "named" nerve or nerve root involvement. In the present matter, there is no evidence of a named nerve or nerve root abnormality. However, Dr. Counts persuasively testified that he included a 2% rating for Claimant's greater auricular nerve because Claimant identified problems in his neck on his pain diagram. He also noted possible auricular nerve impairment during his physical examination of Claimant. Accordingly, Claimant is entitled to a 2% whole person impairment rating for abnormalities involving the greater auricular nerves.

27. Based on a review of the record and persuasive medical opinions, Dr. Counts erroneously assigned Claimant a 17% whole person impairment rating for cervical range of motion deficits. However, Claimant is entitled to receive a 5% whole person impairment rating for hypothyroidism, a 5% whole person rating for respiratory impairment due to difficulty swallowing with aspiration and a 2% whole person impairment rating for abnormalities involving the greater auricular nerves. Combining the ratings yields a 12% whole person impairment as a result of Claimant's July 27, 2015 industrial occupational disease.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S.

A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. See *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *CJI*, Civil 3:16 (2007).

4. In ascertaining a DIME physician's opinion, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office*, 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician's determination regarding MMI and permanent impairment consists of his initial report and any subsequent opinions. *In Re Dazzio*, W.C. No. 4-660-149 (ICAO, June 30, 2008); see *Andrade v. Industrial Claim Appeals Office*, 121 P.3d 328 (Colo. App. 2005).

5. A DIME physician's opinions concerning MMI and impairment carry presumptive weight pursuant to §8-42-107(8)(b)(III), C.R.S.; see *Yeutter v. Industrial Claim Appeals Office*, No. 18CA0498 (Apr. 11, 2019) 2019 COA 53. The statute provides that "[t]he finding regarding [MMI] and permanent medical impairment of an independent medical examiner in a dispute arising under subparagraph (II) of this paragraph (b) may be overcome only by clear and convincing evidence." *Id.* Subparagraph (II) is limited to parties' disputes over "a determination by an authorized treating physician on the question of whether the injured worker has or has not reached [MMI]." §8-42-107(8)(b)(II). "Nowhere in the statute is a DIME's opinion as to the cause of a claimant's injury similarly imbued with presumptive weight." See *Yeutter*, 2019 COA 53 ¶ 18. Accordingly, a DIME physician's opinion carries presumptive weight only with respect to MMI and impairment. *Id.* at ¶ 21.

6. "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc.*, W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear

and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.*, W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); see *Shultz v. Anheuser Busch, Inc.*, W.C. No. 4-380-560 (ICAO, Nov. 17, 2000).

7. A DIME physician is required to rate a claimant's impairment in accordance with the *AMA Guides*. §8-42-107(8)(c), C.R.S.; *Wilson v. Industrial Claim Appeals Office*, 81 P.3d 1117, 1118 (Colo. App. 2003). However, deviations from the *AMA Guides* do not mandate that the DIME physician's impairment rating was incorrect. *In Re Gurrola*, W.C. No. 4-631-447 (ICAO, Nov. 13, 2006). Instead, the ALJ may consider a technical deviation from the *AMA Guides* in determining the weight to be accorded the DIME physician's findings. *Id.* Whether the DIME physician properly applied the *AMA Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In Re Goffinett*, W.C. No. 4-677-750 (ICAO, Apr. 16, 2008).

8. Workers' Compensation Rule 12-4(B) provides that "[a]ny physician determining permanent physical impairment shall use the instructions and forms contained in the *AMA Guides*. Furthermore, the *Rating Tips* provide that spinal range of motion impairment must be completed and applied to the impairment rating only when a corresponding Table 53 diagnosis has been established. In unusual cases with established severe shoulder pathology accompanied by treatment of the cervical musculature, an isolated cervical range of motion impairment is allowed if it is well justified by the clinician. Otherwise, there are no exceptions to the requirement for a corresponding Table 53 rating. *Rating Tips* Desk Aid 11.

9. If a party has carried the initial burden of overcoming the DIME physician's impairment rating by clear and convincing evidence, the ALJ's determination of the correct rating is then a matter of fact based upon the lesser burden of a preponderance of the evidence. See *Deleon v. Whole Foods Market, Inc.*, W.C. No. 4-600-47 (ICAO, Nov. 16, 2006). The ALJ is not required to dissect the overall impairment rating into its numerous component parts and determine whether each part has been overcome by clear and convincing evidence. *Id.* When the ALJ determines that the DIME physician's rating has been overcome, the ALJ may independently determine the correct rating. *Lungu v. North Residence Inn*, W.C. No. 4-561-848 (ICAO, Mar. 19, 2004); *McNulty v. Eastman Kodak Co.*, W.C. No. 4-432-104 (ICAO, Sept. 16, 2002).

10. As found, Respondents have produced clear and convincing evidence to overcome the DIME opinion of Dr. Counts that Claimant suffered a 27% whole person impairment rating as a result of his July 27, 2015 industrial occupational disease. Specifically, Respondents have demonstrated that Dr. Counts incorrectly assigned Claimant a 17% whole person impairment for cervical range of motion deficits. The instructions in the *AMA Guides* only allow range of motion impairment in conjunction with a corresponding Table 53 diagnosis. Furthermore, the *Rating Tips* allow one exception in unusual cases when there is established severe shoulder pathology accompanied by treatment of the cervical musculature, and the isolated cervical range of motion impairment is well justified by the clinician. "Otherwise, there are no exceptions to the requirement for a corresponding Table 53 rating."

11. As found, Dr. Lesnak persuasively explained that Dr. Counts' erroneously assigned Claimant a 17% cervical spine range of motion rating. He specified that Claimant did not present with a Table 53 cervical spine disorder and there was no evidence of any shoulder joint pathology related to his occupational injury. Moreover, Dr. Counts acknowledged that Claimant did not present with a Table 53 diagnosis and the *Rating Tips* exception did not apply because he exhibited normal shoulder function. Dr. Counts detailed that Claimant's condition did not support a Table 53 diagnosis because, even though he received treatment for soft tissue lesions of the neck, he did not suffer an injury to his cervical spine, cervical discs, or nerve roots associated with his cervical spine.

12. As found, Dr. Swarson agreed with Dr. Counts' DIME opinion that Claimant was entitled to receive a 17% whole person impairment for cervical range of motion deficits. However, he admitted that the *AMA Guides* require a Table 53 diagnosis in order to assign a range of motion impairment but recognized that no Table 53 diagnosis exists in this case. He also noted that the *Rating Tips* allow an exception for cervical range of motion impairment ratings without a Table 53 diagnosis in cases of severe shoulder injuries but admitted that Claimant did not suffer severe shoulder pathology. Nevertheless, Dr. Swarson suggested that doctors could apply similar logic associated with the severe shoulder pathology exception to other situations and rate range of motion without a Table 53 diagnosis. However, on cross-examination, Dr. Swarson acknowledged that the *Rating Tips* specifically state that no other exceptions apply to the requirement for a Table 53 diagnosis.

13. As found, the *AMA Guides* require a Table 53 diagnosis and rating in order to assign a range of motion impairment and the *Rating Tips* allow an exception for cervical range of motion impairment ratings without a Table 53 diagnosis only in cases of severe shoulder injuries. The unambiguous language of the *AMA Guides* and *Rating Tips*, in conjunction with the persuasive testimony of Dr. Lesnak, reflect that Dr. Counts erroneously assigned Claimant a 17% whole person impairment rating for cervical range of motion deficits. Furthermore, Dr. Counts acknowledged that Claimant's condition did not support a Table 53 diagnosis. Accordingly, Respondents have produced unmistakable evidence free from serious or substantial doubt that Dr. Counts incorrectly assigned Claimant a 17% whole person impairment rating for cervical range of motion deficits.

14. As found, because Respondents have overcome Dr. Counts' cervical range of motion rating by clear and convincing evidence, the determination of Claimant's correct rating is a matter of fact based upon the lesser burden of a preponderance of the evidence. In addition to the 17% cervical range of motion rating, Dr. Counts assigned Claimant a 5% rating for respiratory impairment due to difficulty swallowing with aspiration; 5% for hypothyroidism; and 2% for spinal nerve impairment based on injury to the great auricular nerve. Initially, Respondents do not dispute that Claimant is entitled to a 5% impairment for hypothyroidism. Under the *AMA Guides*, a Class I impairment may range from 0% - 10% when continuous thyroid therapy is required for correction of thyroid insufficiency and there is no objective physical or laboratory evidence of inadequate replacement therapy. Dr. Counts chose to rate Claimant with a 5%

impairment because Claimant has no symptoms of hypothyroidism. Dr. Lesnak and Dr. Koval also rated Claimant for thyroid impairment because Claimant developed hypothyroidism within the first year following his surgical procedure and radiation therapy could induce hypothyroidism. Accordingly, Claimant is entitled to a 5% whole person impairment rating for hypothyroidism.

15. As found, Claimant has established by a preponderance of the evidence that Dr. Counts properly assigned Claimant a 5% rating respiratory impairment due to difficulty swallowing with aspiration. The *AMA Guides* define respiration as the act or function of breathing and permanent impairment produced by defects of the air passages, such as obstruction, “evidenced primarily by dyspnea.” *AMA Guides*, Table 5, p. 181, Class 1 allows for a 0%-10% rating due to a recognized air passage defect. Dr. Counts detailed that Table 5 of the *AMA Guides* addresses the respiratory component of the ENT system and Class 1 permits a 0-10% impairment rating. He noted that Claimant’s “dyspnea occurs only with difficulty swallowing, particularly with aspiration. His swallowing studies have demonstrated food getting hung up at the level of the hypopharynx.” Dr. Counts thus determined that a 5% rating was appropriate. Notably, ATP Dr. Koval also assigned a class 1 respiration rating for a recognized passage defect.

16. As found, in contrast, Dr. Lesnak explained that Dr. Counts erred when he included a 5% respiration impairment for a recognized passage defect. He specified that there was no evidence of any abnormalities or physical passage defect that suggested any type of respiratory condition related to the occupational injury claim. Dr. Lesnak commented that, although Claimant experienced trouble swallowing, any difficulties did not constitute a passage defect according to the *AMA Guides*. However, despite Dr. Lesnak’s opinion, the record reflects that Dr. Counts properly assigned Claimant a 5% respiration impairment for a recognized passage defect. Claimant explained that radiation affected his salivary glands and food does not go down smoothly but can get caught until he drinks. Furthermore, Dr. Counts noted that Claimant has difficulty swallowing and food becomes stuck at the level of the hypopharynx. Claimant’s difficulty swallowing causes him to experience breathing difficulties. Accordingly, Claimant is entitled to a 5% whole person impairment rating for a respiratory impairment due to difficulty swallowing with aspiration.

17. As found, Claimant has demonstrated by a preponderance of the evidence that Dr. Counts properly assigned Claimant a 2% whole person impairment for abnormalities involving the greater auricular nerves. Dr. Counts explained that he assigned a 2% rating for spinal nerve impairment based on bilateral injury to the greater auricular nerve. He detailed that he assigned the 3% maximum for “loss of function due to sensory deficit, pain or discomfort.” He chose 3% for both sides because it is “quite troublesome” for Claimant. Dr. Counts determined that “Grade 2 fits the best, since the diminished sensation alone rarely would interfere with activity.” He thus assigned a 1% rating for each side of the greater articular nerve. Combining the two sides yielded a total 2% rating for spinal nerve impairment.

18. As found, in contrast, Dr. Lesnak remarked that “[t]here is no medical evidence whatsoever to suggest that the patient sustained any injuries or has any residual abnormalities involving either greater auricular nerve whatsoever.” Dr. Lesnak concluded

that any abnormalities involving the cutaneous skin region are not ratable according to the *AMA Guides* because there must be a “named” nerve or nerve root involvement. In the present matter, there is no evidence of a named nerve or nerve root abnormality. However, Dr. Counts persuasively testified that he included a 2% rating for Claimant’s greater auricular nerve because Claimant identified problems in his neck on his pain diagram. He also noted possible auricular nerve impairment during his physical examination of Claimant. Accordingly, Claimant is entitled to a 2% whole person impairment rating for abnormalities involving the greater auricular nerves.

19. As found, based on a review of the record and persuasive medical opinions, Dr. Counts erroneously assigned Claimant a 17% whole person impairment rating for cervical range of motion deficits. However, Claimant is entitled to receive a 5% whole person impairment rating for hypothyroidism, a 5% whole person rating for respiratory impairment due to difficulty swallowing with aspiration and a 2% whole person impairment rating for abnormalities involving the greater auricular nerves. Combining the ratings yields a 12% whole person impairment as a result of Claimant’s July 27, 2015 industrial occupational disease.

ORDER

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

1. Respondents have overcome Dr. Counts’ DIME opinion that Claimant is entitled to receive a 17% whole person impairment rating for cervical range of motion deficits.
2. Claimant is entitled to receive a 5% whole person impairment rating for hypothyroidism, a 5% whole person rating for respiratory impairment due to difficulty swallowing with aspiration and a 2% whole person impairment rating for abnormalities involving the greater auricular nerves. Combining the ratings, Claimant suffered a 12% whole person impairment as a result of his July 27, 2015 industrial occupational disease.
3. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge’s order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge’s order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative

Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at <http://www.colorado.gov/dpa/oac/forms-WC.htm>.*

DATED: July 9, 2020.

DIGITAL SIGNATURE:


Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that the surgery being proposed by Dr. Rauzzino is reasonable, necessary, and related to his original work injury? In this instance, Dr. Rauzzino is proposing a revision of the original C5 to C7 fusion, as well a new fusion from C3 to C5.

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

Work Injury and Early Treatment

1. Claimant sustained an admitted injury on October 28, 2011. On November 21, 2011, Neurosurgeon Michael Rauzzino, M.D., then performed a C5-C7 anterior cervical discectomy and fusion as part of Claimant's original treatment. (Ex. A, B, p. 6).
2. On December 23, 2011, post-operative x-rays were taken of Claimant's cervical spine with flexion and extension. The x-rays showed the hardware to be well-positioned, with no instability of the cervical spine between flexion and extension. The x-rays also showed mild disc space degenerative changes with small anterior osteophytes at C4-5. (Ex. C, p. 9)
3. On April 27, 2012, a CT of Claimant's cervical spine was performed. It showed solid bony fusion centrally, but with mild posterior osteophyte formation at C5-6 and C6-7. It also showed minimal degenerative changes of the C3-4 and C4-5 disk spaces, with comparable posterior osteophyte formation. (Ex. D, p. 11)
4. On August 3, 2012, the ATP, Miguel Castrejon, M.D., determined Claimant was at MMI with a 22% whole-person impairment rating. His final impression was: "Status post anterior cervical decompression and fusion at C5-6 and C6-7 with metallic hardware and disc spacers; Left upper limb radiculitis with no electrodiagnostic evidence for cervical radiculopathy; and Nonindustrial left carpal tunnel syndrome". Claimant was released with no work restrictions.
5. Dr. Castrejon recommended maintenance care for the next year, including follow-ups with Dr. Rauzzino and himself, and repeat imaging in the event of a change in neurological status. Dr. Castrejon noted the use of prescription medication was not anticipated, but could be considered in the event of a significant flare-up and on a temporary basis. In such event of a significant flare-up, he recommended access to physical therapy. He specifically noted that no additional surgery was anticipated at that time. (Ex. E, pp. 14-16)

6. On January 9, 2013, Claimant was seen by Timothy Sandell, M.D., for a Division IME. Dr. Sandell's diagnostic impressions were:

Cervical and left upper extremity radicular pain,

Status post C5-6 and C6-7 anterior decompression and fusion;

Possible left upper extremity radiculitis/neuropathic pain; and

Left carpal tunnel syndrome, unrelated to this acute injury. (Ex. 4, p. 23)

He agreed Claimant was at MMI as of August 3, 2012. He assigned an impairment rating of 30% of the whole person. His only recommendations for additional treatment were for maintenance care, and he agreed the maintenance care set forth by the treating physician appeared to be appropriate. This included follow-ups through Dr. Rauzzino and Dr. Castrejon, monitoring medications and addressing symptoms otherwise such as physical therapy in the case of a flare-up. *Id* at 24.

7. On August 12, 2013, Respondent filed a Final Admission of Liability for the DIME physician's MMI date of August 3, 2012, and impairment rating of 30% of the whole person. The FAL also admitted liability for reasonable, necessary, related, and authorized care per Dr. Castrejon's 8/3/12 report. (Ex. 8, p. 84)
8. Claimant returned to work without restrictions (Ex. E, p. 15). He continued to work for Employer until his retirement, according to his hearing testimony. Following the Division IME, Claimant did not have significant treatment for his neck. He did not take pain medication, nor did he have physical therapy or injections. As of August 29, 2017, he reported to Dr. Rauzzino he had not had significant flare-ups. (Ex. I, p. 30).

Claimant returns for Follow-up

9. Claimant returned to Dr. Rauzzino on August 29, 2017, for an evaluation because "the workers' compensation people" had called to offer to settle with him, and he was trying to decide what he wanted to do. *Id*.
10. Claimant noted no new symptoms referable to his neck, and stated that had workers' compensation not contacted him, he would not be pursuing the evaluation. After examination, Dr. Rauzzino stated Claimant was status post C5-C7 ACDF and doing very well clinically. He did not require medical maintenance treatment related to the October 2011 injury. He remained at maximum medical improvement with respect to this injury.
11. Dr. Rauzzino noted Claimant wanted to know the status of the levels above and below his original C5-C7 fusion. He therefore recommended plain films and an MRI to assess the severity of any adjacent level disease relatable to the original surgery. Other than that, he did not think there was any additional treatment to be rendered. (Ex. I, pp. 30–31)

12. On October 23, 2017, an MRI was taken of Claimant's cervical spine. The MRI showed normal cord signal and atlantodens interval at the fusion levels. It also showed a right paracentral disc osteophyte complex at C3-4 causing moderate right-sided foraminal stenosis and mild ventral cord deformity, and a broad-based disc osteophyte complex at C4-5 causing moderate spinal canal stenosis and mild inferior foraminal -narrowing bilaterally. (Ex. J, pp. 32-33)
13. On March 20, 2018, Claimant returned to Dr. Rauzzino. He noted Claimant had done quite well from the operation overall, but he had noticed some more achiness and tightness in the left side of his neck and into his shoulder with no significant associated radiculopathy. He had some chronic numbness from the initial injury, and the pain 'came and went', depending upon his level of activity.
14. On examination Claimant had 5/5 strength in the upper extremities, normal sensation to touch bilaterally, and 2+ reflexes. Dr. Rauzzino noted x-rays of the cervical spine showed no significant abnormalities. Mild early adjacent degenerative changes are seen at C3~C4 and C4-C5. He noted the MRI of the cervical spine showed posterior osteophytes at C4-C5, predominantly on the left, causing foraminal stenosis.
15. Dr. Rauzzino opined Claimant had early adjacent level disease, likely causing Claimant's left-sided neck and shoulder pain. Dr. Rauzzino noted he would not recommend anything surgical at that point, but would instead proceed as conservatively as possible for the time being. He planned to start with some physical therapy of the neck. He noted Claimant might benefit from injections, and at some point there was a possibility he would need an extension to take care of some of the stenosis or even possibly a foraminotomy. (Ex. K, p. 34)
16. On November 1, 2018, Dr. Rauzzino re-evaluated Claimant, noting:
- He [Claimant] presents today with neck pain as well as upper extremity symptoms. This pain is sharp, dull, stabbing, aching, burning, and throbbing. It is constant in nature and rated 8/10 to 9/10 on a scale of 0 to 10. It is associated with numbness, tingling and weakness. This significantly worsened about 3 months ago without injury or event. (Ex. 4, p. 24).
17. Dr. Rauzzino's assessment was worsening neck pain and left shoulder and arm pain with numbness, tingling and weakness. He noted Claimant had adjacent segment degeneration on previous imaging above his fusion, which would correlate to the left shoulder, but it was difficult for him to assess whether it was coming from the shoulder itself. He referred Claimant for a new MRI of the cervical spine, flexion/extension x-rays, and a left shoulder MRI. *Id* at 24-25.

New Diagnostics

18. On December 10, 2018, new x-rays were taken of the cervical spine. The x-rays showed no evidence of dynamic instability and no hardware complication. (Ex. L, p. 36)

19. A shoulder MRI taken that date showed severe tendinopathy and chronic SLAP tear. The cervical MRI showed unremarkable alignment. The spinal cord was normal in caliber and demonstrated normal signal. C6-7 was status post ACDF with mild bilateral foraminal narrowing. There was slight progression in right paracentral disc extrusion at C3-4 with lateral recess stenosis, and mild to moderate central stenosis and foraminal narrowing at C4-5. (Ex. L, pp. 35–37)
20. On January 2, 2019, Derrick Winckler, PA-C, and Dr. Rauzzino reviewed these December 10, 2018 x-rays and MRIs with Claimant by phone. They referred Claimant to an orthopedic surgeon for his shoulder. They opined the x-rays of the cervical spine appeared to show a cleft through the C6-C7 level, with possible pseudoarthrosis.
21. Regarding the cervical MRI, they stated they could not fully evaluate whether Claimant had solid fusion at C6-C7 with possible pseudoarthrosis. They also noted a right paracentral disc protrusion at C3-C4 that had *increased* slightly since the prior study, with narrowing of the right lateral recess and proximal right neural foramen, anterior and posterior osteophytes. At C4-C5, they noted uncovertebral joint hypertrophy with mild broad-based disc-osteophyte complex resulting in mild to moderate central stenosis and moderate bilateral foraminal narrowing. They recommended an updated CT scan to verify solid fusion at C6-C7. (Ex. O, p. 40)
22. On January 14, 2019, a non-contrast CT was taken of Claimant’s cervical spine. It was read by Michael E. Holt, M.D., whose impression was:
1. Status post C5-C7 ACDF;
 2. No complications or acute abnormalities;
 3. Cervical spondylosis intact. (Ex. P, p. 41)
23. Dr. Holt specifically noted the anterior fusion plate with screws and interbody spacers at C5-C7, and that no complications were demonstrated. He also noted “changes of degenerative disc disease with osteophytes or neural C3-4 and C4-5”. *Id* at 42.

Continued Consultations with Dr. Rauzzino

24. On January 28, 2019, Claimant followed up with Dr. Rauzzino. He reported he continued to have neck pain that radiated into his left arm and shoulder and into his hands. He also complained of pain in his left shoulder. He felt he was getting worse, with progressive weakness of his arm. Dr. Rauzzino noted the left shoulder MRI showed significant changes including an SLAP tear. He noted the initial reading of the CT scan of the cervical spine indicated no complications; however, he had reviewed the studies himself and believed there was a clear pseudoarthrosis at C6-C7 with loosening of hardware.
25. Dr. Rauzzino stated he had discussed this with the reading radiologist and they had now agreed on this. He opined Claimant continued to suffer from adjacent level disease at C4-C5, as well as pseudoarthrosis at C6-C7 and disease at C3-C4. He opined all of

this contributed to Claimant's symptomatology. He noted Claimant's shoulder pathology could be adding to his symptoms in something of a double crush type syndrome. He opined the radicular symptoms into the arm would not necessarily be accounted for by Claimant's shoulder pathology. He recommended surgical decompression and reconstruction via anterior approach. He opined that the pseudoarthrosis was clearly related to the original surgery, as was the adjacent level disease. (Ex. Q, pp. 43-44)

26. On January 29, 2019, Dr. Holt issued an addendum to his January 14, 2019 report, stating: "There is complete osseous fusion of C5-6 with intact interbody graft and anterior fusion hardware. There is a persistent lucency through the disc space at the C6-7 level representing a pseudoarthrosis. There is also a subtle horizontal lucency extending through the interbody spacer representing a crack or fracture through the interbody spacer." (Ex. P, p. 41)
27. On January 30, 2019, Dr. Rauzzino's office requested prior authorization of ACDF C3-5 with revision of C5-7. (Ex. R, p. 45).

IME with Dr. Messenbaugh

28. On February 14, 2019, Claimant was seen by Robert L. Messenbaugh, M.D., for an IME. Claimant reported to him that, following the November 29, 2011 surgical procedure, he had done well and regarded it as being successful, but he had some persistent numbness involving his left upper extremity with radiation of discomfort and numbness from his neck into his left thumb area.
29. Claimant indicated to Dr. Messenbaugh that sometime the previous summer, he believed July of 2018, he developed a knot in his neck. He had to stop jogging, which he stated he had previously done some four times per week. He stated that he had pain in and about the left side of his neck, radiating into the shoulder and down his arm "like before surgery." He indicated he had neck pain every day, was not sleeping well, and was losing control of his arm. He stated that he was experiencing arm pain and arm-shoulder weakness. He stated that he experienced some episodic cracking and popping within his neck. On examination, Claimant complained of midline tenderness C3 to T1. (Ex. S, pp. 45-55)
30. Dr. Messenbaugh was deposed on 7/25/2019. He testified at a second deposition, by telephone, on 5/21/2020. He has been retired from orthopedic surgery since 2001, after practicing for 30 years. When he did practice actively, he was involved in "everything *excepting cervical spine surgery*". (Messenbaugh depo, p. 68). His area of expertise now is in evaluation and recommendations for follow-up, and making referrals to others. While he would personally review imaging before performing knee or shoulder surgery, he would rely upon the radiologist for reviewing cervical images, because 'I do not profess to be an expert at reading particularly spinal MRIs.' *Id* at p. 71. When reviewing images for extremities, there were occasions when he would see things that the radiologists did not; in such event, he would sometimes discuss this with the radiologist.

31. Dr. Messenbaugh explained that pseudarthrosis means that the fusion failed. He pointed out that at least 5 examiners, including Dr. Holt, had reviewed Mr. Erickson's cervical spine radiographs, MRIs and CTs. None of them reported finding evidence of a C6-7 pseudarthrosis until Dr. Rauzzino reviewed the latest cervical spine MRI, and identified a pseudarthrosis at C6-7. Only afterwards did Dr. Holt write an addendum reporting that he too had identified C6-7 pseudarthrosis. (Ex. S, pp. 47, 49, 51, 56).
32. Dr. Messenbaugh opined that, if a C6-7 pseudarthrosis was unequivocally determined by an independent radiologist, then further attempts at obtaining a solid fusion at C6-7 might be considered. However, there would be little evidence that Claimant would benefit from such a procedure, and there would be concerns that his condition would well be worsened. *Id* at 57.
33. In his IME report, Dr. Messenbaugh noted that radiographic series going back as far as December 23, 2011, showed Claimant had degenerative disc pathology and bone spurring at the C4-5 level. (Ex. S, p. 47). In his experience, one should anticipate progressive cervical spine degenerative disk disease and arthritis, even in someone who has not undergone a cervical spine fusion. He opined there was no way to confirm that any additional surgery upon Claimant's cervical spine at C3,4 or C4,5 levels would be as a direct and singular result of his having previously undergone a 2-level cervical spine fusion C5 through C7.
34. Dr. Messenbaugh expressed concern that there had been no confirmation that Claimant's complaints of neck and arm pain were related to the degenerative pathology noted at the C3-4 and C4-5 disk levels. He was also concerned there was no credible confirmatory evidence to show that if Claimant underwent additional fusions at the levels of C3-4 and C4-5, "much less a re-do surgery at the level of C6-7," he would benefit from such invasive surgical procedures.
35. He further opined that the surgical recommendations for additional cervical spine fusions at the levels of C3-4 and C4-5 should not be considered to be directly due to his prior 2-level cervical spine fusions; instead, they are due to the expected, natural progression of degenerative changes associated with the passage of time, wear and tear, and aging. (Ex. S, p. 57)
36. In his deposition on July 25, 2019, Dr. Messenbaugh opined that the anterior cervical disc fusion, from C3 through C5 with revision of C5 through 7, recommended by Dr. Rauzzino, was not reasonable, necessary, and related to the original October 28, 2011 workers' compensation claim. In Dr. Messenbaugh's opinion, there has been no confirmation that Claimant's cervical spine discomfort is specifically related to C3-4 or C4-5, the disc levels that are being considered for additional fusion. He also pointed out that there has not been confirmation that any of his lingering discomfort is from a reported pseudarthrosis at the C6-7 level, no confirmatory EMG and no diagnostic therapeutic injections. Dr. Messenbaugh expressed concern Claimant might be significantly harmed and not benefited by the surgical procedure. He recommended obtaining additional confirmation.

37. Dr. Messenbaugh stated that we don't know if Claimant has a pseudarthrosis, but, if he has one, it is questionable whether his cervical spine issues are related to that level. He explained that Claimant did not have a fusion, and then go on to non-fusion. He either had a pseudarthrosis 'from the get-go' or he didn't. If Claimant did have a pseudarthrosis, and all these physicians, including Dr. Rauzzino, noted he was doing great, did that mean he was doing great despite his pseudarthrosis? Dr. Messenbaugh agreed it would be reasonable to have a repeat CT scan to make sure there really is that a pseudoarthrosis.
38. On October 28, 2019, a non-contrast CT was taken of Claimant's cervical spine, and compared to the CT of April 27, 2012. It was read by John Sherman, M.D., whose opinion included:
1. No change in stable anterior interbody fusion at C5-6 and C6-7; Mild spurring has developed anteriorly at C3-4 and posteriorly at C7-T1; At C4-5, there is disc bulging or shallow protrusion posterolateral which has developed on the left side and there is mild left foraminal stenosis, developing since the prior study. (Ex. V, pp. 67-68).
39. With regard to the fusion, the radiologist specifically noted there was no change in alignment and no hardware fracture. There was ossification across the disc space. There was no canal or foraminal stenosis or interval change. *Id.*
40. On November 4, 2019, Dr. Messenbaugh reviewed the October 28, 2019 CT report. He noted that Dr. Sherman made no mention whatsoever of identifying a pseudarthrosis at the level of C6, 7. Dr. Messenbaugh further stated that he found no convincing evidence that Claimant has a pseudarthrosis at C6-C7, much less that he is symptomatic as a result. (Ex. W, p. 69).
41. Dr. Messenbaugh testified the October 23, 2017 cervical spine MRI showed the degenerative disc disease that had been seen in 2012 had now progressed, which, in his opinion, was to be fully expected. He opined that if Claimant had not had the C5-C7 fusion, he still would have expected him to have the same findings on the MRI.
42. Dr. Messenbaugh explained that at his previous deposition he had recommended an additional CT of the cervical spine because six trained radiologists had not identified any evidence of pseudarthrosis, then Dr. Holt changed his opinion after visiting with Dr. Rauzzino, and Dr. Rauzzino stated that he could visually identify evidence of a pseudoarthrosis at that level. Dr. Messenbaugh found those reports to be inconsistent with those previously provided, and thought that before Claimant underwent a procedure at the C6-7 level, looking for evidence of a pseudoarthrosis, there should be strong confirmation of necessity for that procedure.
43. Dr. Messenbaugh noted that the radiologist reading the October 28, 2019 CT scan stated there was an interbody fusion from C5 to C7. He made no mention of a cleft being identified, evidence of a pseudoarthrosis, or evidence of a hardware failure or the screw or plate loosening.

44. Dr. Messenbaugh opined the proposed C6-7 fusion repair is not reasonable and not necessary because there has not been any clear substantiation that there is a pseudarthrosis at the C6-7 level. Dr. Messenbaugh opined that, even if there had been evidence of a pseudarthrosis, there was no evidence of any instability or hardware failure and no documentation to confirm Claimant had discomfort at that level.
45. Dr. Messenbaugh explained that if a fusion fails to fuse, and there is motion, there would be evidence of loosening of the hardware, breaking of the hardware, instability, subluxations, and so forth. He further noted there hadn't been injections or anything to confirm, even if there was a pseudoarthrosis, that going in and changing it to a solid fusion would not necessarily relieve Claimant of his discomfort.
46. With regard to the proposed C4-5 fusion, Dr. Messenbaugh found no evidence to clearly show that Claimant's symptomatology was directly, and singularly, related to the C4-5 disc degeneration he has or that by performing a discectomy and fusion at that level, would necessarily relieve his pain. He also noted he did not find clear evidence that the progression of the degenerative disc disease -- that is mild to moderate at C4-5 and mild at C3-4 -- was related to the fact Claimant had previously undergone the C5 through C7 fusion.
47. Dr. Messenbaugh opined the proposed C3-4 fusion is absolutely not supported by the medical and diagnostic records to date. He saw no clear-cut evidence that Claimant requires a C3-4 disc excision and fusion, and he opined it would be a detriment, instead of a benefit to him. He didn't think it was reasonable or necessary, and he opined it was not in any way related to his prior fusions, C5 through C7. He noted it is not one level adjacent, but two levels adjacent. Dr. Messenbaugh pointed out that fusing two additional levels would leave Claimant with a four-level fusion, and he would be quite significantly, severely restricted, in his cervical spine mobility and his consequent function.

Dr. Rauzzino's Deposition

48. Dr. Michael Rauzzino testified via deposition on May 12, 2020. He is a neurosurgeon, fellowship trained in complex spine and deformity. He has been in private practice since 2000, with approximately 80% of his practice devoted to spinal surgery. He is also Level II accredited.
49. He testified the weakness Claimant demonstrated in the muscle that elevates the left shoulder called the deltoid typically correlates with the nerve that would be at risk at the adjacent level above the fusion, the C4-5 level. Asked about the December 10, 2018 MRI, Dr. Rauzzino testified the surgical levels at C5-6 and C6-C7 did not show any residual stenosis. At the C4-5 level, Claimant had arthritic changes in the joints, a disc osteophyte complex that produced pressure on the spinal sac, and bone spurs that produced pressure on the nerves exiting at that level, called foraminal narrowing. He opined this was symptomatic for Claimant.

50. At the C3-4 level, Claimant had degenerative changes that also progressed over time, but since a radiographic finding did not correlate with his exam, it was not the root cause of his symptoms. It showed that there was a potential to cause pressure on the nerve, but it didn't necessarily mean that it was symptomatic. Dr. Rauzzino acknowledged Claimant had mild disc pathology at the C4-5 level at the time of his 2011 two-level fusion, which he stated would not be surprising in a patient of Claimant's age. In fact, Dr. Rauzzino emphasized that given the propensity for degeneration even back in 2011, this is precisely what would make Claimant a higher risk for adjacent level disease.
51. Dr. Rauzzino recommended Claimant have the level above the spinal fusions treated, and "likely the one above that would have to be included, because if you just fix the one above the adjacent level, the chance of the one above it wearing out, because it's in sort of bad shape right now, would be so high, it would be doomed to failure, and you would have to come right back and do it."
52. Dr. Rauzzino also noted that, at the time of this surgery, "you would explore the previous fusion to diagnose -- to confirm the pseudarthrosis, and if present, go ahead and fix it while you are there." He recommended both the C3-4 and C4-5 levels be fused, but he acknowledged he thought the main problem was at C4-5. When asked that even if the pseudoarthrosis were not present, would he still perform the fusions, he replied "without a doubt."
53. Regarding the October 2019 CT scan, Dr. Rauzzino opined it showed an absence of solid bone growth between the vertebrae, and a cleft in the graft where the bone material had reabsorbed. He believed was consistent with a pseudarthrosis. Dr. Rauzzino expressed regret that he didn't take the time to call the radiologist who read the October 28, 2019 CT scan, and have him amend his report as well. Dr. Rauzzino testified that the lack of fusion was so evident, even a lay jury would be able to tell there was a lack of bone growth across the space. He actually observed the lack of bone growth across the space.
54. Dr. Rauzzino confirmed that, despite Dr. Messenbaugh's opinion, in fact an independent radiologist from Grand Junction, with no connection to either party, had confirmed the pseudoarthrosis.
55. Responding to Dr. Messenbaugh's assertion that, in effect, Claimant would not go from "fusion to non-fusion", Dr. Rauzzino strongly disagreed, stating:

No, sir, that's not correct. And the reason that it's not correct is that *often it will take a year or more for a total fusion to happen*. And there are cases where you think that the bone is fused, or you think that you have a solid fusion, and the fusion fails.

And that's because when you put bone graft into one of these spacers, it's often not the patient's own bone. It belongs to a cadaver or some other source. And sometimes, *despite what looks like a solid fusion*,

that bone can reabsorb and dissolve. And what was once appeared to be a solid fusion can become a pseudoarthrosis.

If you look at the pictures that were taken on April 27th, 2012 and compare them to a study that was done in 2019, you can see the severe loss of bone at this level consistent with the pseudoarthrosis. Interestingly, you can see the level above it a C5-6 where, over time, as one would expect, there's a lot more bone that's grown; whereas at C6-7, not only is there – not been more bone grown, but *the bone that was there has been lost*, and that's entirely consistent with the pseudoarthrosis.

And that's something that Dr. Messenbaugh didn't review when he did his review. *He didn't look at both sets of pictures and compare them*, and see the difference how the bone loss was consistent with the pseudoarthrosis. (Rauzzino depo. pp. 46-47)(emphasis added).

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado is to assure quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1)*. Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. *Section 8-43-201, C.R.S.* A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The ALJ, as the fact-finder, is charged with resolving conflicts in expert testimony. *Rockwell Int'l v. Turnbull*, 802 P.2d 1182, 1183 (Colo. App. 1990) Moreover, the ALJ may accept all, part, or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968); *see also Dow Chemical Co. v. Industrial Claim Appeals Office*, 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary medical opinion).

C. In this instance, the ALJ finds Claimant to be sincere and persuasive, in his testimony. Claimant has accurately reported his symptoms to his medical providers, and to the IME, in a sincere effort to alleviate his symptoms. Claimant still leads an active lifestyle, and desires to continue with that. Having undergone one cervical fusion already, he will go into subsequent procedures with eyes open [figuratively speaking]. Further, the ALJ finds that each medical expert offering opinions has done so in good faith, and with a sincere effort to provide the ALJ valuable expert information. As such, the ALJ will determine these issues on the basis of *persuasiveness*, and not *credibility* per se. However, it must be noted that, given his long-term familiarity with Claimant, and his active, professional expertise in treating cervical issues, Dr. Rauzzino has proven more persuasive overall than Dr. Messenbaugh. The ALJ takes note that Dr. Rauzzino has, in effect, acknowledged that even this fusions can fail on occasion. Such are the inexactitudes and limitations of even the most modern of medical techniques.

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

Medical Benefits, Reasonable, Necessary, and Related - Generally

E. Claimant bears the burden of establishing entitlement to medical treatment. See *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Once a claimant has established a compensable work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary medical care to cure and relieve the effects of the work injury. *Section 8-42-101, C.R.S.*; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

F. Even where the Respondents admit liability for post-MMI medical benefits, they remain free to contest the reasonable necessity and causal connection of any specific future treatment. *Milco Construction v. Cowan*, 860 P.2d 539 (Colo. App. 1992). The question of whether the need for treatment is causally related to an industrial injury is one of fact. *Walmart Stores v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Similarly, the question of whether medical treatment is reasonably necessary to cure or relieve the effects of an industrial injury is one of fact. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). Whether the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove by a preponderance of evidence that the disputed treatment is

reasonably necessary to cure or relieve the effects of the injury. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1997).

G. The mere occurrence of an industrial injury does not require an ALJ to find that all subsequent medical treatment and physical disability were caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those which flow proximately and naturally from the injury. *Standard Metals Corp. v. Bell*, 172 Colo. 510, 474 P.2d 662 (1970); Section 8-41-301 (1)(c) C.R.S. 2017.

Reasonable, Necessary, and Related, as Applied

H. Here, Claimant has proven by preponderance of the evidence that the cervical spine fusion at the levels of C3-4 and C4-5 as recommended by Dr. Michael Rauzzino is *reasonable and necessary* to cure the effects of Claimant's industrial injury. Claimant has also shown that this need for the fusion at adjacent levels C3-4 and C4-5 and revision of previous fusion is *related* to the Claimant's 2011 industrial injury. Claimant has unsuccessfully pursued conservative care. Further conservative care, such as injections, would not serve to cure and relieve the effects of the work injury, in the opinion of his treating surgeon. The ALJ concurs. Claimant's disc degeneration at levels C3-4 and C4-5 are a result of adjacent levels disease from his two-level fusion on November 21, 2011.

I. Dr. Messenbaugh opined that Claimant's degenerative disc disease is a result of general wear and tear from an active lifestyle and that Claimant would likely benefit from injections. The ALJ does not concur. Adjacent level disease is a common risk after having a fusion as they involve fusing two or three bones together thus putting stress on the levels above and below the fusion. Further, and as persuasively explained by Dr. Rauzzino, since Claimant already has some pre-existing propensity for degenerative discs, this additional stress on the adjacent levels makes it even *more likely* to result in the need for a fusion. The ALJ is also persuaded that this need goes not only from C5 to C4, but also from C4 to C3, based upon the need to treat Claimant's symptomology and create the best structure, in the opinion of his ATP.

J. Dr. Rauzzino further explained that injections would provide only temporary relief, as adjacent level disease is a mechanical issue that must be surgically corrected. Dr. Rauzzino also identified the presence of a cleft in C6-7, consistent with pseudoarthrosis in the January 14, 2019 CT scan, although it was subtle. Dr. Messenbaugh did not review the actual images from the CT scan and only read the report. Dr. Rauzzino reviewed the images himself and spoke to the reading radiologist personally. There is no evidence in the record this was for any other reason than to assure a correct reading. Regardless of the presence of pseudoarthrosis, Dr. Rauzzino opines that the fusion and decompression of the cervical spine is necessary to cure and relieve the effects of Claimant's work injuries as the adjacent level disease is still present. He also testified that Claimant's left shoulder pain may be resulting from

impingement on the C5 nerve root, which will be relieved with the C4-5 decompression and fusion.

K. Dr. Rauzzino testified in his deposition that a period of several years is enough time for pseudoarthrosis to develop. In his March 12, 2019 report, Dr. Rauzzino discussed that the degenerative disc disease would not have advanced to the point of needing treatment had it not been for the presence of the long construct created by the two-level fusion, as that is the definition of adjacent-level disease. This directly refutes Dr. Messenbaugh's claim that the cervical spine fusion would be well less than 50 percent a direct result of Claimant's previous fusion. Additionally, Dr. Messenbaugh testified that 25 percent of spinal fusion patients have symptoms that later require a revision of the fusion. One in four patients requiring surgical revision is significant. In this case, the weight of the argument regarding management of adjacent level disease must fall to Dr. Rauzzino as a board-certified neurosurgeon.

L. Further, the ALJ finds Dr. Rauzzino's reasoning persuasive regarding the need for a revision surgery to the existing fusion, based upon his direct observations of pseudoarthrosis in the imaging studies. Unfortunately, bone loss can occur in certain individuals over time, even with the best of fusion techniques. It would be easy enough for Dr. Rauzzino to look the other way, or vehemently defend the results of the first fusion; instead, the ALJ finds that he is looking out for his patient, long after the fact. While he is in the process of the additional fusion, it only makes sense to check, up close and personal, the status of the existing hardware and bone condition at C6-C7, and revise as necessary during one procedure.

ORDER

It is therefore Ordered that:

1. Respondents shall pay for the surgery as proposed by Dr. Rauzzino.
2. Respondents shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.
3. All matters not determined herein are reserved for future determination.

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

petition to review form at: <http://www.colorado.gov/dpa/oac/forms-WC.htm>. In addition, it is recommended that you send a copy of your Petition to Review to the Colorado Springs OAC via email at oac-csp@state.co.us.

DATED: July 15, 2020

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

- Is Claimant's claim for compensation barred by the statute of limitations?
- If the Claimant's claim is not barred by the statute of limitations, did Claimant prove by a preponderance of the evidence he suffered a compensable occupational disease of asbestosis?

FINDINGS OF FACT

1. Claimant worked approximately 23 years at Employer's [Redacted] Plant in Colorado Springs before his retirement in November 2000.

2. Claimant worked in several positions including helper, tender, and boiler/turbine operator. He spent an unspecified but significant amount of time working in the basement pulling bottom ash. He also monitored and operated a variety of equipment in the plant. Claimant testified he could see particles moving through the air "from start to finish" of each shift. Claimant generally did not wear a face mask while working. Claimant believes the visible dust contained asbestos but offered no persuasive evidence to substantiate that supposition.

3. In February 1981, the National Institute for Occupational Safety and Health (NIOSH) conducted a "baseline" environmental evaluation of the Martin-Drake facility. NIOSH performed sampling for airborne substances in 34 locations throughout the plant. The most significant health risks identified by the testing were exposure to fly ash and coal dust containing free silica, and exposure to inorganic arsenic, cristobalite, sulfur dioxide, and hydrazine. None of the air samples showed evidence of airborne asbestos. The NIOSH report noted some insulation materials in the plant contained asbestos. Some maintenance tasks involving pipes, meters, gauges, and seals required existing insulation material be temporarily removed to provide access. Of the nine sites from which insulation was sampled, four contained no asbestos, one contained 10% asbestos, one contained 10-20% asbestos, one contained 40% asbestos, and one contained 60% asbestos. The NIOSH report mentions asbestos as a potential health risk but gives no indication workers in the plant were actually exposed to asbestos.

4. In approximately 1985, Claimant participated in asbestos abatement work on his "relief" days. He was given a Tyvek suit and a paper mask during this work, but stated Employer later brought in "professionals" to do the asbestos abatement in the plant. Claimant estimated he performed asbestos abatement for approximately 30 days total.

5. In October 2000, Claimant began having difficulty breathing. He informed his shift supervisor and was sent to Dr. Timothy Rummel, a pulmonologist. Claimant

retired in November 2000, primarily because of limitations related to his breathing. After obtaining x-rays, Dr. Rummel informed Claimant he had 8 to 10 nodules in his lungs. Initially, there was concern for cancer but ultimately the nodules were determined to be benign. Dr. Rummel offered no specific diagnosis or explanation for the cause of the respiratory problems. Claimant was later diagnosed with and received treatment for COPD.

6. Claimant returned to Dr. Rummel on July 17, 2018 because of ongoing breathing difficulty, dyspnea on exertion, and continuous coughing. Claimant told Dr. Rummel he had performed asbestos abatement the power plant in the mid-1980s. He also reported smoking 1 ½ packs of cigarettes per day for 30 years until he quit smoking in 1994. A chest x-ray showed pleural thickening. Dr. Rummel reviewed a pulmonary function test (PFT) performed in April 2018 and opined the results were consistent with GOLD stage II COPD with a superimposed restriction. He opined Claimant “may have simple tobacco-induced COPD with some loss of thoracic height due to osteoporosis/aging. Could alternatively have some component of asbestosis in light of his history and pleural thickening on chest x-ray.” He recommended a chest CT.

7. Claimant did not know or suspect he had asbestosis until Dr. Rummel suggested the diagnosis in July 2018.

8. Claimant returned to Dr. Rummel on October 9, 2018 to review the CT results. The scan showed a 1 cm nodule and increased interstitial markings. He noted the interstitial markings were not mentioned on the last CT performed in 2007. He opined “the findings of the CT scan and pulmonary function tests are consistent with superimposed asbestosis in a patient with known significant asbestos exposure in the late 1980s.” He recommended a PET scan to look for cancer. No specific treatment was recommended for asbestosis.

9. On June 29, 2019, Claimant filed a workers’ compensation claim with the Division claiming an occupational disease of asbestosis.

10. On November 23, 2019, Claimant saw Dr. Jeffrey Schwartz for a pulmonary IME at Respondent’s request. Repeat PTFs in Dr. Schwartz’s office were significantly improved, with normal spirometry and lung volumes. Claimant’s diffusion capacity was mildly reduced but was considered normal when adjusted for alveolar lung volume. According to Dr. Schwartz, the most relevant test regarding asbestosis is the total lung capacity (TLC). Dr. Schwartz opined a TLC less than 80% of predicted is consistent with the diagnosis of asbestosis. Here, Claimant demonstrated 85% of predicted TLC. Accordingly, Dr. Schwartz opined the results of the PFT were not consistent with a diagnosis of asbestosis. Based on the normal spirometry and previous PFTs showing reversible airflow obstruction. Dr. Schwartz opined Claimant probably has asthma of undeterminable etiology.

11. Dr. Schwartz explained the “increased interstitial markings” noted by Dr. Rummel on the prior CT scan do not necessarily indicate asbestosis but could also be

related to prolonged cigarette smoking. Dr. Schwartz recommended a high-resolution CT scan (HRCT) as the “state of the art” radiographic test for asbestosis.

12. Claimant underwent an HRCT on January 17, 2020. The radiologist noted multiple lung nodules, upper and lower lobe centrilobular emphysematous changes and bilateral upper lobe paraseptal emphysematous changes. He saw “no calcified pleural plaque or areas of pleural thickening or thickening of the interlobular septa to suggest asbestosis.” The lung nodules and emphysematous changes were unchanged compared to the August 2018 CT scan.

13. Dr. Schwartz explained a diagnosis of asbestosis requires (1) exposure to respirable asbestos dust sufficient to cause asbestosis, (2) radiographic abnormalities compatible with the diagnosis of asbestosis, and (3) no other pulmonary disorder to account for the clinical and radiographic findings suggesting asbestosis. Based on the lack of positive radiographic findings on the HRCT, Dr. Schwartz opined Claimant does not satisfy the diagnostic criteria for asbestosis.

14. Regarding Claimant’s potential exposure to asbestos, Dr. Schwartz explained the mere presence of asbestos in a building does not necessarily create a health risk. Unless the asbestos is disturbed, the fibers in the insulation are not a problem. It is only the creation of fine asbestos dust when the asbestos is disturbed that causes a problem. He further opined that asbestosis is not caused by brief exposure to asbestosis and typically requires years of high-level exposure. Based on the data in the NIOSH report, even crediting Claimant’s description of approximately 30 days of asbestos abatement work, Dr. Schwartz concluded Claimant was not likely exposed to asbestos sufficient to cause asbestosis.

15. Dr. Schwartz’s opinions and analysis are credible and persuasive.

16. Respondent failed to prove Claimant’s claim is barred by the statute of limitations. Claimant did not reasonably appreciate the nature, seriousness, and probable compensable nature of his condition and tell Dr. Rummel first suggested that diagnosis of asbestosis in July 2018, less than one year before he filed his claim.

17. Claimant failed to prove he suffered an occupational disease of asbestosis, or any other lung condition and proximately caused by his work for Employer.

CONCLUSIONS OF LAW

A. Statute of limitations

Section 8-43-103(2) requires that most claims for compensation be filed with the Division within two years of injury or death. The two-year window is extended the three years if a claimant had a “reasonable excuse” for not bringing the claim within two years. The Act further provides that a claim for asbestosis must be filed within five years after the commencement of disability or death. The statute of limitations is governed by the “discovery rule,” and the begins to run when the claimant, as a reasonable person, knows or should have known “the nature, seriousness and probable compensable character of

his injury.” *City of Boulder v. Payne*, 426 P.2d 194 (Colo. 1967). For purposes of the statute of limitations, a “compensable” injury is a disabling injury that entitles the claimant to compensation in the form of disability benefits. *Id.*; see also *Romero v. Industrial Commission*, 632 P.2d 1052 (Colo. App. 1981). To recognize the “probable compensable character” of an injury, the claimant must appreciate a causal relationship between the employment and the condition. *Taylor v. Summit County*, W.C. No. 4-897-476-01 (March 18, 2014). Confusion regarding the diagnosis or medical causation can be a sufficient basis to prevent the statute of limitations from running. *E.g.*, *Wise v. Rockwell International Corporation*, W.C. No. 4-023-871 (September 20, 1993) (lack of medical opinion indicating a causal relationship is a pertinent factor the ALJ may consider in determining whether the limitation period was triggered).

As found, Respondent failed to prove Claimant’s claim is barred by the statute of limitations. Although Claimant arguably suffered the onset of disability when he retired from his position with Employer in November 2000, he did not reasonably appreciate the nature, seriousness, and probable compensable character of his condition until July 2018 at the earliest, when Dr. Rummel suggested the possibility of asbestosis. At the time of his retirement, Claimant’s primary pulmonary concern was lung nodules and possible cancer. He was later diagnosed with COPD and there is no indication anyone suspected asbestosis until many years later. Additionally, the interstitial markings Dr. Rummel believes are consistent with asbestosis were not shown on the 2007 CT scan, which suggests the condition was not even present or diagnosable in 2000. The statute of limitations did not begin to run until July 17, 2018 at the earliest. Claimant filed his claim with the Division on June 29, 2019, well within the two-year general statute of limitations or the five-year statute applicable to claims of asbestosis. Respondent’s defense relating to the statute of limitations is denied and dismissed.

B. Compensability

To receive compensation or medical benefits, a claimant must prove he is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo. App. 2001). The claimant must prove entitlement to benefits by a preponderance of the evidence. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers’ compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201.

The Act imposes additional requirements for liability of an occupational disease beyond the “arising out of” and “course and scope” requirements. A compensable occupational disease must meet each element of the four-part test mandated by § 8-40-201(14), which defines an occupational disease as:

[A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the

employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

As found, Claimant failed to prove he suffered a compensable injury or occupational disease caused by his work for Employer. Dr. Schwartz's analysis, opinions, and conclusions are credible and persuasive. As an initial matter, it is highly questionable whether Claimant has asbestosis. Dr. Rummel did not definitively diagnose asbestosis, but merely opined the diagnosis was "suggested" by and "consistent with" the PFT results, chest x-rays, and the 2018 CT scan. But Claimant's recent PFT was normal and, more important, the HRCT on January 17, 2020 showed "no calcified pleural plaque or areas of pleural thickening or thickening of the interlobular septa to suggest asbestosis." The HRCT showed upper and lower lobe emphysematous changes which might account for Claimant's reported dyspnea on exertion. The radiographic findings of centrilobular emphysema are probably related to Claimant's long history of heavy smoking, without contribution from his work for Employer.

Even if Claimant has asbestosis, there is no persuasive evidence he was exposed to asbestos at sufficient levels or durations to have caused it. Almost half of the insulation sampled during the 1981 NIOSH evaluation had no asbestos, and the NIOSH report did not identify asbestos exposure as a significant health risk for plant workers. Moreover, as Dr. Schwartz explained, the mere presence of asbestos insulation in a work site is not necessarily a health risk. The asbestos must be disturbed and become airborne before it can be inhaled into the lungs. The NIOSH testing showed no evidence of airborne asbestos anywhere in the plant. Although the ALJ does not doubt Claimant's testimony the air in the plant was routinely filled with "dust," there is no persuasive evidence the dust contained asbestos. Dr. Rummel's opinion regarding a causal connection to Claimant's work is not persuasive because it is based on the inaccurate assumption Claimant had "significant" asbestos exposure in the 1980s. The ALJ instead credits Dr. Schwartz's opinion Claimant did not have sufficient asbestos exposure at work to cause asbestosis.

ORDER

It is therefore ordered that:

1. Claimant's claim for workers' compensation benefits is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures

to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: <http://www.colorado.gov/dpa/oac/forms-WC.htm>. **In addition, it is requested that you send a courtesy copy of your Petition to Review to the Colorado Springs OAC office via email at oac-csp@state.co.us**

DATED: July 17, 2020

s/ Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-392-153-003**

ISSUES

1. Whether Claimant established by a preponderance of the evidence that medical treatment for right foot neuropathy is reasonably necessary to relieve the effects of his August 25, 1998 industrial injury or to prevent further deterioration of his work-related condition.
2. Whether Claimant established by a preponderance of the evidence that his February 20, 2018 surgery to his right foot was reasonably necessary to relieve the effects of his August 25, 1998 industrial injury or to prevent further deterioration of his work-related condition.
3. Whether Claimant established by a preponderance of the evidence that his October 23, 2018 surgery to his right foot was reasonably necessary to relieve the effects of his August 25, 1998 industrial injury or to prevent further deterioration of his work-related condition.
4. Whether Claimant established, by a preponderance of the evidence that his January 31, 2020 surgery to his right foot was reasonably necessary to relieve the effects of his August 25, 1998 industrial injury or to prevent further deterioration of his work-related condition.
5. Whether Claimant established by a preponderance of the evidence that he is entitled to reimbursement for out of pocket expenditures in the amount of \$134.31.

PRELIMINARY MATTER

This matter previously proceeded to hearing on August 1, 2017. Corrected Findings of Fact were issued on October 11, 2017. Those factual findings are incorporated herein by reference.

FINDINGS OF FACT

1. Claimant sustained an admitted industrial Injury to his low back on August 25, 1998 while lifting an object out of the trunk of his car. Claimant sustained multilevel lumbar disc herniations at L4-5 and L5-S1, and an annular tear at L3-4. Since his injury, Claimant has undergone multiple surgical procedures to his spine and lower back. Claimant underwent a partial laminectomy and discectomy on December 26, 2000. Claimant subsequently underwent a semi-hemilaminectomy, discectomy and foraminotomy on March 19, 2002. (Ex. 1). On June 20, 2005, Claimant underwent a surgical fusion at L4-S1. (Ex. B). On April 12, 2006, Claimant had a spinal cord stimulator

implanted at T12 through S1. On December 22, 2016, a facet removal procedure was performed, and on June 18, 2007, a facet ablation procedure was performed. On February 4, 2008, Claimant underwent a hardware removal. On November 13, 2008, Claimant underwent a fusion at L3-4, and a second spinal cord stimulator was placed at the T3 area. On September 17, 2012, Claimant underwent a posterior lumbar decompression L2-3 with allograft fusion and revision of spine instrumentation, posterior spinal fusion revision, L1-3 decompressive. In July 2013, Claimant underwent an additional surgery to repair a collapse of the fusion at the L4-5 level.

2. Claimant was placed at maximum medical improvement on July 25, 2016, with a 76% whole person rating. (Ex. 2).

3. On February 20, 2018, Claimant underwent surgery on his right foot for toenail fungus and hammertoe of the right foot (the "February 2018 Surgery"). The February 2018 Surgery, performed by Daniel Ocel, M.D., included a toenail ablation, matricectomy to the right 1st second and third toes, and flexor tenotomies of the right second and third toes. (Ex. G).

4. On October 23, 2018, Claimant underwent surgery on his right foot (the "October 2018 Surgery"). Dr. Ocel performed a modified second toe amputation of the second toe on Claimant's right foot for a diagnosis of osteomyelitis (i.e., bone infection) of right foot, unspecified type. (Ex. G).

5. On January 31, 2020, Claimant underwent surgery on his right foot for acute hematogenous osteomyelitis, right ankle and foot (the "January 2020 Surgery"). The January 2020 Surgery, a partial amputation of Claimant's right great toe, was performed by Blake Hines, D.P.M. (Ex. G).

6. Claimant testified he injured his right big toe in a fall in October of November 2019 when he experienced a series of falls. Claimant testified he was wearing a walking cast for his foot in December 2019 because he could not get his shoe on. Claimant testified that sometime around January 2020, the big toe on his right foot began to get really bad. Claimant testified the neuropathy in his foot caused him trouble walking.

FACTS RELATED TO CAUSE OF RIGHT FOOT NEUROPATHY

7. On February 23, 2001, Claimant saw Gordon Yee, M.D., for a postoperative visit. Claimant reported experiencing a recurrence of numbness in his left foot and having constant numbness in the sole of his left foot and involving his second, third and fourth toes. Claimant reported that his right lower extremity was asymptomatic. (Ex. G).

8. On April 12, 2005, Claimant saw Jeffrey Thramann, M.D., for evaluation of, among other things, bilateral foot numbness. Claimant reported a history of back pain and pain radiating in his left leg with numbness into bilateral lower extremities (Ex. I).

9. On July 18, 2005, Claimant saw Phil Cambe, M.D., at Boulder Community Hospital Pain Management for fractured ribs. Claimant reported a "recent fall at home with fracture of right wrist and right ribs." (Ex. D).

10. On July 21, 2006, Claimant saw Eric Busch, PA-C at Boulder Neurosurgical Associates for a neurosurgical visit. Mr. Busch noted Claimant had undergone placement of a spinal cord stimulator in April 2006 resulting in significant improvement of his back pain and the burning pain in his feet. Claimant still reported numbness in his feet. Sensory examination demonstrated mild decreased sensation in the soles of his feet bilaterally. (Ex. I).

11. On September 29, 2006, Claimant saw Mr. Busch, who noted the spinal cord stimulator placed in April 2006 was “doing a very good job of alleviating the burning pain in his feet. [Claimant] still has numbness in parts of his leg and feet.” (Ex. I).

12. On April 13, 2007, Claimant saw Alan Villavicencio, M.D., a neurosurgeon, at Boulder Neurosurgical Associates, for a follow-up visit. Claimant reported the April 2006 spinal cord stimulator significantly helped his burning foot pain. Claimant also numbness in his feet bilaterally. (Ex. I).

13. On June 1, 2007, Claimant saw Dr. Villavicencio for a follow-up visit. Claimant reported “fairly constant pain across his low back that radiates into his buttocks bilaterally associated with a dead sensation in the bottom of his feet and paresthesias in the entire bilateral legs and feet.” (Ex. I, p. 1024-25). Dr. Villavicencio’s found Claimant “has ongoing low back pain and intermittent lower extremity radicular symptoms that may be related to the adjacent degeneration at L3-4.” (Ex. I).

14. On June 10, 2007, Claimant underwent an independent medical examination (IME) with William Shaw, M.D., Respondents’ request. Among other things, Claimant complained of pain on the right from the buttocks, through the thigh, into the lateral calf and the sole of the foot to the mid foot region. “He also feels pain across the instep toward the second and third toes.” In addition, the Claimant described burning numbness in the left foot “without the deep stabbing pain in the foot which is present proximally.” (Ex. E).

15. On August 20, 2007, Claimant saw Dr. Leif Redal, his primary care provider. Dr. Redal diagnosed Claimant with hypertension, edema and diabetes mellitus and Claimant was started on hydrochlorothiazide. (Ex. G).

16. On May 16, 2008, Claimant saw Dr. Villavicencio. Dr. Villavicencio’s neurological examination demonstrated Claimant had decreased sensation in his right thigh and calf and plantar surfaces of his bilateral feet. (Ex. I).

17. On November 13, 2008, Claimant underwent a right-sided L3-4 transforaminal lumbar interbody fusion with decompression of the L3 and L4 nerve roots; a redo right L4-5 posterior hemilaminectomy and foraminotomy; and a trial placement of a thoracic spinal cord stimulator. (Ex. I).

18. On December 3, 2008, Claimant saw Dr. Villavicencio. Claimant reported new decreased sensation in the dorsal aspect of his feet bilaterally starting on postoperative day number one from his surgery on November 13, 2008. Dr. Villavicencio’s found Claimant had a new, right greater than left, lateral thigh decreased

sensation and dorsal foot decreased sensation since the first day after his November 13, 2008 surgery. (Ex. I).

19. On February 3, 2009, Claimant saw Dr. Redal. Claimant reported worsening bilateral lower extremity edema, pain and numbness since surgery in November. (Ex. F).

20. On March 6, 2009, Claimant saw Dr. Villavicencio and reported sharp pain extending along the right lateral thigh and foot numbness. (Ex. I).

21. On June 19, 2009, Claimant underwent an IME with Alexander Jacobs, M.D., at Respondents' request. Claimant reported "pain in the feet, (right greater than left). In the feet the symptoms are more paresthesias." Claimant reported abnormal sensation in the arms and legs. Dr. Jacobs' diagnostic impression for "PROBLEMS RELATED TO THE 08/1995 INJURY" included, among other things, "LUMBAR DISC DISEASE, multiple failed surgeries, pain (including radicular pain into the lower extremities.)" (Ex. D).

22. On November 13, 2009, Claimant saw Dr. Villavicencio and reported he continued to experience chronic pain issues and peripheral neuropathy in his lower extremities. Dr. Villavicencio found Claimant "has persistent numbness in his bilateral lower extremities and anterior lateral thighs." (Ex. I).

23. On April 13, 2010, Claimant saw Dr. Redal. Claimant reported "his feet seem to be hurting him more than they had." Dr. Redal's assessment included as an "alternate" diagnosis: "Other specified idiopathic peripheral neuropathy." Dr. Redal's "plan" included discussion of further workup available, additional information regarding neuropathy in legs. ... Will check comprehensive metabolic panel, vitamin D level today." (Ex. F).

24. On May 7, 2010, Claimant saw Dr. Redal and presented with pain in his shoulders due to a recent fall. (Ex. F).

25. On December 10, 2010, Claimant saw Dr. Villavicencio. Dr. Villavicencio found Claimant "remains neurologically stable with ongoing chronic back pain and bilateral anterior thigh paresthesias and foot paresthesias. These are unchanged from his visit with us one year ago." Dr. Villavicencio opined Claimant had some evidence of adjacent segment disease with retrolisthesis of L4 on L4, as seen on his imaging studies. (Ex. I).

26. On December 30, 2011, Claimant saw Dr. Villavicencio. Claimant reported worsening neuropathic pain in his feet, which he described as burning and stabbing. Dr. Villavicencio found Claimant "continues to struggle with chronic low back pain, as well as chronic and worsening, bilateral neuropathic pain in his feet." (Ex. I).

27. On September 11, 2012, Claimant saw George Frey, M.D., at Colorado Comprehensive Spine Institute. Claimant reported experiencing burning and numbness in his bilateral feet. Dr. Frey opined Claimant had severe stenosis at the L2-3 segment,

and much of his lower extremity symptoms were due to stenosis. He also opined that Claimant had arachnoiditis, “and this may explain the pains in the feet.” (Ex. K).

28. On July 17, 2014, Claimant underwent an IME with Kathie McCranie, M.D., at the request of Respondents. Claimant reported pain in the low and mid back, which is burning, stabbing, aching “with pins and needles and numbness, pain in both of his feet, which is burning, stabbing...” (Ex. C).

29. On February 3, 2015, Claimant saw Dr. Redal. Claimant reported a concern about right lower leg anterior shin swelling. Claimant reported he fell but did not sustain any scrapes or injuries. (Ex. F).

30. On April 8, 2015, Claimant saw Robert Moghim, M.D., for a Division Independent Medical Examination (DIME). Claimant reported he had pain in his bilateral legs and the pain radiated to the feet bilaterally. Dr. Moghim opined Claimant’s prognosis was “poor” and “Patient has chronic pain syndrome with clear findings that highlight central sensitization resulting in paresis, sensation loss, ambulatory assistance and hyperesthesia/allodynia of the back and LEs.” (Ex. B, p. 18).

31. On January 16, 2017, Claimant was evaluated at Craig Hospital. Claimant continued to have severe debilitating neuropathy from feet to the knees extending to his waist at times. Claimant described the pain as shooting and stabbing and limiting his ability to walk functionally. (Ex. J).

32. On September 26, 2017, Claimant was seen by Dr. Frey. Dr. Frey found Claimant had “progressive neuropathy of the feet.” Dr. Frey found Claimant had a predominantly right SIJ dysfunction based on his gate disturbance and peripheral neuropathy (sic) as well as the deconditioning.” (Ex. K).

33. Claimant’s medical records from multiple providers contain references to a history of hypertension. Multiple glucose tests indicate Claimant’s glucose level was in excess of 100 mg/dl. Dr. Burris credibly testified blood glucose levels in excess of 100 are considered elevated. Despite a history of elevated blood glucose and hypertension, the records do not contain evidence that Claimant’s primary care providers offered treatment or treated Claimant for diabetes mellitus or for metabolic syndrome.

FACTS RELATED TO FEBRUARY 2018 SURGERY

34. On December 4, 2017, Claimant saw Dr. Redal for an annual wellness visit. On inspection of Claimant’s skin and subcutaneous tissue, Dr. Redal did not find any rashes or lesions and no areas of discoloration. Dr. Redal ordered labs which showed Claimant’s glucose level to be 124 mg/dl. Dr. Redal’s examination of Claimant’s right lower extremity noted no joint or limp tenderness, no edema present and no ecchymosis. Dr. Redal’s assessment included a diagnosis of onychomycosis. (Ex. F).

35. On January 9, 2018, Claimant saw Dr. Redal. Claimant reported severe pain in his right foot and especially the third toe for the previous 7 to 8 days. Claimant reported pain in his left and right great toes and the second and third toes of his right foot.

Pain was generally under the nail. Dr. Redal found Claimant had onychomycosis with pronounced thickening of the nails and some arching of all toes. Claimant also reported his “typical level of neuropathic pain which is moderate and consistent and bilateral.” Dr. Redal examined Claimant’s right foot and found: “3rd digit with moderate erythema, mild warmth, moderate desquamation, no purulence, thickening of nail, moderate to marked tenderness to touch especially distal portion great nail and great toe tender to touch but no significant erythema no warmth and less tenderness moderate erythema, mild warmth and less tenderness.” Dr. Redal’s assessment was “Cellulitis and abscess of foot.” Dr. Redal referred the patient to Dr. Ocel. Dr. Redal stated cellulitis was the most likely cause of increased pain given redness and desquamation and mild warmth in his toe. (Ex. F).

36. On February 2, 2018, Claimant saw Dr. Ocel, of Cornerstone Orthopedics & Sports Medicine, for right foot pain. Dr. Ocel examined Claimant’s right foot and found “[t]hickened and fungally infected nails ... of the right first, second and third digits. Likewise tip keratosis noted along the second and third digits also that appeared to be superficially infected. He is not tender to palpation over these areas. He does have a palpable dorsalis pedis as well as posterior tibial pulse and brisk capillary refill of his digits is noted.” (Ex. G, p. 396). Dr. Ocel diagnosed Claimant with toenail fungus; hammertoe of right foot, and keratosis of plantar aspect of foot. Dr. Ocel recommended removal of the toenail, matricectomy and flexor tenotomies to help heal the tip keratoses. (Ex. G).

37. On February 12, 2018, Claimant saw Dr. Goldberg. Dr. Goldberg’s treatment note from this date notes, Claimant “is getting his toenails removed secondary to fungus and concerns about seeding his spinal hardware.” (Ex. H).

38. On February 20, 2018, Dr. Ocel performed the February 2018 Surgery on Claimant’s right foot, for a preoperative diagnosis of chronic ingrown and onychomycotic right first, second, and third toenails; flexible hammertoe deformities, right second and third digits. (Ex. G).

39. On March 8, 2018, Claimant saw MaryAnne Persons, PA, for a post-surgery visit. Ms. Persons noted Claimant was three weeks status post-surgery and doing fairly well. Ms. Persons examined Claimant’s surgical incisions and found no erythema or drainage “however his entire foot is in general quite dry and he does have some cracking over the incisions especially under his toes.” Ms. Persons encouraged Claimant to use lotion with cocoa butter vitamin E oil on his cracking foot. Claimant stated this has “always been an ongoing problem for him.” (The ALJ infers from the context Claimant was referencing dryness and cracking of his feet). (Ex. G).

40. On March 23, 2018, Claimant saw Ms. Persons for evaluation of his right foot. Ms. Persons’ found Claimant’s feet improved, and Claimant had been using the recommended cream. Ms. Persons also noted significant improvement in Claimant’s skin. (Ex. G).

41. On April 20, 2018, Claimant saw MaryAnne Persons, PA for evaluation of his right foot. Claimant reported walking better and wearing a regular shoe. Ms. Persons

found well-healed surgical incisions, minimal soft tissue swelling with weight-bearing. (Ex. G).

42. Claimant did not testify concerning the reason for the February 2018 Surgery.

FACTS RELATED TO OCTOBER 2018 SURGERY

43. On September 13, 2018, Claimant saw Dr. Ocel for a complaint of right foot pain. Dr. Ocel found erythema over the distal tip of the second toe, no active drainage and tenderness to palpation. Claimant's foot showed no evidence of osteomyelitic changes or signs consistent with abscess formation. Dr. Ocel's assessment was cellulitis of toe of right foot. Dr. Ocel prescribed a trial of Keflex and recommended Claimant perform Epsom salt soaks. Dr. Ocel's record from September 13, 2018 does not include any statement regarding the cause of Claimant's cellulitis. (Ex. G).

44. On September 20, 2018, Claimant saw Ms. Persons for a complaint of "right foot pain." Claimant reported his toe had improved in the previous 24 hours and he had completed a course of antibiotics 2 days earlier. Ms. Persons examined Claimant's foot and found "large callus across the dorsal surface extending onto the plantar surface of the toe. There is a small area that is open and there is no induration it is very shallow at this point. When compared [pictures] from a week ago I think it is improved." Ms. Persons' assessment was "Cellulitis of toe of right foot." Ms. Persons' record from September 20, 2018 does not include any statement regarding the cause of Claimant's cellulitis. (Ex. G).

45. On September 28, 2018, Claimant saw Dr. Ocel for "right foot pain." Dr. Ocel's assessment was "Cellulitis of toe of right foot." Dr. Ocel's review of systems was negative for gait disturbance. Dr. Ocel's record from September 28, 2018 does not include any statement regarding the cause of Claimant's cellulitis. (Ex. G).

46. On October 3, 2018, Claimant saw Dr. Goldberg. Claimant reported a pressure ulcer on distal right second toe with a heavy callus. Dr. Goldberg's record from October 3, 2018 does not include any statement regarding the cause of Claimant's pressure ulcer. (Ex. H).

47. On October 15, 2018, Claimant saw Dr. Ocel for "right foot pain." Dr. Ocel examined Claimant's right foot and noted "The right second toe continues to be mildly erythematous with a distal ulcer although no significant drainage is appreciated. He does demonstrate moderate soft tissue swelling within this region. He does have a strong dorsalis pedis as well as posterior tibial pulse." Dr. Ocel's assessment was "Cellulitis of toe of right foot." Dr. Ocel's impression was "Continued erythema and soft tissue swelling about the second toe. I am concerned about the possibility of osteomyelitis and for this reason we will obtain an MRI for evaluation. We have discussed potential modified second toe amputation should this be the case. He voices an understanding and agreement and we will follow up after his imaging study." Dr. Ocel's ordered an MRI of

Claimant's right foot. Dr. Ocel's record from October 15, 2018 does not include any statement regarding the cause of Claimant's cellulitis. (Ex. G).

48. October 23, 2018, Dr. Ocel performed the October 2018 Surgery for the diagnosis of osteomyelitis of right foot. (Ex. G).

49. On November 26, 2018, Claimant saw Dr. Goldberg. Dr. Goldberg noted Claimant "had right second toe bone removed due to bone infection." Dr. Goldberg did not opine as to the cause of Claimant's bone infection or relate the injury to his industrial injury. (Ex. H).

50. On January 18, 2019, Claimant saw Dr. Ocel. Dr. Ocel examined Claimant's right ankle and found mild soft tissue swelling of the right ankle consistent with Claimant's lymphedema. Dr. Ocel observed: "It looks like he split the skin of the distal right with no active drainage or sign of infection." Dr. Ocel diagnosed Claimant with bilateral foot pain. Dr. Ocel advised Claimant to continue to use a stiff sold shoe and soak his foot in Epsom salt. (Ex. G).

51. Claimant did not testify concerning the reason for the October 28, 2018 Surgery.

FACTS RELATED TO JANUARY 2020 SURGERY

52. On February 1, 2019, Claimant saw Dr. Ocel. Dr. Ocel found Claimant had a "minimal open ulcer at the distal aspect of the right great toe with no active drainage or sign of infection. Hypertrophic nail plate noted." Dr. Ocel's assessment was "skin ulcer of right great toe, limited to breakdown of skin." Dr. Ocel's record does not contain any statement regarding the cause of Claimant's skin ulcer. (Ex. G).

53. On February 18, 2019, Claimant saw Dr. Ocel. Claimant's right great toe ulcer at the distal aspect of the toe looked much improved with no active drainage or sign of infection. (Ex. G, 603). Dr. Ocel's assessment was skin ulcer of right great toe, limited to breakdown of skin." Dr. Ocel did not restrict Claimant from any activities. (Ex. G).

54. On March 18, 2019, Claimant saw Dr. Ocel. Claimant's calluses were improved after using Palmer's oil. Claimant did not have any signs of infection. (Ex. G).

55. On April 19, 2019, Claimant saw Dr. Ocel. Claimant's right great toe ulcer was improved. Claimant had developed a callous on the fourth toe of the right foot with a small ulceration with no signs of infection. Claimant had minimal soft tissue swelling and redness of the fourth toe. Dr. Ocel trimmed the callous on Claimant's right fourth toe and removed the toenail. Dr. Ocel noted Claimant was continuing to wear his post-operative shoe. (The ALJ infers the shoe is the post-operative shoe from the October 2018 Surgery). (Ex. G).

56. On April 29, 2019, Claimant saw Dr. Ocel. Claimant's ulceration of claimant's fourth toe was healing and there was no swelling or erythema of the toe or right foot. Dr. Ocel noted Claimant was continuing to wear his post-operative shoe. (Ex. G).

57. On June 3, 2019, Claimant saw Dr. Ocel for evaluation of his right fourth toe ulceration. Dr. Ocel noted Claimant would transition out of his post-operative shoe and into his regular shoe wear. (Ex. G).

58. On July 22, 2019, Claimant saw Dr. Ocel for evaluation of his right foot. Dr. Ocel noted Claimant had developed a callous over the fourth toe of his right foot. Dr. Ocel trimmed the callous. Claimant reported he had been doing well in his normal shoe wear. (Ex. G.).

59. On August 7, 2019, Claimant saw Efren Caballes, M.D., at Cornerstone Orthopedics, for evaluation of bilateral knee pain. Claimant reported he had some weakness and reported he had fallen four times over the past few weeks. (Ex. G).

60. On August 12, 2019, Claimant saw Dr. Ocel for right foot pain. Claimant reported he had been wearing his tennis shoes without any difficulties. (Ex. G).

61. On September 30, 2019, Claimant saw Dr. Ocel for follow-up regarding his right fourth toe ulcer. Claimant reported he continued wearing his tennis shoes without difficulties and continued to trim the fourth toe callous. (Ex. G).

62. On October 28, 2019, Claimant saw Dr. Ocel for evaluation of right foot pain. Claimant reported an object fell on his foot the previous week. He stated the foot was painful and swollen afterward, but the swelling and pain had improved at the time of the visit. Dr. Ocel examined Claimant's right foot and found tenderness over the lateral aspect of the mid-foot, and minimal soft tissue swelling. X-rays showed no evidence of acute skeletal pathology. Dr. Ocel did not restrict Claimant from any activities. (Ex. G).

63. On November 20, 2019, Claimant saw Dr. Blake Hines for right foot pain, including "initial evaluation of right hallux wound." Claimant reported gradual onset of pain in his right foot. The pain was described as aching, burning, dull, sharp, throbbing and radiating. Claimant reported the pain was aggravated by climbing and descending stairs and lifting. Claimant reported noting "a darkened blister to the distal tip of the right hallux last week, but his toe became more red and swollen [M]onday, with drainage noted. He notes that it looks better today than Monday." Claimant reported "no injury." Dr. Hines examined Claimant's right foot and noted Moderate edema to right hallux. Dr. Hines found Claimant's "protective sensation absent to level of the toes," and noted a large blister "to distal tip of right hallux. Blister is already open. Mild malodor noted. No purulence noted. Right hallux is erythematous to mid-proximal phalanx. Following derroofing of blister, full-thickness ulceration of distal toe tip noted measuring ~0.8 x 0[.]8 x 0.2 cm. Fat layer exposed. Fibrogranular base. Wound does not probe deeply. No other wounds noted." Dr. Hines' assessment was chronic ulcer of right great toe with fat layer exposed and cellulitis of great right toe. Dr. Hines also indicated "[Claimant] has fallen 2 times in the last year. The patient is not at risk for falls." (Ex. G).

64. Claimant saw Dr. Hines on November 27, 2019 for evaluation of his right hallux wound. Claimant noted improvement since last being seen. Dr. Hines found a "[f]ull-thickness ulceration of distal toe tip persists measuring ~ 0.7 x 0[.]6 x 0.2 cm. Fat

layer exposed. Fibrogranular base. Wound does not probe deeply. No other wounds noted." Dr. Hines performed an excisional debridement of ulceration and noted that the "wound was brought to a healthy bleeding base. "He will change dressings as needed. Dr. Hines advised Claimant to avoid pressure on the toe and to "[m]anage blood sugars closely." Dr. Hines' assessment included: Chronic ulcer of right great toe with fat layer exposed; Type-2 diabetes mellitus with diabetic polyneuropathy with long-term current use of insulin; and cellulitis of right great toe. (Ex. G).

65. At his December 5, 2019 visit with Dr. Hines, Claimant reported "he previously had a foot wound that took a very long time to heal. He also reported that his neuropathy was from previous back surgeries and that he had been told he was borderline diabetic." Dr. Hines found "[f]ull-thickness ulceration of the distal toe tip persists measuring ~0.6 x 0.6 x 0.2cm. Fat layer exposed. Fibrogranular base. Wound does not probe deeply. No other wounds noted." Dr. Hines' relevant assessment was cellulitis of great toe, right; chronic ulcer of right great toe with fat layer exposed; peripheral polyneuropathy. Dr. Hines debrided the wound and provided Claimant with a "CAM walker." Dr. Hines noted "If his [wound] does not continue improving, we will need to get him into a total contact cast." Dr. Hines also indicated "[Claimant] has fallen 2 times in the last year. The patient is not at risk for falls." (Ex. G).

66. On December 9, 2019, Claimant saw Dr. Ocel. Claimant reported he had fallen five times in the past year and the falls resulted in an injury to his "R great toe." Claimant did not specifically report any falls occurring since his December 5, 2019 appointment with Dr. Hines. Claimant reported to Dr. Ocel he had been using a CAM boot and has been trying to stay off his foot. Dr. Ocel noted a 1 by 1 cm great toe ulcer, which he described as smaller in comparison to the picture of the ulcer when Dr. Hines first saw the toe. Photos of Claimant's toe ulcer were not included in the record. (Ex. G).

67. On December 12, 2019, Claimant saw Dr. Hines for evaluation of his right hallux (i.e., great toe) wound. Claimant reported a marked increase in pain in the toe over the previous 2-3 days. He also reported drainage/malodor with dressing changes. Claimant was concerned he may have an infection. Dr. Hines found "[f]ull-thickness ulceration of distal toe tip has increased in size, now measuring ~1.2 x 1.0 x 0.4cm. Cellulitis of right hallux extending from the tip to mid-proximal phalanx. Fat layer exposed. Fibrogranular base. Wound now probes to periosteum, but not bone. Small amount of purulent material noted in wound base. No other wounds noted." Dr. Hines opined Claimant had acquired an infection. Dr. Hines advised Claimant was at high risk for getting osteomyelitis and needing a toe amputation. Claimant reported he had fallen 5 times in the last year and the falls resulted in an injury to his great right toe. Claimant did not report any specific falls occurring since his December 5, 2019 visit with Dr. Hines. (Ex. G).

68. On December 16, 2019, Claimant saw Dr. Ocel for evaluation of his right foot. Claimant and his wife reported the toe looked better than Thursday. (The ALJ infers this is a reference to the December 12, 2019 visit with Dr. Hines). Dr. Ocel found Claimant's toe ulcer appeared improved. Dr. Ocel's assessment included cellulitis of great toe, right and chronic ulcer of right great toe with fat layer exposed. (Ex. G).

69. On December 23, 2019, Claimant saw Dr. Hines for evaluation of his right foot. Claimant reported he was very happy with his progress and his infection was improving. Claimant reported he had fallen five times in the last year, and the fall resulted in an injury to his great right toe. Claimant did not report any specific falls occurring since his December 5, 2019 visit with Dr. Hines. Dr. Hines found the ulceration on the distal toe tip had decreased in size and Claimant's cellulitis was resolving. Dr. Hines' assessment was cellulitis of great toe, right, chronic ulcer of right great toe with fat layer exposed and type-2 diabetes mellitus with diabetic polyneuropathy, with long-term current use of insulin. (Ex. G).

70. On December 30, 2019, Claimant saw Dr. Hines. Dr. Hines found Claimant's toe wound was improved and his infection resolving. Dr. Hines' assessment was cellulitis of great toe, right, chronic ulcer of right great toe with fat layer exposed and type-2 diabetes mellitus with diabetic polyneuropathy, with long-term current use of insulin. (Ex. G).

71. On January 9, 2020, Claimant saw Dr. Hines for evaluation of his right foot. Claimant reported he had fallen six times in the last year, resulting in his then-current right great toe injury. Dr. Hines' relevant assessment was cellulitis of great toe, right, chronic ulcer of right great toe with fat layer exposed. Claimant did not report any falls occurring since his December 12, 2019 visit with Dr. Hines. (Ex. G).

72. On December 11, 2019, Claimant saw Sheldon Goldberg, M.D. Dr. Goldberg stated "[Claimant] has a new ulcer on his right 1st toe. He is seeing a podiatrist. He is in a walking boot. His wound is directly related to his LE neuropathy which is related to his work injury." (Ex. 4).

73. On January 15, 2020, Claimant saw Dr. Goldberg. Claimant reported he "had a fall and injured his right foot and got a wound with an abscess and ulcer. He is seeing a wound doctor at a wound clinic weekly." (Ex. G).

74. On January 16, 2020, Claimant saw Dr. Hines. Claimant reported minimal improvement of his toe wound but noted improvement in the infection. Dr. Hines' relevant assessment was cellulitis of great toe, right, chronic ulcer of right great toe with fat layer exposed. (Ex. G).

75. On January 23, 2020, Claimant saw Dr. Ocel for evaluation of his right foot. Claimant reported he had fallen nine times in the last year. Claimant did not report any specific falls occurring since his January 9, 2020 visit with Dr. Hines. Dr. Ocel found the ulceration on the distal right toe tip had increased slightly in size. X-rays showed osteolytic changes to the right first distal phalanx, and Dr. Ocel recommended amputation at the first DIP joint. Dr. Ocel's relevant assessment included cellulitis of great toe, right, chronic ulcer of right great toe with fat layer exposed, and acute hematogenous osteomyelitis, right ankle and foot. Dr. Ocel noted Claimant had surgery scheduled with Dr. Hines. (Ex. G).

76. On January 31, 2020, performed the January 2020 Surgery for a diagnosis of acute hematogenous osteomyelitis, right ankle and foot. (Ex. G).

77. On February 25, 2020, Dr. Ocel issued a letter to Claimant's counsel indicating it is was in response to a request for his opinions. The letter to which Dr. Ocel was responding is not in the Court's record. Dr. Ocel's letter states:

As you are aware, I am the treating physician for [Claimant] with regard to his foot and ankle issues in association with his occupational injury dated 08/25/98. I am providing this report in response to your January 29, 2020 request for my opinions regarding the cause and nature of his foot and ankle difficulties. Please note that the following opinions are given to a reasonable degree of medical certainty.

Based upon my review of his medical history, as well as follow up examinations and treatment, I believe that [Claimant] sustained a permanent new injury during the 08/25/98 incident which has resulted in [Claimant's] foot and ankle difficulties."

Based on my experience as a board certified orthopedic surgeon, fellowship trained in foot and ankle surgery as well as my actual physical examination and treatment of [Claimant], I can state with a reasonable degree of medical certainty that his profound neuropathy and the subsequent long term effects of the neuropathy on the physiology of the foot and ankle, most recently the requirement of a great toe amputation was the direct cause of the injury noted above.

Given the nature of the injuries sustained by [Claimant] and the resultant neuropathy, regardless of appropriate care of the neuropathy, [Claimant] may indeed require future surgical intervention stemming from debridement to future amputations.

(Ex. 3).

78. Claimant saw Dr. Ocel approximately 28 times between February 2, 2018 and January 23, 2020. Claimant also saw Ms. Persons (a Physician assistant in Dr. Ocel's office) approximately 8 times in 2018. Claimant saw Dr. Hines approximately nine times from November 20, 2019 through February 6, 2020. The records from these providers at Cornerstone do not reference Claimant's industrial injury.

79. Claimant incurred \$134.31 in expenses for medications prescribed for issues with his feet between November 20, 2019 and January 23, 2020. (Ex. 6).

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. See § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. See § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find a fact is more probably true than not. Page v. Clark, 197 Colo. 306, 592 P.2d 792 (1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. University Park Care Center v. Industrial Claim Appeals Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. Prudential Insurance Co. v. Cline, 57 P.2d 1205 (Colo. 1936); Bodensieck v. Industrial Claim Appeals Office, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. Cordova v. Industrial Claim Appeals Office, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. Colorado Springs Motors, Ltd. v. Industrial Commission, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, 5 P.3d 385 (Colo. App. 2000).

COMPENSABILITY

To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S. (2006); see City of Boulder v. Streeb, 706 P.2d 786, 791 (Colo. 1985). The need for medical treatment may extend beyond the point of MMI where claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. Grover v. Industrial Commission, 759 P.2d 705 (Colo. 1988). The claimant must prove entitlement to Grover medical benefits by a preponderance of the evidence. Lerner v. Wal-Mart Stores, Inc., 865 P.2d 915 (Colo. App. 1993).

The claimant must prove a causal nexus between the claimed disability and the work-related injury. Singleton v. Kenya Corp., 961 P.2d 571 (Colo. App. 1998). Proof of causation is a threshold requirement which an injured employee must establish by a preponderance of the evidence before any compensation is awarded. The question of causation is generally one of fact for determination by the ALJ." Faulkner v. Industrial Claim Appeals, 12 P.3d 844, (Colo. App. 2000)

Under section 8-42-101(1)(a), C.R.S., respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of the industrial injury. See Owens v. Industrial Claim Appeals Office, 49 P.3d 1187, 1188 (Colo. App. 2002). All results flowing proximately and naturally from an industrial injury are compensable. Id., citing Standard Metals Corp. v. Ball, 474 P.2d 622 (Colo. 1970). However, when a later injury occurs as the result of another independent intervening cause, no compensability exists. Owens, supra, citing Post Printing & Publishing Co., supra. Whether a particular condition is the result of an independent intervening cause is a question of fact for resolution by the ALJ. Faulkner, supra; Owens, 49 P.3d at 1188-89.

Claimant has established by a preponderance of the evidence that his right foot neuropathy is the result of his industrial injury of August 25, 1998. The Claimant's medical records establish the Claimant has experienced neuropathic symptoms in his feet since at least 2005, and that these symptoms are related to neuropathic symptoms in his lower back, and legs. Dr. Villavicencio's records demonstrate Claimant's neuropathic foot pain was relieved and controlled through the implantation of a spinal stimulator in April 2006, although Claimant continued to experience foot numbness following surgery. Dr. Villavicencio also noted Claimant's lower extremity radicular symptoms may be related degeneration at L3-4. Following the Claimant's November 13, 2008 surgery, his right foot symptoms worsened.

Dr. Burris' testimony concerning the cause of Claimant's right foot neuropathy is not persuasive. Dr. Burris agreed Claimant has lower extremity/foot neuropathy. Dr. Burris attributed the right foot neuropathy to Claimant's comorbidities and metabolic syndrome. Dr. Burris' opinion is not supported by the Claimant's medical records. For example, although the Claimant has a constellation of symptoms consistent with metabolic syndrome, including hypertension, elevated blood glucose, and obesity, none of Claimant's treating health care providers, including his primary care provider, Dr. Redal, diagnosed Claimant with or treated Claimant for, metabolic syndrome. In June 2009, Respondent's IME physician, Dr. Jacobs attributed Claimant's radicular pain in the lower extremities to his August 25, 1998 industrial injury. In September 2012, Dr. Frey, M.D. attributed the Claimant's lower extremity and foot symptoms to severe stenosis at the L2-3 segment and arachnoiditis. These opinions, coupled with Claimant's right foot neuropathy worsening immediately after his November 2008 surgery, establish Claimant's right foot neuropathy is, more likely than not, a sequelae of Claimant's November 13, 2008 surgery, which was causally related to his industrial injury. As such, the right foot neuropathy is also causally related to the industrial injury.

Dr. Burris' testimony that the inconsistencies in the Claimant's medical records regarding neurologic findings supports the position that the Claimant's neuropathy is related to comorbidities rather than his back injury is not persuasive. The Court concludes it is more likely than not Claimant's right foot neuropathy is causally related to his industrial injury of August 25, 1998.

The ALJ finds the Claimant met his burden of proof of establishing that his right foot neuropathy is related to or caused by his August 25, 1998 industrial injury and, therefore, treatment for right foot neuropathy is reasonably necessary to relieve the effects of his August 25, 1998 industrial injury or to prevent further deterioration of his work-related condition.

SPECIFIC MEDICAL BENEFITS AT ISSUE

The question of whether medical treatment is reasonable and necessary is one of fact for determination by the ALJ. Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office, 989 P.2d 251 (Colo. App. 1999). The ALJ's determinations in this regard must be upheld if supported by substantial evidence. Kroupa v. Industrial Claim Appeals Office, 53 P.3d 1192, 1197 (Colo. App. 2002). Section 8-43-301(8), C.R.S. The existence of evidence which, if credited, might permit a contrary result affords no basis for relief on appeal. Cordova v. Industrial Claim Appeals Office, 55 P.3d 186 (Colo. App. 2002). "In the Matter of the Claim of Bud Forbes, Claimant, No. W.C. No. 4-797-103, 2011 WL 5616888, at *3 (Colo. Ind. Cl. App. Off. Nov. 7, 2011).

No compensability exists, however, when a later accident, injury, or disease occurs as the direct result of an independent intervening cause. Owens, supra; Post Printing & Publishing Co., supra. If the need for treatment results from an intervening injury or disease unrelated to the industrial injury, then treatment of the subsequent condition is not compensable. This also is a question of fact for resolution by the ALJ. Owens, supra. In the Matter of the Claim of Susan Merrill, Claimant, No. W.C. No. 4-635-705-02, 2013 WL 2143871, at *4 (Colo. Ind. Cl. App. Off. May 10, 2013).

Claimant offered the written statements of Dr. Ocel and Dr. Goldberg as evidence that Claimant's foot surgeries were causally related to his industrial injury.

Dr. Ocel's report of February 25, 2020 is neither credible nor persuasive. Although Dr. Ocel, and others in his office, saw Claimant approximately 45 times for issues related to his right foot between February 2, 2018 and January 23, 2020. Dr. Ocel's records do not reference the Claimant's industrial injury. While Dr. Ocel's report states he reviewed Claimant's "medical history," it does not indicate he reviewed any of Claimant's medical records, or whether he was aware of the nature and extent of Claimant's industrial injury. Dr. Ocel's report fails to provide any coherent medical basis for the conclusory statement that Claimant's industrial injury is the cause of Claimant's "foot and ankle difficulties."

The February 2018 Surgery

Claimant has not established by a preponderance of the evidence that the February 2018 Surgery was related to his industrial injury. Claimant's February 2018

surgery was for toenail fungus and hammertoe. Claimant did not testify concerning the need or cause for the February 2018 Surgery. Dr Ocel's February 25, 2020 report does not reference the February 2018 Surgery he performed, nor does it provide any medical (or logical) basis for concluding Claimant developed toenail fungus or hammertoe as the result of his industrial injury. Dr. Ocel's contemporaneous medical records do not attribute the Claimant's toenail fungus and hammertoe to his right foot neuropathy or his industrial injury. Dr. Goldberg's December 11, 2019 treatment note does not address Claimant's February 2018 Surgery.

The ALJ finds the Claimant did not meet his burden of proof of establishing his right foot toenail fungus, hammertoe or keratosis or the February 2018 surgery was related to or caused by his August 25, 1998 industrial injury by a preponderance of the evidence. Consequently, this treatment was not reasonably necessary to relieve the effects of his August 25, 1998 industrial injury or to prevent further deterioration of his work-related condition.

The October 2018 Surgery

Claimant has not established by a preponderance of the evidence that the October 2018 Surgery was related to his industrial injury. The medical indication for Claimant's October 2018 Surgery was osteomyelitis (i.e., a bone infection). Although Dr. Ocel performed the October 2018 surgery, his contemporaneous medical records do not address the cause of the injury, and do not attribute the injury to either the Claimant's foot neuropathy or his industrial injury.

Dr. Ocel's February 25, 2020 report does not reference the October 2018 Surgery he performed, nor does it provide any medical (or logical) basis for concluding Claimant developed osteomyelitis in his second toe as the result of Claimant's industrial injury. Dr. Ocel does not explain how the patient's cellulitis or osteomyelitis were related to his neuropathy.

Dr. Goldberg's December 11, 2019 treatment note does not address Claimant's October 2018 Surgery. Claimant reported to Dr. Goldberg that he had a pressure ulcer on the distal right second toe on October 3, 2018. On November 26, 2018, Claimant reported to Dr. Goldberg he "had right 2nd toe bone removed due to bone infection." Dr. Goldberg did not opine as to the cause of these conditions, nor did Dr. Goldberg treat these conditions.

The ALJ finds the Claimant did not meet his burden of proof of establishing either his right second toe wound, or the October 2018 surgery was related to or caused by his August 25, 1998 industrial injury by a preponderance of the evidence. Consequently, this treatment was not reasonably necessary to relieve the effects of his August 25, 1998 industrial injury or to prevent further deterioration of his work-related condition.

The January 2020 Surgery

Claimant has not established by a preponderance of the evidence that the January 2020 Surgery was related to his industrial injury. Claimant testified he fell several times

in October and November 2019 and injured his toe in a fall he attributed to his foot neuropathy. Claimant's testimony regarding this issue is not credible or supported by the contemporaneous medical records.

When Claimant saw Dr. Hines on November 20, 2019, he did not report his injury was the result of a fall or explain the mechanism of an injury. Instead, Claimant reported the onset of his right foot pain was "gradual" and there was "no injury." Claimant reported he noted a "darkened blister on the distal tip of his right hallux last week, but his toe became more red and swollen [M]onday, with drainage noted." Claimant did not report to Dr. Hines the injury to his toe was the result of a fall and reported he had fallen twice the previous year. Claimant had a history of issues with his toes, including an ulcer on his great right toe in February 2019, and an ulcer on his right fourth toe also in 2019. Claimant also reported longstanding issues with dryness and cracking in his feet, and that he had a history of wounds taking an extended time to heal. Dr. Hines initial assessment was of a "chronic" ulcer of the right toe, further indicating that the ulcer was not of traumatic origin. Both Dr. Hines and Dr. Ocel diagnosed Claimant with a "chronic" ulcer of the right great toe on multiple occasions after November 20, 2019.

Claimant's medical records demonstrate he contemporaneously reported falls to his treating care providers when those falls resulted in injury or were suspected of causing an injury. For example, on July 18, 2005, Claimant reported to Dr. Cambe a recent fall resulting in wrist and rib fractures. On May 7, 2010, Claimant saw Dr. Redal and reported he had shoulder pain due to a fall. On February 3, 2015, Claimant saw Dr. Redal and reported he was concerned about right lower leg swelling. He reported to Dr. Redal he had fallen but did not sustain any scrapes or injuries. On August 7, 2019, Claimant saw Dr. Caballes and reported he had fallen "4 times over the past few weeks." Claimant did not report to Dr. Hines he had fallen. Claimant did not attribute his right toe injury to a fall until seeing Dr. Ocel on December 9, 2019, approximately three weeks after seeing Dr. Hines. Claimant's reports of falls gradually increased from an initial report of two falls in the past year on November 2, 2019, to reports of five falls, six falls and then nine falls within the prior year on January 23, 2020. Claimant's medical records do not report any contemporaneous falls during this time period, only an increasing number by history.

Although Claimant incurred \$134.31 in expenses for prescriptions related to the treatment of his right great toe issues, because the expenses arose out of a surgery unrelated to his industrial injury, Claimant is not entitled to medical benefits for these expenses.

The ALJ finds the Claimant did not meet his burden of proof of establishing his right great toe wound, the January 2020 surgery, or the \$134.41 in prescription expenses were related to or caused by his August 25, 1998 industrial injury. Consequently, this treatment was not reasonably necessary to relieve the effects of his August 25, 1998 industrial injury or to prevent further deterioration of his work-related condition.

ORDER

1. Claimant has established, by a preponderance of the evidence, that treatment for right foot neuropathy is reasonably necessary to relieve the effects of his August 25, 1998 industrial injury.
2. Claimant is entitled to general award of reasonable and necessary medical benefits to treat his right foot neuropathy.
3. Claimant's has failed to establish, by a preponderance of the evidence, that his February 2018 surgery was reasonable, necessary, and causally related to his August 25, 1998 industrial injury. His request for payment of expenses related to the February 2018 Surgery is denied.
4. Claimant's has failed to establish, by a preponderance of the evidence, that his October 2018 surgery was reasonable, necessary, and causally related to his August 25, 1998 industrial injury. His request for payment of expenses related to his October 2018 Surgery is denied.
5. Claimant's has failed to establish, by a preponderance of the evidence, that his January 2020 surgery was reasonable, necessary, and causally related to his August 25, 1998 industrial injury. His request for payment of expenses related to his January 2020 Surgery is denied.
6. Claimant's request for reimbursement of prescription expenses in the amount of \$134.31 is denied.
7. Any and all issues not determined here are reserved for future decision.

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

DATED: July 17, 2020.

/s/ Steven R. Kabler
Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th floor
Denver, CO 80203

ISSUES

1. Whether Respondents have produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of John Hughes, M.D. that Claimant suffered a 15% whole person impairment rating as a result of his March 12, 2018 lower back injury.

2. Whether Claimant has established by a preponderance of the evidence that he is entitled to receive Temporary Partial Disability (TPD) benefits for the period March 13, 2018 through May 9, 2018.

3. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period September 17, 2018 through January 18, 2019.

4. Whether Respondents have proven by a preponderance of the evidence that Claimant was responsible for his termination from employment under §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. (collectively "termination statutes") and is thus precluded from receiving indemnity benefits.

5. Whether Claimant has established by a preponderance of the evidence that he is entitled to recover penalties for Respondents' failure to admit or deny liability as required by §8-43-203(2)(a), C.R.S.

6. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to recover penalties for Respondents' failure to comply with an October 26, 2018 Order issued by the Director of the Division of Workers' Compensation.

STIPULATIONS

The parties agreed to the following:

1. Claimant earned an Average Weekly Wage (AWW) of \$967.71.
2. If Claimant is entitled to receive TPD benefits from March 13, 2018 through May 9, 2018, they have a total value of \$1,660.55.
3. If Claimant is entitled to receive TTD benefits from September 17, 2018 through January 18, 2019, with an offset for unemployment benefits, they have a total value of \$9,799.72 prior to interest.

FINDINGS OF FACT

1. Claimant worked for Employer as a Framer/Carpenter. His job duties involved building forms that were used to frame concrete.

2. On March 12, 2018 Claimant injured his lower back while lifting forms. After reporting his injury to Employer, Claimant received medical treatment through Workwell.

3. On March 13, 2018 Claimant underwent an examination with Authorized Treating Physician (ATP) Bruce Cazden, M.D. Claimant reported feeling a pulling sensation in his "low right back" and "right groin area" while moving a large wooden form. On physical examination, Claimant was tender to palpation in his right lateral oblique muscles with pain extending around to the right lower abdomen. Dr. Cazden assigned work restrictions of no lifting over 10 pounds, no bending or twisting at the waist and no climbing ladders. He diagnosed Claimant with the following: lower back pain; strain of muscle, fascia and tendon of the lower back and abdomen and; acute pain due to trauma.

4. Employer accommodated Claimant's restrictions by providing light duty work in the yard. However, Claimant failed to report to work from March 19, 2018 through March 22, 2018 and did not respond to phone calls from Employer's Accountant/Controller Amanda F[Redacted]. Claimant acknowledged that he was required to notify a supervisor if he was going to be late or miss a shift. He specifically testified that a supervisor told him "Don't miss work anymore because they will fire you." Claimant's supervisor Dan S[Redacted] completed a Non-Compliance/Disciplinary Action form that specified Employer had not heard from Claimant during the week. The form noted that Claimant called Employer on March 22, 2020 "to say he had been in jail and needed to go pickup his vehicle." Claimant reported for work the following day at 7:00 a.m.

5. On April 3, 2018 Mr. S[Redacted] completed another Non-Compliance/Disciplinary Action form. The form specified that Claimant was supposed to show up for work on April 3, 2018 following a vacation from March 28, 2018 until April 2, 2018. Claimant called Employer at 9:00 a.m. on April 3, 2018 to let Ms. F[Redacted] know he would be at work after running an errand.

6. On April 5, 2018 Claimant followed up with Dr. Cazden. He reported working modified duty and noted "he feels that he could do a little bit more at work so he would like his restrictions reduced." Claimant noted primarily right hip pain that he rated as 3/10. He commented that he felt better and his pain diagram reflected no involvement of his lower extremities beyond his right hip.

7. Claimant returned to Dr. Cazden on April 20, 2018 and reported he had been working full duty. His primary complaint was pain located in the *left* thoracic paraspinous region that he rated as 3/10. Dr. Cazden modified Claimant's work restrictions to prohibit lifting over 40 pounds.

8. Claimant did not appear for his follow-up appointment with Dr. Cazden or show up or call in to work on Monday, May 7, 2018. Claimant testified that pain caused

his absences. On May 9, 2018 Claimant was terminated from employment. Ms. F[Redacted] explained that Claimant was terminated for violating Employer's policy by failing to call in or show up for work on multiple occasions.

9. On May 11, 2018 Claimant applied for a position with Jalisco International, Inc. On May 14, 2018 Jalisco hired Claimant as a Carpenter.

10. On August 20, 2018 Claimant filed a Worker's Claim for Compensation. He listed the date of injury as March 13, 2018. Jeffrey Y[Redacted] of the [Redacted] Law Firm entered his appearance on behalf of Claimant on August 22, 2018. Insurer's Claims Adjuster Lauren M[Redacted] scheduled a demand appointment for Claimant at Workwell for September 11, 2018.

11. On August 30, 2018 the Division of Workers' Compensation sent a letter to Respondents. The letter requested Respondents' position on Claimant's claim within 20 days.

12. Claimant attended the September 11, 2018 demand appointment at Workwell. He was evaluated by Terrance Webb, MD. Claimant reported 4/10 pain in his right lower abdomen, right hip and groin that was aggravated by "heavy lifting." Notably, on his Injury Questionnaire Claimant specified that he was working full duty and feeling "about the same." He also noted that there had not been any changes in his health since his last visit to a physician. Dr. Webb assigned the following work restrictions: no lifting, pushing or pulling over 20 pounds; no overhead work and, sitting/standing as tolerated. Claimant provided his work restrictions to his supervisor at Jalisco.

13. On September 12, 2018 Ms. M[Redacted] left a message for Mr. Y[Redacted] seeking to clarify the date of injury and date of birth listed on the Worker's Claim for Compensation in order to submit a First Report of Injury and position statement electronically without generating duplicate claims. Ms. M[Redacted] sent an email to Mr. Y[Redacted] the afternoon of September 12, 2018 asking him to correct the date of birth so that she could file a position statement. She was also taking steps to verify the date of injury.

14. In a letter dated September 17, 2018 the Executive Vice President of Jalisco wrote that Claimant was disqualified from his Carpenter position based on his work restrictions. The letter specified that the job requirements of Claimant's position included the ability to lift and carry objects in excess of 75 pounds, walk and stand for long periods of time, and lift, push, pull or carry objects while using abdominal and lower back muscles. The letter concluded that, due to Claimant's work restrictions, he was unable to safely perform the necessary duties of the job and was therefore terminated from employment.

15. On September 21, 2018 Mr. Y[Redacted] filed an Amended Worker's Claim for Compensation correcting Claimant's date of birth. The date of injury remained listed as March 13, 2018.

16. On October 10, 2018 Ms. M[Redacted] sent an email to Mr. Y[Redacted] requesting corrections to the Worker's Claim for Compensation so that she could file an electronic position statement. She confirmed that the correct date of injury was March 12, 2018. The email provided "corrections need to be made to your report so I can file" the First Report of Injury.

17. On October 24, 2018 Claimant was evaluated by Kevin Keefe, DO, at Workwell. He reported 3/10 pain primarily in his right hip, lower back and right flank. There was no tenderness in his right groin and his lower extremity examination was normal. Dr. Keefe referred Claimant for an MRI and physiatry evaluation. Claimant's work restrictions remained the same.

18. On October 26, 2018 the Director of the Division of Workers' Compensation (Director) issued an Order requesting Respondents to state a position on liability in the present claim WC 5-085-650. On October 30, 2018 Ms. M[Redacted] sent an email to Mr. Y[Redacted] with a copy to a Division representative. The email noted that "a few things need to be corrected on your end of this claim so I can state a position and avoid a new WC# being assigned." She also remarked that the correct date of injury was March 12, 2018 and the social security number listed on the Worker's Claim "might not be accurate." Ms. M[Redacted] closed the email by stating "[p]lease advise as soon as possible."

19. On November 6, 2018 Ms. M[Redacted] sent another email to Mr. Y[Redacted] with a medical report from Workwell confirming that the correct date of injury for the claim was March 12, 2018. Referencing the Director's Order, Ms. M[Redacted] closed the email by stating "[p]lease let me know if you are in agreement with the 3/12/2018 date of injury so we can resolve this and I can file our position in this case as soon as possible."

20. On November 6, 2018 Claimant underwent an MRI ordered by Dr. Keefe. On November 8, 2018 Claimant was evaluated by Eric Shoemaker, D.O. at Ascent Medical Consultants. After reviewing Claimant's MRI, Dr. Shoemaker determined that Claimant had a right lateralizing disc protrusion at L3-L4 with right L3 radiculitis. Dr. Shoemaker recommended right L3-L4 transforaminal epidural steroid injections for diagnostic and potentially therapeutic benefit to treat persistent, "significant functionally limiting pain" based on "a nerve impingement with radicular pattern pain."

21. Ms. M[Redacted] filed a First Report of Injury electronically by using the incorrect date of injury of March 13, 2018 so that she could then electronically file a Notice of Contest to satisfy the Director's Order. The First Report of Injury generated a duplicate claim number of WC 5-092-444 due to a discrepancy in Claimant's social security number.

22. On November 13, 2018 Ms. M[Redacted] received an email from Debbie T[Redacted] from the Division regarding changing the date of injury from March 13, 2018 to March 12, 2018. Ms. T[Redacted] stated that to change the date of injury "to 3/12/2018 all parties have to agree because of the Worker's Claim indicating

3/13/2018.” Ms. T[Redacted] also noted that the Division had assigned a temporary social security number because none was listed on the Worker’s Claim for Compensation. Ms. M[Redacted] immediately called Mr. Y[Redacted]’s office and left a message for his paralegal requesting a return call.

23. On December 3, 2018 Claimant returned to Workwell. He was evaluated by William Ford, ANP-C. The notes reflect that the epidural injection recommended by Dr. Shoemaker had been authorized, but Claimant did not wish to proceed with the procedure. Claimant denied lower extremity symptoms.

24. On December 4, 2018 the Division received Respondents’ Notice of Contest. On December 5, 2018 counsel for Respondents filed an Unopposed Motion to Merge Duplicate Claims for WC 5-085-650 and WC 5-092-444. The parties agreed to consolidate the duplicate claims under WC 5-085-650, change the date of injury to March 12, 2018 and modify the social security number listed for Claimant. On December 10, 2018 the Division issued an Order granting the unopposed motion.

25. Claimant returned to Workwell on December 17, 2018. He reported worsening right sided low back pain that he rated 6/10. ANP-C Ford noted that Claimant was “not reporting any radicular symptoms.” Claimant refused to undergo an epidural injection. He was referred to an orthopedic surgeon Matthew Gerlach, M.D. for an evaluation.

26. On January 14, 2019 Claimant visited Dr. Gerlach for a surgical evaluation. Dr. Gerlach reviewed the lumbar MRI and noted that the L3-4 and L4-5 small right foraminal disc protrusions were not causing significant nerve compression. He did not recommend surgery and noted that Claimant’s “small foraminal disc protrusions at L3-4 and L4-5 are of uncertain significance and very unlikely the primary source of the patient’s persistent back pain.”

27. On January 18, 2019 Claimant returned to Workwell and was evaluated by ATP Dr. Cazden. Dr. Cazden determined that Claimant had reached Maximum Medical Improvement (MMI). He assigned a 7% whole person permanent impairment rating under Table 53, IIC of the *AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised) (AMA Guides)* for an unoperated herniated disc with persistent pain. He assigned an additional 6% impairment for range of motion deficits. Combining the ratings yielded a total 12% whole person permanent impairment rating.

28. Respondents filed a Final Admission of Liability (FAL) consistent with Dr. Cazden’s MMI and impairment determinations. Claimant objected to the FAL and sought a Division Independent Medical Examination (DIME).

29. On July 15, 2019 Claimant underwent a DIME with John Hughes, M.D. Dr. Hughes diagnosed Claimant with a lumbar spine sprain/strain with persistent right L3 radiculitis as well as lower back and right groin pain. He agreed with Dr. Cazden that Claimant reached MMI on January 18, 2019. Dr. Hughes assigned a 7% whole person permanent impairment rating under Table 53 II(c) for a specific disorder of the lumbar

spine. He added an additional 8% for range of motion deficits. Dr. Hughes remarked that Claimant's MRI finding of a disk protrusion at L3-4 "is probably an injury related finding of at least 'moderate' severity."

30. Dr. Hughes also assigned a 1% impairment rating for "right L3 radiculopathy" based on Tables 10 and 49 of the *AMA Guides*. Dr. Hughes specifically noted that Claimant exhibited symptoms consistent with an L3 radiculopathy. He commented that MRI findings were consistent with the radicular pathology and Claimant was offered an epidural steroid injection. Dr. Hughes remarked that "Dr. Cazden did not assign impairment for right L3 radiculopathy but I do feel there is an indication to make such an impairment assignment." Table 10 contains the grading scheme for pain and loss of sensation resulting from peripheral nervous system disorders. Dr. Hughes determined that Claimant's sensory loss qualified as 40% grade, which is described as "Decreased sensation with or without pain, which interferes with activity." He then consulted Table 49 entitled "Unilateral Spinal Nerve Root Impairment Affecting the Lower Extremity" to assess a 5% lower extremity rating. Dr. Hughes multiplied the 5% by 40% grade to reach a 2% lower extremity rating for sensory loss based on the right L3 radiculopathy. The 2% lower extremity rating converted to a 1% whole person rating. Combining the ratings yielded a 15% whole person impairment as a result of Claimant's March 12, 2018 lower back injury.

31. On September 9, 2019 Claimant underwent an independent medical examination with F. Mark Paz, M.D. Dr. Paz considered Claimant's medical records and conducted a physical examination. He concluded that it was not medically probable that the "disc protrusion at the L3-4 level right-sided, and the annular tear at the L4-5 level, are causally related to the March 12, 2018, incident." Dr. Paz explained that the mechanism of injury was "inconsistent with the diagnosis/diagnoses of the L3-4 disc protrusion and/or the L4-5 annular tear." He reasoned that Claimant suffers from chronic lower back pain. Dr. Paz summarized that, "in the absence of a Table 53 diagnosis and no objective evidence of a lumbar spine radiculopathy, there is no impairment for range of motion of the lumbar spine or for a peripheral nerve impairment." Accordingly, he assigned a 0% permanent impairment as a result of Claimant's March 12, 2018 work injury.

32. Dr. Paz testified at the hearing in this matter. He maintained that it was not medically probable that the disc protrusion at the L3-4 level or the annular tear at the L4-5 level were causally related to the March 12, 2018 incident. He remarked that the Division of Workers' Compensation *Impairment Rating Tips (Rating Tips)* specify "diagnostic imaging is not sufficient justification to rate a nonspecific spinal complaint" and "the existence of these anatomic findings cannot be considered pathologic unless there are clear physiologic ties and correlation with clinical findings in an individual patient." Dr. Paz agreed with orthopedic surgeon Dr. Gerlach that Claimant's pain generator is unlikely related to the MRI findings at the L3-4/L4-5 levels.

33. Dr. Paz detailed that radiculopathy at the level of Claimant's right groin symptoms would potentially be related to an anatomic MRI finding at T12-L1. He remarked that Claimant's MRI identified a disc protrusion at the L3 level with right-sided

impingement of the foramen or where the L4 nerve exits. Dr. Paz noted that the dermatomal distribution of L4 is over the outside aspect of the thigh, radiating towards the knee, across the knee and down the leg. Claimant's right groin pain was inconsistent with the distribution of the L4 nerve root and thus the MRI findings at L3-4 were not related to his right groin complaints.

34. Ms. M[Redacted] testified at the hearing in this matter. She explained that filing a First Report of Injury is a prerequisite to taking a position on liability. Claimant's injury had been handled as a medical only claim and Respondents' had been authorizing treatment. Ms. M[Redacted] recalled that she received an error message from the electronic filing vendor when trying to submit the First Report of Injury. She then contacted the Division to determine the reasons for the rejection and determined there was a difference in the dates of injury. Ms. M[Redacted] then relied on the Division's advice to correct the date of injury so she could electronically file a First Report of Injury. She ultimately accomplished the filing when the parties agreed on the date of injury and merged duplicate claims. The Division approved the merger in an Order issued December 10, 2018.

35. Respondents have failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Hughes that Claimant suffered a 15% whole person impairment rating as a result of his March 12, 2018 lower back injury. The record reveals that Dr. Hughes correctly applied the *AMA Guides* and properly assigned Claimant a 15% whole person impairment rating. Initially, Dr. Hughes diagnosed Claimant with a lumbar spine sprain/strain with persistent right L3 radiculitis as well as lower back and right groin pain. He agreed with Dr. Cazden that Claimant reached MMI on January 18, 2019. Dr. Hughes assigned Claimant a 7% whole person permanent impairment rating under Table 53 II(c) for a specific disorder of the lumbar spine and an additional 8% for range of motion deficits. He remarked that Claimant's MRI findings of a disk protrusion at L3-4 "is probably an injury related finding of at least 'moderate' severity." Dr. Hughes also assigned a 1% impairment rating for "right L3 radiculopathy" to arrive at a combined 15% whole person rating. Similarly, Dr. Shoemaker determined that Claimant had a right lateralizing disc protrusion at L3-L4 with right L3 radiculitis. He recommended right L3-L4 transforaminal epidural steroid injections for diagnostic and potentially therapeutic benefit to treat persistent, "significant functionally limiting pain" based on "a nerve impingement with radicular pattern pain." Finally, ATP Dr. Cazden also assigned a 7% whole person permanent impairment rating under Table 53, IIC of the *AMA Guides* for an unoperated herniated disc with persistent pain. He assigned an additional 6% impairment for range of motion deficits.

36. In contrast, Dr. Paz concluded that it was not medically probable that the "disc protrusion at the L3-4 level right-sided, and the annular tear at the L4-5 level, are causally related to the March 12, 2018, incident." Dr. Paz explained that the mechanism of injury was "inconsistent with the diagnosis/diagnoses of the L3-4 disc protrusion and/or the L4-5 annular tear." He reasoned that Claimant suffers from chronic lower back pain. Accordingly, he assigned a 0% permanent impairment as a result of Claimant's March 12, 2018 work injury. However, despite the determination of Dr. Paz, the record and persuasive medical opinions reflect that Claimant suffered a specific

disorder of the lumbar spine as a result of his March 12, 2019 work accident. While Dr. Paz testified that a 0% permanency rating is appropriate, his difference of opinion is insufficient to overcome Dr. Hughes' decision to assign a Table 53 rating. Based on Dr. Hughes' range of motion measurements, Claimant is also entitled to receive an impairment rating for his range of motion deficits.

37. Respondents specifically contend that Dr. Hughes' 1% impairment rating for L3 radiculitis was clearly erroneous. Dr. Hughes assigned the 1% impairment rating for "right L3 radiculopathy" based on Tables 10 and 49 of the *AMA Guides*. He noted that Claimant exhibited symptoms consistent with an L3 radiculopathy. He commented that MRI findings were consistent with the radicular pathology and Claimant was offered an epidural steroid injection. Dr. Hughes remarked that "Dr. Cazden did not assign impairment for right L3 radiculopathy but I do feel there is an indication to make such an impairment assignment." Table 10 contains the grading scheme for pain and loss of sensation resulting from peripheral nervous system disorders. Dr. Hughes determined that Claimant's sensory loss qualified as 40% grade, which is described as "Decreased sensation with or without pain, which interferes with activity." He then consulted Table 49 entitled "Unilateral Spinal Nerve Root Impairment Affecting the Lower Extremity," to assess a 5% lower extremity rating. Dr. Hughes multiplied the 5% by 40% grade to reach a 2% lower extremity rating for sensory loss based on the right L3 radiculopathy. The 2% lower extremity rating converted to a 1% whole person impairment.

38. Relying on an orthopedic surgery evaluation by Dr. Gerlach, treatment notes from Workwell and Dr. Paz's expert testimony, Respondents assert that Claimant's MRI findings cannot be causally related to his right groin pain or other lower extremity symptoms. Dr. Paz specifically testified that the dermatomal distribution of the L4 level does not include the right groin area and the disc protrusion at L3-4 was unlikely the source of pain. Moreover, Dr. Gerlach did not recommend surgery because Claimant's "small foraminal disc protrusions at L3-4 and L4-5 are of uncertain significance and very unlikely the primary source of the patient's persistent back pain." Despite Respondents' contentions, the differences in medical opinions with Dr. Hughes are insufficient to overcome his 1% whole person impairment rating for right L3 radiculopathy. Dr. Hughes reasoned that Claimant's symptoms and MRI findings were consistent with L3 radicular pathology.

39. The record reflects that Dr. Hughes correctly applied the *AMA Guides* and did not erroneously assign Claimant a 15% whole person impairment rating as a result of his industrial injury. On March 12, 2018 Claimant suffered a lumbar spine sprain/strain with persistent right L3 radiculitis as well as lower back and right groin pain. Respondents have not produced unmistakable evidence free from serious or substantial doubt that Dr. Hughes' impairment determination was incorrect. Accordingly, Claimant suffered a 15% whole person impairment rating as a result of his March 12, 2018 industrial injury.

40. Claimant has failed to establish that it is more probably true than not that he is entitled to receive TPD benefits for the period March 13, 2018 through May 9, 2018. The record reveals that any reduction in Claimant's earnings while working for

Employer after his injury cannot be attributed to his industrial injury. Employer accommodated Claimant's work restrictions by providing light duty work in the yard. However, Claimant failed to report to work for a variety of reasons. Specifically, from March 19, 2018 through March 22, 2018 Claimant did not present to work or respond to phone calls from Ms. F[Redacted]. On March 22, 2018 Claimant called Employer "to say he had been in jail and needed to go pickup his vehicle." Claimant reported to work the following day at 7:00 a.m. He also took a planned vacation from March 28, 2018 until April 2, 2018. Claimant then called Employer at 9:00 a.m. on April 3, 2018 to report he would be at work after running an errand. Claimant has thus failed to demonstrate that the difference between his AWW at the time of his injury and his earnings during the continuance of temporary partial disability was caused by his March 12, 2018 work injury. Accordingly, Claimant's request for TPD benefits is denied and dismissed.

41. Claimant has failed to demonstrate that it is more probably true than not that he is entitled to receive TTD benefits for the period September 17, 2018 through January 18, 2019. The persuasive evidence demonstrates that Claimant was responsible for his termination from employment with Employer on May 9, 2018. Moreover, Claimant did not suffer a worsening of condition subsequent to his termination that caused a wage loss.

42. Initially, Claimant was responsible for his termination from Employer because he repeatedly failed to show up or call in to work. Claimant failed to report to work from March 19, 2018 through March 22, 2018 and did not respond to phone calls from Ms. F[Redacted]. Claimant acknowledged that he was required to notify a supervisor if he was going to be late or miss a shift. He specifically testified that a supervisor told him "Don't miss work anymore because they will fire you." Claimant's supervisor Dan S[Redacted] completed a Non-Compliance/Disciplinary Action form that specified Employer had not heard from Claimant during the week. The form noted that Claimant called Employer on March 22, 2020 "to say he had been in jail and needed to go pickup his vehicle." Claimant reported for work the following day at 7:00 a.m. On April 3, 2018 Mr. S[Redacted] completed another Non-Compliance/Disciplinary Action form. The form specified that Claimant was supposed to show up for work on April 3, 2018 following a vacation from March 28, 2018 until April 2, 2018. Claimant called Employer at 9:00 a.m. on April 3, 2018 to let Ms. F[Redacted] know he would be at work after running an errand. On Monday May 7, 2018 Claimant again did not show up or call in to work. Claimant testified that pain caused his absence. On May 9, 2018 Claimant was terminated from employment. Ms. F[Redacted] explained that Claimant was terminated based on the violation of Employer's policy for failing to call in or show up for work on multiple occasions.

43. Claimant willfully violated Employer's company policy when he repeatedly failed to notify a supervisor that he would not be coming in or arrive late to work. Claimant acknowledged the obligation to contact Employer if he was going to be late or not come in at all, and recognized that if he failed to show up for work he would be fired. Ms. F[Redacted]'s persuasive testimony and the employment records reveal that Claimant was warned multiple times about no-call/no-show violations. Nevertheless, Claimant failed to call-in or appear for shifts for non-injury-related reasons on at least

three occasions following the March 12, 2018 injury and was ultimately terminated. The record reflects that Claimant was thus responsible for his termination. He precipitated the employment termination by a volitional act that he would reasonably expect to cause the loss of employment. He is therefore precluded from receiving TTD benefits.

44. Claimant contends that, even if he was responsible for his termination of employment with Employer, he is entitled to receive TTD benefits based on a worsening of condition. At the time of termination from Employer he had a restriction of no lifting over 40 pounds. After returning to Workwell on September 11, 2018 Claimant received the following work restrictions: no lifting, pushing or pulling over 20 pounds; no overhead work and, sitting/standing as tolerated.

45. Despite Claimant's assertion, the record reveals that Claimant did not suffer a worsening of condition subsequent to his termination from employment with Employer that caused a wage loss. A subsequent increase in work restrictions is not per se evidence of a worsening condition. Initially, Claimant did not return for medical treatment following his termination from Employer until Ms. M[Redacted] scheduled a demand appointment on his behalf for September 11, 2018. On his September 11, 2018 Injury Questionnaire when he visited Dr. Webb, Claimant specified that he was working full duty and feeling "about the same." He also noted that there had not been any changes in his health since his last visit to a physician. Claimant was terminated by Jalisco on September 17, 2018 because of his work restrictions. The termination letter specified that the job requirements of Claimant's position included the ability to lift and carry objects in excess of 75 pounds, walk and stand for long periods of time, and the ability to lift, push, pull or carry objects while using abdominal and lower back muscles.

46. Although Claimant was terminated from Jalisco based on his work restrictions, he has failed to demonstrate that he suffered a wage loss as a result of a worsening of condition. Claimant earned wages as a Carpenter for Jalisco from May 14, 2018 until he was terminated on September 17, 2018. While the hours Claimant worked for Jalisco varied by week, Claimant demonstrated the ability to work significant overtime sporadically throughout the summer. Based on the objective evidence presented in the form of his wages from Jalisco, Claimant's earnings were not negatively affected by any physical or functional inability to work. Moreover, Claimant did not seek medical treatment during the period. It is speculative to connect Claimant's increased work restrictions and loss of wages from Jalisco to a worsening of condition. Accordingly, Claimant's request for TTD benefits is denied and dismissed.

47. Claimant has failed to establish that it is more probably true than not that he is entitled to recover penalties for Respondents' failure to admit or deny liability as required by §8-43-203(2)(a), C.R.S. He has also failed to demonstrate that he is entitled to recover penalties for Respondents' failure to comply with an October 26, 2018 Order issued by the Director of the Division of Workers' Compensation. Initially, Insurer did not file a First Report of Injury within 20 days after it had knowledge of information that would require the employer to file a First Report of Injury with the DOWC under §8-43-101, C.R.S. Moreover, Respondents violated the Director's October 26, 2018 Order by failing to file a position statement within 15 days. Nevertheless, Respondents actions

constituting the violations were not objectively unreasonable because they were predicated on a rational argument based in law or fact.

48. Ms. M[Redacted] testified at the hearing in this matter. She explained that filing a First Report of Injury is a prerequisite to taking a position on liability. Claimant's injury had been handled as a medical only claim and Respondents' had been authorizing treatment. Ms. M[Redacted] recalled that she received an error message from the electronic filing vendor when trying to submit the First Report of Injury. She then contacted the Division to determine the reasons for the rejection and determined there was a difference in the dates of injury. Ms. M[Redacted] then relied on the Division's advice to correct the date of injury so that she could electronically file a First Report of Injury. She ultimately accomplished the filing when the parties agreed on the date of injury and merged duplicate claims. The Division approved the merger in an Order issued December 10, 2018.

49. The record reflects that Respondents did not ignore or refuse to comply with the Director's Order. Rather, Ms. M[Redacted] followed up repeatedly both with Mr. Y[Redacted] and representatives from the Division in order to correct the date of injury and social security number in the Division's records so she could file a First Report of Injury without generating a duplicate claim in order to file a Notice of Contest. Despite her attempts, Ms. M[Redacted] eventually filed a First Report of Injury electronically by using the incorrect date of injury of March 13, 2018 so that she could then electronically file a Notice of Contest to satisfy the Director's Order. The First Report of Injury generated a duplicate claim number of WC 5-092-444 due to a discrepancy in Claimant's social security number. On November 13, 2018 Ms. M[Redacted] received an email from Ms. T[Redacted] from the Division regarding changing the date of injury from March 13, 2018 to March 12, 2018. Ms. T[Redacted] stated that to change the date of injury "to 3/12/2018 all parties have to agree because of the Worker's Claim indicating 3/13/2018." She also noted that the Division had assigned a temporary social security number because none was listed on the Worker's Claim for Compensation. On December 4, 2018 the Division received Respondents' Notice of Contest. On December 5, 2018 counsel for Respondents filed an Unopposed Motion to Merge Duplicate Claims for WC 5-085-650 and WC 5-092-444. The parties agreed to consolidate the duplicate claims under WC 5-085-650, change the date of injury to March 12, 2018 and modify the social security number listed for Claimant. The record reveals that Ms. M[Redacted]'s actions on Respondents' behalf were reasonable under the circumstances because she took rational steps to correct the confusion in Claimant's social security number and date of injury. Accordingly, Claimant's request for penalties is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S.

A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. See *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *CJI*, Civil 3:16 (2007).

Overcoming the DIME

4. In ascertaining a DIME physician's opinion, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office*, 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician's determination regarding MMI and permanent impairment consists of his initial report and any subsequent opinions. *In Re Dazzio*, W.C. No. 4-660-149 (ICAO, June 30, 2008); see *Andrade v. Industrial Claim Appeals Office*, 121 P.3d 328 (Colo. App. 2005).

5. A DIME physician's opinions concerning MMI and impairment carry presumptive weight pursuant to §8-42-107(8)(b)(III), C.R.S.; see *Yeutter v. Industrial Claim Appeals Office*, No. 18CA0498 (Apr. 11, 2019) 2019 COA 53. The statute provides that "[t]he finding regarding [MMI] and permanent medical impairment of an independent medical examiner in a dispute arising under subparagraph (II) of this paragraph (b) may be overcome only by clear and convincing evidence." *Id.* Subparagraph (II) is limited to parties' disputes over "a determination by an authorized treating physician on the question of whether the injured worker has or has not reached [MMI]." §8-42-107(8)(b)(II). "Nowhere in the statute is a DIME's opinion as to the cause of a claimant's injury similarly imbued with presumptive weight." See *Yeutter*, 2019 COA 53 ¶ 18. Accordingly, a DIME physician's opinion carries presumptive weight only with respect to MMI and impairment. *Id.* at ¶ 21.

6. "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable

and free from serious or substantial doubt.” *Adams v. Sealy, Inc.*, W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.*, W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); see *Shultz v. Anheuser Busch, Inc.*, W.C. No. 4-380-560 (ICAO, Nov. 17, 2000).

7. A DIME physician is required to rate a claimant’s impairment in accordance with the *AMA Guides*. §8-42-107(8)(c), C.R.S.; *Wilson v. Industrial Claim Appeals Office*, 81 P.3d 1117, 1118 (Colo. App. 2003). However, deviations from the *AMA Guides* do not mandate that the DIME physician’s impairment rating was incorrect. *In Re Gurrola*, W.C. No. 4-631-447 (ICAO, Nov. 13, 2006). Instead, the ALJ may consider a technical deviation from the *AMA Guides* in determining the weight to be accorded the DIME physician’s findings. *Id.* Whether the DIME physician properly applied the *AMA Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In Re Goffinett*, W.C. No. 4-677-750 (ICAO, Apr. 16, 2008).

8. If a party has carried the initial burden of overcoming the DIME physician’s impairment rating by clear and convincing evidence, the ALJ’s determination of the correct rating is then a matter of fact based upon the lesser burden of a preponderance of the evidence. See *Deleon v. Whole Foods Market, Inc.*, W.C. No. 4-600-47 (ICAO, Nov. 16, 2006). The ALJ is not required to dissect the overall impairment rating into its numerous component parts and determine whether each part has been overcome by clear and convincing evidence. *Id.* When the ALJ determines that the DIME physician’s rating has been overcome, the ALJ may independently determine the correct rating. *Lungu v. North Residence Inn*, W.C. No. 4-561-848 (ICAO, Mar. 19, 2004); *McNulty v. Eastman Kodak Co.*, W.C. No. 4-432-104 (ICAO, Sept. 16, 2002).

9. As found, Respondents have failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Hughes that Claimant suffered a 15% whole person impairment rating as a result of his March 12, 2018 lower back injury. The record reveals that Dr. Hughes correctly applied the *AMA Guides* and properly assigned Claimant a 15% whole person impairment rating. Initially, Dr. Hughes diagnosed Claimant with a lumbar spine sprain/strain with persistent right L3 radiculitis as well as lower back and right groin pain. He agreed with Dr. Cazden that Claimant reached MMI on January 18, 2019. Dr. Hughes assigned Claimant a 7% whole person permanent impairment rating under Table 53 II(c) for a specific disorder of the lumbar spine and an additional 8% for range of motion deficits. He remarked that Claimant’s MRI findings of a disk protrusion at L3-4 “is probably an injury related finding of at least ‘moderate’ severity.” Dr. Hughes also assigned a 1% impairment rating for “right L3 radiculopathy” to arrive at a combined 15% whole person rating. Similarly, Dr. Shoemaker determined that Claimant had a right lateralizing disc protrusion at L3-L4 with right L3 radiculitis. He recommended right L3-L4 transforaminal epidural steroid injections for diagnostic and potentially therapeutic benefit to treat persistent, “significant functionally limiting pain” based on “a nerve impingement with radicular pattern pain.” Finally, ATP Dr. Cazden also assigned a 7% whole person permanent impairment rating under Table 53, IIC of the *AMA Guides* for an unoperated herniated disc with persistent pain. He assigned an additional 6% impairment for range of motion deficits.

10. As found, in contrast, Dr. Paz concluded that it was not medically probable that the “disc protrusion at the L3-4 level right-sided, and the annular tear at the L4-5 level, are causally related to the March 12, 2018, incident.” Dr. Paz explained that the mechanism of injury was “inconsistent with the diagnosis/diagnoses of the L3-4 disc protrusion and/or the L4-5 annular tear.” He reasoned that Claimant suffers from chronic lower back pain. Accordingly, he assigned a 0% permanent impairment as a result of Claimant’s March 12, 2018 work injury. However, despite the determination of Dr. Paz, the record and persuasive medical opinions reflect that Claimant suffered a specific disorder of the lumbar spine as a result of his March 12, 2019 work accident. While Dr. Paz testified that a 0% permanency rating is appropriate, his difference of opinion is insufficient to overcome Dr. Hughes’ decision to assign a Table 53 rating. Based on Dr. Hughes’ range of motion measurements, Claimant is also entitled to receive an impairment rating for his range of motion deficits.

11. As found, Respondents specifically contend that Dr. Hughes’ 1% impairment rating for L3 radiculitis was clearly erroneous. Dr. Hughes assigned the 1% impairment rating for “right L3 radiculopathy” based on Tables 10 and 49 of the *AMA Guides*. He noted that Claimant exhibited symptoms consistent with an L3 radiculopathy. He commented that MRI findings were consistent with the radicular pathology and Claimant was offered an epidural steroid injection. Dr. Hughes remarked that “Dr. Cazden did not assign impairment for right L3 radiculopathy but I do feel there is an indication to make such an impairment assignment.” Table 10 contains the grading scheme for pain and loss of sensation resulting from peripheral nervous system disorders. Dr. Hughes determined that Claimant’s sensory loss qualified as 40% grade, which is described as “Decreased sensation with or without pain, which interferes with activity.” He then consulted Table 49 entitled “Unilateral Spinal Nerve Root Impairment Affecting the Lower Extremity,” to assess a 5% lower extremity rating. Dr. Hughes multiplied the 5% by 40% grade to reach a 2% lower extremity rating for sensory loss based on the right L3 radiculopathy. The 2% lower extremity rating converted to a 1% whole person impairment.

12. As found, relying on an orthopedic surgery evaluation by Dr. Gerlach, treatment notes from Workwell and Dr. Paz’s expert testimony, Respondents assert that Claimant’s MRI findings cannot be causally related to his right groin pain or other lower extremity symptoms. Dr. Paz specifically testified that the dermatomal distribution of the L4 level does not include the right groin area and the disc protrusion at L3-4 was unlikely the source of pain. Moreover, Dr. Gerlach did not recommend surgery because Claimant’s “small foraminal disc protrusions at L3-4 and L4-5 are of uncertain significance and very unlikely the primary source of the patient’s persistent back pain.” Despite Respondents’ contentions, the differences in medical opinions with Dr. Hughes are insufficient to overcome his 1% whole person impairment rating for right L3 radiculopathy. Dr. Hughes reasoned that Claimant’s symptoms and MRI findings were consistent with L3 radicular pathology.

13. As found, the record reflects that Dr. Hughes correctly applied the *AMA Guides* and did not erroneously assign Claimant a 15% whole person impairment rating as a result of his industrial injury. On March 12, 2018 Claimant suffered a lumbar spine

sprain/strain with persistent right L3 radiculitis as well as lower back and right groin pain. Respondents have not produced unmistakable evidence free from serious or substantial doubt that Dr. Hughes' impairment determination was incorrect. Accordingly, Claimant suffered a 15% whole person impairment rating as a result of his March 12, 2018 industrial injury.

Temporary Partial Disability Benefits

14. Section 8-42-106(1), C.R.S., provides for an award of Temporary Partial Disability (TPD) benefits based on the difference between the claimant's Average Weekly Wage (AWW) at the time of injury and the earnings during the continuance of the temporary partial disability. In order to receive TPD benefits the claimant must establish that the injury has caused the disability and consequent partial wage loss. Section 8-42-103(1), C.R.S.; *Safeway Stores, Inc. v. Husson*, 732 P.2d 1244 (Colo. App. 1986) (temporary partial compensation benefits are designed as a partial substitute for lost wages or impaired earning capacity arising from a compensable injury). A claimant suffers from an impairment of earning capacity when he has a complete inability to work or there are restrictions that impair his ability to effectively and properly perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997).

15. As found, Claimant has failed to establish by a preponderance of the evidence that he is entitled to receive TPD benefits for the period March 13, 2018 through May 9, 2018. The record reveals that any reduction in Claimant's earnings while working for Employer after his injury cannot be attributed to his industrial injury. Employer accommodated Claimant's work restrictions by providing light duty work in the yard. However, Claimant failed to report to work for a variety of reasons. Specifically, from March 19, 2018 through March 22, 2018 Claimant did not present to work or respond to phone calls from Ms. F[Redacted]. On March 22, 2018 Claimant called Employer "to say he had been in jail and needed to go pickup his vehicle." Claimant reported to work the following day at 7:00 a.m. He also took a planned vacation from March 28, 2018 until April 2, 2018. Claimant then called Employer at 9:00 a.m. on April 3, 2018 to report he would be at work after running an errand. Claimant has thus failed to demonstrate that the difference between his AWW at the time of his injury and his earnings during the continuance of temporary partial disability was caused by his March 12, 2018 work injury. Accordingly, Claimant's request for TPD benefits is denied and dismissed.

Temporary Total Disability Benefits

16. To prove entitlement to Temporary Total Disability (TTD) benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. See Sections 8-42-(1)(g), 8-42-105(4); *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals*

Office, 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term “disability” connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (citing *Ricks v. Industrial Claim Appeals Office*, P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic*, 952 P.2d 831, 833 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

17. Under the termination statutes in §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. a claimant who is responsible for his or her termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and wage loss. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1131 (Colo. App. 2008). The termination statutes provide that, in cases where an employee is responsible for her termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, W.C. No. 4-631-681 (ICAO, Apr. 24, 2006). A claimant does not act “volitionally” or exercise control over the circumstances leading to her termination if the effects of the injury prevent her from performing her assigned duties and cause the termination. *In re of Eskridge*, W.C. No. 4-651-260 (ICAO, Apr. 21, 2006). Therefore, to establish that Claimant was responsible for her termination, respondents must demonstrate by a preponderance of the evidence that Claimant committed a volitional act, or exercised some control over her termination under the totality of the circumstances. See *Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994). An employee is thus “responsible” if she precipitated the employment termination by a volitional act that she would reasonably expect to cause the loss of employment. *Patchek v. Dep't of Public Safety*, W.C. No. 4-432-301 (ICAP, Sept. 27, 2001).

18. Section 8-42-105(4) does not bar TTD wage loss claims after a termination for which the employee was responsible when the worsening of a work-related injury incurred during that employment causes a subsequent wage loss. *Anderson v. Longmont Toyota, Inc.*, 102 P.3d 323, 326 (Colo. 2004). This is limited to cases in which the “claimant's condition worsens after the termination of employment and prevents or diminishes the claimant's ability to work,” rather than where the wage loss is the result of the voluntary or for-cause termination of the regular or modified employment. *Id.* at 326; *Grisbaum v. Indus. Claim Appeals Office*, 109 P.3d 1054, 1056

(Colo. App. 2005). A subsequent increase in work restrictions is not per se evidence of a worsening condition, and whether a worsened condition caused the claimant's wage loss is a factual question for the ALJ. See *Apex Transportation, Inc. v. Industrial Claim Appeals Office*, 321 P.3d 630, 632 (Colo.App.2014); *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186, 191 (Colo.App.2002). An ALJ may consider several factors in determining that a worsened condition, and not an intervening termination of employment, caused the claimant's wage loss. *Apex Transportation, Inc.*, 321 P.3d at 633.

19. As found, Claimant has failed to demonstrate by a preponderance of the evidence that he is entitled to receive TTD benefits for the period September 17, 2018 through January 18, 2019. The persuasive evidence demonstrates that Claimant was responsible for his termination from employment with Employer on May 9, 2018. Moreover, Claimant did not suffer a worsening of condition subsequent to his termination that caused a wage loss.

20. As found, initially, Claimant was responsible for his termination from Employer because he repeatedly failed to show up or call in to work. Claimant failed to report to work from March 19, 2018 through March 22, 2018 and did not respond to phone calls from Ms. F[Redacted]. Claimant acknowledged that he was required to notify a supervisor if he was going to be late or miss a shift. He specifically testified that a supervisor told him "Don't miss work anymore because they will fire you." Claimant's supervisor Dan S[Redacted] completed a Non-Compliance/Disciplinary Action form that specified Employer had not heard from Claimant during the week. The form noted that Claimant called Employer on March 22, 2020 "to say he had been in jail and needed to go pickup his vehicle." Claimant reported for work the following day at 7:00 a.m. On April 3, 2018 Mr. S[Redacted] completed another Non-Compliance/Disciplinary Action form. The form specified that Claimant was supposed to show up for work on April 3, 2018 following a vacation from March 28, 2018 until April 2, 2018. Claimant called Employer at 9:00 a.m. on April 3, 2018 to let Ms. F[Redacted] know he would be at work after running an errand. On Monday May 7, 2018 Claimant again did not show up or call in to work. Claimant testified that pain caused his absence. On May 9, 2018 Claimant was terminated from employment. Ms. F[Redacted] explained that Claimant was terminated based on the violation of Employer's policy for failing to call in or show up for work on multiple occasions.

21. As found, Claimant willfully violated Employer's company policy when he repeatedly failed to notify a supervisor that he would not be coming in or arrive late to work. Claimant acknowledged the obligation to contact Employer if he was going to be late or not come in at all, and recognized that if he failed to show up for work he would be fired. Ms. F[Redacted]'s persuasive testimony and the employment records reveal that Claimant was warned multiple times about no-call/no-show violations. Nevertheless, Claimant failed to call-in or appear for shifts for non-injury-related reasons on at least three occasions following the March 12, 2018 injury and was ultimately terminated. The record reflects that Claimant was thus responsible for his termination. He precipitated the employment termination by a volitional act that he would reasonably

expect to cause the loss of employment. He is therefore precluded from receiving TTD benefits.

22. As found, Claimant contends that, even if he was responsible for his termination of employment with Employer, he is entitled to receive TTD benefits based on a worsening of condition. At the time of termination from Employer he had a restriction of no lifting over 40 pounds. After returning to Workwell on September 11, 2018 Claimant received the following work restrictions: no lifting, pushing or pulling over 20 pounds; no overhead work and, sitting/standing as tolerated.

23. As found, despite Claimant's assertion, the record reveals that Claimant did not suffer a worsening of condition subsequent to his termination from employment with Employer that caused a wage loss. A subsequent increase in work restrictions is not per se evidence of a worsening condition. Initially, Claimant did not return for medical treatment following his termination from Employer until Ms. M[Redacted] scheduled a demand appointment on his behalf for September 11, 2018. On his September 11, 2018 Injury Questionnaire when he visited Dr. Webb, Claimant specified that he was working full duty and feeling "about the same." He also noted that there had not been any changes in his health since his last visit to a physician. Claimant was terminated by Jalisco on September 17, 2018 because of his work restrictions. The termination letter specified that the job requirements of Claimant's position included the ability to lift and carry objects in excess of 75 pounds, walk and stand for long periods of time, and the ability to lift, push, pull or carry objects while using abdominal and lower back muscles.

24. As found, although Claimant was terminated from Jalisco based on his work restrictions, he has failed to demonstrate that he suffered a wage loss as a result of a worsening of condition. Claimant earned wages as a Carpenter for Jalisco from May 14, 2018 until he was terminated on September 17, 2018. While the hours Claimant worked for Jalisco varied by week, Claimant demonstrated the ability to work significant overtime sporadically throughout the summer. Based on the objective evidence presented in the form of his wages from Jalisco, Claimant's earnings were not negatively affected by any physical or functional inability to work. Moreover, Claimant did not seek medical treatment during the period. It is speculative to connect Claimant's increased work restrictions and loss of wages from Jalisco to a worsening of condition. Accordingly, Claimant's request for TTD benefits is denied and dismissed.

Penalties

25. Whether statutory penalties may be imposed under § 8-43-304(1) C.R.S. involves a two-step analysis. The statute provides for the imposition of penalties of up to \$1000 per day where the insurer "violates any provision of article 40 to 47 of [title 8], or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or the panel, for which no penalty has been specifically provided, or fails, neglects or refuses to obey any lawful order made by the director or panel..." Thus, the ALJ must first determine whether the insurer's conduct constitutes a violation of the Act, a rule, or an order. Second, the ALJ must

determine whether any action or inaction constituting the violation was objectively unreasonable. The reasonableness of the insurer's action depends on whether it was based on a rational argument based in law or fact. *Jiminez v. Industrial Claim Appeals Office*, 107 P.3d 965 (Colo. App. 2003); *Gustafson v. Ampex Corp.*, W.C. No. 4-187-261 (ICAO, Aug. 2, 2006). There is no requirement that the insurer know that its actions were unreasonable. *Pueblo School District No. 70 v. Toth*, 924 P.2d 1094 (Colo. App. 1996).

26. The question of whether the insurer's conduct was objectively reasonable ordinarily presents a question of fact for the ALJ. *Pioneers Hospital v. Industrial Claim Appeals Office*, 114 P.3d 97 (Colo. App. 2005); see also *Pant Connection Plus v. Industrial Claim Appeals Office*, 240 P.3d 429 (Colo. App. 2010). A party establishes a prima facie showing of unreasonable conduct by proving that an insurer violated a rule of procedure. *Pioneers Hospital v. Industrial Claim Appeals Office*, supra. If the claimant makes such a prima facie showing the burden of persuasion shifts to the respondents to show their conduct was reasonable under the circumstances. *Pioneers Hospital v. Industrial Claim Appeals Office*, supra, *Human Resource Co. v. Industrial Claim Appeals Office*, 984 P.2d 1194 (Colo. App. 1999).

27. Section 8-43-203(1)(a), C.R.S. provides:

The employer or, if insured, the employer's insurance carrier shall notify in writing the division and the injured employee . . . within twenty days after a report is, or should have been filed with the division pursuant to section 8-43-101, whether liability is admitted or contested; except that, for purpose of this section, any knowledge on the part of the employer, if insured, is not knowledge on the part of the insurance carrier.

28. Section 8-43-203(2)(a), C.R.S. specifies that if such notice is not filed, "the employer, or if insured, the employer's insurance carrier, may become liable to the claimant, if successful on the claim for compensation, for up to one day's compensation for each failure to so notify." Because the claimant seeks the imposition of a penalty for failure timely to admit or deny liability, the claimant bears the burden of proof to establish the circumstances justifying the imposition of the penalty. See *Pioneer Hospital v. Industrial Claim Appeals Office*, 114 P.3d 97 (Colo. App. 2005) (claimant seeking imposition of penalty under § 8-43-304(1) bore burden of proof to establish circumstances justifying a penalty).

29. Under the language of § 8-43-203(1)(a), knowledge of an insured may not be imputed to the insurer. See *State Compensation Insurance Fund v. Wilson*, 736 P.2d 33 (Colo. 1987); *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Thus, an insurer is not responsible for admitting or denying liability until 20 days after it has knowledge of information that would require the employer to file a first report of injury with the DOWC under §8-43-101, C.R.S. Those circumstances include injuries that result in "lost time from work for the injured employee in excess of three shifts or

calendar days.” The mere knowledge that the claimant sustained an injury and had restrictions resulting in a prescription for modified duty does not establish that the claimant missed work as a result of the injury or the number of days missed. See *Ralston Purina-Keystone v. Lowry*, 821 P.2d 910 (Colo. App. 1991); *Atencio v. Holiday Retirement Corp.*, W.C. No. 4-532-443 (ICAP Nov. 15, 2002).

30. Section 8-43-304(1) authorizes the imposition of penalties of not more than \$1000 per day if an employee or person “fails, neglects, or refuses to obey any lawful order made by the director or panel.” A person fails or neglects to obey an order if she leaves undone that which is mandated by an order. See *Dworkin, Chambers & Williams, P.C. v. Provo*, 81 P.3d 1053 (Colo. 2003). In cases where a party fails, neglects or refuses to obey an *order* to take some action, penalties may be imposed under § 8-43-304(1), even if the Act imposes a specific violation for the underlying conduct. *Holliday v. Bestop, Inc.*, 23 P.3d 700 (Colo. 2001); *Giddings v. Industrial Claim Appeals Office*, 39 P.3d 1211 (Colo. App. 2001).

31. As found, Claimant has failed to establish by a preponderance of the evidence that he is entitled to recover penalties for Respondents’ failure to admit or deny liability as required by §8-43-203(2)(a), C.R.S. He has also failed to demonstrate that he is entitled to recover penalties for Respondents’ failure to comply with an October 26, 2018 Order issued by the Director of the Division of Workers’ Compensation. Initially, Insurer did not file a First Report of Injury within 20 days after it had knowledge of information that would require the employer to file a First Report of Injury with the DOWC under §8-43-101, C.R.S. Moreover, Respondents violated the Director’s October 26, 2018 Order by failing to file a position statement within 15 days. Nevertheless, Respondents actions constituting the violations were not objectively unreasonable because they were predicated on a rational argument based in law or fact.

32. As found, Ms. M[Redacted] testified at the hearing in this matter. She explained that filing a First Report of Injury is a prerequisite to taking a position on liability. Claimant’s injury had been handled as a medical only claim and Respondents’ had been authorizing treatment. Ms. M[Redacted] recalled that she received an error message from the electronic filing vendor when trying to submit the First Report of Injury. She then contacted the Division to determine the reasons for the rejection and determined there was a difference in the dates of injury. Ms. M[Redacted] then relied on the Division’s advice to correct the date of injury so that she could electronically file a First Report of Injury. She ultimately accomplished the filing when the parties agreed on the date of injury and merged duplicate claims. The Division approved the merger in an Order issued December 10, 2018.

33. As found, the record reflects that Respondents did not ignore or refuse to comply with the Director’s Order. Rather, Ms. M[Redacted] followed up repeatedly both with Mr. Y[Redacted] and representatives from the Division in order to correct the date of injury and social security number in the Division’s records so she could file a First Report of Injury without generating a duplicate claim in order to file a Notice of Contest. Despite her attempts, Ms. M[Redacted] eventually filed a First Report of Injury

electronically by using the incorrect date of injury of March 13, 2018 so that she could then electronically file a Notice of Contest to satisfy the Director's Order. The First Report of Injury generated a duplicate claim number of WC 5-092-444 due to a discrepancy in Claimant's social security number. On November 13, 2018 Ms. M[Redacted] received an email from Ms. T[Redacted] from the Division regarding changing the date of injury from March 13, 2018 to March 12, 2018. Ms. T[Redacted] stated that to change the date of injury "to 3/12/2018 all parties have to agree because of the Worker's Claim indicating 3/13/2018." She also noted that the Division had assigned a temporary social security number because none was listed on the Worker's Claim for Compensation. On December 4, 2018 the Division received Respondents' Notice of Contest. On December 5, 2018 counsel for Respondents filed an Unopposed Motion to Merge Duplicate Claims for WC 5-085-650 and WC 5-092-444. The parties agreed to consolidate the duplicate claims under WC 5-085-650, change the date of injury to March 12, 2018 and modify the social security number listed for Claimant. The record reveals that Ms. M[Redacted]'s actions on Respondents' behalf were reasonable under the circumstances because she took rational steps to correct the confusion in Claimant's social security number and date of injury. Accordingly, Claimant's request for penalties is denied and dismissed.

ORDER

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

1. Respondents have failed to overcome Dr. Hughes' DIME opinion. Claimant suffered a 15% whole person impairment rating as a result of his March 12, 2018 lower back injury.
2. Claimant's request for TPD benefits is denied and dismissed.
3. Claimant's request for TTD benefits is denied and dismissed.
4. Claimant's request for penalties is denied and dismissed.
5. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to*

Review, see Rule 26, OACRP. You may access a form for a petition to review at <http://www.colorado.gov/dpa/oac/forms-WC.htm>.

DATED: July 20, 2020.

DIGITAL SIGNATURE:


Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-116-275-002**

ISSUES

- Whether the claimant has demonstrated, by a preponderance of the evidence, that the respondents are subject to the Colorado Workers' Compensation Act.
- If the ALJ concludes that Colorado has jurisdiction, whether the claimant has demonstrated, by a preponderance of the evidence, that on August 13, 2019, he suffered an injury arising out of and in the course and scope of his employment with the employer.
- If the claim is found compensable, whether the claimant has demonstrated, by a preponderance of the evidence, that medical treatment he has received is reasonable, necessary and related to the August 13, 2019 injury.
- If the claim is found compensable, whether the claimant has demonstrated, by a preponderance of the evidence, that penalties should be assessed against the respondents for violation of WCRP 5-2(a) for failing to timely admit or deny the claimant's claim.
- If the ALJ finds that the respondents have violated WCRP 5-2, whether the respondents have proven, by a preponderance of the evidence, that said violation has been cured.
- If the claim is found compensable, the parties have stipulated to an average weekly wage (AWW) of \$1,611.81.
- The issue of whether the claimant is entitled to temporary total disability (TTD) benefits and for what time period, is reserved for future determination.

FINDINGS OF FACT

1. The claimant resides in Cedaredge, Colorado. The employer operates in the oil and gas industry. The employer's corporate offices are located in Texas. In February 2018, the employer offered the claimant a position performing quality control for the welding aspect of the employer's projects. The work the claimant was offered would take place in the Permian Basin. The Permian Basin is a geographical area in the western part of Texas, and into eastern New Mexico. The employer does not operate in Colorado.

2. Prior to receiving an offer of employment from the employer, the claimant was interviewed in Delta, Colorado. Thereafter, the claimant was sent an email extending an offer of employment. The claimant testified that he also received a phone call regarding the job offer. A written Offer of Employment for the position of QA/QC Quality

was extended to the claimant on February 2, 2018 by Dirk F[Redacted], Area Manager. The offer included language indicating that the offer was conditional upon the completion of a drug test, a background check, and certain paperwork.

3. On February 3, 2018, Mr. F[Redacted] emailed the claimant regarding an orientation date of February 12, 2018. In that same email, Mr. F[Redacted] invited the claimant to attend a team building event on February 10, 2018.

4. On February 6, 2018, the employer emailed the claimant “onboarding” paperwork. That paperwork included an authorization for a background check; benefit enrollment; an IRS W-4 form; direct deposit information; a confidentiality agreement; and wage deduction information. The claimant completed the onboarding paperwork on June 6, 2018 and returned it to the employer through an online portal. The claimant completed this paperwork and responded to employer emails from his home in Cedaredge, Colorado.

5. On February 12, 2018, the claimant was present at the employer’s offices in Seminole, Texas for his orientation and additional training. On that date, the claimant signed a number of documents. These documents included the employment offer; an application for employment; the employer’s company vehicle policy; and a background check and disclosure authorization.

6. Following the orientation on February 12, 2018, the claimant began performing his job duties for the employer. The claimant made arrangements to work five weeks in Texas and then return home to Colorado for one week. During his five weeks of work in Texas, the claimant stayed at an RV park in Midland, Texas. The claimant testified that on four occasions he drove his company vehicle from his trailer in Midland, Texas to his residence in Colorado, and then back to Texas. The claimant was not paid for his drive time to and from Colorado. Likewise, he was not paid for his commute from his trailer in Midland, Texas to any assigned job location or the employer’s offices.

7. The claimant testified that during the one week periods in Colorado, he would respond to work related calls, emails, and texts. The claimant would respond to these issues using both his personal phone and his company phone. Such contact would be from customers, site supervisors, and QC technicians. Responding to these individuals was not required by the employer while the claimant was at home in Colorado. The claimant was not paid for any work he performed while in Colorado. The claimant testified that he elected to perform work for the employer while at his home in Colorado because it made his life easier when he returned to Texas.

8. On August 2, 2019, the claimant left Texas to return to Colorado on his normally scheduled time off. Prior to departing, the claimant emailed Mr. F[Redacted] and stated that he was not sure if he would return to work for the employer. The claimant testified that he felt the employer had stripped him of his authority. Thereafter, the claimant and Mr. F[Redacted] spoke via telephone and the claimant agreed to return to work as scheduled.

9. On August 13, 2019, the claimant left his home in Colorado to report to work for the employer in Texas. While traveling through New Mexico on that same date, the claimant was involved in a motor vehicle accident (MVA). It is undisputed that the claimant was operating his personal vehicle at the time of the MVA.

10. The claimant testified that at the time of the MVA he had reduced his speed because there was a storm outside of Roswell, New Mexico. Another driver rear ended the claimant's vehicle at a high rate of speed. The claimant testified that as a result of the MVA, his head hit the head rest with such force that the head rest was bent.

11. The claimant testified that after the MVA his symptoms included throbbing pain at the base of his skull, pain in his neck, low back pain, and bilateral leg numbness. The claimant also testified he had concussion type symptoms that included headaches, dizziness, photophobia, loss of balance, and difficulty concentrating.

12. Following the MVA, the claimant drove himself to the emergency room at Eastern New Mexico Medical Center to obtain medical treatment. At that time, the claimant reported neck pain that radiated into his head and low back pain. The claimant was diagnosed with sprains of ligaments in the cervical spine and the lumbar spine. The claimant was prescribed hydrocodone.

13. After he received medical treatment, the claimant sent a text message to Mr. F[Redacted] regarding the MVA. In that text, the claimant stated "I will be late [sic] got in a wreck". The claimant also stated that he would be spending the night in Roswell, New Mexico.

14. Following the August 13, 2019 MVA, the claimant returned to work on August 14, 2019 and commenced performing his normal job duties. The claimant testified that he did not feel that he was 100 percent, but he continued to work. Following the August 13, 2019 MVA, the employer did not offer the claimant medical treatment and the claimant did not request medical treatment. The claimant continued working his normal job duties until the end of his five week rotation and his scheduled return to Colorado.

15. In the interim, on August 27, 2019, the claimant's attorney filed a Worker's Claim for Compensation with the Colorado Division of Workers' Compensation regarding the August 13, 2019 MVA.

16. When the claimant returned to Colorado after his five week rotation in Texas, he sought medical treatment with Brady Chiropractic. On September 23, 2019, the claimant was seen at that practice by Dr. Sean Lynch. On that date, the claimant reported headaches, concussion symptoms, pain in his neck, upper back, lower back, and hips.

17. The claimant also sought treatment with his primary care provider, Alice Marie Slaven Emond, FNP with Delta Health and Wellness Center. The claimant was seen by Ms. Slaven Elmond on September 25, 2019. At that time, Ms. Slaven Elmond diagnosed the claimant with a concussion, vision disturbance, headaches, rib pain, and post-traumatic stress disorder. Ms. Slaven Elmond ordered a computerized tomography

(CT) scan of the claimant's head, x-rays of the claimant's cervical spine, and made a referral to ophthalmology.

18. On September 25, 2019, x-rays of the claimant's cervical spine showed moderate degenerative disc and facet joint changes throughout the spine.

19. On October 2, 2019, the claimant was seen by Dr. Michael Hehmann. At that time, Dr. Hehmann noted that the claimant had a history of cervical spine injury, neck injury, and concussion. Dr. Hehmann also noted that the claimant's symptoms involved the C2-C3 level. He recommended the claimant undergo a cervical spine magnetic resonance imaging (MRI) scan.

20. On October 9, 2019, a cervical spine MRI showed moderate degenerative disc and facet joint changes throughout the spine, with varying degrees of foraminal stenosis.

21. On October 10, 2019, the claimant returned to Dr. Hehmann to discuss the MRI results. Dr. Hehmann opined that the claimant would likely need future surgery. At that time, he recommended the claimant avoid "heavy-type of work".

22. On October 11, 2019, the claimant was seen by Dr. Bjorn Irion with Western Orthopedics and Sports Medicine. At that time, Dr. Irion opined that the claimant's symptoms were consistent with a concussion. He also diagnosed lumbar back pain with radiculopathy; cervical foraminal stenosis; cervical degenerative disc disease; and vestibular malfunction. Dr. Irion recommended an MRI of the claimant's lumbar spine and physical therapy.

23. On October 25, 2019, a lumbar spine MRI showed a left paracentral disc extrusion at the L1-L2 level, and a right paracentral disc extrusion at the L2-L3 level. On November 1, 2019, the claimant returned to Dr. Irion who opined that the lumbar spine MRI findings were likely chronic.

24. On November 28, 2019, the employer completed an Employer's First Report of Injury. That form noted that the employer was notified of the claimant's MVA on August 13, 2019.

25. Allison O[Redacted], adjuster with the insurer testified at hearing. Ms. O[Redacted] testified that the insurer learned of the claimant's claim on December 2, 2019. Ms. O[Redacted] further testified that the claimant's file was transferred to her on December 3, 2019 and on December 4, 2019, the insurer's system listed Ms. O[Redacted] as the adjuster. Thereafter, the insurer filed a Notice of Contest on December 6, 2019.

26. Mr. F[Redacted] testified he did not learn that the claimant was asserting the MVA was work related until mid-December 2019.

27. On December 31, 2019, the claimant was seen by Dr. Hehmann. At that time, Dr. Hehmann referred the claimant to orthopedic specialists Dr. Gebhard and Dr.

Clifford. Dr. Hehmann opined that the claimant would benefit from epidural injections at the L1-L2 and L2-L3 levels.

28. In January 2020, Mr. F[Redacted] learned that the claimant was undergoing extensive medical treatment. As a result, Mr. F[Redacted] asked the claimant to obtain a medical release before he would be allowed to return to work.

29. On January 27, 2020, Dr. Hehmann provided the claimant with a written note that indicated that the claimant could return to work with no restrictions. The claimant provided that medical release to Mr. F[Redacted] via text message. Mr. F[Redacted] testified that although the claimant provided the requested medical release, he was not comfortable with the claimant returning to work.

30. Based upon the evidence and testimony presented at hearing, the ALJ finds that the claimant has failed to demonstrate that Colorado jurisdiction is appropriate in this case. The ALJ finds that the last act necessary to create the employment contract between the claimant and the employer occurred on February 12, 2018, when the claimant completed employment paperwork and attended orientation in Texas.

31. The ALJ finds that the work the claimant conducted at his home in Cedaredge, Colorado was insufficient to rise to the level of “substantial employment” in Colorado. The claimant was not required to perform any work while in Colorado and he was not paid for that time. The ALJ finds that the claimant made a unilateral decision when he chose to respond to calls, emails, and texts while on his days off in Colorado. Finally, the ALJ finds that any work related activity the claimant may have performed in Colorado was merely one-sixth (or less) of his total work for the employer, (as he worked five weeks in Texas and then returned to Colorado for one week). The ALJ finds that this is not “substantial” employment occurring in Colorado.

CONCLUSIONS OF LAW

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

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness’s testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias,

prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

3. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

4. The claimant is required to prove by a preponderance of the evidence that at the time of the injury that he and the employer were subject to the provisions of the Workers' Compensation Act.

5. Section 8-41-204, C.R.S. addresses injuries sustained outside of Colorado. That section states, in pertinent part:

If an employee who has been hired or is regularly employed in this state receives personal injuries in an accident . . . arising out of and in the course and scope of such employment outside of this state, the employee . . . shall be entitled to compensation according to the law of this state. This provision shall apply only to those injuries received by the employee within six months after leaving this state...

6. The six-month limitation period identified in Section 8-41-204, C.R.S. commences to run from the date of departure following the most recent assignment. *Employers' Liability Assurance Corp. v. Industrial Commission*, 363.P.2d 646 (1961). In the present case, there is no six month time period to consider, because the claimant left Colorado the same date as the MVA.

7. In addition to Section 8-41-204, C.R.S., in *United States Fidelity & Guaranty Co. v. Industrial Commission*, 61 P.2d 1033 (Colo. 1936), the Colorado Supreme Court set forth three requirements related to out-of-state injuries. Those requirements are: 1) a contract of employment created in Colorado; 2) employment in Colorado under a contract created outside the state; and 3) substantial employment in Colorado. In *Denver Truck Exch. v. Perryman*, 307 P.2d 805 (Colo. 1957), the Colorado Supreme Court further clarified that if any two of these requirements are met, it makes no difference that the employee is not a resident of Colorado or is killed outside the state, (so long as other statutory time limits on out-of-state employment are met).

8. The *Perryman* court indicated that the place of creation of an employment contract is determined according to the parties' intention, which could mean the place where the offer is accepted, or where the last act necessary to the meeting of the minds or to completion of the contract is performed.

9. There is no specific test defining where "substantial employment" as defined in *Perryman* exists. Courts evaluate what constitutes "substantial employment" on a case-by-case basis.

10. The ALJ concludes that Colorado lacks jurisdiction over the claimant's claim for workers' compensation in this case. As found, the MVA occurred outside of Colorado. The employment contract was created in Texas. The claimant did not engage in substantial employment in Colorado while working for the employer. Therefore, the claimant has failed to demonstrate by a preponderance of the evidence that Colorado jurisdiction is appropriate. The claimant's claim for worker's compensation is denied and dismissed for lack of jurisdiction. All other remaining issues are moot and will not be addressed.

ORDER

It is therefore ordered:

1. The claimant's claim for workers' compensation related to an August 13, 2019 motor vehicle accident is denied and dismissed for lack of jurisdiction.
2. The remaining issues are dismissed as moot.

Dated this 22nd day of July 2020.



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

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

ISSUES

- I. Has Claimant shown, by clear and convincing evidence, that the DIME opinion on MMI should be overcome?
- II. Assuming this DIME opinion has been overcome, is Claimant entitled to Temporary Disability payments?
- III. Has Claimant shown, by a preponderance of the evidence, that his left shoulder has worsened such that he may reopen his case?
- IV. If Claimant's case is reopened, has Claimant shown, by a preponderance of the evidence, that the rotator cuff surgery as proposed by Dr. Pak is reasonable necessary, and relate to his work injury?

STIPULATIONS

Claimant stipulated that the Date of MMI is what Claimant seeks to overcome; the Impairment Ratings set by the DIME have been accepted by Claimant.

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

Executive Summary / Timelines

1. Claimant, a convenience store manager, suffered an admitted work injury on January 10, 2017, when he developed left shoulder pain while stocking and lifting milk at work. According to his testimony at hearing, he was surprised by the weight of a case he lifted overhead.
2. Thomas Centi, M.D. was the primary authorized treating physician, who then referred Claimant to Dr. Pak for orthopedic consultation.
3. Claimant underwent a left shoulder rotator cuff surgery performed on May 10, 2017 by Dr. Pak. During Claimant's recovery, he developed right shoulder pain, as a result of overuse of the opposing shoulder. He underwent right shoulder surgery on November 1, 2017, performed by Dr. Pak.
4. Claimant also developed left cubital tunnel of the ulnar nerve that Respondents initially denied, then later admitted for.

5. Dr. Centi found Claimant reached MMI as of August 9, 2018, and assigned permanent impairment ratings for both shoulder injuries and his left elbow. Respondents filed a FAL on September 26, 2018, consistent with Dr. Centi's MMI date and impairment ratings.

6. On October 9, 2018, orthopedist Karl Larsen, M.D. performed a left ulnar neurolysis at the elbow for Claimant's left cubital tunnel syndrome.

7. Claimant also timely objected to the FAL and requested a DIME. The DIME was conducted by Dr. Frank Polanco, who issued his report on January 8, 2019, and an addendum report on February 19, 2019. Dr. Polanco opined Claimant was at MMI as of August 28, 2018.

8. Respondents filed a new FAL on March 11, 2019, consistent with Dr. Polanco's DIME. Respondents filed an amended FAL on May 28, 2019.

Left Elbow

9. Dr. Murray, from October 20, 2017 until the last visit on May 11, 2018, noted Claimant's grip strength was strong, except for March 22, 2018, when the left hand grip was slightly weaker than the right. (Ex. 12, pp. 234, 243, 251 and 256; Ex. CC, p. 282).

10. Claimant underwent an EMG on 10/13/17 which revealed moderate left ulnar mononeuropathy at the elbow and mild left median mononeuropathy at the wrist. (Ex. 13). The Claimant was referred to Dr. Karl Larsen for his left elbow pain.

11. On November 6, 2017, Claimant saw Dr. Larsen for the first time. Claimant reported numbness and tingling in the fourth and fifth digits of the left hand. (Ex. 14, p. 282) Dr. Larsen diagnosed cubital tunnel syndrome, and indicated that it was causally related to the work injury. Dr. Larsen noted, "[S]ubjectively diminished sensation to light touch in the palmar aspect of the digits including the small finger. Two-point discrimination however is preserved in the hand at 6 mm/6 mm except in the small finger, which is slightly widened to 8 mm. He has preserved intrinsic muscle bulk and strength." "He has a positive Tinel's sign over the ulnar nerve and a positive elbow flexion compression test at the elbow." (Ex. 14, p. 283)

12. Dr. Larsen recommended ulnar nerve decompression surgery with possible nerve transposition "as soon as possible to try to limit the harm to his ulnar nerve". (Ex. 14, pp. 280-284). Although the cubital tunnel syndrome surgery was initially denied as unrelated to the 1/10/17 injury, Respondent's eventually agreed that the Claimant's left cubital tunnel syndrome was related to the left shoulder surgery of 5/10/17 and accepted liability for the condition.

13. On March 7, 2018, Dr. Larsen noted the WC insurer had accepted care for the left arm ulnar nerve. However, Claimant reported continued symptoms. Dr. Larsen noted he did not know that surgery was an emergency that needed to be done that second, but he wanted to get the nerve decompressed as soon as possible. Claimant reported, “[S]till recovering on both shoulders and is not quite ready to have an ulnar nerve surgery.” (Ex. 14, p. 286)

14. On April 16, 2018, Dr. Pak released Claimant from care for both shoulders. Claimant made good progress with range of motion and experienced expected activity related pain. Claimant was to continue the work hardening program. (Ex. EE, p. 288)

15. On April 27, 2018, Claimant informed Dr. Murray he wanted to strengthen his shoulders and complete work hardening before proceeding with left elbow surgery. Shoulder pain was 4/10. (Ex. FF, p. 292) Claimant also declined surgery on March 22, 2018 and April 12, 2018, for the same reasons. (Ex. CC, DD)

16. On May 7, 2018, Claimant returned to Dr. Larsen and reported intermittent numbness and tingling in the ring and small finger of the left hand with elbow discomfort. Claimant declined left elbow surgery at this time, as he still desired to strengthen his shoulders first. Dr. Larson noted they “discussed this at length.”

17. On June 22, 2018, Claimant saw Steven Byrne, PA – C, at Dr. Murray’s office. Claimant “continued to decrease tramadol use successfully.” Claimant had excellent grip strength bilaterally. Positive Tinel’s on the left elbow. Bilateral shoulder pain was 3/10. Claimant reported that he and his attorney do not want the left elbow procedure until his shoulders had resolved. (Ex. II, p. 317)

18. On July 2, 2018, Claimant completed work hardening for both shoulders. He had reached his lifting goals after 12 sessions. He was able to lift, carry and push/pull the weight required for his job. Bilateral shoulder strength was reported at 5/5. (Ex. LL, p. 328)

19. On July 10, 2018, Claimant had normal left hand strength. Claimant informed Dr. Centi he did not want left elbow surgery at that time. (Ex. MM, p. 334)

20. On August 9, 2018, Dr. Centi noted Claimant had regained a great deal of function and strength in his shoulders. Claimant complained of pain with elevation but was improving. Pain was 4/10, but 90% of the time. Dr. Centi placed Claimant at MMI, and allowed a return to work, with restrictions. Claimant did not want the left elbow procedure at this time. (Ex. OO, p. 347-49). Claimant did fill out a pain diagram, which still indicated pain from his left elbow to the 4th and 5th digits of his left hand. *Id* at 351.

21. On August 28, 2018, Claimant returned to Dr. Centi, who noted that although a left elbow procedure had been offered to Claimant, Claimant decided to forego any

further surgical intervention *at that time*. Current medications were noted as 'none'. Dr. Centi noted, "[r]ange of motion is better in the left shoulder than the right shoulder but both are functional. Strength is nearly complete." (Ex. PP, p. 356) Dr. Centi assigned an 8% UE rating for the left elbow, a 13% UE rating for the left shoulder, and a 15% UE rating for the right shoulder. *Id* at p. 357. Dr. Centi recommended maintenance care.

22. On September 12, 2018, Claimant reported to Dr. Larsen his "shoulders are doing quite a bit better, but he has had no improvement in the ring and small finger numbness and medial elbow discomfort." Claimant did not report left hand grip problems. Claimant now wanted left elbow surgery. (Ex. QQ, p. 360)

23. On October 9, 2018, Dr. Larsen performed a left ulnar neurolysis at the elbow. In the operative report, Dr. Larsen noted portions of the ulnar nerve had been flattened and compressed. This surgery fully decompressed the ulnar nerve. (Ex. 14, p. 290)

24. On December 7, 2018, Claimant saw Dr. Larsen, who released Claimant from care on that date. Claimant was "doing very well. He has no numbness or tingling. He had just some residual mild soreness at the elbow." (Ex. 14, p. 294) At hearing, Claimant also testified that he felt that the surgery performed by Dr. Larsen was successful, since his symptoms had been improved considerably.

25. Between being placed at MMI in August 2018 until May 7, 2019, Claimant did not see any authorized provider, including Dr. Pak, Dr. Centi, or Dr. Murray. Between August 28, 2018 until May 7, 2019 when Claimant saw Dr. Pak, no medical report contains any complaints from Claimant of increased left shoulder pain.

26. Claimant requested, and had a DIME on January 8, 2019 with Frank Polanco, M.D. Dr. Polanco stated that Claimant reached MMI on August 28, 2018. Claimant reported left shoulder pain, aching with occasional sharp pain at 3/10. Claimant reported right shoulder aching and soreness at 2/10. (Ex. A, p. 4, 5, 9)

27. At the DIME, Dr. Polanco took a history from Claimant, reviewed medical records, and conducted a medical examination. Dr. Polanco noted that Dr. Larsen performed a cubital tunnel release on October 9, 2018 which was noted to be causally related to this claim. (Ex. A, p. 4-9)

28. Dr. Polanco performed left elbow and bilateral shoulder range of motion measurements, and utilized Tables 10 and 11 of the AMA Guides, to determine Claimant's impairment ratings. He assigned 17% UE for the left shoulder, and 16% UE for the right shoulder. However, this time the DIME physician assigned a *zero* rating for the left elbow/cubital tunnel. (Ex. A, pp. 5, 9-11)

29. In his DIME report, under *Assessment*, Dr. Polanco noted four items:

1. Status post Left rotator cuff repair 5/10/17.
2. Status post right shoulder arthroscopy 11/1/17.
3. Left cubital tunnel release 10/9/18.
4. MMI 8/28/18

30. Dr. Ciccone is an orthopedic surgeon, and is Level II accredited in Colorado workers' compensation. Dr. Ciccone testified at a December 4, 2019 deposition that Dr. Polanco did not err in his medical opinion of Claimant's MMI date.

31. At hearing, Dr. Timothy Hall, Claimant's expert, termed Claimant's left ulnar nerve issue as demyelination, which occurred due to the post-op position of the arm after surgery when pressure was placed upon the nerve. Dr. Hall testified that demyelination is "the beginning of the end of the nerve." He added that if nothing had been done to Claimant's damaged left ulnar nerve, Claimant "would have lost function in his hand."

32. Dr. Hall also testified about the provocative tests he performed on Claimant's shoulders, to attempt to isolate the pathology. Dr. Hall felt like more pain was coming from the rotator cuff than the AC joint. He also testified that the 5/15/19 MRI revealed pathology in the rotator cuff, as well as degeneration of the AC joint.

Reopen; Left Shoulder Rotator Cuff Surgery

33. On May 21, 2019, while still placed at MMI, Claimant returned to Dr. Pak's office and saw Trisha Finnegan, PA. She noted Claimant had tenderness over the left AC joint. She administered a left shoulder intra-articular AC joint injection. (Ex. TT, p. 377-384)

34. Claimant saw NP Finnegan on June 21, 2019, and reported approximately 10 days relief in his symptoms from the AC joint injection; however, he now had left shoulder pain again. Dr. Pak recommended surgery of a left shoulder arthroscopy with debridement, distal clavicle excision, exploration, and possible rotator cuff repair. Claimant wanted this surgery. (Ex. 5, p. 129-30) Dr. Pak testified at this deposition that the surgical procedures he recommended included operating on the left AC joint.

35. Dr. Pak testified that the relief Claimant received from the injection in May 2019 established "there really is pathology there [at the left AC joint] that's causing part of the pain." Dr. Pak did not testify directly that the AC joint injection in May 2019 established that there was pathology in the left rotator cuff.

36. Dr. Pak testified that if the AC joint injection had not provided Claimant relief, he would have recommend injecting the subacromial space to test the rotator cuff. Dr. Pak testified he did not recommend an injection to test the rotator cuff because Claimant

“still has an AC joint problem that needs to be taken care of ...” (Pak Depo p. 30, lines 3-5)

37. Dr. Pak testified that he agreed with Dr. Ciccone that the rotator cuff portion of his recommended surgery was “exploratory”. Dr. Pak was not sure, based on his examination and the MRI, that there was an actual tear to the rotator cuff, and that the MRI results could simply be “the post-operative changes and that’s all.”

38. Dr. Pak noted that MRIs are not absolute, especially after a rotator cuff surgery, because of the interference with the signals from the anchors and other artifacts from the original surgery. He explained that an MRI has a typical resolution of about 2 to 3 millimeters, so that if the rotator cuff is partially torn more than 50%, “you to have to worry about it.” Dr. Pak testified the rotator cuff portion of the surgery would involve “going to look at, essentially, the rotator cuff ... exploring to see what that looks like.”

39. Dr. Pak made clear that Claimant has an AC joint problem that needs to be surgically addressed, regardless of the rotator cuff issue. There is no further need to perform other diagnostic tests on the rotator cuff when the AC joint will be addressed in any event. He is unable to state that the AC joint problem was due to the original work injury. In fact, he felt like it was less likely than not. He was strongly of the opinion, however, that it made no sense to subject Claimant to two surgeries (one to address the AC joint, one to address possible rotator cuff pathology) when both issues could be addressed at the same time. Dr. Pak did opine that “something changed” between when the last saw Claimant before being placed at MMI and upon seeing him again on 5/7/19.

40. Dr. Pak opined Claimant’s left shoulder rotator cuff worsened after MMI. Dr. Pak recommended left rotator cuff surgery due to this worsening. Dr. Pak did not know the reason for the worsening. Dr. Pak did not know with certainty if the worsening was related to the industrial injury. He did, however, confirm that in his opinion it was *more likely than not* that the worsening in Claimant’s left shoulder was *related* to his work injury.

41. Dr. Ciccone testified in a rebuttal deposition that Dr. Pak (who he opined is a good surgeon) did not address the AC joint when he performed the initial surgery because the AC joint was not symptomatic and was not part of the industrial injury. He went on to explain that Claimant could not use his shoulder normally because the AC joint was now inflamed and that Claimant now had impingement and some perhaps rotator cuff tendinitis because the AC joint interfered with proper shoulder mechanics. Accordingly, Dr. Ciccone attributed any worsening in Claimant’s rotator cuff to issues in the unrelated AC joint. Based on this, Dr. Ciccone opined that the requested surgery was not reasonable, necessary, and related to the industrial injury.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. §8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. §8-43-201, C.R.S.

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

C. Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The ALJ finds that Claimant has testified sincerely and credibly, in a sincere effort to convey his symptoms to the medical providers, and the ALJ.

D. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55, P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo.

1968). T. The ALJ finds that each expert has rendered their opinions to the best of their abilities, based upon the information they were provided. The real issue here is one of *persuasiveness*.

E. Further, courts are to be "mindful that the Workmen's Compensation Act is to be liberally construed to effectuate its humanitarian purpose of assisting injured workers." *James v. Irrigation Motor and Pump Co.*, 503 P.2d 1025 (Colo. 1972).

Overcoming the DIME Opinion on MMI, Generally

F. The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, supra*; *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998); *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186, 189-190 (Colo. App. 2002); *Sholund v. John Elway Dodge Arapahoe*, W.C. No. 4-522-173 (ICAO October 22, 2004); *Kreps v. United Airlines*, W.C. Nos. 4-565-545 and 4-618-577 (ICAO January 13, 2005). The MMI determination requires the DIME physician to assess, as a matter of diagnosis, whether the various components of a claimant's medical condition are casually related to the injury. *Martinez v. ICAO*, No. 06CA2673 (Colo. App. July 26, 2007). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995) In other words, to overcome a DIME physician's opinion regarding the cause of a particular component of a claimant's overall medical impairment, MMI or the degree of whole person impairment, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be "unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc.*, W.C. No. 4-476-254 (ICAP, Oct. 4, 2001).

G. "Maximum medical improvement" is defined in Section 8-40-201(11.5), C.R.S. as:

A point in time when any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition. The requirement for future medical maintenance which will not significantly improve the condition or the possibility of improvement or deterioration resulting from the passage of time shall not affect a finding of maximum medical improvement. The possibility of improvement or deterioration resulting from the passage of time alone shall not affect a finding of maximum medical improvement.

H. This enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appeals Office, supra*. Where the evidence is subject to conflicting inferences a mere difference of opinion between qualified medical experts does not necessarily rise to the level of clear and convincing

evidence. Rather it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Oates v. Vortex Industries*, WC 4-712-812 (ICAO November 21, 2008).

I. As a matter of diagnosis the assessment of permanent medical impairment inherently requires the DIME physician to identify and evaluate all losses that result from the injury. *Mosley v. Industrial Claim Appeals Office*, 78 P.3d 1150 (Colo. App. 2003). Consequently, a DIME physician's finding that a causal relationship does or does not exist between an injury and a particular impairment must be overcome by clear and convincing evidence. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). The rating physician's determination concerning the cause or causes of impairment should include an assessment of data collected during a clinical evaluation and the mere existence of impairment does not create a presumption of contribution by a factor with which the impairment is often associated. *Wackenhut Corp. v. Industrial Claim Appeals Office*, 17 P.3d 202 (Colo. App. 2000).

Overcoming the DIME on MMI, as Applied

J. In his DIME report, Dr. Polanco noted that Claimant's elbow surgery as performed by Dr. Larsen was causally related to the work injury. Further, Dr. Polanco took no (apparent) issue with Dr. Centi's impairment ratings, although there were [as is not uncommonly the case] slight differences in the ratings for Claimant's left and right shoulders. What is quite uncommonly the case, however, is for the ATP to show a left elbow impairment rating of 8%, and the DIME rating on the same elbow be reduced to zero approximately 4 months later. What changed? The ALJ finds and concludes specifically that what changed was Dr. Larsen's successful left elbow surgery a performed on Claimant on 10/9/2018 to decompress the ulnar nerve. This surgery was intended to (and did) cure and relieve Claimant from the effects of his work injury (in this case, stemming initially from his shoulder problems).

K. Dr. Centi apparently concluded that Claimant had chosen to *forego* surgery [thus effectively refusing further medical treatment], and placed him at MMI as a result. The ALJ finds that Claimant had, to that point, chosen to *defer* the proposed elbow surgery, despite his ongoing symptoms, until he became comfortable with his shoulder symptoms first. The ALJ finds Claimant's reticence to move prematurely to have been reasonable. Shortly after he was placed at MMI by Dr. Centi, Claimant determined that it was indeed time to move on the elbow situation. And so he did, and successfully.

L. Respondents argue that Dr. Larsen's 10/9/2018 surgery amounted to mere *maintenance care*. The ALJ does not concur. Mere maintenance care does not bring one from 8% impairment to zero in the span of 4 months. The ALJ finds that Claimant was not at MMI until he was released by Dr. Larsen in 12/7/2018. By extension, the ALJ finds, by clear and convincing evidence, that Dr. Polanco's MMI date of 8/28/2018 was highly probably incorrect. Claimant was never at MMI until he was

released by Dr. Larsen, and that is the date Dr. Polanco should have used in his DIME report.

Reopening due to Worsening of Condition, Generally

M. Section 8-43-303(1), C.R.S. provides that a worker's compensation award may be reopened based on a change in condition. In seeking to reopen, Claimant shoulders the burden of proving his condition has changed and that she is entitled to benefits by a preponderance of the evidence. *Berg v. Industrial Claim Appeals Office*, 128 P.3d 270 (Colo. App. 2005); *Osborne v. Industrial Commission*, 725 P.2d 63, 65 (Colo. App. 1986). A change in condition refers either to a change in the condition of the original compensable injury or to a change in a claimant's physical or mental condition that is causally connected to the original injury. *Heinicke v. Industrial Claim Appeals Office*, 197 P.3d 220 (Colo. App. 2008); *Jarosinski v. Industrial Claim Appeals Office*, 62 P.3d 1082, 1084 (Colo. App. 2002). A "change in condition" pertains to changes that occur after a claim is closed. *In re Caraveo*, W.C. No. 4-358-465 (ICAO, Oct. 25, 2006). Reopening is warranted if the Claimant proves that additional medical treatment or disability benefits are warranted. *Richards v. Industrial Claim Appeals Office*, 996 P.2d 756 (Colo. App. 2000); *Dorman v. B & W Construction Co.*, 765 P.2d 1033 (Colo. App. 1988). The determination of whether a claimant has sustained her burden of proof to reopen a claim is one of fact for the ALJ. *In re Nguyen*, W.C. No. 4-543-945 (ICAO, July 19, 2004).

Reopening, as Applied

N. Dr. Pak has opined that the Claimant's left shoulder condition has worsened. His records reflect that the Claimant's symptoms have now worsened to the same level as before the initial rotator cuff surgery. Upon his return to Dr. Pak on 5/7/19, the Claimant complained of sharp, aching, dull, burning and tingling mostly about the posterior lateral and superior aspects of his shoulder at a level of 3 to 7 out of 10. At the point of MMI by Dr. Centi, the Claimant had pain, but it was no more than a 3 out of 10 level. Dr. Ciccone also agrees the Claimant's left shoulder symptoms have worsened. He simply disagrees as to what is causing those symptoms. Dr. Hall's IME also reflects that the Claimant's condition has worsened. Claimant has proven by a preponderance of the evidence that his condition has worsened since being placed at MMI, and that his claim should be reopened. He is, therefore, entitled to all medical treatment that is reasonable, necessary, and related to his original work injury.

Reasonable, Necessary, and Related Shoulder Surgery

O. Here, the parties disagree is whether the surgery recommended by Dr. Pak is "related" to the industrial injury of 1/10/17. They both agree that surgery to the shoulder is now reasonable and necessary-at least as to the AC joint. Dr. Pak agrees that the current AC joint pathology is likely *not related* to the work injury. Both Dr. Pak and Dr. Ciccone acknowledge that MRIs of post-surgical (rotator cuff repair) shoulders are not exceptionally clear due to the metal which is used to reattach the tissues while

repairing the rotator cuff. Dr. Pak testified that the MRI showed about a 50% tear in the footprint where the cuff was repaired. According to Dr. Pak, that is right on the line whether one needs additional surgery to make sure that there is not additional tearing or other pathology of the rotator cuff. Dr. Pak testified that many times once he opens the shoulder up, he finds more tearing at the footprint of the previous surgery than is shown on the MRI.

P. Dr. Pak and Dr. Ciccone's examination findings bear some similarities. Dr. Hall's examination revealed even fewer AC joint symptoms than that of Dr. Pak and Dr. Ciccone. Dr. Hall opined that more of Claimant's pain was coming from the rotator cuff than the AC joint, despite their very close proximity in the shoulder joint. There is clear evidence of AC joint degeneration in Claimant's shoulder; however, the exams performed by Dr. Pak, Dr. Ciccone and Dr. Hall each reveal rotator cuff impingement signs as well. The fact that Dr. Pak cannot be completely sure of whether there is additional rotator cuff tearing (due to poor quality of MRI post-surgery) should not be a reason that Dr. Pak's surgery is unreasonable (purely exploratory) or unrelated to the original injury. The Claimant's testimony that he has had worsening pain in the front and side of his shoulder and that the symptoms he has now are much like those he had before his first rotator cuff repair is credible.

Q. Drs. Pak and Hall's explanation for Dr. Pak's recommendation of a second surgery and its relatedness to the original industrial injury is supported by significant evidence. Dr. Pak (who has, after all, treated Claimant extensively) feels that the worsening of Claimant's condition is more likely than not related to his work injury. He did not recommend a further battery of tests in an attempt to further isolate Claimant's rotator cuff pathology in particular, since the AC joint needs surgery anyway. It certainly makes no medical sense (and the ALJ concurs) to subject Claimant to two separate surgeries, mere millimeters apart, just to sort out who pays for what.

R. Claimant has shown - not with great certainty, but by a preponderance of the evidence - that examining his rotator cuff (in person, as it were) for possible repair by Dr. Pak is reasonable, necessary, and related to his original work injury. That opinion, and that of Dr. Hall is more persuasive than Dr. Ciccone's opinion to the contrary. Rotator cuff surgery is to be paid by Respondents according to the fee schedule set by the Division of Workers Compensation. Additional service to the AC joint has not been shown to be related to the work injury; however, if legal authority (not cited by the parties herein) exists to order payment for the full procedure as recommended by Dr. Pak, it should be ordered. Absent such authority, the parties should take all reasonable steps to assure that all necessary repairs to Claimant's shoulder be accomplished in one surgical procedure.

ORDER

It is therefore Ordered that:

1. The DIME physician's opinion on MMI has been overcome. The date of MMI is December 7, 2018. Respondents shall pay temporary disability payments in accordance with this MMI date.
2. Claimant has suffered a worsening of his left shoulder condition sufficient to reopen his case.
3. Respondents shall pay for the surgery as proposed by Dr. Pak to examine and repair Claimant's left rotator cuff according to the fee schedule. All efforts are to be made by the parties to assure that all recommended repairs to Claimant's left shoulder are performed in one surgery.
4. Respondents shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.
5. All matters not determined herein are reserved for future determination.

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

DATED: July 22, 2020

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

1. Whether the claimant has demonstrated, by a preponderance of the evidence, that on December 17, 2018, he suffered an injury arising out of and in the course and scope of his employment with the employer.

2. If the claim is found compensable, whether the claimant has demonstrated, by a preponderance of the evidence, that the claimant is entitled to temporary total disability (TTD) benefits beginning November 21, 2019 and ongoing.

3. If the claimant is awarded TTD benefits, whether the respondents have demonstrated, by a preponderance of the evidence, that the claimant is responsible for his termination of employment.

4. The issues of reasonable, necessary, and related medical benefits and temporary partial disability (TPD) benefits were endorsed for hearing. At hearing, the parties agreed to reserve those issues for future determination.

FINDINGS OF FACT

1. The claimant began working for the employer in 2014. The claimant began as an installer, installing insulation. At some point after 2014, he began working in the employer's warehouse. The claimant's job duties included organizing the warehouse, lifting bags of insulation, moving scaffolding, and shelving rolls of plastic.

2. The claimant and his direct supervisor, Mr. C[Redacted], provided conflicting testimony regarding a December 17, 2018 incident and their related discussions. The ALJ has included both versions below.

3. The claimant testified that while at work on December 17, 2018, he slipped on ice and fell. The claimant testified that he slipped while walking between the employer's buildings with his supervisor, Mr. C[Redacted]. The claimant further testified that when he slipped he fell backwards and landed on cement and immediately had back pain. The claimant asserts that he asked his supervisor to let him seek medical treatment, but his supervisor told him to take pain medication. The claimant continued working on that date. The claimant testified that he worked, but he was in pain. The claimant worked his normal job duties from December 15, 2018 until November 21, 2019.

4. Mr. C[Redacted] testified that he did not see the claimant slip and fall on December 15, 2018. It is Mr. C[Redacted]' testimony that he was in the warehouse when the claimant limped in and stated that he "almost fell". Mr. C[Redacted] testified that the claimant did not appear to be in pain on that date or thereafter. The claimant did not say anything about being injured until "the middle of" 2019. At that time, the claimant reported to Mr. C[Redacted] that he had a burning sensation in his leg and his buttocks.

5. The claimant testified that following the December 17, 2018 incident, he experienced a worsening of his symptoms. Despite this worsening, the claimant continued to work full duty.

6. On October 10, 2019, the claimant sought medical treatment at Vail Health and was seen by Dr. Joshua Rusk. At that time, the claimant reported left lower extremity pain. Dr. Rusk diagnosed sciatica and ordered an x-ray of the claimant's lumbosacral spine. The x-ray was performed on that same date and showed no evidence of fracture, dislocation, spondylolisthesis, or significant degenerative change.

7. On October 18, 2019, the claimant returned to Vail Health and was seen in the emergency department by Dr. Gayle Braunholtz. The claimant reported pain that began in his buttocks and radiated into his left knee and lateral calf. The claimant told Dr. Braunholtz that he had experienced this pain on and off for one year, following a slip on ice, while working. However, the claimant noted that while his prior pain had been intermittent, his pain on October 18, 2019 was constant. Dr. Braunholtz diagnosed lumbago and ordered a magnetic resonance image (MRI) of the claimant's lumbar spine.

8. On October 21, 2019, an MRI of the claimant's lumbar spine showed a subarticular disc protrusion at the left L5-S1 level that narrowed the left lateral recess and displaced the descending left S1 nerve root. The radiologist noted that this disc protrusion was new when compared to a 2012 MRI. It was also noted that there were mild degenerative changes that were unchanged from 2012.

9. With regard to the 2012 MRI, the claimant testified that he injured his back while working for another employer in 2012. The claimant testified that the 2012 injury occurred when he fell off of a ladder. Surgery was recommended for the claimant following that 2012 injury. The claimant testified that he chose not to undergo surgery because he understood that it could possibly make him worse.

10. On October 29, 2019, the claimant was seen at Vail Summit Orthopaedics and Neurosurgery by Dr. Scott Raub. The claimant sought treatment with Dr. Raub because he had previously treated the claimant in 2012. On October 29, 2019, the claimant reported to Dr. Raub that he slipped on ice approximately one year prior. The claimant clarified that he did not fall at that time, but "jarred his body" and began to feel pain in his posterior left thigh and left calf. The claimant also reported that approximately one month prior to seeing Dr. Raub, his symptoms increased significantly and became constant. Dr. Raub diagnosed lumbosacral radiculopathy and recommended a left S1 transforaminal epidural steroid injection (TFESI). Dr. Raub also noted that due to the size of the disc protrusion at the L5-S1 level, the claimant could be a surgical candidate.

11. On October 30, 2019, the claimant returned to Vail Summit Orthopaedics and Neurosurgery and was seen by Dr. Ernest Braxton. At that time, the claimant reported that he was injured at work four weeks prior. Dr. Braxton diagnosed lumbosacral disc herniation, radiculopathy, and stenosis. Dr. Braxton recommended the claimant undergo a left L5-S1 microdiscectomy for resection of the herniated disc. On October 20, 2019, Dr. Braxton administered a caudal epidural steroid injection to help alleviate the claimant's symptoms until surgery could be performed.

12. Mr. C[Redacted] testified that in October or November 2019, that the claimant reported to Mr. C[Redacted] that his leg and buttocks pain was related to the December 2018 incident. Mr. C[Redacted] testified that once the claimant stated the relatedness to the 2018 incident, he offered to write an incident report. However, the claimant declined because he wanted to first see what his doctor advised. Subsequently, the claimant reported to Mr. C[Redacted] that his doctor was recommending surgery. The claimant asked if the employer would pay his deductible so that he could undergo the surgery.

13. The parties agree that the claimant's employment ended on November 21, 2019. The claimant testified that he did not "quit" his employment, but left because he could not perform his job duties due to his pain. On that date, the claimant informed his coworker, Andres M[Redacted], that he could no longer perform his job.

14. Mr. C[Redacted] testified that when the employer did not address the claimant's request to pay the deductible for the surgery, he was upset. Mr. C[Redacted] learned from Mr. M[Redacted] that the claimant quit. The claimant did not speak with Mr. C[Redacted] regarding his reasons for quitting.

15. On May 5, 2020, the claimant attended an independent medical examination (IME) with Dr. John Burriss. In connection with the IME, Dr. Burriss reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In his IME report, Dr. Burriss opined that the claimant's leg and back pain is due to lumbar degenerative disc disease, most prominent at the L5-S1 level. Dr. Burriss also opined that the cause of these symptoms is the natural progression of degenerative disc disease, and not due to a fall in December 2018.

16. On May 15, 2020, Dr. Burriss authored an addendum to his IME report after his review of additional medical records. In that addendum, Dr. Burriss noted that the additional records confirm the existence of a preexisting lumbar degenerative disc disease. Dr. Burriss reiterated his opinion that the claimant's lumbar condition was not causally related to the December 17, 2018 incident, but is due to the natural progression of his preexisting condition. Dr. Burriss' testimony by deposition was consistent with his written reports.

17. The ALJ finds that the claimant's current symptoms did not arise from the December 17, 2018 ice slipping incident. The ALJ is not persuaded that the claimant's current symptoms and condition in October of 2019 arose from the December 17, 2018 ice slipping incident.

18. The ALJ credits the testimony of Mr. C[Redacted], the medical records, and the opinions of Dr. Burriss. The ALJ finds that the claimant has failed to demonstrate that it is more likely than not that he suffered an injury at work on December 17, 2018 that necessitated medical treatment. The claimant has also failed to demonstrate that it is more likely than not that the slip on the ice on December 17, 2018, aggravated, accelerated, or combined with the claimant's preexisting condition to necessitate treatment.

CONCLUSIONS OF LAW

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

2. The ALJ’s factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness’s testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

4. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it “aggravates accelerates or combines with a preexisting disease or infirmity to produce disability or need for treatment.” *See H & H Warehouse v. Vicory, supra*.

5. As found, the claimant has failed to demonstrate by a preponderance of the evidence that he suffered a compensable work injury on December 17, 2018. As found, the claimant has failed to demonstrate by a preponderance of the evidence that the on December 17, 2018 incident aggravated, accelerated, or combined with claimant’s preexisting condition to necessitate medical treatment. As found, the testimony of Mr. C[Redacted], the medical records, and the opinions of Dr. Burris are credible and persuasive.

ORDER

It is therefore ordered that the claimant's claim for workers' compensation benefits is denied and dismissed.

Dated this 23rd day of July 2020.



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

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

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-130-161-001**

ISSUES

- Did Claimant prove he suffered a compensable injury on February 4, 2020?
If Claimant proved a compensable injury, the ALJ will address the following issues:
- Did Claimant have the right to select his own treating physician?
- Was the medical treatment Claimant received for his injury reasonably necessary and authorized?
- What is Claimant's average weekly wage (AWW)?
- Did Claimant prove entitlement to TTD benefits from February 4, 2020 ongoing?
- Did Respondents prove Claimant was responsible for termination of his employment?
- Did Respondents prove entitlement to an offset for Claimant's union disability benefits?

FINDINGS OF FACT

1. Claimant works for Employer as a journeyman pipefitter. His duties include welding, wrenching, fabricating, and installing pipes. The work was physically demanding and required frequent heavy lifting and frequent use of his upper extremities. In February 2020, Claimant was working on site for Collins Aerospace. Employer was a subcontractor for Collins Aerospace.

2. Claimant's regular schedule was 6:00 AM to 2:30 PM, with a thirty-minute lunch break. Claimant is conscientious about tardiness and typically arrived at the job site between 5:25 AM and 5:30 AM. Other co-workers usually arrived between 5:30 AM and 5:40 AM. Employer never admonished the workers for arriving early. To the contrary, Claimant has the impression Employer appreciated everyone arriving early and being ready to start work promptly at 6:00 AM.

3. Claimant parked his vehicle in a designated lot reserved for subcontractors. Employer did not own the parking lot, but its employees accessed the lot with a key card provided by the general contractor. Claimant usually brought a lunch to work because there are few convenient or quick food options nearby and he did not want to risk returning late from his relatively short lunch break.

4. The general contractor allowed Employer's employees to use part of one of its buildings as a lunchroom. After arriving at work, Claimant routinely put his lunch in the

lunchroom refrigerator. He would then return to his vehicle to wait until approximately 5:50 AM before walking to the “gang box” to receive his assignment for the day. Many of Claimant’s co-workers stored their lunches in the lunchroom too.

5. Claimant was not paid for any time on site before his shift started at 6:00.

6. On February 4, 2020, Claimant entered the lunchroom to store his lunch as usual. Upon entering the lunchroom, he slipped and fell on the linoleum floor. It had snowed that morning and Claimant either slipped because of water on the floor, water on his shoes, or both.

7. When he fell, Claimant heard and felt a pop in his left elbow and felt immediate severe pain. He went back to his vehicle and waited for his foreman to arrive so he could report the injury. Claimant recalls he was sweating despite the cold because the pain was so bad.

8. Claimant’s supervisor, Will P[Redacted], arrived shortly before 6:00 AM. Claimant described the incident to Mr. P[Redacted] and said he needed immediate treatment. The facility has on-site EMTs, but they had not arrived by that time. Claimant did not feel he could wait because the pain was so severe, so he told Mr. P[Redacted] he would go to the Parkview Hospital emergency room. Mr. P[Redacted] gave no specific instructions regarding where to seek treatment.

9. While at Parkview, Claimant received a text message from Mr. P[Redacted] advising this claim was being denied and he should go to an urgent care facility where the cost of treatment would be cheaper. Because Claimant was already at the hospital, in severe pain, and concerned the injury might be too serious for an urgent care clinic, he decided to stay at Parkview.

10. The ER records document Claimant’s pain was primarily in his left upper arm around the elbow with associated paresthesias. Claimant also reported “he has started to develop a tight sensation in his neck and shoulders.” X-rays suggested a radial head fracture, but a CT scan showed no fracture. Claimant was discharged and advised to follow-up with his primary care physician if his pain persisted.

11. Receiving no further direction from Employer, Claimant saw his PCP, Dr. Rochelle Elijah, who referred him to Dr. Karl Larsen, an orthopedist.

12. Claimant saw Dr. Larsen’s physician’s assistant, Stephanie Noble, at his initial appointment on February 10, 2020. He explained, “he went early in to work to put his lunch away and get the day started when he slipped on the lunchroom floor and fell directly onto his left elbow. He felt a pop.” Besides ongoing left arm pain, he reported some neck and back pain. PA-C Noble ordered an “urgent” MRI, which was completed the same day.

13. Claimant met with Dr. Larsen later that day to review the MRI. It showed a high-grade rupture of the triceps tendon. Dr. Larsen informed Claimant “this is of such significance that it needs to be repaired.” He further noted, “recovery from triceps tendon

repairs can be very lengthy, and given his high-demand physical work, especially with overhead lifting activities, I suspect it will be at least three months before he would be able to return to work after that, possibly longer and would not truthfully be able to lift unrestricted overhead until he is about six months postop.”

14. Dr. Larsen performed a left distal triceps tendon repair on February 20, 2020 at Surgical Center of the Rockies.

15. On March 30, 2020, Dr. Larsen documented persistent numbness and tingling in Claimant’s fingers that started after the accident. The numbness was previously in an ulnar distribution, but now was affecting the other fingers too. Dr. Larsen ordered an EMG to check for nerve compression or other neurological lesion.

16. Claimant saw Dr. John Raschbacher for an IME at Respondents’ request on April 24, 2020. Claimant was still wearing a hinged elbow brace and slowly progressing with post-surgical rehab. He thought his range of motion was “on track” and slowly getting better. Claimant described numbness and tingling primarily in an ulnar distribution, although it also affected his index finger. He recently had the EMG and was told it showed nerve damage at the elbow and carpal tunnel syndrome at the wrist. Claimant’s initial neck and upper back symptoms had improved, and he perceived no current need for treatment to any body parts other than his left arm. Dr. Raschbacher concluded Claimant’s left elbow and triceps injury resulted directly from his fall at work and the treatment he received was appropriate. He further opined, “depending on the EMG and nerve conduction study results and progress over the next couple months, the question of whether or not there will be a peripheral nerve problem or injury that demands treatment is a possibility.” He thought a five-pound lifting restriction was appropriate.

17. Dr. Raschbacher testified Claimant presented as straightforward and forthright with no suggestion of exaggeration or embellishment. That assessment matches the ALJ’s impression of Claimant at hearing. Claimant’s testimony was credible and persuasive.

18. Claimant proved he suffered a compensable injury arising out of and in the course and scope of his employment. Even though he was not “on the clock” performing any specific work duty at the time of the accident, putting his lunch away in the lunchroom was sufficiently interrelated with his job duties to be considered an incident of his employment.

19. The treatment at the Parkview Hospital emergency department on February 4, 2020 was reasonably necessary emergent treatment for the compensable injury.

20. Employer did not provide Claimant a list of designated providers or otherwise exercise its right to select the treating physician. The right of selection passed to Claimant and he selected Dr. Elijah, who referred him to Dr. Larsen. Dr. Elijah and Dr. Larsen are authorized.

21. The evaluations and treatment provided by Dr. Elijah and Dr. Larsen, including the February 20, 2020 surgery, were reasonably necessary to cure and relieve the effects of Claimant's compensable injury.

22. Claimant was disabled from his physically demanding job by the effects of the injury and suffered an injury-related wage loss commencing February 4, 2020. As of the hearing, he had not returned to work, been released to regular duty, or put at MMI by any ATP.

23. Respondents argued at hearing Claimant was responsible for termination of his employment. Claimant believes he is still an employee of Employer. He has remained in contact with Mr. P[Redacted], who has indicated "we would love to have you back" when he is released to return to work. No persuasive evidence was presented that Claimant was terminated or quit his job. Even if he were considered terminated but eligible for rehire, there is no persuasive evidence of any noninjury-related reason for separation from his employment. Respondents' post-hearing brief does not mention the issue and it appears the defense has been abandoned.

24. Claimant has received approximately \$1,500 in disability benefits from his union, based on a rate of \$138.52 per week. There is no persuasive evidence Employer paid any premiums or otherwise or contributed to the cost of the disability policy. Respondents failed to prove an offset against TTD benefits.

25. Claimant was generally scheduled to work 40 hours per week but occasionally worked less than 40 hours. The record contains wage records showing his earnings in November 2019 through January 2020. Claimant argues those months do not accurately reflect his average earnings because he took a vacation, missed some time due to illness, and took some time off for the holidays. The wage records for that period show one week around Thanksgiving where he worked only three days (11/29/2019), and one week where he had no earnings (12/6/2019). Claimant did not identify specific days he missed, but the ALJ infers the 11/29/2019 and 12/6/2019 pay periods correspond to the referenced vacation, holiday, and illness. The fairest way to account for these distorting factors is to exclude those two weeks from the calculation.

26. Claimant's AWW is \$1,383.89, based on his twelve paychecks from November 2019 through January 2020:

| <u>Check Date</u> | <u>Gross wages</u> |
|-------------------|--------------------|
| 11/1/2019 | \$1,534.00 |
| 11/8/2019 | \$1,150.50 |
| 11/15/2019 | \$1,150.50 |
| 11/22/2019 | \$1,609.05 |
| 12/13/2019 | \$1,534.00 |
| 12/20/2019 | \$1,227.20 |
| 12/27/2019 | \$1,227.20 |
| 1/10/2020 | \$1,489.00 |

| | |
|-------------|-------------------|
| 1/17/2020 | \$1,390.00 |
| 1/24/2020 | \$1,227.20 |
| 1/31/2020 | \$1,534.00 |
| 2/7/2020 | \$1,534.00 |
| <hr/> | |
| Total: | \$16,606.65 |
| No. weeks: | 12 |
| AWW: | \$1,383.89 |

CONCLUSIONS OF LAW

A. Compensability

To establish a compensable claim, a claimant must prove he suffered an injury arising out of and in the course of his employment. Section 8-41-301(1)(b); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). The claimant must prove entitlement to benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case are not interpreted liberally, for either claimant or respondents. Section 8-43-201.

There is no question Claimant suffered a significant injury when he fell on February 4, 2020. But Respondents deny the injury occurred while performing service arising out of and in the course of his employment.

The terms "arising out of" and "in the course of" are not synonymous. The "course of employment" requirement is satisfied if the injury occurred within the time and place limits of the employment relationship and during an activity that had some connection with the employee's job-related functions." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991). The term "arising out of" is narrower and requires an injury "has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered a part of the employee's employment contract." *Horodysyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001).

The claimant need not actually be performing work duties at the time of the injury, nor must the activity be a strict employment requirement or confer an express benefit on the employer. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207, 210 (Colo. 1996). "Many job functions involve discretionary or optional activities on the part of the employee, devoid of any duty component and unrelated to any specific benefit to the employer, but nonetheless sufficiently incidental to the work itself as to be properly considered as arising out of and in the course of employment." *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). The ultimate question is whether the activity is sufficiently "interrelated to the conditions and circumstances under which the employee generally performs the job

functions that the activity may reasonably be characterized as an incident of employment.” *Price, supra* at 210.

As found, Claimant proved his injury arose out of and occurred within the course and scope of his employment. The act of putting his lunch away in the designated lunchroom is sufficiently interrelated to the conditions and circumstances of his job to reasonably be considered incidental to his employment. Storing lunches in the lunchroom was a common practice among Claimant and his co-workers. Taking a break to eat is a near universal activity for full-time workers, and access to the lunchroom provided mutual benefits to Claimant and Employer. Even though Claimant did not have to bring a lunch, it was certainly reasonable for him to do so given the dearth of nearby food options and the short lunch break. As Claimant explained, other employees sometimes left for lunch a few minutes early or were late returning, neither of which he considered appropriate. Employer benefitted from having its employees on time and working throughout their scheduled shift. Access to the lunchroom was a fringe benefit to Claimant since he did not have to store food in his vehicle where it could freeze in the winter or spoil in the summer.

The fact Claimant arrived at work early does not change the outcome. A claimant need not be “on the clock” to suffer a compensable injury, and the “time limits” of employment include a reasonable interval before and after official working hours when the employee is on the employer’s property. *E.g., Ventura v. Albertson’s Inc.*, 856 P.2d 35 (Colo. App. 1992) (injury was compensable even though employee had already clocked out for the day); *Industrial Commission v. Hayden Coal Co.*, 155 P.2d 158 (Colo. 1944) (interval up to 35 minutes has been allowed for arrival and departure from work). Claimant had no personal or nonwork-related reason for being in that location at that time. Rather, he routinely arrived at work early because he is a conscientious employee who does not want to risk being late. It would be incongruous to penalize him for a behavior Employer appreciated.

Nor is it dispositive that Employer did not own the building in which the lunchroom was located. There is no strict requirement that an employee’s injury occur on property “owned, maintained, or controlled by the employer.” *Woodruff World Travel, Inc. v. Industrial Commission*, 554 P.2d 705 (Colo. App. 1976). In *Woodruff*, the court deemed it sufficient that the property was provided for employees to use, the employer was aware its employees used the property, and the property “constituted an obvious fringe benefit to claimant.” *Id.* at 94-95. Although *Woodruff* dealt with a parking lot, its rationale applies equally well to the lunchroom here.

B. Medical benefits

The respondents are liable for medical treatment reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101. The claimant must prove entitlement to disputed medical benefits by a preponderance of the evidence. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

Besides proving treatment is reasonably necessary, the claimant must prove the provider is “authorized.” *Bunch v. Industrial Claim Appeals Office*, 148 P.3d 381 (Colo. App. 2006). Authorization refers to a provider’s legal right to treat the claimant at the respondents’ expense. *Mason Jar Restaurant v. Industrial Claim Appeals Office*, 862 P.2d 1026 (Colo. App. 1993). Providers typically become authorized by the initial selection of a treating physician, agreement of the parties, or upon referrals made in the “normal progression of authorized treatment.” *Bestway Concrete v Industrial Claim Appeals Office*, 984 P.2d 680 (Colo. App. 1999); *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985).

Under § 8-43-404(5), the employer has the right to choose the treating physician in the first instance. The employer must tender medical treatment “forthwith,” or the right of selection passes to the claimant. *Rogers v. Industrial Claim Appeals Office*, 746 P.2d 565 (Colo. App. 1987). To properly exercise its right of selection, the employer must give the claimant a list of at least four providers from which he can choose. Section 8-43-404(5)(a)(I)(A).

Employer never referred Claimant to a physician. Mr. P[Redacted] suggested Claimant go to an urgent care clinic instead of the emergency room, but that was based on the understanding Claimant would have to pay for treatment himself. In any event, Employer did not provide a list of designated providers. Accordingly, the right of selection passed to Claimant. He chose Dr. Elijah, who referred him to Dr. Larsen. Both physicians are authorized and the treatment they provided was reasonably needed to cure and relieve the effects of Claimant’s compensable injury.

Treatment received on an emergency basis is deemed authorized without regard to whether the claimant had prior approval from the employer or a referral. *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990); see also WCRP 8-2. The emergency exception is not necessarily limited to life-threatening situations, and whether a “bona fide emergency” existed is a question of fact for the ALJ to be determined based on the circumstances. *Hoffman v. Wal-Mart Stores*, W.C. No. 4-774-720 (January 12, 2010). As found, Claimant’s treatment at the Parkview Hospital emergency department on July 3, 2019 was reasonably necessary emergency treatment for his injury.

C. Temporary total disability (TTD) benefits

A claimant is entitled to TTD benefits if the injury causes a disability, the disability causes the claimant to leave work, and the claimant misses more than three regular working days. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term disability connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function, and (2) impairment of wage-earning capacity as demonstrated by claimant’s inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999).

As found, Claimant was disabled and suffered a wage loss commencing February 4, 2020. It would have been impossible for Claimant to perform his physically demanding job given the severe injury to his left arm.

D. Responsibility for termination

Sections 8-42-103(1)(g) and 8-42-105(4)(a) provide, “In cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury.” The respondents must prove by a preponderance of the evidence that a claimant was terminated for cause or was responsible for the separation from employment. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008). To establish that a claimant was responsible for termination, the respondents must show the claimant performed a volitional act or otherwise exercised “some degree of control over the circumstances which led to the termination.” *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 5 P.3d 1061, 1062 (Colo. App. 2002); *Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1995); *Velo v. Employment Solutions Personnel*, 988 P.2d 1139 (Colo. App. 1988).

There is no persuasive evidence Claimant has been terminated, much less that he performed any volitional act to make him “responsible for termination” within the meaning of the statute. Claimant has been off work solely because of his injury.

E. Average weekly wage

Section 8-42-102(2) provides compensation shall be based on the employee’s average weekly earnings “at the time of the injury.” The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. But § 8-42-102(3) gives the ALJ wide discretion to “fairly” calculate the employee’s AWW in any manner that seems most appropriate under the circumstances. The entire objective of AWW calculation is to arrive at a “fair approximation” of the claimant’s actual wage loss and diminished earning capacity because of the industrial injury. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993).

As found, Claimant’s AWW is \$1,383.89, based on the twelve paychecks he received from November 2019 through January 2020. This computational method adequately accounts for the distorting effects of “one off” factors such as a vacation and illness. This AWW corresponds to a TTD rate of \$922.59 ($\$1,383.89 \times 2/3 = \922.59).

F. Offset for disability benefits

Section 8-42-103(1)(d)(I) provides the respondents an offset against TTD benefits for disability benefits payable to an employee “under a pension or disability plan financed in whole or in part by the employer.” Here, there is no persuasive evidence Employer contributed to the disability benefits Claimant received through his union. Respondents failed to prove entitlement to an offset.

ORDER

It is therefore ordered that:

1. Claimant's injury of February 4, 2020 is compensable.
2. Insurer shall cover all reasonably necessary treatment from authorized providers to cure and relieve the effects of Claimant's compensable injury, including, but not limited to, treatment from Dr. Elijah, Dr. Larsen, Surgical Center of the Rockies, and Parkview Hospital.
3. Claimant's AWW is \$1,383.89, with a corresponding TTD rate of \$922.59.
4. Insurer shall pay Claimant TTD benefits at the rate of \$922.59 per week, commencing February 4, 2020 and continuing until terminated by law.
5. Insurer shall pay Claimant statutory interest of 8% per annum on all indemnity benefits not paid when due.
6. Respondents' defense that Claimant was responsible for termination of his employment is denied and dismissed.
7. Respondents' request for an offset based on Claimant's receipt of disability benefits through his union is denied and dismissed.
8. All issues not decided herein are reserved for future determination.

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

DATED: July 23, 2020

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-059-514-001**

ISSUE

1. Whether Respondents established, by a preponderance of the evidence, that Claimant's October 10, 2017 industrial injury resulted from Claimant's willful failure to obey a reasonable rule adopted by Employer for the safety of the employee.

FINDINGS OF FACT

1. Claimant is a 65-year-old man who was employed by Employer beginning on October 9, 2017 as a Lead Fulfillment Associate.
2. Respondents filed a General Admission of Liability on October 26, 2017, (Ex. A) admitting Claimant was injured on October 10, 2017, with an average weekly wage of \$576. Liability was admitted for medical benefits and temporary total disability commencing on October 11, 2017 and ongoing at the rate of \$384 per week but a Safety Rule Violation was claimed with the TTD rate reduced by 50% to \$192 per week.
3. On October 9, 2017, Claimant underwent classroom training regarding, among other things, the operation of powered industrial trucks ("PITs").
4. Employer's PIT Safety Rules included the following rule regarding "Equipment Safety": "When operating PIT the operator must always remain within the confines of the operator compartment or platform. PIT operators are never to extend their hands, feet or any body part outside of the PIT while in operation." (Ex. 9).
5. Claimant received Employer's PIT Safety Rules, acknowledged receipt of the rules in writing, and passed a written quiz regarding PIT Safety Rules.
6. The Acknowledgement Form Claimant signed on October 9, 2017 indicated Claimant understood and would comply with all Amazon PIT Operational Rules and Guidelines. (Ex. 9).
7. On October 10, 2017, Claimant received practical training on the operation of the PIT, and specifically a stand-up forklift.
8. Before October 10, 2017, Claimant had not operated a PIT.
9. During his practical training, Claimant was instructed to attempt to operate the PIT through different maneuvers. After conducting basic operations, Claimant was instructed to operate the PIT in a counterclockwise circle.
10. While conducting the counterclockwise circle maneuver, Claimant was concentrating on the PIT's controls. At some point Claimant looked up and saw the PIT

was about to hit a concrete wall. Claimant took his hands off the PIT controls, but the PIT's forward momentum caused it to continue toward the concrete wall.

11. As the PIT approached the concrete wall, Claimant reflexively raised his left arm to try to protect himself. As a result, Claimant's his left hand was outside the confines of the PIT operator compartment and was crushed between the PIT and the wall. In extracting his hand, Claimant sustained a de-gloving injury to his left hand and injury to his left shoulder.

12. Other than extending his hand in a protective gesture, Claimant did not operate the PIT with his hand outside the operator compartment.

13. Respondents offered no testimony refuting Claimant's account of the incident leading to his injury. Respondents' Exhibit N, a video of the incident, does not demonstrate that Claimant willfully had any body parts outside of the confines of the operator compartment of the PIT he was operating.

14. Claimant's testimony concerning the events of October 10, 2017 is credible and undisputed.

15. The ALJ finds that Claimant did not willfully or deliberately place his hand outside the confines of the PIT operator compartment and that extending his left hand was an instinctive reflex without conscious thought.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. See § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. See § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceedings is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony

is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Safety Rule Violation

Section 8-42-112(1)(b), C.R.S. authorizes a fifty percent reduction in compensation for an employee's "willful failure to obey any reasonable rule adopted by the employer for the safety of the employee." "Under § 8-42-112(1)(b) it is the respondents' burden to prove every element justifying a reduction in compensation for willful failure to obey a reasonable safety rule." *Horton v. Swift and Company*, W.C. No. 4-779-078 (ICAO, Apr. 21, 2010). "The term 'willful' connotes deliberate intent, but mere carelessness, negligence, forgetfulness, remissness or oversight does not satisfy the statutory standard." *In re Claim of Goddard*, W.C. 4-919-196-02 (ICAO, Sep. 19, 2016), citing *Bennett Properties Co. v. Industrial Commission*, 437 P.2d 548 (Colo. 1968). Willful conduct may be proven by circumstantial evidence including evidence of frequent warnings, the obviousness of the risk, and the extent of deliberation evidenced by claimant's conduct. See *In re Heien*; W.C. No. 5-059-799-01 (ICAO, Nov. 29, 2018).

Respondents need not establish that an employee had the safety rule in mind and decided to break it. *In re Alvarado*, W.C. No. 4-559-275 (ICAO, Dec. 10, 2003). Rather, it is sufficient to show the employee knew the rule and deliberately performed the forbidden act. *Id.* "Willfulness" also does not encompass "the negligent deviation from safe conduct dictated by common sense." *In re Gutierrez*, W.C. No. 4-561-352 (ICAO, Apr. 29, 2004). Generally, an employee's violation of a rule to facilitate the accomplishment of the employer's business does not constitute willful misconduct. *Grose v. Rivera Electric*, W.C. No. 4-418-465 (ICAO, Aug. 25, 2000). Whether an employee has deliberately violated a safety rule is a question of fact to be determined by the ALJ. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office*, 907 P.2d 715, 719 (Colo. App. 1995).

Respondents have failed to establish that Claimant's industrial injury resulted from Claimant's willful failure to obey a reasonable rule adopted by Employer for the safety of the employee. The Workers' Compensation Act requires that a Claimant's violation of a safety rule be "willful." Claimant had no experience operating a PIT prior to October 10, 2017. During his initial practical training, Claimant inadvertently caused the PIT he was attempting to operate to collide with a wall in Employer's facility. Claimant's instinct was to extend his arm to protect himself. This was a natural reflex reaction that Claimant did not deliberately perform. The evidence does not demonstrate that Claimant "deliberately" or "willfully" extended his left hand beyond the confines of the PIT's operator

compartment. Thus, although Claimant's action technically was not in compliance with Employer's safety rule, the noncompliance was not willful.

ORDER

It is therefore ordered that:

1. Respondents are not entitled to reduce Claimant's temporary or permanent compensation or benefits by 50% for any alleged safety rule violation. Respondents' claims for a reduction are denied and dismissed.
2. All matters not determined herein are reserved for future determination.

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

DATED: July 23, 2020.

/s/ Steven R. Kabler
Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-121-498-002**

ISSUE

1. Whether Claimant has established, by a preponderance of the evidence, entitlement to temporary disability benefits from November 4, 2019 and ongoing until terminated by statute.
2. Whether Respondents established, by a preponderance of the evidence, that Claimant was responsible for termination of his employment on or about November 4, 2019 and the resulting wage loss from his termination.

STIPULATIONS

1. The date of injury was September 26, 2019.
2. Claimant's Average Weekly Wage is \$817.25 for a TTD rate of \$544.83.

FINDINGS OF FACT

1. Claimant is a 31-year-old male who worked for Employer as a dry case selector beginning on September 20, 2018. Claimant's work schedule was Sunday through Thursday of each week, and Claimant's daily work shift started at 9:00 a.m.
2. On September 26, 2019, Claimant sustained an admitted industrial injury to his lumbar spine while loading a pallet.
3. Respondents presented testimony from Melissa Y[Redacted], the human resources director for Employer's Aurora distribution center where Claimant worked. Ms. Y[Redacted] testified that Employer instituted a new attendance policy which included a "point system" for employee absences in April 2019 (the "Attendance Policy"). The Attendance Policy in effect at the time of Claimant's industrial injury was, by its terms, effective April 28, 2019. Claimant signed a document acknowledging receipt of the Attendance Policy on April 17, 2019. (Ex. C).
4. Ms. Y[Redacted] testified that upon institution of Employer's Attendance Policy, employees' prior attendance records were expunged, and prior attendance issues were not thereafter considered toward potential disciplinary action.
5. Under the Attendance Policy, employees received "points" for unexcused absences and tardiness. The Attendance Policy provides that a "combination of eight (8) occurrences including absences, tardy or early leaves in a consecutive twelve (12) month period will result in termination of employment." (Ex. C). Ms. Y[Redacted] testified the accumulation of 8 points by an Employee was grounds for termination.

6. The Attendance Policy provides that “Employees prevented from coming to work or delayed in getting to work must call their supervisor/manager at least one hour prior to their scheduled start time. In Distribution Centers where there is a Sick Hotline, the call should be made at least one hour prior to the scheduled start time.” (Ex. C).
7. The Attendance Policy does not provide instruction to employees regarding reporting procedures for attending medical visits related to industrial injuries.
8. Prior to his industrial injury, Claimant had a significant history of attendance issues. Between June 26, 2019 and September 8, 2019, Employer provided Claimant with various “Corrective Action” forms for attendance and tardiness issues. As of September 8, 2019, Claimant had accumulated 8.5 points under the Attendance Policy. (Ex. C).
9. Although Claimant had accumulated more than 8 points, Employer did not terminate Claimant on September 8, 2019, and chose not to enforce the Attendance Policy. The September 8, 2019 Corrective Action Form advised Claimant “to avoid further disciplinary actions, please make a more conscious effort to arrive to work on time, when scheduled.” (Ex. C).
10. Ms. Y[Redacted] testified that Employer had a “standard practice” applicable to employees who suffered workplace injuries. Ms. Y[Redacted] testified it was standard practice for employees, who had workplace-injury-related appointments during their scheduled shift to report to work, clock in, attend medical appointments, and return to work to finish their shift (the “WC Attendance Procedure”).
11. Ms. Y[Redacted] testified she met with the Claimant sometime after October 10, 2019, to discuss the conditions of Claimant’s return to work and for him to sign a “Transitional Duty” contract advising him all Employer policies still applied to him, and providing him with a modified duty description. The “Transitional Duty” contract is not in the Court record. Claimant was placed on a modified duty position, based on the work restrictions provided by PA Joslyn. Claimant was re-assigned to a janitorial position.
12. Ms. Y[Redacted] did not discuss with Claimant Employer’s WC Attendance Procedure. Ms. Y[Redacted] testified she “thinks” Employer’s safety coordinator informed Claimant of the WC Attendance Procedure. Ms. Y[Redacted] also testified she checked Claimant’s employment records, and he was following the WC Attendance Procedure. Ms. Y[Redacted] testified Claimant had medical appointments on “many, many days” on which he followed the WC Attendance Procedure. Ms. Y[Redacted] testified that Claimant had shown “over and over and over again that he knew the process and what to do. He was opting just to not do it.” Claimant testified that he was not informed of Employer’s “WC Attendance Procedure.”

13. Claimant initially presented to UC Health on September 26, 2019, with complaints of back pain, was released and told to return to work. Employers' records of Claimant's absences and tardiness do not contain an entry for September 26, 2019. (Ex. C).
14. On September 30, 2019, Claimant presented to Jonathan Joslyn, PA-C, at Concentra, with complaints of back pain. Claimant was given a work restriction of lifting up to 10 lbs. occasionally; pushing/pulling up to 20 lbs. occasionally; and no bending or twisting. Also, on September 30, 2019, Claimant began physical therapy at Concentra with Jessica McAlee, PT. (Ex. A).
15. PA Joslyn's treatment note from September 30, 2019, indicates Claimant's vital signs were taken at 1:12 p.m., and the note was electronically signed at 2:11 p.m. on September 30, 2019. (Ex. A). The ALJ infers that the appointment was scheduled at approximately 1:00 p.m.
16. Ms. McAlee's note from September 30, 2019 was dictated at 4:42 p.m., indicating the appointment took place sometime between 2:00 and 4:42 p.m. (Ex. A).
17. Employers' records of Claimant's absences and tardiness do not contain an entry for September 30, 2019. Neither Claimant nor Respondents offered testimony regarding whether Claimant followed the WC Attendance Procedure on September 30, 2019. (Ex. C).
18. Claimant did not attend work on October 7, 8, 9 or 10, 2019. Although Claimant did not have a work restriction prohibiting him from working, Employer treated these dates as "excused absences" and did not assign Claimant any "points" under its attendance policy. Claimant received temporary total disability benefits for the time period of October 8, 2019 through October 12, 2019. (Ex. 3).
19. On October 7, 2019, Claimant attended his second physical therapy appointment. (Ex. A).
20. Employer's attendance records indicate that Claimant's absence on October 7, 2019 was "Excused Time – No Pay." (Ex. C).
21. On October 9, 2019, Claimant attended his third physical therapy appointment. (Ex. A).
22. Employer's attendance records indicates that Claimant's absence on October 9, 2019 was "Excused Time – No Pay." (Ex. C).
23. On October 10, 2019, attended an appointment with Cheryl Meyers Saffold, M.D. Dr. Saffold gave Claimant work restrictions to include lifting up to 10 lbs. occasionally, push/pull up to 20 lbs., occasionally, no bending or twisting, no sweeping or mopping, no squatting, no kneeling. (Ex. A).

24. Employer's attendance records indicates that Claimant's absence on October 10, 2019 was "Excused Time – No Pay." (Ex. C).
25. On October 13, 2019, Claimant returned to modified duty and full hours and wages. (Ex. 3).
26. On October 14, 2019, Claimant attended his fourth physical therapy appointment, starting at 9:55 a.m. The treatment note was electronically signed at 10:51 a.m. (Ex. A).
27. Employers' records of Claimant's absences and tardiness do not contain an entry for October 14, 2019. (Ex. C). Neither Claimant nor Respondents offered testimony regarding whether Claimant followed the WC Attendance Procedure on October 14, 2019.
28. On October 16, 2019, Claimant attended his fifth physical therapy appointment. The treatment note was dictated at 11:54 a.m. on 10/10/19. (Ex. A). The ALJ infers that Claimant's physical therapy appointment on October 16, 2019 began at approximately 11:00 a.m.
29. On October 16, 2019, Claimant saw Nickolas Curcija, PA-C, Claimant's vital signs were recorded at 12:43 p.m., and the treatment note was electronically signed at 3:56 p.m. PA Curcija revised Claimant's work restrictions to lifting up to 30 lbs. frequently and push/pull up to 30 lbs. frequently. (Ex. A).
30. Employers' records of Claimant's absences and tardiness do not contain an entry for October 16, 2019. (Ex. C). Neither Claimant nor Respondents offered testimony regarding whether Claimant followed the WC Attendance Procedure on October 16, 2019.
31. On October 21, 2019, Claimant saw PA Joslyn for a "recheck." Claimant's vital signs were recorded at 4:00 p.m., and the note was electronically signed at 5:47 p.m., indicating that the visit took place between these times. PA Joslyn reiterated Claimant's work restrictions of lifting up to 30 lbs. frequently and push/pull up to 30 lbs. frequently. (Ex. A).
32. Employers' records of Claimant's absences and tardiness do not contain an entry for October 21, 2019. (Ex. C). Neither Claimant nor Respondents offered testimony regarding whether Claimant followed the WC Attendance Procedure on October 21, 2019.
33. On October 24, 2019, Claimant saw Richard Mobus, D.C., for chiropractic. The treatment note for this date of service indicated Claimant's vital signs were recorded at 8:29 a.m., and the treatment note was dictated at 8:50 a.m. (Ex. A). The ALJ infers the appointment with Dr. Mobus took place between these times, and likely lasted less than 20 minutes. Claimant testified that his chiropractic appointments began at 8:30 a.m. (The ALJ notes that the record indicates it was

“electronically signed” at 7:50 a.m. but infers this is likely an error and the note was signed at 8:50 a.m.). (Ex. A).

34. Employers’ records of Claimant’s absences and tardiness do not contain an entry for October 24, 2019. (Ex. C). Neither Claimant nor Respondents offered testimony regarding whether Claimant followed the WC Attendance Procedure on October 24, 2019.
35. On October 31, 2019, Claimant saw Richard Mobus, D.C., for chiropractic. The treatment note for this date of service indicated Claimant’s vital signs were recorded at 8:29 a.m., and the treatment note was dictated at 8:50 a.m. (Ex. A). The ALJ infers the appointment with Dr. Mobus took place between these times, and likely lasted less than 20 minutes. (The ALJ notes that the record indicates it was “electronically signed” at 7:50 a.m. but infers this is likely an error and that the note was signed at 8:50 a.m.). (Ex. C).
36. Employers’ records of Claimant’s absences and tardiness do not contain an entry for October 31, 2019. (Ex. C). Neither Claimant nor Respondents offered testimony regarding whether Claimant followed the WC Attendance Procedure on October 31, 2019.
37. On November 4, 2019, Claimant was scheduled to work beginning at 9:00 a.m. Claimant called Employer’s attendance line (the ALJ infers this is was the “Sick Hotline” referenced in the Attendance Policy) sometime before 8:00 a.m., on November 4, 2019. Claimant testified he left a message that he had an appointment and would be in to work after the appointment.
38. Ms. Y[Redacted] testified that, based on notes in Claimant’s file, Claimant left a message on the Sick Hotline indicating that he “has appointments all day” on November 4, 2019. Claimant testified he did not say he had appointments “all day.”
39. Claimant attended his November 4, 2019 physical therapy appointment at 11:30 a.m. Claimant received a voicemail from Employer notifying him his employment was terminated while he was leaving his physical therapy appointment.
40. Employer terminated Claimant’s employment on November 4, 2019, with a stated reason for termination as “attendance.” (Ex. A).
41. Claimant testified that calling in before November 4, 2019 appointment was consistent with what he had done for other appointments. Claimant testified that in some instances, he would call in to work before his shift and attend an appointment, and then come to work after. The ALJ infers from Claimant’s testimony that Claimant also clocked into work before other appointments and then returned to work after.

42. On November 21, 2019, Claimant saw Amanda Cava, M.D. for an office visit. Claimant Dr. Cava modified Claimant's work restrictions lifting up to 30 lbs. constantly and pushing/pulling up to 30 lbs. constantly.
43. On December 12, 2019, Claimant saw PA Joslyn. Claimant continued to be under work restrictions of lifting up to 30 lbs. constantly and pushing/pulling up to 30 lbs. constantly. PA Joslyn noted Claimant was "approximately 50% of the way toward meeting the physical requirements of his job." (Ex. A).
44. Claimant's work restrictions of lifting up to 30 lbs. constantly, and pushing/pulling up to 30 lbs. constantly, remained the same at visits with PA Joslyn on January 2, 2020, January 27, 2020, February 17, 2020. (Ex. A).
45. On May 7, 2020, Claimant saw Mr. Joslyn. Claimant's work restrictions continued to be lifting up to 30 lbs. constantly and pushing/pulling up to 30 lbs. constantly. (Ex. 4).

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. See § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. See § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceedings is the domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Entitlement To TTD Benefits

To prove entitlement to Temporary Total Disability (TTD) benefits, Claimant must prove his industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office*, 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage-earning capacity as demonstrated by Claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999).

The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) TTD benefits ordinarily continue until terminated by the occurrence of one of the criteria listed in § 8-42-105 (3), C.R.S.

The existence of disability is a question of fact for the ALJ. No requirement exists that a claimant produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lyburn v. Symbios Logic*, 952 P.2d 831, 833 (Colo. App. 1997).

Claimant suffered an admitted injury to his back, and was under work restrictions through at least May 7, 2020, including lifting, pushing, and pulling no more than 30 lbs. The restrictions of lifting, pushing, and pulling no more than 30 lbs. are substantially similar to the restrictions provided to Claimant prior to his termination. The evidence establishes that although Claimant returned to work, his return was in a modified position subject to the restrictions placed on him by his treating health care providers. The ALJ concludes that Claimant's testimony, Ms. Y[Redacted]'s testimony and the medical records establish by a preponderance of the evidence Claimant's injury prevented him from performing his regular job duties for more than three work shifts, starting October 10, 2019.

Claimant's entitlement to TTD benefits ended upon Claimant's return to modified employment with Employer on October 13, 2019. Because he was working in a modified job capacity for Employer within his work restrictions and earning normal wages, Claimant was not entitled to any TTD benefits from October 13, 2019 until his termination on November 4, 2019. § 8-42-105 (3)(b), C.R.S. However, upon termination of his

employment on November 4, 2019, Claimant again sustained actual wage loss due to his industrial injury and resulting disability. On and after November 4, 2019, Claimant remained under work restrictions that prevented him from resuming his prior pre-injury employment. Claimant is medically incapacitated with restrictions of bodily function that cause him to have work restrictions and impairment in his wage-earning capacity. Since November 4, 2019, Claimant has been medically incapacitated and has been unable to resume his prior work. His wage-earning capacity is thus impaired due to his industrial injury and resulting disability. Claimant testified he has not returned to work since his November 4, 2019 termination and that he has earned no income since that date. Because none of the other criteria listed in § 8-42-105(3) were fulfilled after November 4, 2019, Claimant has established, by a preponderance of the evidence, an entitlement to TTD benefits beginning November 4, 2019.

Claimant's failure to seek new employment does not diminish his entitlement to TTD benefits. The Workers Compensation Act does not create an affirmative duty on the part of a temporarily disabled claimant to seek work within his or her restrictions. *Schlage Lock v. Lahr*, 870 P.2d 615, 617 (Colo. App. 1993). "Thus, a claimant's ability to perform post-injury employment or willingness to seek employment does not necessarily reflect the degree of physical impairment resulting from the change in physical condition." *Id.*, citing *Denny's Restaurant, Inc. v. Husson*, 746 P.2d 63 (Colo. App. 1987). Nor does a claimant's hypothetical ability to perform some employment within his or her temporary medical restrictions sever the causal connection between the injury and the temporary wage loss. See *Eastman Kodak Co. v. Industrial Commission*, 725 P.2d 107 (Colo. App. 1986). The rationale for this rule is that the temporary physical impairment resulting from the injury impairs the claimant's opportunities for employment on the open labor market. See *Hobbs v. Industrial Claim Appeals Office*, 804 P.2d 210 (Colo. App. 1990).

RESPONSIBILITY FOR TERMINATION

The Workers' Compensation Act prohibits a claimant from receiving temporary disability benefits if the claimant is responsible for termination of the employment relationship. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, (Colo. App. 2008); §§ 8-42-103(1)(g), 8-42-105(4)(a), C.R.S. The termination statutes provide that where an employee is responsible for his termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, W.C. No. 4-631-681 (ICAO, Apr. 24, 2006).

"Under the termination statutes, sections 8-42-103(1)(g) and 8-42-105(4), an employer bears the burden of establishing by a preponderance of the evidence that a claimant was terminated for cause or was responsible for the separation from employment." *Gilmore*, 187 P.3d at 1132. Violation of an employer's policy does not necessarily establish the claimant acted volitionally with respect to a discharge from employment. *Gonzales v. Industrial Commission*, 740 P.2d 999 (Colo. 1987). An "incidental violation" is not enough to show the claimant acted volitionally. *Starr v. Industrial Claim Appeals Office*, 224 P.3d 1056, 1065 (Colo. App. 2009). However, a claimant may act volitionally, and therefore be "responsible" for the purposes of the termination statute, if they are aware of what the employer requires and deliberately fails

to perform accordingly. *Gilmore*, 187 P.3d at 1132. Ultimately, the question of whether the claimant was responsible for the termination is one of fact for determination by the ALJ. *Apex Transportation, Inc. v. Industrial Claim Appeals Office*, 321 P.3d 630, 632 (Colo. App. 2014).

Respondents have not met their burden of establishing that Claimant was responsible for his separation from employment. At issue is whether Claimant failed to follow Employer's putative attendance procedure for employees who are seeking medical treatment for industrial injuries (i.e., the "WC Attendance Procedure").

Employer's HR Director, Ms. Y[Redacted] testified that Employer's "standard procedure" when Claimant had a medical appointment related to his industrial injury was to follow the WC Attendance Procedure. Specifically, that the employee was expected to attend medical appointments while on "on the clock" and return to work after appointments. This WC Attendance Procedure is not contained in Employer's written Attendance Policy. No evidence was offered at hearing that this "standard procedure" is memorialized in any written document.

Ms. Y[Redacted] did not discuss the WC Attendance Procedure with Claimant, and Respondents did not present any credible evidence at hearing demonstrating Claimant had been informed of the WC Attendance Procedure, either verbally or in writing. Ms. Y[Redacted] testified she "thinks" an unidentified "Safety Coordinator" informed Claimant of the WC Attendance Procedure, but she had no personal knowledge this actually occurred. Claimant testified he was not aware of the WC Attendance Procedure, and his understanding was that he required to call into work at least one hour before, in accordance with the written Attendance Policy. The record contains insufficient evidence to establish that Claimant was verbally informed of the WC Attendance Procedure. Claimant testified he believed he was complying with Employers' policy by calling the "Sick Hotline" at least one hour prior to his shift.

The Court is asked to infer that Claimant was aware of the WC Attendance Procedure based on Ms. Y[Redacted]'s testimony that Claimant followed the standard procedure for his other treatment appointments. Ms. Y[Redacted] testified Claimant had appointments on "many, many days" during work hours and that he followed the WC Attendance Procedure "over and over and over again" prior to November 4, 2019. Ms. Y[Redacted]'s testimony in this regard is not supported by the record.

Claimant's work schedule was Sunday through Thursday, starting at 9:00 a.m. Between Claimant's injury on September 26, 2019 and the day before his termination on November 4, 2019, Claimant attended medical, physical therapy or chiropractic appointments on nine days (September 30, October 7, 9, 10, 14, 16, 21, 24, and 31). Claimant's September 30 appointment was his initial appointment, and before the time Ms. Y[Redacted] testified a "Safety Coordinator" may have informed Claimant of the WC Attendance Procedure. On three of these days – October 7, October 9, and October 10 – Claimant did not attend work and was granted "Excused Time – No Pay." Consequently, Claimant had no opportunity to demonstrate compliance with the putative

WC Attendance Procedure on those four dates (i.e., September 30, and October 7, 9, and 10).

On two of the remaining five days – October 24 and October 31 – Claimant's appointments were at 8:30 a.m. Claimant could not have followed the WC Attendance Procedure on these dates because his appointments were before his shift at 9:00 a.m.

Only three dates exist on which Claimant 1) worked; 2) had medical appointments starting during his shift; and 3) were after the date Respondents assert Claimant was informed of the "WC Attendance Procedure" – October 14, October 16, and October 21, 2019. Claimant's appointment on October 14, 2019, began at 9:55 a.m., his appointments on October 16 began at approximately 11:00 a.m., and his appointment on October 21, 2019 began at 4:00 p.m.

Neither Claimant nor Respondents offered evidence of Claimant following the WC Attendance Procedure on any specific date. Moreover, the records contains no evidence from which it can be inferred that Claimant followed or did not follow the WC Attendance Procedure on any of the dates when compliance would have been feasible. Claimant's attendance records do not reflect the times Claimant clocked in on any date. Nor do Claimant's attendance records note medical appointments on any given date. Thus, the Court cannot determine, for example, whether Claimant followed the WC Attendance Procedure on October 14 or 16, or whether Claimant merely called the Sick Hotline before his shift and clocked in after appointments. The lack of entries in Claimant's attendance records merely reflect that the procedure Claimant followed on those days was not considered a violation of Employer's Attendance Policy. The evidence of Claimant's conduct presented at hearing was insufficient to impute knowledge of the WC Attendance Procedure to Claimant.

Respondents have not met their burden of establishing by a preponderance of the evidence that Claimant was aware of what Employer required and deliberately failed to perform accordingly. As such, Respondents have not met the burden of establishing that Claimant was responsible for his termination as required by § 8-42-103(g) and § 8-42-105 (4)(a), C.R.S.

Although Claimant was capable of the work that Employer assigned to him post-injury, Claimant was not "responsible" for his termination by Employer during his period of temporary disability. As such, a causal link between Claimant's industrial injury and his post-termination wage loss is established, and Claimant is entitled to temporary total disability benefits from November 4, 2019 through the date of this Order, and continuing until one of the criteria of § 8-42-105(3)(a)-(d), C.R.S, is met.

ORDER

It is therefore ordered that:

1. Claimant's claim for TTD benefits from November 4, 2019 through the date of this order is granted.

2. Insurer shall pay Claimant TTD benefits from November 4, 2019 through the date of this order in the amount of \$544.83 per week.
3. Insurer shall pay statutory interest at the rate of 8% per annum on compensation benefits not paid when due.
4. All matters not determined herein are reserved for future determination.

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

DATED: July 23, 2020.

/s/ Steven R. Kabler
Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

Whether the claimant had demonstrated, by a preponderance of the evidence, that the left total knee replacement recommended by Dr Douglas Huene is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted October 10, 2018 work injury.

FINDINGS OF FACT

1. The claimant has worked for the employer for 21 years. On October 10, 2018, the claimant was working in the employer's wrapping department. The claimant picked up a box weighing approximately 10 pounds, and he pivoted on his left foot. While pivoting, the claimant felt and heard a pop in his left knee. The claimant further testified that he immediately had pain in his left knee and he was unable to place any weight on his left leg.

2. The claimant was sent for medical treatment on October 10, 2018 and was seen at Peak Occupational Wellness by Isaac Klosterman, PA-C. At that time, the claimant reported pivoting on his left leg and feeling and hearing a pop. The claimant also reported that prior to that incident he had experienced tightness in his left knee during the prior two days. On exam, Mr. Klosterman noted moderate to significant edema over the claimant's entire left knee. Mr. Klosterman diagnosed bursitis of the left knee with medial knee pain. He recommended the use of NSAIDs and a hinged knee brace. In addition, Mr. Klosterman placed the claimant under work restrictions.

3. On October 17, 2018, the claimant returned to Mr. Klosterman and reported that his symptoms had improved and he was no longer using a cane. At that time, Mr. Klosterman noted that the claimant had a sprain of the medial collateral ligament of his left knee. Mr. Klosterman referred the claimant to physical therapy. On October 31, 2018, the claimant reported to Mr. Klosterman that he was doing well working light duty. On November 9, 2018, the claimant returned to Peak Occupational Wellness and was seen by Susan Dockins, FNP. The claimant continued to report improvement in his symptoms, but with continuing medial pain in his left knee.

4. On November 26, 2018, the claimant was seen at Peak Occupational Wellness, by Dr. Stephen Adams. At that time, the claimant reported worsening symptoms and a feeling that his left knee would "lock". Dr. Adams administered a steroid injection and ordered additional physical therapy treatment. On December 11, 2018, the claimant reported some pain relief following the injection. Thereafter, on December 27, 2018, Dr. Adams administered a left pes anserine bursa injection.

5. On January 18, 2019, an MRI of the claimant's left knee showed a full thickness radial tear of the posterior horn of the medial meniscus. In addition, the MRI showed a closed fracture of the condyle of the left femur.

6. Following the MRI, Dr. Adams referred the claimant to Dr. Douglas Huene for an orthopedic surgical consultation. The claimant was first seen by Dr. Huene on February 8, 2019. At that time, the claimant described the pivoting/twisting incident that occurred on October 10, 2018. Dr. Huene noted that the claimant had undergone physical therapy, two injections, used NSAIDs, a brace, and a TENS unit. Dr. Huene opined that the claimant was not a good candidate for a total knee replacement. However, he noted that the claimant might benefit from arthroscopic surgery.

7. On February 27, 2019, Dr. Huene performed arthroscopic left knee surgery that included debridement of the medial meniscus tear, debridement of the the medial femoral condyle articular surface, debridement of the patellar articular surface, debridement of the medial plica, and removal of a loose body.

8. On March 6, 2019, the claimant returned to Dr. Huene. At that time, Dr. Huene noted that the claimant's incisions were healing and the claimant was able to ambulate without difficulty. Dr. Huene released the claimant to return to modified duty. The claimant's work restrictions included no crawling, kneeling, squatting, or climbing. In addition, the claimant was limited to walking no more than one hour per day, and standing no longer than one hour per day. On April 3, 2019, Dr. Huene released the claimant to return to full duty work with no work restrictions.

9. Following the surgery the claimant's left knee symptoms improved. However, on April 14, 2019, the claimant reported to Dr. Adams that he "tweaked" his knee at physical therapy, which resulted in increased medial pain. Thereafter, during a vacation in June 2019, his left knee pain worsened.

10. On June 9, 2019, the claimant reported to Dr. Huene that his left knee pain was worse. At that time, the claimant asked Dr. Huene for a total knee replacement. Dr. Huene did not state an opinion regarding knee replacement. However, he placed the claimant on work restrictions that included no lifting, carrying, pushing, or pulling more than 10 pounds; no crawling, kneeling, squatting, or climbing; and limited standing and walking to four hours per day.

11. On June 21, 2019, the claimant reported to Dr. Adams that he experienced an increase in his left knee pain while out of town on vacation. Dr. Adams noted that the claimant had been vacationing at a higher altitude. Despite this increase in symptoms, the claimant also reported that he was "pretty close" to working full duties at work. Thereafter on July 2, 2019, the claimant reported to Dr. Adams that his left knee pain had been much worse since the day before. On that date, Dr. Adams administered a steroid injection into the claimant's left knee.

12. On July 7, 2019, x-rays of the claimant's left knee showed mild degenerative changes, slight loss of articular cartilage, and slight degenerative spurring.

13. On July 9, 2019, Dr. Adams took the claimant off of all work.

14. On July 16, 2019, an MRI of the claimant's left knee showed tricompartmental arthritic changes, with moderate joint effusion, and a loose body.

15. On August 2, 2019, the claimant was seen by Dr. Huene. At that time, the claimant reported that his knee "suddenly became worse with [no known injury] and he is absolutely miserable". Dr. Huene recommended the claimant undergo a repeat arthroscopy.

16. At the request of the respondents, Dr. Mark Failingler reviewed the claimant's medical records and issued an undated written report¹. Dr. Failingler opined that the claimant has high grade chondromalacia and arthritis in his left knee. Dr. Failingler also opined that the claimant's preexisting left knee condition was exacerbated by the October 10, 2018 incident at work. However, the arthroscopy performed by Dr. Huene did not help the claimant's condition. Dr. Failingler opined that the best treatment for the claimant's left knee would include rest so the stress fracture could heal. Dr. Failingler further opined that the claimant's left knee symptoms were caused by the natural progress of the degenerative joint disease in that joint, and not related to the claimant's job duties. Dr. Failingler recommended that the insurer deny the request for a second arthroscopic surgery. The recommended repeat arthroscopy was denied.

17. On January 2, 2020, the respondents filed a General Admission of Liability.

18. Subsequently, on February 7, 2020, Dr. Huene recommended a left total knee arthroplasty (replacement). In support of this surgical recommendation, Dr. Huene noted that the claimant had end stage joint disease in his left knee, had failed conservative treatment, and had reduced range of motion.

19. On May 13, 2020, the claimant attended an independent medical examination (IME) with Dr. Failingler. In connection with the IME, Dr. Failingler reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In the IME report, Dr. Failingler opined that a left total knee replacement would be reasonable treatment of the claimant's left knee. However, Dr. Failingler further opined that the claimant's need for left knee surgery is not related to the October 10, 2018 work incident. In support of this opinion, Dr. Failingler noted that the condition of the claimant's left knee is the result of preexisting degenerative joint disease. Based upon Dr. Failingler's IME report, the respondents denied authorization for the requested left total knee replacement.

20. The ALJ credits the medical records and the opinions of Dr. Huene over the conflicting opinions of Dr. Failingler. The ALJ finds that the claimant has demonstrated that it is more likely than not that the recommended left total knee replacement is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury. The ALJ is persuaded that the claimant's October 10, 2018 work injury exacerbated the degenerative condition in the claimant's left knee. The ALJ further finds

¹ In his May 13, 2020 IME report, Dr. Failingler identified the date of his previous records review as August 3, 2019.

that the claimant has demonstrated it is more likely than not that the claimant's current need for a left total knee replacement is causally related to the admitted work injury.

CONCLUSIONS OF LAW

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

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

4. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

5. As found, the claimant has successfully demonstrated, by a preponderance of the evidence, that the left total knee replacement recommended by Dr. Huene is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted work injury. As found, the medical records and the opinions of Dr. Huene are credible and persuasive.

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ORDER

It is therefore ordered that the respondents shall pay for the left total knee replacement recommended by Dr. Huene, pursuant to the Colorado Medical Fee Schedule.

Dated this 27th day of July 2020.



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

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

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-125-703-001**

ISSUES

Whether the claimant has demonstrated, by a preponderance of the evidence, that she is entitled to temporary total disability (TTD) benefits beginning May 8, 2019 and ongoing.

If the claimant is found to be entitled to TTD benefits, what is the claimant's average weekly wage (AWW)?

FINDINGS OF FACT

1. On March 13, 2019, the claimant was employed with the employer as a Certified Nursing Assistant (CNA) and Qualified Medication Administration Personnel (QMAP). The claimant worked on the "float team". This meant that the claimant traveled to different facilities to provide services to patients, based upon the employer's staffing needs.

2. On March 13, 2019, the claimant was injured while at work. The injury occurred when the claimant was assisting a patient while using a "sit to stand" assistive device. During this transfer, the patient started to slip, causing the claimant to fall into a lunging position. The claimant testified that she felt a pop and a warm rush down her back. The respondents have admitted liability for the claimant's March 13, 2019 injury.

3. The claimant testified that her treatment for her injury was overseen by Dr. Stephen Adams and Norman Lee Dockins, PA-C with Peak Professionals. On March 15, 2019, the claimant was seen by Mr. Dockins. At that time, Mr. Dockins assigned temporary work restrictions that included no lifting over 10 pounds, no carrying, pushing, or pulling over five pounds, limited walking to two hours per day, standing of no more than one hour per day, and sitting no more than five hours per day. In addition, Mr. Dockins noted on the WC164 form "frequent standing breaks every 15 minutes as needed". Thereafter, Mr. Dockins continued to assign work restrictions. On April 4, 2019, he included a notation of "frequent standing breaks every 15 minutes as needed".

4. During this same time, the employer offered the claimant modified duty work that complied with her work restrictions. On March 20, 2019, a Modified Duty Work Agreement was accepted by the claimant. The claimant testified that this modified work was performed at a facility in Montrose, Colorado. The claimant resides in Ridgway, Colorado. While performing modified duty work in Montrose the claimant drove from her home in Ridgway to the work location. The claimant testified that her commute to the Montrose location was approximately 30 minutes.

5. The claimant continued working in this manner until the employer offered the claimant a different position on May 3, 2019. In a form titled Employer Transitional Job Offer, the position offered was a receptionist position with a start date of May 7, 2019. The claimant's work restrictions were included on that form and included "with frequent standing breaks every 15 minutes as needed."

6. The claimant testified that she accepted this receptionist position, which was located in Eckert, Colorado. The claimant testified that prior to her injury, the 65 mile drive between Ridgway and Eckert would take approximately one hour and 15 minutes. However, due to her injury and related work restrictions, the claimant had to stop multiple times to walk around and stretch. As a result, this same drive took the claimant two hours.

7. On May 7, 2019, the claimant made the drive from her home in Ridgway to the receptionist job in Eckert. The claimant testified that she was able to perform all of the duties required of her in Eckert. However, due to her need to stop driving every 15 minutes, the commute was two hours each way. This resulted in a 12 hour day for the claimant; (eight hours of work and four hours of total drive time).

8. On May 7, 2019, the claimant notified the employer via email and text message that she was declining the position in Eckert. The claimant noted that although she was able to perform the job duties, the 65 mile commute was too far and too painful for her to drive.

9. On May 8, 2020, the insurer provided a job description to Mr. Dockins and asked him to indicate whether the claimant would be able to perform the position. Mr. Dockins signed this form and indicated that the position would meet the claimant's work restrictions. The job description specifically included "sitting 5 hours per day, with frequent standing breaks every 15 minutes as needed".

10. On May 13, 2019, the employer offered the claimant a temporary modified position with a start date of May 20, 2019. On May 20, 2019, the claimant declined the employer's offer of a temporary modified position.

11. The claimant testified that she has not been offered any other positions with the employer. The claimant testified that she has not been paid any wages since March 7, 2019. In addition, she has not received temporary total disability (TTD) or temporary partial disability (TPD) benefit payments from the respondents. The claimant testified that she has relied on family members for financial support since her injury.

12. The ALJ credits the claimant's testimony and finds that she has demonstrated that it is more likely than not that she is entitled to TTD benefits beginning May 8, 2019. The ALJ is persuaded that the claimant attempted to work in the modified employment position in Eckert, but due to the substantial commute, she was unable to continue in that position. The ALJ finds that the claimant's behavior was objectively reasonable given the distance from her home in Ridgway to Eckert and her work restrictions (that included getting up from sitting every 15 minutes).

13. Wage records entered into evidence indicate that the claimant earned wages totalling \$23,283.75 in 2018, and \$8,245.07 for the period of January 1, 2019 to May 7, 2019. This is a total of \$31,528.82 for a time period of 492 days. The ALJ calculates this to be average wages of \$64.08 per day, or \$448.56 per week.

CONCLUSIONS OF LAW

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

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

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

and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

5.The claimant's receipt of TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. Section 8-42-105(3)(a)-(d), C.R.S.

6.The ALJ should consider the consequences of the industrial injury, the financial hardship that would be imposed on the claimant by accepting the modified employment, and "[a]ny other reasons that would, in the opinion of the administrative law judge, make it impracticable for the claimant to accept the offer of modified employment." Section 8-42-105(4)(b)(II).

7.As found, the claimant has demonstrated by a preponderance of the evidence that she is entitled to TTD benefits beginning May 8, 2019 and ongoing until terminated by law. As found, the claimant has demonstrated that it was reasonable for her to decline the offer of modified employment due to the distance required by the commute, and her work restrictions. As found, the claimant's testimony is credible and persuasive.

8.The ALJ must determine an employee's AWW by calculating the monetary rate at which services are paid the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995).

9.Section 8-42-102(2), C.R.S. requires the ALJ to base claimant's AWW on his earnings at the time of the injury. Under some circumstances, the ALJ may determine the claimant's TTD rate based upon her AWW on a date other than the date of the injury. *Campbell v. IBM Corporation*, 867 P.2d 77 (Colo. App. 1993). Section 8-42-102(3), C.R.S. grants the ALJ discretionary authority to alter that formula if for any reason it will not fairly determine claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective of calculating AWW is to arrive at a fair approximation of claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO, May 7, 2007).

10.As found, the claimant's average weekly wage (AWW) is \$448.56. As found, this calculation was reached by dividing the total of \$31,528.82 by 492 days, resulting in a daily rate of \$64.08. When this is multiplied by seven days in a week, it results in an AWW of \$448.56

ORDER

It is therefore ordered:

1. The claimant is entitled to temporary total disability (TTD) benefits beginning May 8, 2019 and ongoing until terminated by law.
2. The claimant's average weekly wage (AWW) is \$448.56.
3. All matters not determined here are reserved for future determination.

Dated this 28th day of July 2020.



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

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**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-112-091-003**

ISSUES

Whether the claimant has demonstrated, by a preponderance of the evidence, that penalties should be assessed against the respondent pursuant to Sections 8-43-304 and 8-43-305, C.R.S. for the respondent's alleged failure to comply with ALJ Mottram's December 30, 2019 order; March 10, 2020 order; and March 30, 2020 order.

Whether the claimant has demonstrated, by a preponderance of the evidence, that penalties should be assessed against the respondent pursuant to Section 8-43-408(4), C.R.S.

FINDINGS OF FACT

1. On December 12, 2019, the parties went to hearing before ALJ Mottram on a number of issues. Those issues included compensability of an alleged July 4, 2019 work injury; the reasonableness, necessity, and relatedness of medical treatment; temporary disability benefits; and whether the employer failed to carry workers' compensation insurance.

2. On December 30, 2019, ALJ Mottram issued Findings of Fact, Conclusions of Law and Order (FFCLO). In the order, the respondent was ordered to pay \$30,844.60 in medical bills; \$20,571.43 in temporary total disability (TTD) benefits; and \$12,854.01 to the Colorado Uninsured Employer Fund. These funds were to be paid within 10 days of the date the order was served. Alternatively, the respondent could deposit the total of \$64,270.04 with the Trustee of the Colorado Division of Workers' Compensation, or post a bond in that same amount.

3. The December 30, 2019 order was served on the parties, via e-mail, on December 31, 2019. Therefore, ten days following that date was January 10, 2020.

4. On December 31, 2019, Gina J[Redacted], Trustee, Special Funds Unit, Division of Workers' Compensation, sent an email to the respondent regarding ALJ Mottram's order. In that email, Ms. J[Redacted] referred to Section 8-43-304(1), C.R.S. and notified the respondent that failure to comply with the order could lead to additional penalties.

5. On January 17, 2020, the respondent timely filed a petition to review regarding the December 30, 2019 order.

6. On March 10, 2020, ALJ Mottram issued a Supplemental Order in which he included additional factual findings. That Supplemental Order did not result in a different outcome when compared to the December 30, 2019 FFCLO. However, it did provide the

respondent with an additional ten days to make the ordered payments to the trustee or post a bond as outlined above.

7. The March 10, 2020 Supplemental Order was issued to the parties, via email, on March 11, 2020. Ten days from that date of service was March 21, 2020.

8. On March 27, 2020, the respondent timely filed a petition to review on the March 10, 2020 order.

9. On March 30, 2020, ALJ Mottram issued a Second Supplemental Order. In that order, ALJ Mottram clarified that the amount of \$12,854.01 was to be paid directly to the Colorado Uninsured Employer Fund, and was not to be paid to the Trustee or made a part of the bond. ALJ Mottram further clarified that the remaining amount of \$51,416.03 was to be paid to the Trustee, or a bond was to be posted in that amount.

10. The Second Supplemental Order was served on the parties, via e-mail, on March 31, 2019. Ten days from the date of service was April 10, 2020.

11. On March 31, 2020, Ms. J[Redacted] sent an email to the respondent regarding ALJ Mottram's March 30, 2020 order. In that email, Ms. J[Redacted] again referred to Section 8-43-304(1), C.R.S. and notified the respondent that failure to comply with the order could lead to additional penalties.

12. On April 8, 2020, the respondent filed a timely petition to review regarding the March 30, 2020 order.

13. All three of ALJ Mottram's orders in this matter included the following language:

IT IS FURTHER ORDERED: That the filing of any appeal, including a petition to review, shall not relieve the employer of the obligation to pay the designated sum to the trustee or file a bond. § 8-43-408(2), C.R.S.

14. The claimant testified that the respondent has made no payments in compliance with any of ALJ Mottram's orders.

15. On June 10, 2020, the Industrial Claim Appeals Office (ICAO) issued a Remand Order in which the issue of temporary disability benefits was remanded to ALJ Mottram. On all other issues, the ICAO affirmed ALJ Mottram's Second Supplemental Order.¹

16. The ALJ finds that the respondent failed to comply with the December 30, 2019 order beginning January 11, 2020 through and including the date of service of ALJ Mottram's Supplemental Order on March 11, 2020.

¹ As of the date of this order, the ICAO's June 10, 2020 order has been appealed. As a result, it is the understanding of the ALJ that the file regarding ALJ Mottram's Second Supplemental Order has been forwarded to the Colorado Court of Appeals.

17. The ALJ finds that the respondent failed to comply with the March 10, 2020 Supplemental Order beginning on March 22, 2020 through and including the date of service of ALJ Mottram's Second Supplemental Order on March 31, 2020.

18. The ALJ finds that the respondent failed to comply with the March 30, 2020 Second Supplemental Order beginning on April 11, 2020 through and including the date of the hearing on July 9, 2020.

19. The claimant has also requested penalties pursuant to Section 8-43-408(4), C.R.S., for the respondent's failure to comply with a lawful order. As found, the respondent has failed to comply with three orders issued by ALJ Mottram.

CONCLUSIONS OF LAW

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

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

4. Prior to the assessment of any penalties, the ALJ must first determine whether a party has violated any provision of the Workers' Compensation Act or an order. If the ALJ finds such a violation, penalties may be imposed if it is also found that the employer's actions were objectively unreasonable. Section 8-43-304, C.R.S. *City Market, Inc. v. Industrial Claim Appeals Office*, 68 P.3d 601 (Colo. App. 2003); *Pioneers Hospital of Rio Blanco County v. Industrial Claim Appeals Office*, 114 P.3d 97 (Colo. App. 2005); *Jimenez v. Industrial Claim Appeals Office*, 107 P.3d 965 (Colo. App. 2003). The "objective standard" is measured by reasonableness of the insurer's action and does not require knowledge that the conduct was unreasonable." *Colorado Compensation*

Insurance Authority v. Industrial Claim Appeals Office, 907 P.2d 676 (Colo. App. 1995). Section 8-43-305, C.R.S. provides that each day is a separate offense. Therefore, penalties may be assessed of up to \$1,000.00 per day.

5. In this case, the claimant seeks penalties for the respondent's failure to comply with the orders issued by ALJ Mottram. It is undisputed that the respondent has made no payments in compliance with the December 30, 2019, March 10, 2020, or March 30, 2020 orders. The respondent argues that because a petition to review was properly filed in this matter, that they were not required to comply with the orders, pending the outcome of their appeal.

6. The Colorado legislature has provided a specific statutory directive to employers that fail to carry workers' compensation insurance. Specifically, Section 8-43-408(2), C.R.S. provides, in pertinent part:

The filing of any appeal, including a petition to review, shall not relieve the employer of the obligation under this subsection (2) to pay the designated sum to a trustee or to file a bond.

7. Therefore, the ALJ concludes that the respondent's filing of timely petitions to review did not suspend the obligation to comply with ALJ Mottram's orders.

8. The ALJ further concludes that the actions of the respondent were not objectively reasonable. The respondent was informed in all three of the orders that they were to comply with the order, even in the event of an appeal/petition to review. The ALJ concludes that this was not objectively reasonable.

9. Therefore, the respondent violated ALJ Mottram's December 30, 2019 FFLCO. The violation began on the 11th day after service of the order. Therefore, the respondent's violation of that first order was from January 11, 2020 through and including March 11, 2020 (the date of service of the Supplemental Order). The ALJ calculates this to be 30 days.

10. The respondent also violated ALJ Mottram's March 10, 2019 Supplemental Order. The violation began on the 11th day after service of the order. Therefore, the respondent's violation of that order was from March 22, 2020 through and including March 31, 2020 (the date of service of the Second Supplemental Order). The ALJ calculates this to be 10 days.

11. Finally, the respondent violated ALJ Mottram's March 30, 2020 Second Supplemental Order. The violation began on the 11th day after service of the order. Therefore, the respondent's violation of that order was from April 11, 2020 through and including July 9, 2020 (the date of the hearing). The ALJ calculates this to be 89 days.

12. Based upon all of the foregoing, the ALJ concludes that penalties are appropriate in this matter. Given the continued failure to comply with an order of an ALJ, this ALJ orders the respondent to pay the claimant penalties of \$250.00 per day for a total

of 129 days. This results in total penalties of \$32,250.00.² No portion of this total shall be apportioned to the uninsured employer fund.

13. Section 8-43-408(4), C.R.S. provides that an employer who fails to comply with an order issued pursuant to Sections 8-43-408(2) or (3), C.R.S., may be subject to an additional penalty “for an amount equal to fifty percent of such order or judgment or one thousand dollars, whichever is greater, plus reasonable attorney fees incurred after entry of a judgment or order.”

14. As the ALJ has concluded above that the respondent failed to comply with ALJ Mottram’s orders, the 50 percent penalty allowed by Section 8-43-408(4) C.R.S. is appropriate in this matter.

15. Therefore, the respondent shall pay to the claimant additional penalties in the amount of \$25,708.02,³ plus attorney fees beginning April 11, 2020.

ORDER

It is therefore ordered:

1. The respondent shall pay the claimant penalties totaling \$57,958.02. No amount of this total shall be apportioned to the uninsured employer fund.

2. The amount of penalties ordered at this time is **in addition** to the amounts due and owing pursuant to the ALJ Mottram’s March 30, 2020 Second Supplemental order.

3. The respondent shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. In lieu of payment of the above to the claimant, the respondent shall:

a. Within ten (10) days of the date of service of this order, deposit the sum of \$57,958.02 with the Division of Workers' Compensation, as trustee, to secure the payment of all unpaid compensation and benefits awarded. The check shall be payable to: Division of Workers' Compensation/Trustee. The check shall be mailed to the Division of Workers' Compensation, 633 17th Street, Suite 900, Denver, Colorado 80202, Attention: Gina J[Redacted], Trustee; **OR**

b. Within ten (10) days of the date of service of this order, file a bond in the sum of \$57,958.02 with the Division of Workers' Compensation within ten (10) days of the date of this order:

² \$250.00 per day for a total of 129 days.

³ 50 percent of the judgment amount of \$51,416.03.

i. Signed by two or more responsible sureties who have received prior approval of the Division of Workers' Compensation; or

ii. Issued by a surety company authorized to do business in Colorado.

iii. The bond shall guarantee payment of the compensation and benefits awarded.

5. The respondent shall notify the Division of Workers' Compensation of payments made pursuant to this order.

6. The filing of any appeal, including a Petition to Review, shall not relieve the respondent of the obligation to pay the designated sum to the trustee or to file the bond. Section 8-43-408(2), C.R.S.

Dated this 29th day of July 2020.



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

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

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-972-041-002**

ISSUES

- I. Whether Claimant established Respondents failed to timely pay Claimant his TTD benefits and are subject to penalties pursuant to C.R.S. 8-43-401(2) and C.R.S. 8-43-304(1).
- II. Whether Claimant established Respondents failed to timely file an admission pursuant to WCRP 5-5(C)(1) and are subject to penalties under C.R.S. 8-43-304(1).
- III. Whether Claimant failed to plead with specificity his contention that Respondents failed to timely pay certain medical bills pursuant to ALJ Cayce's Order.
- IV. Whether Claimant established Respondents are subject to penalties under C.R.S. 8-43-304(1) for their failure to timely pay Claimant's medical bills pursuant to ALJ Cayce's Order.

FINDINGS OF FACT

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

Admitted Industrial Injury

1. Claimant suffered an admitted industrial injury to his low back. (*Cl's Ex. 1, pg. 3.*) Claimant underwent an L5-S1 laminectomy and discectomy. *Id.* He was ultimately placed at maximum medical improvement in December 2015.
2. After being placed at MMI, Claimant underwent a DIME in 2016. Pursuant to the DIME, Claimant's date of MMI was confirmed and he was assigned a 24% whole person impairment rating. (*Cl's Ex. 1, pg. 4.*) Respondents then filed a Final Admission of Liability (FAL). Claimant objected to the FAL and filed an Application for Hearing. Before a hearing took place, Respondents filed another FAL on January 31, 2017 and the claim then closed. *Id.*

Reopening & ALJ Cayce's Order

3. On October 13, 2018 Claimant bent down to pick up a piece of paper and when he stood up, he immediately felt pain in his lower back which radiated bilaterally into his legs and down to his feet.
4. Pursuant to ALJ Cayce's August 30, 2019 Order, the case was reopened under C.R.S. 8-43-303. (*Cl's Ex. 1, pp. 10,11.*) The certificate of mailing is dated September 3, 2019. *Id.*
5. In accordance with the reopening, ALJ Cayce ordered the following:

- a. Medical treatment from the October 13, 2018 exacerbation/aggravation is reasonable, related, and authorized, including, but not limited to, the ER visit, and Dr. Mitchell and Dr. Rauzzino's visits, prescriptions, and referrals. Respondents shall pay for that medical treatment according to the Colorado Medical Fee Schedule; and
 - b. Claimant is entitled to TTD from October 13, 2018 to October 29, 2018.
6. As noted, the Order specifically directed Respondents to pay for Claimant's past medical treatment pursuant to the Colorado Medical Fee Schedule.
7. The Order specified the period for which disability benefits were payable, but it did not specify the rate at which the disability benefits were payable to Claimant. See 8-43-215. The ALJ's order does, however, reference the previously admitted AWW of \$840.
8. Neither Claimant nor Respondents requested a corrected order or filed a petition to review.

Claimant's Application for Hearing – Endorsing Penalties.

9. On February 10, 2020, Claimant filed an application for hearing. In his application, he specifically set forth his penalty allegations regarding Respondents failure to timely pay Claimant the TTD benefits ordered by the ALJ and for their failure to timely file a general admission of liability.
10. On the other hand, Claimant's application broadly sets forth his penalty allegations about the Respondents failure to timely pay Claimant's medical benefits under ALJ Cayce's Order. His application, in part, provides:

Respondents further failed, in accordance with section 8-43-401(2)(a), C.R.S., to comply with the ALJ's Order by not paying Claimant medical benefits (including out-of-pocket reimbursements) and interest within 30 days of when they became due. Respondents are liable for penalties of up to \$1000 per day under section 8-43-304(1), C.R.S., for violating the ALJ's Order.

The Claimant has yet to receive a check for the ordered reimbursement of out-of-pocket medical costs or interest. The violation of the ALJ's order continues.

11. Thus, his application for hearing did not specifically set forth each medical benefit or bill Claimant alleged was not paid, the date each bill was submitted to Respondents (either by the provider or Claimant), the date each medical benefit or bill at issue should have been paid, and the date each bill or medical benefit was paid – if at all. Claimant also failed to do the same regarding his out of pocket medical expenses. As a result, based on his application, it was impossible to determine which medical bills and expenses were allegedly not

paid timely, which exact bills and expenses remained to be paid, and which bills and expenses formed the basis of his penalty claims.

12. The failure of Claimant to set forth his penalty allegations with specificity failed to put the Respondents on notice as to the exact medical bills at issue. As a result, Claimant submitted several medical bills at hearing which he asserted were not paid after ALJ Cayce issued her order. And, because Claimant failed to plead with specificity, Respondents failed to assert at the hearing that many bills submitted by Claimant at the hearing were paid before ALJ Cayce issued her Order.
13. Although pretrial discovery and discussions between counsel should have resolved these issues before the hearing in front of this ALJ, for whatever reason, it did not. As a result, the ALJ spent a significant amount of time going through the evidence submitted by the parties to assess the penalty allegations raised by Claimant. While doing so, the ALJ determined that many of the bills Claimant submitted and asserted were not paid timely after ALJ Cayce issued her order were paid before she issued her Order. This task was made harder based on the medical payment log submitted by Respondents in Exhibit D. The medical payment log submitted by Respondents was printed out in portrait mode instead of landscape mode. As a result, each page of the payment log is but a partial piece of the relevant payment information for each medical bill. As filed by Respondents, the first 13 pages of the payment log are missing the last two columns of the payment log data. Thus, the corresponding columns for pages 1 through 13 of the medical payment logs are contained on pages 14 through 26. Thus, the complete payment log for each transaction is covered over two pages - 13 pages apart. For example, the complete transaction data for the transactions listed on page 1 are contained on page 1 and 14 and the complete transaction data for the transactions listed on page 2 are contained on page 2 and page 15, and so forth.

***Penalty for Failure to file
General Admission of Liability Pursuant to W.R.C.P. 5-5(C)(1)***

14. Rule 5-5(C)(1) states that following an order that has become final, a new admission submitted to comply with that order must be filed within 30 days. Pursuant to § 8-43-301(2), the August 30, 2019 Order of ALJ Cayce, which was served on September 3, became final when no proceeding for judicial review was commenced. By virtue of the rule, Respondents had until October 3, 2019 to file a conforming general admission of liability (GAL).
15. As a result of the Order, Respondents filed a GAL on October 25, 2019. (*CI's Ex. 2.*) The initial GAL was filed 22 days late. On top of the GAL being filed late, the Respondents inadvertently admitted for the wrong period of TTD benefits. Rather than admit for TTD starting on October 13, 2018, the GAL admitted for TTD starting October 23, 2018. As a result, the GAL only admitted for TTD from October 23, 2018 through October 29, 2018. *Id.*
16. The ALJ infers from the evidence submitted that the person inputting the data for the GAL hit the "2" key instead of the "1" key when entering the start date for

Claimant's TTD benefits. As a result, the ALJ finds that the error in the admission for the wrong period of TTD stemmed from a typographical error.

17. Besides admitting to the wrong TTD period, the GAL also admitted for an average weekly wage ("AWW") of \$747.32 rather than the previously admitted AWW of \$860.00. *Id.* That said, the admitted TTD rate on the GAL reflected the previously admitted AWW of \$860.00 creating the correct TTD benefit rate of \$560.00. Thus, Claimant was paid at the correct TTD rate – based on an AWW of \$860.00 - despite a different AWW being listed on the GAL.
18. On November 5, 2019, 11 days after the GAL was filed, an email sent from Claimant's counsel's office to Respondents brought the AWW error to the Respondents attention. The email did not, however bring to Respondents attention the typographical error about the start date for Claimant's TTD benefits.
19. On November 12, 2019 Respondents received correspondence from the Division of Workers' Compensation which noted that under WCRP 5-5(C)(1) an admission consistent with the order was required. (*CI's Ex. 3.*) The Division said that they required an amended admission to be filed within fifteen days of receipt of the letter since the ALJ's order "appears to effect" TTD benefits. *Id.*
20. On November 27, 2019, Respondents filed an amended GAL complying with the Division of Workers' Compensation request and WCRP 5-5-(C)(1). Respondents corrected the TTD dates to October 13, 2018 through October 29, 2018, in conformity with the ALJ's Order. (*CI's Ex. 6.*)
21. Thus, Respondents filed a GAL consistent with the ALJ's order regarding Claimant's TTD benefits 55 days late.
22. The conforming GAL was filed before Claimant filed his application for penalties on February 10, 2020. Thus, Respondents did cure their violation of WCRP 5-5(C)(1).
23. Respondents did not, however, present any evidence explaining why they failed to file a GAL timely.

Payment of TTD

24. Claimant was owed \$1,360.00 in TTD benefits from October 13, 2018 through October 29, 2018. (*CI's Ex. 1, p. 11.*)
25. Under C.R.S. 8-43-301(2), the ALJ's Order, which was served on September 3, 2019, was not appealed, and became final. That said, applying section 8-43-401(1)(a), C.R.S., payment of benefits were due 30 days from the date of the order, in this case October 3, 2019.
26. On October 9, 2019, Claimant's counsels' office followed up with Respondents concerning the status of payment to Claimant's providers and his TTD benefits. (*CI's Ex. 4, p. 30.*)
27. Again, on October 15, 2019, Claimant's counsels' office followed up with Respondents concerning the status of the claim. (*Id. at p. 29.*)

28. On October 24, 2019, Claimant's counsel sent another email stating that Respondents had not complied with the ALJ's Order. (*CI's Ex. 5, p. 31*).
29. On October 25, 2019, Respondents paid Claimant only \$560.00 in TTD benefits instead of \$1,360.00 due to the error related to the start date of Claimant's TTD benefits as set forth on the GAL. (Respondents' *Ex. D.*) Rather than start TTD on October 13, 2018, Respondents started TTD on October 23, 2018. As found above, the error stemmed from a typographical error while inputting the start date into the GAL.
30. On November 12, 2019, the Department of Labor and Employment sent a letter to Respondents stating Respondents had not complied with the Order because an "admission consistent with the order" had not been filed. (*CI's Ex. 3, p. 28.*) That said, even the letter from the Division did not explain the error(s) in the admission.
31. After reviewing the letter from the Division, Respondents figured out the error about the start date for Claimant's TTD benefits. Thus, on November 27, 2019, Respondents filed another GAL that accurately reflected the TTD benefits ordered by the ALJ. They also issued a second check to Claimant for \$800 to make up the difference between the amount ordered by the ALJ and the smaller amount they had paid earlier and that conflicted with the Order. (*CI's Ex. 6, p. 32*), (*CI's Ex. 9.*)
32. By the time Respondents paid Claimant the full amount of TTD benefits following the ALJ's Order, the benefits were 55 days late. As a result, Respondents violated § 8-43-401(2)(a), C.R.S., a provision of the Act, as well as the ALJ's Order by failing to timely pay Claimant the TTD benefits that were awarded.
33. Respondents, however, paid Claimant the proper amount of TTD benefits pursuant to the Order by November 27, 2019. As a result, Respondents cured the violation before Claimant filed his Application for Hearing and endorsed the issue of penalties on February 10, 2020.
34. Claimant presented no evidence establishing Respondents knew or reasonably should have known that they had not complied with the ALJ's order regarding the payment of TTD benefits after the first GAL was filed and the first payment to Claimant was made. Even the first email from Claimant's counsel on November 5, 2019 only referenced the wrong AWW. The email did not point out the wrong TTD period and payment. Thus, Respondents and Claimant's counsel's office were still unaware Claimant was at first paid the wrong amount of TTD benefits.
35. Again, once Respondents became aware that they admitted for the wrong period of TTD, a check to make up the difference was issued on November 27, 2019.

Payment of Medical Benefits

Hatch Chiropractic and Wellness bill from 2017

36. Claimant submitted a bill from Hatch Chiropractic and Wellness. The bill covers treatment from June 12, 2017 through July 31, 2017 and totals \$3,032. (CI's Ex. 15, pp. 72-73.) As for this bill, the ALJ finds as follows:

- ALJ Cayce found the medical treatment from the October 13, 2018 exacerbation/aggravation is reasonable, related, and authorized, including, but not limited to, the ER visit, and Dr. Mitchell and Dr. Rauzzino's visits, prescriptions, and referrals. The treatment billed for in the Hatch bill, however, is from 2017 and predates the 2018 exacerbation/aggravation addressed by ALJ Cayce. Nor is the bill specifically addressed in the Order. As a result, the Hatch bill is not governed by ALJ Cayce's Order.
- Moreover, the Hatch bill is dated August 6, 2018. There is not, however, any credible and persuasive evidence establishing when the Hatch bill was presented to Respondents for payment. (CI's Ex. 15, pp. 72-73.)
- In addition, there is no credible and persuasive evidence establishing the bill was not paid under the fee schedule.
- The Medical Payment Log shows Hatch Chiropractic was paid on January 22, 2019 for services provided during June and July 2017. (See Respondents' Exhibit D, pp. 16, 17, 29, 30.)
- As a result, the Hatch bill was paid before the May 28, 2019 hearing in front of ALJ Cayce and her subsequent order.
- Claimant also failed to plead with specificity the alleged failure to pay the Hatch bill.

Dr. Linda Mitchell's bills from October 2018

37. Claimant submitted bills from Dr. Mitchell. The bills are for treatment provided on October 16, 22, and 29 of 2018. (CI's Ex. 16, pp. 74-75.) As for these bills, the ALJ finds as follows:

- There was no credible and persuasive evidence submitted establishing when Dr. Mitchell's bills were submitted to Respondents.
- There was no credible and persuasive evidence submitted establishing the bills were not paid under the fee schedule.
- The Medical Payment Log shows Dr. Mitchell's bills for treatment provided during October 2018 were paid on January 22, 2019. (See Respondents' Exhibit D, pp. 16 and 29.)
- Dr. Mitchell's medical bills were paid before the May 28, 2019 hearing in front of ALJ Cayce and her subsequent order.

- On November 1, 2019, Claimant's counsel emailed Respondents requesting confirmation that the past medical treatment had been paid and requested a payment log. (*CI's Ex. 10, p. 58*). Claimant's counsel followed up that day with another email stating that Claimant was unable to return to his doctor, because Dr. Mitchell was requiring payment of the past medical bills and confirmation that Respondents would pay moving forward. *Id.* There is not, however, any other evidence, such as a medical report or record from Dr. Mitchell, confirming that specific bills were outstanding and that she would not treat Claimant until those bills were paid.
- As a result, the ALJ finds that the October 2018 bills from Dr. Mitchell that were submitted at hearing by Claimant were paid before the May 28, 2019 hearing in front of ALJ Cayce and her subsequent order.
- Claimant also failed to plead with specificity the alleged failure to pay Dr. Mitchell's bills for these specific dates of service.

Dr. Rauzzino's bill from February 11, 2019.

38. Claimant submitted a bill from Dr. Rauzzino (a/k/a Workers' Compensation RX Solutions) for treatment provided on February 11, 2019. The total amount billed was \$2,689.50. (*See CI's Ex. 14, p. 71.*) As for this bill, the ALJ finds as follows:

- There was no credible and persuasive evidence submitted at hearing establishing when the Dr. Rauzzino's bill was submitted to the Respondents.
- There was no credible and persuasive evidence submitted at hearing establishing the bill was not paid pursuant to the fee schedule.
- The Medical Payment Log shows Dr. Rauzzino's bill was paid on April 16, 2019 for the treatment provided during February 2019. (*See Respondents' Exhibits, BS 16 and 29.*) (Respondents paid Workers' Compensation — Dr. Rauzzino — \$1,419.35 and \$1,270.50, which totals \$2,689.50.)
- As a result, Dr. Rauzzino's bill was paid before the May 28, 2019 hearing in front of ALJ Cayce and her subsequent order.
- Claimant also failed to plead with specificity the alleged failure to pay Dr. Rauzzino's February 11, 2019 bill.

Sky Ridge Medical Center Bill.

39. Claimant submitted a bill from Sky Ridge Medical Center for Claimant's treatment in the emergency department on October 15, 2018. The total amount billed was \$20,174.00. (*See CI's Ex. 17, pp. 76-78.*) As for this bill, the ALJ finds as follows:

- There was no credible and persuasive evidence submitted establishing when the bill was submitted to the Respondents.

- There was no credible and persuasive evidence submitted establishing the bill was not paid under the fee schedule.
- The Medical Payment Log shows the Sky Ridge Medical Center bill was paid on February 4, 2019 for treatment provided during the October 15, 2018 emergency room visit. (See *Respondents' Exhibit D, pp. 16 and 29.*)
- As a result, Sky Ridge Medical Center's bill was paid before the May 28, 2019 hearing in front of ALJ Cayce and before her subsequent order.
- Claimant also failed to plead with specificity the alleged failure to pay the October 15, 2018 Sky Ridge Medical Center bill.

Radiology Imaging Associates, PC Bill.

40. Claimant submitted a bill from Radiology Imaging Associates, PC from Claimant's treatment in the emergency department at Sky Ridge on October 15, 2018. The exact amount of the bill is not clear, but it appears to be \$341. (See *CI's Ex. 17, p. 79.*) As for this bill, the ALJ finds as follows:

- There was no credible and persuasive evidence submitted establishing when the bill was submitted to the Respondents.
- There was no credible and persuasive evidence submitted establishing the bill was not paid under the fee schedule.
- The Medical Payment Log shows the Radiology Imaging Associates bill was paid on January 22, 2019 for radiology services provided during Claimant's October 15, 2018 emergency room visit. (See *Respondents' Exhibit D, pp. 16 and 29.*)
- As a result, the Radiology Imaging Associates bill was paid before the May 28, 2019 hearing in front of ALJ Cayce and before her subsequent order.
- Claimant also failed to plead with specificity the alleged failure to pay the Radiology Imaging Associates' bill.

Payment to Claimant for his out of pocket expenses from October 22, 2018 appointment with Dr. Rauzzino.

41. Based on Respondents' proposed Order, they do not dispute that they had proper notice of their alleged failure to timely reimburse Claimant for his out-of-pocket expenses related to his October 22, 2018 appointment with Dr. Rauzzino. This bill was therefore addressed at hearing and in Respondents' proposed order.
42. Claimant paid out-of-pocket for his treatment with Dr. Rauzzino at Front Range Spine on October 22, 2018. Claimant paid \$338.06. (*CI's Ex. 11.*)

43. On January 22, 2020, Claimant's counsels' office requested Respondents to reimburse Claimant \$338.06 for his out-of-pocket expenses from the October 22, 2018 appointment with Dr. Rauzzino. This request constituted a bill under Rule 16-11(F) (*CI's Ex. 11, p. 59-60.*) Claimant also submitted a bill from Dr. Rauzzino for the October 22, 2018 appointment as an exhibit. (*CI's Ex. 14, p. 69.*)
44. Claimant testified that he did not know when the alleged medical bills were submitted to the insurance company from the provider. (*T:20, lines 18-21.*)
45. There is insufficient credible and persuasive evidence to determine when the bill was provided to Respondents and when they were advised Claimant was seeking reimbursement for the payment he made to Dr. Rauzzino's office until Claimant's counsel requested reimbursement on January 22, 2020.
46. Pursuant to the ALJ's order, and Rule 16-11(F), payment to Claimant was due 30 days after the January 22, 2020 request for reimbursement was made. As a result, reimbursement to Claimant was due by February 21, 2020.
47. On March 18, 2020, Respondents' counsel re-requested the bills that had not been paid from Claimant's counsel. (*CI's Ex. 11, p. 61.*)
48. On April 9, 2020, Respondents reimbursed Claimant for his out-of-pocket expenses paid to Dr. Rauzzino. (*CI's Ex. 12*); (*Tr. at 17:25-18:11.*) Thus, payment was 48 days late. (February 21, 2020 to April 9, 2020 = 48 days.)
49. Since Claimant filed his application for hearing on February 10, 2020, and payment was not made until April 9, 2020, Respondents did not cure the violation.
50. Respondents were 48 days late in reimbursing Claimant for his out-of-pocket medical expenses to Dr. Rauzzino.
51. Respondents did not provide any reason for why they failed to timely reimburse Claimant. As a result, they failed to establish a reasonable basis for their failure to timely reimburse Claimant for his out-of-pocket expenses he paid to Dr. Rauzzino.

Payment to Claimant for out-of-pocket expenses for his prescription medications.

52. On September 18, 2018, Claimant requested reimbursement by email for a single prescription he obtained on September 10, 2018 in the amount of \$33.99. The email makes clear the attachment is the September 10, 2018 receipt. No other attachments are referenced. (*CI's Ex. 13.*)
53. As result, the ALJ finds that the only receipts attached to the email were the receipts for the September 10, 2018 purchase of the of the methylprednisolone dose pack. (*CI's Ex. 13.*)
54. Claimant's *Exhibit 13* also includes receipts for naproxen, cyclobenzaprine, and lidocaine patches. These receipts, however, are dated October 15, 2018. And there is no correspondence from Claimant to Respondents specifically

referencing requests for reimbursement for these prescriptions. As a result, the ALJ cannot determine when, if ever, these other receipts were provided to Respondents and whether Claimant ever requested reimbursement for these prescriptions as well. Thus, the ALJ finds Claimant failed to establish that he requested Respondents to reimburse him for these other prescriptions of October 15, 2018.

55. ALJ Cayce, in her Order that was served on September 3, 2019, found and ordered:

Medical treatment from the October 13, 2018 exacerbation/aggravation is reasonable, related, and authorized, including, but not limited to, the ER visit, and Dr. Mitchell and Dr. Rauzzino's visits, prescriptions, and referrals.

56. Claimant, however, failed to plead with specificity Respondents failure to reimburse him for his out-of-pocket prescription costs of \$33.99. As a result, Respondents were not provided ample opportunity to cure this alleged penalty and defend against this penalty. As a result, Respondents did not address these prescriptions in their proposed order.

Medical Payment Log

57. Claimant's *Exhibit 19* purports to be Respondents' medical payment log setting forth the date Respondents paid certain providers. Claimant contends that payment log supports his contention Respondents did not pay the bills he submitted at hearing and which were ordered to be paid by the ALJ's Order.

58. But the "pay from" and "pay through" dates appear to be the dates of service and do not coincide with the bills submitted by Claimant and which he contends were not paid timely after the ALJ issued her Order. (*CI's. Ex. 19.*)

59. As found above, the payment log provided by Respondents coincides with the bills submitted by Claimant and which he contends were not paid timely. And, as found, Respondents' payment log establishes the medical bills Claimant contends were not paid timely by Respondents after the ALJ's Order - were paid by Respondents before the ALJ's Order. The only medical bill that was not paid before the ALJ's Order is Claimant's request for reimbursement for his out-of-pocket payment of \$338.06 for his October 22, 2018 appointment with Dr. Rauzzino.

Aggravating Factors

60. Claimant presented no credible and persuasive evidence establishing the Respondents' conduct represents a pattern of practice. On the other hand, Respondents presented no witnesses to explain why the violations occurred. In the end, the ALJ does not find the Respondents' conduct - as found in this case - represents a pattern of practice.

CONCLUSIONS OF LAW

Based on these findings of fact, the Judge draws these conclusions of law:

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the need for litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is what leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

Analysis of Penalties

Whether statutory penalties may be imposed under § 8-43-304(1) C.R.S. involves a two-step analysis. The statute provides for the imposition of penalties of up to \$1,000 per day where the insurer "violates any provision of article 40 to 47 of [title 8], or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or the panel, for which no penalty has been specifically provided, or fails, neglects or refuses to obey any lawful order made by the director or panel..." Thus, the ALJ must first determine whether the insurer's conduct violates the Act, a rule, or an order. Second, the ALJ must determine whether

any action or inaction constituting the violation was objectively unreasonable. The reasonableness of the insurer's action depends on whether it was based on a rational argument based in law or fact. *Jiminez v. Indus. Claim Appeals Office*, 107 P.3d 965 (Colo. App. 2003); *Gustafson v. Ampex Corp.*, W.C. No. 4-187-261 (ICAO, Aug. 2, 2006). There is no requirement that the insurer know that its actions were unreasonable. *Pueblo Sch. Dist. No. 70 v. Toth*, 924 P.2d 1094 (Colo. App. 1996).

Whether the insurer's conduct was objectively reasonable ordinarily presents a question of fact for the ALJ. *Pioneers Hosp. v. Indus. Claim Appeals Office*, 114 P.3d 97 (Colo. App. 2005); see also *Pant Connection Plus v. Indus. Claim Appeals Office*, 240 P.3d 429 (Colo. App. 2010). A party establishes a prima facie showing of unreasonable conduct by proving that an insurer violated a rule of procedure. *Pioneers Hosp. v. Indus. Claim Appeals Office*, supra. If the claimant makes such a prima facie showing the burden of persuasion shifts to the respondents to show their conduct was reasonable under the circumstances. *Pioneers Hosp. v. Indus. Claim Appeals Office*, supra, *Human Res. Co. v. Indus. Claim Appeals Office*, 984 P.2d 1194 (Colo. App. 1999).

Violation of an Order

Section 8-43-304(1) authorizes imposing penalties of not more than \$1,000 per day if an employee or person "fails, neglects, or refuses to obey any lawful order made by the director or panel." This provision applies to orders entered by a PALJ. Section 8-43-207.5, C. R. S. (order entered by PALJ shall be an order of the director and is binding on the parties); *Kennedy v. Indus. Claim Appeals Office*, 100 P.3d 949 (Colo. App. 2004). A person fails or neglects to obey an order if she leaves undone what an order mandates. A person refuses to comply with an order if she withholds compliance with an order. See *Dworkin, Chambers & Williams, P.C. v. Provo*, 81 P.3d 1053 (Colo. 2003). When a party fails, neglects or refuses to obey an order to take some action, penalties may be imposed under § 8-43-304(1), even if the Act imposes a specific violation for the underlying conduct. *Holliday v. Bestop, Inc.*, 23 P.3d 700 (Colo. 2001); *Giddings v. Indus. Claim Appeals Office*, 39 P.3d 1211 (Colo. App. 2001).

Factors to be Considered in Imposing Penalties

The ALJ may assess a penalty of up to \$1,000 per day for each day the Director's order was violated. § 8-43-304(1) C.R.S. The ALJ may consider a "wide variety of factors" in determining an appropriate penalty. *Adakai v. St. Mary Corwin Hospital*, W.C. No. 4-619-954 (ICAO, May 5, 2006). That said, any penalty assessed should not be excessive in the sense that it is grossly disproportionate to the conduct in question. *Associated Bus. Products v. Indus. Claim Appeals Office*, 126 P.3d 323 (Colo. App. 2005). When determining the penalty, the ALJ may consider factors including the "degree of reprehensibility" of the violator's conduct, the disparity between the actual or potential harm suffered by the claimant and the award of penalties, and the difference between the penalties awarded and penalties assessed in comparable cases. *Id.*

Cure Provisions

Section 8-43-304(4), C.R.S., the cure provision, provides that:

In any application for hearing for a penalty pursuant to subsection (1) of this section, the applicant shall state with specificity the grounds on which the penalty is being asserted. After the date of mailing of such application, an alleged violator shall have twenty days to cure the violation. If the violator cures the violation within such twenty-day period, and the party seeking such penalty fails to prove by clear and convincing evidence that the alleged violator knew or reasonably should have known such person was in violation, no penalty shall be assessed. The curing of the violation within the twenty-day period shall not establish that the violator knew or should have known that such person was in violation.

The cure statute adds an element of proof to a claim for penalties when a cure is proven. Typically, it is unnecessary for the party seeking penalties to prove that the violator knew or reasonably should have known they were in violation. The party seeking penalties must only prove the putative violator acted unreasonably under an objective standard. See *Jiminez v. Indus. Claim Appeals Office*, 107 P.3d 965 (Colo.App.2003). Section 8-43-304(4) modifies the rule and adds an extra element of proof when a cure has been effected. The party seeking penalties must prove by clear and convincing evidence that the violator had actual or constructive knowledge that its conduct was unreasonable. *Diversified Veterans Corporate Ctr. v. Hewuse*, 942 P.2d 1312 (Colo. App. 1997); see *In re Tadlock*, W.C. No. 4-200-716 (ICAO, May 16, 2007). Constructive knowledge imputes certain knowledge to a party to prevent a party from denying knowledge or acting in a way to remain ignorant. See *Lombard v. Colorado Outdoor Educ. Ctr., Inc.*, 187 P.3d 565, 572 (Colo. 2008).

Penalty for Late TTD Benefits

Section 8-43-401(2)(a), C.R.S. states, "After all appeals have been exhausted or in cases where there have been no appeals, all insurers... shall pay benefits within thirty days after any benefits are due." ALJ Cayce issued her Order on August 30, 2019 and it was served on September 3, 2019. Since no appeal was filed, benefits should have been paid no later than October 3, 2019.

On October 9, 2019, Claimant's counsels' office followed up with Respondents concerning the status of payment to Claimant's providers and payment of his TTD benefits. On October 15, 2019, again Claimant's counsels' office followed up with Respondents concerning the status of the claim. On October 24, 2019, Claimant's counsel sent another email stating that Respondents had not complied with ALJ Cayce's Order.

Finally, on October 25, 2019, 22 days late, Respondents issued an insufficient check for Claimant's TTD benefits. The check paid Claimant TTD for the dates of

October 23, 2018 through October 29, 2018, amounting to \$530, instead of benefits for October 13, 2018 through October 29, 2018, amounting to \$1,360, which was ordered.

On November 12, 2019, the Department of Labor and Employment sent a letter to Respondents stating that Respondents had not complied with the Order, because an “admission consistent with the order” had not been filed. Respondents then filed a General Admission on November 27, 2019 that properly reflected the TTD benefits ordered by the ALJ and issued a second check to Claimant for \$800 to make up the difference between the amount ordered and the smaller amount they had paid that differed from the Order. By the time Claimant had been paid the full amount of TTD benefits ordered by the ALJ, the benefits were 55 days late. Thus, Respondents violated § 8-43-401(2)(a), C.R.S., a provision of the Act, as well as the ALJ’s Order, by failing to timely pay Claimant the TTD benefits ordered to be paid and concurrently met the first step of the penalties analysis under § 8-43-304(1), C.R.S.

As to the second step of the penalty analysis, Respondents acted unreasonably. First, Respondents are presumed to know the law. *Midget Consol. Gold Mining Co. v. Indus. Commission*, 193 P. 493 (Colo. 1920); *Paul v. Indus. Commission*, 632 P.2d 638 (Colo. App. 1981); *Rogan v. UPS*, WC # 4-314-848 (March 2, 1999). Second, Respondents were contacted by Claimant’s counsel’s office several times and once by the Division of Workers’ Compensation regarding the payment of benefits and errors with the GAL. Respondents failed to act as a reasonable insurer by failing to timely pay Claimant his TTD benefits. As a result, penalties are warranted based on the facts here.

As to proportionality, Respondents presented no evidence at the hearing on their ability to pay or appropriate penalties for their failure to comply with the Order timely. As a result, they have essentially waived their right to argue that a penalty of any amount is grossly disproportionate or not warranted based on their conduct. See, *Associated Business Products*, 126 P.3d 323, 33 (Colo. App. 2005).

Respondents did contend that their failure to pay Claimant his TTD benefits was due to a typographical error. While there was a typographical error related to the period of TTD benefits first paid to Claimant, Respondents failed to explain why they were 22 days late in issuing the first payment to Claimant. As found, the first check issued to Claimant for \$530 was 22 days late. And, although Respondents cured the violation, they did not provide any reason for their failure to timely pay Claimant the TTD benefits that were ordered. As a result, Claimant proved by clear and convincing evidence that Respondents either knew or reasonably should have known that they violated the ALJ’s order and violating the act by not timely issuing the first check to Claimant. In similar circumstances when respondents have violated an Order of an ALJ, our courts have imposed significant penalties. See *Toledo v. Res. Management Sys.*, W.C. 3-996-080, *2 (ICAO April 1, 1993) (penalty for \$4800 for employer’s 6-week late payment of benefits following an order of the court).

Here, the ALJ finds and concludes Claimant established that he is entitled to penalties for Respondents failure to timely begin payment of his TTD benefits as ordered by ALJ Cayce. Here, the court imposes a penalty of \$100 per day for the first 22 days the Respondents were late in paying Claimant his TTD benefits. This results in

a total penalty of \$2,200. The court determines this penalty is not excessive considering there were no facts presented by Respondents about their inability to pay or why they failed to timely make any payment. Plus, the penalty is like that in *Toledo v. Res. Management*. Again, it is the lack of any explanation or reason for the late payment of TTD which supports the amount of the penalty for this conduct.

It was, however, found that Respondents failure to pay Claimant the full amount of TTD benefits on time was because of a typographical error related to the start date. And Claimant failed to establish by clear and convincing evidence that Respondents knew or reasonably should have known that Respondents violated the statute and Order based on a typographical error. As found, the initial communication from Claimant's counsel's office and the Division did not specify the error in the GAL about the period TTD was payable. The ALJ therefore finds and concludes that penalties are not warranted for the added delay in issuing Claimant the remaining TTD benefits ordered by the ALJ since this was because of a typographical error. Claimant failed to establish Respondents new or reasonably should have known they violated the ALJ's Order because of any type of error. And, when the error was discovered, they paid Claimant the TTD benefits that were ordered.

As a result, the total penalty for Respondents failure to timely pay Claimant his TTD benefits is \$2,200.

Penalties Regarding the Payment of Medical Benefits

Section 8-43-401(2)(a), C.R.S. states, "After all appeals have been exhausted or in cases where there have been no appeals, all insurers... shall pay benefits within thirty days after any benefits are due."

The ALJ ordered Respondents to pay medical benefits. As found above, Respondents did not file a Petition to Review the ALJ's Order on or before the deadline of September 23, 2019, nor did they pay medical benefits on or before October 3, 2019. Claimant contacted Respondents several times about the medical bills.

Based not on Claimant's Application for hearing, but the evidence submitted by Claimant, Claimant alleges Respondents violated the ALJ's Order by failing to pay several of Claimant's medical bills. Claimant submitted the following medical bills and receipts into evidence:

- i. Dr. Linda Mitchell's bills from October 2018,
- ii. Dr. Rauzzino's bill from February 11, 2019,
- iii. Radiology Imaging Associates' bill from October 15, 2018,
- iv. Sky Ridge Medical Center bills from October 15, 2018,
- v. Hatch Chiropractic and Wellness bills from 2017,
- vi. Payment by Claimant for his out of pocket expenses from October 22, 2018 appointment with Dr. Rauzzino, and

- vii. Payment by Claimant for his out-of-pocket expenses for prescription medications which were incurred on September 18, 2018 and October 15, 2018.

Medical bills i through v.

As found, medical bills i-v were paid before the ALJ issued her Order. Plus, Claimant failed to plead those penalties with specificity. As a result, Claimant's claim for penalties regarding bills i through v is denied.

Medical bill vi.

Claimant was not, however, timely reimbursed for his out-of-pocket expenses paid to Dr. Rauzzino. On January 22, 2020, Claimant's counsels' office requested Respondents to reimburse Claimant \$338.06 for his out-of-pocket expenses for his October 22, 2018 appointment with Dr. Rauzzino. This request constituted a bill under Rule 16-11(F). Claimant also submitted a bill from Dr. Rauzzino for the October 22, 2018 appointment as an exhibit. Before Claimant's counsel requested reimbursement on January 22, 2020, there is no other credible and persuasive evidence establishing this request for reimbursement was made before January 22, 2020.

Pursuant to the ALJ's Order, and Rule 16-11(F), payment to Claimant was due 30 days after the January 22, 2020 request for reimbursement was made. As a result, reimbursement to Claimant was due by February 21, 2020.

On March 18, 2020, Respondents' counsel requested Claimant's counsel to again provide to Respondents any unpaid bills. Then, on April 9, 2020, Respondents reimbursed Claimant for his out-of-pocket expenses paid to Dr. Rauzzino in the amount of \$338.06. Thus, payment was 48 days late and Respondents violated the ALJ's Order and rule by failing to timely pay medical benefits and concurrently met the first step of the penalties analysis under § 8-43-304(1), C.R.S.

As to the second step of the penalty analysis, Respondents acted unreasonably. First, Respondents are presumed to know the law. *Midget Consol. Gold Mining Co. v. Indus. Commission*, 193 P. 493 (Colo. 1920); *Paul v. Indus. Commission*, 632 P.2d 638 (Colo. App. 1981); *Rogan v. UPS*, WC # 4-314-848 (March 2, 1999). Claimant requested reimbursement for his out of pocket medical expenses for treating with Dr. Rauzinno for his work injury on January 22, 2020 and pursuant to the ALJ's Order, Respondents knew, or reasonably should have known, they were liable for such treatment and had to reimburse Claimant within 30 days.

Respondents were contacted several times about the payment of Claimant's outstanding medical bills. Yet, Respondents did not provide any credible and persuasive evidence that they actively tried to determine whether any previously submitted bills remained unpaid, they merely asked Claimant's counsel to resubmit any bills that remained unpaid. This is different than Respondents saying they reviewed the file and determined all bills have been paid and if Claimant contends any bills remain unpaid to please provide those bills so Respondents can investigate more. Instead, Respondents merely did nothing and delayed payment by merely asking for Claimant to

resubmit any previously submitted bills that remained unpaid. That said, Claimant could have been more specific in the first instance by specifically setting forth each unpaid bill.

Respondents presented no evidence at the hearing on their ability to pay or appropriate penalties for their failure to comply with the Order, and so they have waived their right to argue that a penalty of any amount is grossly disproportionate to their conduct. See, *Associated Business Products*, 126 P.3d 323, 33 (Colo. App. 2005). “In *Pueblo School District No. 70 v. Toth*, [P.2d at 1096, 1100], the court upheld an ALJ's order for the imposition of penalties where ALJ found the insurer's ‘repeated and stubborn refusal to respond’ to requests for the payment of medical benefits justified penalties at the rate of \$500 per day. In *Choice Casing Service, Inc., v. Industrial Claim Appeals Office*, [96CA0664 (Colo. App. January 16, 1997) (not selected for publication) (affirming W.C. No. 4-125-136 (ICAO March 29, 1996))] the court affirmed a \$63,000 penalty for an insurer's 126 day delay in filing an admission of liability where the respondents presented no reasonable mitigating actions for the delay, and the ALJ was not persuaded the delay was harmless.” *Giddings v. N. Telecom*, W. C. No. 4-293-203, at *4 (Colo. Ind. Cl. App. Off. Sept. 30, 2002).

Here, Claimant also established by clear and convincing evidence that Respondents knew or reasonably should have known that they were violation of ALJ Cayce's order by not reimbursing Claimant on time.

As a result, the ALJ finds and concludes Claimant established that he is entitled to penalties for Respondents failure to timely reimburse Claimant for his out-of-pocket expenses he paid to Dr. Rauzinno. As a result, the ALJ finds that \$25 per day, for 48 days, is an appropriate penalty. Again, it is the lack of any meaningful Response by Respondents showing they were trying to comply with the ALJ's Order and the failure to provide any reason for not complying with the Order that warrants the daily penalty rate of \$25 for their failure to timely reimburse Claimant. For that reason, the total penalty for Respondents failure to timely reimburse Claimant for his out-of-pocket medical expense of \$338.06 is \$1,200.

Medical bills (prescriptions) vii.

On September 18, 2018, Claimant requested reimbursement by email for a single prescription he obtained on September 10, 2018 in the amount of \$33.99. The email makes clear the attachment is the September 10, 2018 receipt. No other attachments are referenced. As result, the ALJ finds that the only receipts attached to the email were the receipts for the September 10, 2018 purchase of the of the methylprednisolone dose pack. (*Cl. Ex. 13.*)

Claimant's *Exhibit 13* also includes receipts for naproxen, cyclobenzaprine, and lidocaine patches. These receipts, however, are dated October 15, 2018 and there is no correspondence from Claimant to Respondents that specifically references and requests reimbursement for these prescriptions. As a result, the ALJ cannot determine when, if ever, these other receipts were provided to Respondents and whether Claimant ever requested reimbursement for the prescriptions he bought on October 15, 2018. As a result, the ALJ finds Claimant failed to establish that he requested Respondents to reimburse him for the October 15, 2018 prescriptions.

There is no evidence Claimant followed up specifically on the status of his September 18, 2018 request for reimbursement for \$33.99. Respondents also failed to establish that they reimbursed Claimant for his September 2018 out-of-pocket prescription medication expense of \$33.99.

That said, Claimant failed to plead this penalty with specificity. As a result, if properly plead, Respondents might have been able to cure the alleged penalty or produce other evidence about the payment or the reason they failed to pay. As a result, Claimant's request for penalties for the prescription for \$33.99 is denied since Respondents did not have proper notice of this penalty.

Penalty for Failure to Timely File a General Admission of Liability

Section 8-43-401(2)(a), C.R.S. states, "After all appeals have been exhausted or in cases where there have been no appeals, all insurers... shall pay benefits within thirty days after any benefits are due." Failure to obey a workers' compensation rule of procedure is the equivalent of failure to obey an "order" for purposes of § 8-43-304(1). *Fera v. Indus. Claim Appeals Office*, 169 P.3d 231, 234 (Colo. App. 2007) (citing *Pioneers Hosp. v. Indus. Claim Appeals Office*, 114 P.3d 97, 98 (Colo. App. 2005)).

Under WCRP 5-5(C)(1), following any order becoming final which alters or awards benefits, an admission consistent with the Order shall be filed within 30 days. As found above, ALJ Cayce's Order, signed August 30, 2019 and served September 3, 2019, required Respondents to pay TTD benefits. This Order awarded benefits under the Act, as Claimant had not been receiving any benefits just before the reopening. Respondents were therefore required to file a General Admission within 30 days of the order becoming final, October 3, 2019. See WCRP 5-5(C), 5-5(C)(1).

Like the facts in the penalties above, Claimant's counsels' office followed up with Respondents about compliance with the Order, but Respondents did not issue its first GAL following the Order until October 25, 2019, which was 22 days late. Even then, the GAL had the incorrect AWW listed, and it only admitted for TTD benefits for less than half the time the ALJ had ordered. After receiving a letter from the Division noting that the GAL did not comply with the Order, Respondents filed another GAL on November 27, 2019, this time with the correct TTD start date. Respondents violated Rule 5-5(C)(1) by not filing a GAL consistent with the Order within 30 days of the Order becoming finalized, and concurrently met the first step of the penalties analysis under § 8-43-304(1), C.R.S.

As to the second step of the penalty analysis, Respondents acted unreasonably. Respondents are presumed to know the law. *Midget Consol. Gold Mining Co. v. Indus. Commission*, 193 P. 493 (Colo. 1920); *Paul v. Indus. Commission*, 632 P.2d 638 (Colo. App. 1981); *Rogan v. UPS*, WC No. 4-314-848 (March 2, 1999).

But Respondents did cure the penalty before Claimant filed his Application on February 10, 2020. That said, Respondents presented no evidence to dispute a finding that they reasonably should have known the law associated with need to file an admission consistent with an order when an order awards benefits. As a result, Claimant established by clear and convincing evidence that Respondents knew or

reasonably should have known that an admission had to be filed consistent with the ALJ's order within 30 days.

As to proportionality, Respondents presented no evidence at the hearing on their ability to pay or appropriate penalties for their failure to comply with the Rules, and so they have waived their right to argue that a penalty of any amount is grossly disproportionate to their conduct. See, *Associated Business Products*, 126 P.3d 323, 33 (Colo. App. 2005). In *Jakel v. N. Colorado Paper*, the ICAO did not disturb the ALJ's determination to order penalties of \$75 a day for a violation of a Rule. W. C. No. 4-524-991 (ICAO Oct. 6, 2003). In a similar rule violation, the office of administrative courts fined respondents in *Kelly v. Kaiser Hill Co.* \$300 a day for 19 days for failure to produce a medical record within 15 days. W. C. No. 4-332-063, (ICAO Aug.11, 2000). That said, in the prior cases, the rule violated was a long-standing rule. Here, Rule 5-5(C)(1) was amended, effective August 1, 2019.

The ALJ also determined that before August 1, 2019, Rule 5-5(C)(1) only required an admission to be filed when an order "alters benefits being paid." As a result, WCRP 5-5 (C) and 5-5 (C)(1) did not govern when an order "instituted benefits that were not being paid." See *Miller v. Recob & Associates*, W.C. No. 5-001-904-02 (Sept. 17, 2018.)

But in response to *Miller v. Recob & Associates*, Rule 5-5(C)(1) was amended, effective August 1, 2019, to require an admission to be filed when an Order "alters or awards benefits" as done in this case when ALJ Kayce reopened Claimant's claim and awarded TTD benefits.

The ALJ therefore finds and concludes that a penalty of \$10 per day for Respondents' violation of the rule is appropriate for the first 22 days. Once the first GAL was filed, the remaining error was a typographical error and Claimant failed to establish by clear and convincing evidence that Respondents knew or reasonably should have known they continued to violate the applicable rule until they filed their corrected GAL.

As a result, the ALJ finds and concludes that Respondents should be penalized \$10 per day from October 3, 2019 through October 25, 2019, which is 22 days. As a result, Respondents are penalized \$220 for their failure to timely file a general admission of liability under WCRP 5-5(C)(1).

Apportionment of Penalties

If a penalty is assessed under § 8-43-304, C.R.S. the ALJ must apportion payment of the penalty between the aggrieved party and the Colorado uninsured employer fund created by § 8-67-105 C.R.S. except that the amount apportioned to the aggrieved party shall be a minimum of twenty-five percent of any penalty assessed. The ALJ determines that 65% of the penalty shall be apportioned and paid to Claimant and 35% shall be apportioned and paid to the Colorado uninsured employer fund.

ORDER

Based on these findings of fact and conclusions of law, the Judge enters the following order:

1. Respondents are subject to penalties in the amount of \$3,620.
2. The penalties shall be apportioned and 65% paid to Claimant and 35% paid to the Colorado uninsured employer fund.
3. Respondents shall pay a penalty in the amount of \$2,353 to Claimant.
4. Respondents shall pay a penalty in the amount of \$1,267 to the Colorado uninsured employer fund.
5. All matters not determined herein are reserved for future determination.

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

DATED: July 29, 2020.

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-057-048-001**

ISSUES

- Did Respondents prove they should be permitted withdraw their General Admission of Liability (GAL)?
- Did Claimant prove entitlement to knee surgery recommended by Dr. Simonich?
- Did Claimant prove entitlement to a closed period of TTD from the date of injury to August 8, 2017, and ongoing TTD commencing August 29, 2017?
- Did Respondents prove Claimant was responsible for termination of his employment on August 28, 2017?
- The parties agreed to reserve the issue of average weekly wage. Claimant's opposed oral motion to reserve the issue of disfigurement was granted. Respondents stipulated Dr. McGarry is authorized because Employer did not timely refer Claimant to a provider after his injury.

FINDINGS OF FACT

1. Claimant worked for Employer as a part-time sandwich artist at a Subway restaurant located inside a convenience store in Florence, Colorado. He primarily worked the closing shift. His duties included making sandwiches, taking payments, and closing the store.

2. Claimant suffered an admitted injury to this right knee on July 29, 2017. He slipped on an onion, causing him to "do the splits" and strike his right knee on the floor. He felt immediate pain in the knee that made it difficult to stand and walk.

3. Claimant reported the injury by phone to the District Manager, Mike R[Redacted], who directed Claimant to the emergency room.

4. Claimant went to the St. Thomas More Hospital emergency department that afternoon. The physical examination showed mild effusion and tenderness to palpation over the medial aspect of the right knee. X rays showed "moderate" effusion, unchanged since a prior x-ray on June 8, 2017. Claimant was given crutches, advised to use ice and NSAIDs, and instructed to follow up with his PCP.

5. Causation in this case is complicated by a prior injury to Claimant's right knee in June 2017. On June 7, 2017, Claimant was running up a hill and experienced two painful pops in his right knee. He contacted his PCP, Dr. Joseph McGarry, who ordered an x-ray. The x-ray showed a "small" knee effusion.

6. Claimant saw Dr. McGarry on June 9, 2017. Dr. McGarry noted tenderness over the MCL and joint effusion. He was concerned about ligament or cartilage damage and ordered an MRI.

7. The MRI was completed on June 15, 2017. It showed a small joint effusion and bone contusions of the medial patellar facet and lateral femoral condyle, consistent with sequelae of patellar dislocation. No injuries to the ligaments or cartilage were identified.

8. On June 23, 2017, Dr. McGarry observed “clinically significant reduction in the amount of swelling in the fusion in his knee.” There was no observable ecchymosis. Knee flexion was “good,” but he could not achieve full extension. Claimant had “no particular pain.” Dr. McGarry noted, “I think the patient is healing.” He recommended Claimant perform quad strengthening exercises and follow-up in two months.

9. Claimant did not see Dr. McGarry again until August 2, 2017, four days after the work accident. He was in significant knee pain and using crutches because it was difficult to bear weight on the knee. Dr. McGarry observed increased joint effusion and “fresh” ecchymosis on the medial aspect of the knee around the MCL. Claimant had “extreme pain” when stressing the ligament. Overall, Dr. McGarry believed Claimant was “much more impaired” than at his last visit on June 23.

10. Claimant had another MRI on August 24, 2017. It showed a joint effusion and bone bruising with edema in the medial facet of the patella and lateral femoral condyle “likely related to a recent lateral patellar dislocation.” Although the radiologist did not compare films, these findings are essentially the same as described in the June 15, 2017 MRI report. The radiologist also noted patellar tendinitis, which had not previously been reported.

11. Claimant saw Dr. McGarry again on September 11, 2017. His knee was still very painful, and he “jumped” when the patella was examined. Dr. McGarry opined “the patient is having prolonged but genuine pain in his knee. I think he needs to get into a physical therapy program.” He ordered PT and released Claimant to modified light work, with standing and walking no more than 4 ½ hours in an eight-hour shift.

12. On October 13, 2017, Dr. McGarry noted Claimant “has never been contacted by the work comp people.” His knee was still very painful with limited range of motion, causing a “profound limp.” Dr. McGarry noted atrophy of the right thigh and reiterated the need for PT “to regain function of his leg.” He also referred Claimant for an orthopedic evaluation with Dr. Minihane, Dr. Patterson, or Dr. McFadden.

13. At his November 20, 2017 appointment, Claimant reported he had started physical therapy. The knee was improved since the last visit. Claimant requested a referral to Dr. Danylchuk, who had performed a successful shoulder surgery on Claimant’s father. Dr. McGarry explained it was important for Claimant to strengthen his quads “to get better patella tracking.”

14. By the January 15, 2018 appointment with Dr. McGarry, Claimant had completed 12 sessions of PT. Dr. McGarry opined surgery would not be the pivotal issue and encouraged Claimant to continue home exercises, noting “straight leg raises would help quite a bit.

15. Dr. Danylchuk declined the referral because he does not treat knees, so Dr. McGarry referred Claimant to Dr. William Watson. Claimant saw Dr. Watson on February 8, 2018. The report notes, “he feels the knee is unstable and feels the kneecap goes out of place at the outside.” Symptoms were aggravated by “most activities.” Claimant was markedly tender over the patellofemoral ligaments and the lateral facet of the lateral femoral condyle. Dr. Watson suspected “severe contusion of the cartilaginous surface,” and recommended another MRI.

16. The MRI was performed on February 9, 2018. The radiologist appreciated bone contusions “in the medial femoral condyle as well as the tibial plateau to a lesser degree.” He further noted, “when compared to the prior MRI of the knee of 08/24/17, the bone contusion in the medial femoral condyle is new. Bone contusion in the lateral femoral condyle has resolved.”

17. After reviewing the MRI, Dr. Watson recommended six more weeks of physical therapy to work on strengthening and range of motion.

18. Claimant returned to Dr. Watson on March 15, 2018. His knee was “getting better but still gives out.” Claimant noticed fluid in the knee and swelling at the end of the day. Dr. Watson noted, “I received more information on this case. In June he was running and dislocated his kneecap. He had an MRI on 6/15/2017 [that] showed sequelae of patella dislocation. He states he [did] fairly well after this and was able to work without restrictions and had little problems. On 7/29/2017 he sustained another patellar dislocation when he sustained a valgus stress dislocating kneecap landing hard on the medial femoral condyle.” On examination, Claimant still had marked quadriceps weakness and patellar instability. Dr. Watson made no surgical recommendation but referred Claimant to another orthopedist, Dr. Simonich, for a second opinion.

19. Claimant saw Dr. Simonich on May 25, 2018. Claimant reported a feeling of instability, although his main complaints were pain and clicking beneath his patella. He had not experienced a recurrent dislocation or subluxation. Claimant described knee swelling with activity, and difficulty hiking or walking on uneven terrain. He also reported “erythema and purple skin color changes in the anterior knees and severe shooting pain at rest down the lateral knees and posterior knees.” Dr. Simonich noted Claimant had “very skinny legs with poor quad development.” He opined, “he has increased signal intensity on MRI of the anteromedial tibial plateau and in the region of the medial epicondyle which may not be consistent with patellar dislocation which normally shows injury to the distal medial patella in the lateral trochlea, although this could be consistent with an injury to the MPFL origin.” Dr. Simonich diagnosed patellar dislocation, but qualified the diagnosis by opining, “this has been his working diagnosis, but I’m not sure that this is his true injury. I think he has symptoms of reflex inhibition of his quadriceps more than patellar instability.” He also diagnosed patellofemoral syndrome possible

“pinching” of synovium in the patellofemoral joint. He also suggested a possible diagnosis of complex regional pain syndrome “based on pain at rest and skin color changes and gait.” He wanted to rule out CRPS before recommending surgery to evaluate the patellar cartilage. He further opined, “I’m not certain that he requires an MPFL reconstruction as he has symptoms of reflex inhibition more than instability.”

20. Claimant followed up with Dr. Simonich on July 10, 2018. Claimant described burning around the knee and “soreness” above and below the patella. His ability to walk had improved but was still limited. Claimant indicated his patellofemoral joint “continues to sublux and dislocate and he doesn’t feel like his knee is improving enough and he is not able to perform ADLs adequately.” Dr. Simonich indicated the previous diagnosis of CRPS was “improved.” Without further explanation, Dr. Simonich recommended a right knee arthroscopy with MPFL reconstruction using allograft. He did not attempt to reconcile the statement Claimant’s knee “continued” subluxing and dislocating with the May 25 note indicating Claimant specifically denied recurrent subluxations or dislocations. Nor did Dr. Simonich revisit the diagnostic uncertainty regarding patellar dislocation versus reflex inhibition he noted in the prior report.

21. Respondents denied the surgery and scheduled an IME with Dr. Timothy O’Brien.

22. Claimant saw Dr. O’Brien on August 21, 2018. Dr. O’Brien determined Claimant suffered a patellar dislocation in June 2017 which typically takes up to six months to heal, with waxing and waning pain complaints. Dr. O’Brien opined the July 29, 2017 work accident did not result in a “new injury” because there were no new x-ray or MRI findings, no new accumulation of fluid on the knee joint, and no objective evidence of new tissue breakage or yielding. Dr. O’Brien opined surgery was not reasonably necessary or work-related given Claimant’s global ligamentous laxity and because any injury Claimant “hypothetically” sustained in July 2017 would have already healed.

23. In his hearing testimony, Dr. O’Brien clarified he would have expected Claimant to heal from the June 2017 dislocation in 6 to 12 weeks.

24. On December 12, 2018, Dr. McGarry responded to a request from Respondents to address MMI. He opined Claimant was not yet at MMI because significant loss of leg strength and muscle mass, range of motion loss, and altered gait. He opined Claimant needed to continue with his exercise and strengthening program to attain MMI.

25. Approximately five days later, Claimant suffered a setback when his right knee gave out at home causing him to fall.

26. Claimant moved to California in May 2019 to work in a marijuana grow business, so he did not see Dr. McGarry for several months.

27. Claimant returned to Dr. McGarry on February 21, 2020 after moving back to Colorado. Claimant had been more vigorous with stretches and exercises per Dr. McGarry’s previous instructions. He continued to demonstrate “very obvious atrophy of the right quadriceps,” although this was improved from previous measurements. Dr.

McGarry stated "I have seen significant improvement in his muscle tone on his right leg, but unfortunately, the patient has not regained a muscle mass which he has lost previously." He was unsure "whether there will be much more improvement from this point on," but encouraged Claimant to continue the exercise program.

28. Claimant's last documented appointment with Dr. McGarry was on March 6, 2020. Claimant's condition remained largely the same. Dr. McGarry noted,

I had the patient ambulate up and down the hallway to study his gait and he has somewhat of a knock-knee gait. He has made tremendous progress in 2017 when he could barely walk and could not bend his knee. There is no perceptible limp.

ASSESSMENT: The patient as noted on last dictation should continue with his exercise program. Certainly, still a question of some internal derangement or instability of the right knee. I only got back to the exam room and the patient was putting on his jeans after completing his walking. He had some sudden discomfort and had to shake his knee out of it in order to get it to "unlocked." I think there is still instability in the knee, and as I have noted previously, there is certainly loss of range of motion and strength in the knee.

29. Dr. McGarry testified he does not endorse the surgery recommended by Dr. Simonich, for several reasons. He believes Dr. Simonich's rationale for the proposed surgery is unclear. Nor is it clear whether the surgery is intended to treat the residual effects of Claimant's injury or a nonwork-related condition. More important, Dr. McGarry believes Claimant's best avenue for pain relief and functional improvement is a consistent and vigorous strengthening program.

30. As noted previously, Claimant worked for Employer part-time, primarily on the closing shift. Time records from June 28, 2017 through July 25, 2017 show he worked 18.51, 6.22, 12.73, and 10.57 hours respectively over the four weeks before the June 29, 2017 injury, which averages to 12.01 per week.

31. For the week ending August 1, 2017, Claimant had been scheduled to work July 28, July 29, and July 31. He was scheduled three hours on July 29 (the date of injury), but only worked approximately 30 minutes before injuring his knee. Claimant missed his next scheduled shift on July 31, 2017 because of the injury. He worked his scheduled shifts the next week, on August 4, 2017 and August 8, 2017. Although Claimant was only scheduled to work three shifts the week ending August 15, 2017, he picked up a fourth shift. The week ending August 22, he again picked up a fourth shift.

32. Claimant testified when he returned to work after the accident, he was performing tasks such as making sandwiches, taking payments, and closing the store on "pretty much the same shift" he was working before the accident. Employer accommodated his injury by allowing him extra breaks and a chair in which to sit as needed.

33. There is no persuasive evidence Claimant missed at least three shifts from work because of the work injury. Except for July 31, 2017, Claimant worked all his scheduled shifts and even picked up some extra shifts.

34. Employer terminated Claimant on August 28, 2017. Documents in his employment file, coupled with Mr. R[Redacted]'s persuasive testimony, show Claimant was terminated for numerous performance lapses despite multiple warnings and write-ups. Claimant's first write-up occurred in October 2016 because he and a co-worker left the back door open all day, left the cash register open, and took breaks at the same time, leaving a customer waiting while both employees were outside. On June 5, 2017, Claimant was almost 2 hours late for work and did not call to indicate he would be late. A few days later, Claimant received a written warning for failing to complete multiple items on the closing checklist even though he checked them off as having been done. On June 26, 2017, he was written up for closing the store early and turning away a customer who arrived before the store was scheduled to close.

35. After Claimant was found to have again closed the store early on August 17, 21, and 25 2017, and receiving an additional write-up for not weighing weigh strips and steak after repeated counseling, Mr. R[Redacted] decided to terminate Claimant's employment.

36. Claimant's testimony he was trained by his previous manager to close the store early if it was slow is not credible. As Mr. R[Redacted] persuasively explained, closing the store early violates Company policy and the Subway franchise contract.

37. Dr. McGarry's testimony at hearing was credible and persuasive, particularly regarding the relative severity of Claimant's symptoms and functional limitations before and after the July 29, 2017 work accident. Dr. McGarry is also persuasive reasonably necessary treatment, including surgery (or the lack thereof).

38. Respondents failed to prove a basis to withdraw their GAL. The persuasive evidence shows Claimant suffered a compensable injury on July 29, 2017.

39. The treatment rendered by, and on referral from, Dr. McGarry was reasonably needed to cure and relieve the effects of Claimant's compensable injury.

40. Claimant failed to prove the MPFL reconstruction surgery recommended by Dr. Simonich is reasonably necessary to cure and relieve the effects of his injury.

41. Claimant failed to prove he was disabled and suffered a wage loss more than three shifts because of the work accident.

42. Respondents proved Claimant was responsible for termination of his employment on August 28, 2017.

CONCLUSIONS OF LAW

A. Withdrawal of GAL

To receive compensation or medical benefits, a claimant must prove he is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo. App. 2001). The claimant must prove that an injury directly and proximately caused the condition for which he seeks benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). A pre-existing condition does not disqualify a claim for compensation if a work accident aggravates, accelerates, or combines with the underlying condition to cause disability or a need for treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). An injury need not be dramatic to support a finding of compensability. Even a “minor strain” or a “temporary exacerbation” of a pre-existing condition can be a sufficient basis for a compensable claim if it was caused by a claimant’s work activities and caused her to seek medical treatment. *E.g.*, *Garcia v. Express Personnel*, W.C. No. 4-587-458 (August 24, 2004); *Conry v. City of Aurora*, W.C. No. 4-195-130 (April 17, 1996).

By filing an admission of liability, the employer or insurer has “admitted that the claimant has sustained the burden of proving entitlement to benefits.” *City of Brighton v. Rodriguez*, 318 P.3d 496, 507 (Colo. 2014). If the employer subsequently seeks to withdraw its admission of liability, it must prove by a preponderance of the evidence that the claimant’s injuries were not compensable. See § 8-43-201(1) (“a party seeking to modify an issue determined by a general or final admission ... shall bear the burden of proof for any such modification.”). Thus, to withdraw a GAL, the respondents must prove the claimant suffered no compensable injury in the first instance.

As found, Respondents failed to prove a basis to withdraw their GAL. Dr. McGarry’s records and testimony persuasively show Claimant’s condition was worse after the July 29, 2017 work accident than before. On August 2, 2017, Dr. McGarry observed increased joint effusion, “fresh” ecchymosis, and greater apparent pain. Claimant was using crutches and having difficulty walking, which was not the case immediately the work accident. Claimant had a witnessed accident that elicited immediate pain and proximately caused him to seek treatment he would not otherwise have pursued. The persuasive evidence shows Claimant suffered a compensable injury on July 29, 2017.

B. Medical benefits

The respondents are liable for medical treatment reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101. The mere occurrence of a compensable injury does not compel the ALJ to approve all requested treatment. Even if the respondents admit liability for an accident, they retain the right to dispute the reasonable necessity or relatedness of any specific treatment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). Where the respondents dispute the claimant’s entitlement to medical benefits, the claimant must prove the treatment is reasonably necessary and causally related to the industrial accident. *Wal-Mart Stores, Inc. v.*

Industrial Claim Appeals Office, 989 P.2d 251 (Colo. App. 1999). The claimant must prove entitlement to medical benefits by a preponderance of the evidence. *Page v. Clark*, 592 P.2d 792 (Colo. 1979).

As found, the treatment rendered by, and on referral from, Dr. McGarry was reasonably needed to cure and relieve the effects of Claimant's compensable injury. Imaging studies were appropriate to investigate the nature and extent of Claimant's knee pathology and delineate a treatment plan. Dr. McGarry's primary focus on therapy and exercise was appropriate. Dr. McGarry reasonably requested orthopedic evaluation to explore whether Claimant was a surgical candidate. Claimant reasonably sought emergent treatment at the St. Thomas More Hospital immediately after the accident at Mr. R[Redacted]'s instigation.

Claimant failed to prove the MPFL reconstruction surgery recommended by Dr. Simonich is reasonably necessary or related to his injury. Dr. Watson made no surgical recommendation. Dr. McGarry does not favor it, and Dr. O'Brien echoed that opinion. Dr. Simonich is the only physician recommending surgery, but he did not adequately explain his rationale. MPFL reconstruction is typically intended to treat laxity associated with recurrent subluxations or dislocations. But Dr. Simonich initially questioned whether patellar dislocation was Claimant's "true injury," and instead "I think he has symptoms of reflex inhibition of his quadriceps more than patellar instability." At the next appointment, he abruptly recommended MPFL reconstruction, with no further discussion or explanation or the questions raised in his prior report. Additionally, Dr. Simonich offered no persuasive opinion regarding any causal connection between the July 29, 2017 work accident and the proposed surgery. Finally, Claimant did not pursue surgery for more than two years, which suggests even he is not convinced of its necessity or utility.

C. TTD benefits before Claimant's termination

A claimant is entitled to TTD benefits if the injury causes a disability, the disability causes the claimant to leave work, and the claimant misses more than three regular working days. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term disability connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function, and (2) impairment of wage-earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999).

There is no persuasive evidence Claimant missed at least three shifts because of the work accident. Claimant missed work on July 31, 2017 but worked all subsequent shifts for which he was scheduled. In fact, Claimant even picked up extra shifts and does not appear to have suffered any wage loss before he was terminated on August 28, 2017.

D. Claimant was responsible for termination of employment

Sections 8-42-103(1)(g) and 8-42-105(4)(a) provide:

In cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury.

The respondents must prove by a preponderance of the evidence that a claimant was terminated for cause or was responsible for the separation from employment. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008). To establish that a claimant was responsible for termination, the respondents must show the claimant performed a volitional act or otherwise exercised “some degree of control over the circumstances which led to the termination.” *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 5 P.3d 1061, 1062 (Colo. App. 2002); *Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1995); *Velo v. Employment Solutions Personnel*, 988 P.2d 1139 (Colo. App. 1988). The concept of “volitional conduct” is not necessarily related to culpability, but instead requires the exercise of some control or choice in the circumstances leading to the discharge. *Richards v. Winter Park Recreational Association*, 919 P.2d 983 (Colo. App. 1996). The ALJ must consider the totality of the circumstances to determine whether the claimant was responsible for his termination. *Knepfler v. Kenton Manor*, W.C. No. 4-557-781 (March 17, 2004).

As found, Respondents proved Claimant was responsible for termination of his employment. Claimant received repeated notices and warnings about various performance issues over a period of many months. Mr. R[Redacted]’s testimony and the written documentation in Claimant’s employment file are credible and persuasive. The accretion of multiple issues despite repeated counseling and warnings amply justified Claimant’s dismissal. The totality of persuasive evidence shows Claimant performed volitional acts and otherwise exercised a degree of control over the circumstances leading to his termination.

ORDER

It is therefore ordered that:

1. Respondents’ request to withdraw their General Admission of Liability is denied and dismissed.
2. Insurer shall cover all medical treatment from authorized providers reasonably needed to cure and relieve the effects of Claimant’s compensable injury.
3. Claimant’s request for MPFL reconstruction surgery recommended by Dr. Simonich is denied and dismissed.
4. Claimant’s request for TTD benefits before his termination on August 28, 2017 is denied and dismissed.
5. Claimant’s request for TTD benefits commencing August 29, 2017 is denied and dismissed.

6. All issues not decided herein, or otherwise closed by operation of law, are reserved for future determination.

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

DATED: July 29, 2020

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-118-410-001**

ISSUE

1. Whether Claimant has shown, by a preponderance of the evidence, that a psychological evaluation, as recommended by Lon Noel, M.D., is reasonable, necessary, and causally related to her work injury of March 19, 2019.

FINDINGS OF FACT

1. Claimant is 54-year-old woman who sustained an admitted work-related injury to her left ankle, left shoulder and lower back while working for Employer on March 19, 2019. (Ex. A). Claimant has received medical treatment through Authorized Treating Provider (ATP) Lon Noel, M.D. (Ex. C).

2. On May 28, 2019, Claimant saw Dr. Noel. Dr. Noel reviewed the results of an MRI performed on Claimant's left shoulder, which showed a SLAP 2 lesion with no full thickness rotator cuff tear. (Ex. C)

3. On June 24, 2019, Dr. Noel referred Claimant to Michael Hewitt, M.D., for evaluation of her shoulder. (Ex. C).

4. On July 3, 2019, Claimant saw Dr. Hewitt for evaluation of her left shoulder. Dr. Hewitt diagnosed Claimant with shoulder impingement syndrome of the left shoulder. (Ex. D).

5. After failure of conservative treatment, Dr. Hewitt performed surgery on the Claimant's left shoulder on January 21, 2020. (Ex. D). Claimant's January 21, 2020 left shoulder surgery was reasonable and necessary and related to her work injury of March 19, 2019.

6. Claimant experienced post-operative complications resulting from her January 21, 2020 surgery after she was discharged and returned to her home. Claimant woke in the middle of the night choking, with a racing heartbeat and experiencing difficulty breathing. Claimant called the surgery center and was advised to get to the hospital as soon as possible. Claimant called an ambulance and was taken to Swedish Hospital where she was admitted for approximately 48 hours because of breathing difficulties. Her admission pulse oximetry was 82%, Claimant's blood pressure was elevated and thought to be secondary to her nerve block at the time of surgery and the effect of pain medications. (Ex. C).

7. Claimant testified the experience following her surgery was very upsetting and she felt that she might die.

8. During the week of February 6, 2020, Dr. Noel's office received a text message from Dr. Hewitt's office indicating Claimant "is having a lot of mental stress with

adjustment problems post-surgery. . . She had postop complications and was admitted to Swedish Hospital for 48 hours because of breathing difficulties. . . She is complaining of anxiety and depression.” (Ex. C).

9. On February 6, 2020, Claimant saw Dr. Noel and reported she was having problems sleeping and complained of anxiety and depression. Dr. Noel found that Claimant was demonstrating somewhat of a depressive affect and also seemed anxious in general. Dr. Noel referred the patient to Dr. Timothy Shea for a psychological evaluation. (Ex. C).

10. On February 13, 2020, Claimant saw Dr. Noel. Claimant reported that she was still concerned regarding her psychological situation. (Ex. C).

11. By letter dated February 21, 2020, Respondents denied Dr. Noel’s referral for a psychological evaluation because: “These services are not related to patient’s workers’ compensation claim, or are not medically necessary, § 8-42-101(1)(a), C.R.S. No (sic)”. (Ex. B).

12. On February 25, 2020, Claimant saw Dr. Noel. Claimant reported she was continuing to experience a lot of anxiety. Claimant reported she was “still having flashbacks regarding the complications that occurred after her shoulder surgery involving her lungs and oxygen levels.” Dr. Noel conducted an examination of Claimant and noted she was “demonstrating some anxiety regarding her sleeping situation. She is still having some depression.” Dr. Noel prescribed Claimant alprazolam (i.e., Xanax) 0.5 mg to be taken one half tablet during the daytime when necessary and one tablet at bedtime for anxiety and possible hyperventilation.” (Ex. C).

13. On February 27, 2020, Claimant saw Dr. Noel. Claimant reported the alprazolam prescription had definitely been helping. Dr. Noel’s records reflect that “Today [Claimant] took .25 mg of alprazolam at midday which definitely helped her anxiety.” (Ex. C).

14. On March 27, 2020, Claimant saw Dr. Noel. Claimant reported her depression had worsened, and she was still having problems sleeping. Dr. Noel documented that Claimant “sounds discouraged but is not showing overt signs of mood affect disorder.” Claimant’s medications included alprazolam when necessary during the day. Dr. Noel added a prescription for one daily dose of Zoloft 50 mg. (Ex. C).

15. On April 16, 2020, Claimant had a telephone consultation with Dr. Noel. Dr. Noel noted that Claimant’s medications continued to be alprazolam/Skelaxin/Zoloft/Advil. Claimant reported that she was continuing to rotate alprazolam and Skelaxin but was still having problems sleeping. Claimant also reported that Zoloft had definitely been helping. Dr. Noel’s record of the April 16, 2020 telephone consultation does not comment on Claimant’s affect. (Ex. C).

16. On April 30, 2020, Claimant had a telephone consultation with Dr. Noel. Dr. Noel indicated that Claimant had “done well on increased doses of Zoloft. She takes alprazolam one half doses (sic) daily but mainly at bedtime.” Dr. Noel increased

Claimant's prescription for Zoloft to 100 mg, daily. Dr. Noel's record of the April 30, 2020 telephone consultation does not comment on Claimant's affect. (Ex. C).

17. On May 14, 2020, Claimant had a telephone consultation with Dr. Noel. Dr. Noel noted Claimant's medications included Zoloft 100 mg daily "which has definitely helped her depression." Dr. Noel's record of the May 14, 2020 telephone consultation does not comment on Claimant's affect. (Ex. C).

18. On June 9, 2020, Claimant saw Dr. Noel. Dr. Noel indicated that Claimant continued to take Zoloft and alprazolam. Dr. Noel noted "No overt depressive affect is noted today." (Ex. C).

19. Claimant testified that she is currently experiencing symptoms in her left ankle which includes soreness, stiffness, and difficulty walking on uneven surfaces. Claimant testified that her symptoms in her ankle have negatively impacted her ability to function as it is difficult to stand or walk for any prolonged period of time. Claimant testified her ankle feels unstable, which causes her anxiety regarding the possibility of falling again.

20. Claimant testified that she is currently experiences symptoms in her left shoulder which includes pain, soreness, problems sleeping, and limited range of motion. Claimant stated that her symptoms have impacted her ability to function, as she has issues with conducting any overhead activities as well as any activity that involves rotation of her left shoulder.

21. Claimant testified that her current symptoms and functional limitations has impacted her emotionally. She is frustrated, out of work, unable to sleep which has caused her to be very anxious and depressed. Claimant testified that she experiences panic attacks and feels helpless.

22. Claimant testified that she has discussed her symptoms with Dr. Hewitt and Dr. Noel, which lead to the referral to Dr. Shea.

23. Claimant testified she wishes to pursue the referral to Dr. Shea because she still experiences frustration, depression, and anxiety that is not improving. Claimant also prefers to receive treatment with Dr. Shea in lieu of prescription medications for anxiety and depression. Claimant testified that even with anti-anxiety and anti-depressant medications she continues to experience symptoms of anxiety and depression.

24. The ALJ finds the testimony of Claimant to be credible and persuasive regarding her symptoms associated with anxiety and depression.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to

injured workers at a reasonable cost to employers, without the necessity of litigation. See § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. See § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979).

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceedings is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. Respondents may, nevertheless, challenge the reasonableness and necessity of current or newly requested treatment notwithstanding its position regarding previous medical care in a case. See *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). "In order to impose liability for medical treatment, the ALJ must find the need for treatment was proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1) (b), C.R.S." *In re Claim of Laurienti*, WC No. 5-058-824-001 (ICAO, Feb. 11, 2020). The claimant bears the burden of proof to establish the right to specific medical benefits. *HLJ Management Group, Inc. v. Kim*, 804 P.2d 250 (Colo. App. 1990). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School District #11*, W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012).

Claimant has established by a preponderance of the evidence that psychological evaluation and treatment, as recommended by Lon Noel, M.D., is reasonable, necessary and proximately caused by an injury arising out of and in the course of the employment — specifically, Claimant's March 19, 2019 injury. Claimant's January 21, 2020 left shoulder surgery was to relieve the effects of her admitted left shoulder injury. As a result of the January 21, 2020 surgery, Claimant experienced complications, which gave rise to

anxiety and depression. Claimant's ATP, Dr. Noel, reasonably referred Claimant to Dr. Timothy Shea for a psychological evaluation and treatment.

Although Claimant did not initially experience symptoms of anxiety or depression, her symptoms began as the result of complications following her January 21, 2020 shoulder surgery. Claimant's medical records do not support the position that Claimant's anxiety and depression are "non-existent condition[s]." To the contrary, Claimant experienced a significant and anxiety provoking complication as a result of her January 21, 2020 surgery, requiring two additional days of hospitalization. Following her hospitalization, Claimant repeatedly reported experiencing symptoms of anxiety and depression to her providers, albeit not at every visit with every provider. In addition, Claimant credibly testified to the emotional difficulty she has experienced as a result of her injuries and her decreased function resulting from those injuries.

When Insurer denied Claimant's referral, Dr. Noel prescribed Claimant alprazolam (Xanax) for her anxiety and Zoloft for her depression. Dr. Noel's decision to treat these conditions indicates Claimant was experiencing these symptoms. Claimant reported these medications were helpful, although they did not fully relieve her symptoms. Again, Claimant's reports that anti-anxiety and anti-depressant medications helped her symptoms indicates that the conditions existed. Claimant credibly testified that she continues to experience symptoms of anxiety and depression, and she wishes to see Dr. Shea in the hope of addressing these conditions and avoiding becoming dependent on medication. Claimant's testimony concerning the effect of these complications, as well as her ongoing symptoms, was credible and persuasive.

The ALJ find the Claimant met her burden of proof of establishing that the referral to Dr. Shea for psychological evaluation was related to or caused by her March 19, 2019 industrial injury by a preponderance of the evidence.

ORDER

It is therefore ordered that:

1. Claimant has established by a preponderance of the evidence that the psychological evaluation recommended by Lon Noel, M.D. is reasonable, necessary, and causally related to her March 19, 2019 work injury. Respondents shall authorize the referral.
2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the

certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: <http://www.colorado.gov/dpa/oac/forms-WC.htm>.

DATED: October 1, 2021

/s/ Steven R. Kabler
Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-120-176-001**

ISSUE

1. Whether Claimant established by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course of employment with Employer on or about September 30, 2019.
2. Whether Claimant established by a preponderance of the evidence entitlement to a general award of reasonable and necessary medical benefits causally related to his September 30, 2019 injury.
3. Whether Claimant established by a preponderance of the evidence entitlement to temporary total disability (TTD) benefits from the date of injury until January 1, 2020.
4. Claimant's average weekly wage.
5. Whether Respondents established by a preponderance of the evidence that Claimant's injury was the result of a safety violation.

FINDINGS OF FACT

1. Claimant is a 33-year-old male who was employed by Employer as a chemist in Employer's lab from June 2, 2019 until October 21, 2019. Claimant's average weekly wage was \$1,370.69 per week.

2. On and before September 30, 2019, Employer's business was extraction and production of crude oil from industrial hemp plants. The end product Employer produced and sold was "winterized crude." The production of winterized crude first requires the extraction of crude oil from hemp. The crude oil is then further refined to remove fats, lipids, and waxes. The resulting product is "winterized crude." (Ex. K). Winterized crude may then be further refined through the process of distillation to create "distillate." (Ex. L). Distillate is used in the production of CBD products. As of September 30, 2019, Employer did not produce or manufacture distillate and did not use distillate in conjunction with its business.

3. Claimant was hired to assist Employer to develop its crude extraction process. Claimant's job responsibilities included primarily the operation of "reactor #1" – a piece of equipment used to extract raw crude from hemp. Employer also used a piece of equipment referred to as "reactor #2" to further refine the raw crude into winterized crude. Employer's chief operating officer, Jimmy W[Redacted], was primarily responsible for the operation of "reactor #2." (Ex. J).

4. Prior to Claimant's employment with Employer, Claimant had produced CBD products independent of Employer. (Ex. H). During the course of Claimant's employment, Claimant expressed the desire to start his own business manufacturing CBD distillate and other CBD products.

5. Toward that end, on approximately September 23, 2019, Claimant acquired 9 kilograms of winterized crude from Employer, with the intent of using the winterized crude to manufacture CBD distillate for his own business (i.e., independent of Employer). (Ex. D).

6. During the course of his employment, Employer permitted Claimant to use space in Employer's laboratory to work on his own "side business" of producing distillate. (Ex. I). Mr. W[Redacted] testified Employer permitted Claimant to use this additional space because Claimant was also a personal friend, and it was a way to permit Claimant to make additional money outside his employment with Employer. Mr. W[Redacted] testified Claimant had started to work on Claimant's distillation business throughout his work week with Employer. Some time prior to September 30, 2019, Claimant and Employer reached an agreement to permit Claimant to work for Employer Monday through Thursday of each week. On Fridays, Claimant was permitted to use space in Employer's laboratory to work on his own distillate production business.

7. On the morning of September 30, 2019, Claimant notified Employer of his resignation effective three weeks from the date of notice (i.e., effective October 21, 2019). Employer accepted Claimant's resignation. (Ex. F). One of the reasons for Claimant's resignation was Claimant's plan to operate his own business manufacturing CBD distillate for sale.

8. Later on September 30, 2019, Claimant was performing what he characterized as "quality control" on some "fatty distillate." Claimant testified he placed the distillate in a one-gallon glass jar with a large amount of ethanol (at a ratio of approximately 4 parts ethanol to one part distillate). Claimant then used a heat gun to heat the distillate/ethanol solution. During this process, the distillate/ethanol solution ignited, causing significant burn injuries to Claimant. September 30, 2019 was a Monday, and not a day on which Employer had agreed Claimant could work on his own distillation projects.

9. Claimant was taken to UC Health for treatment and has sustained significant burn injuries to his lower extremities as a result of the fire or explosion. (Ex. M).

10. Claimant testified the distillate with which he was working was Employer's property and that he was conducting quality control on behalf of Employer. Claimant's testimony regarding the purpose of the quality control and the ownership of the distillate was not credible.

11. Mr. W[Redacted] testified the quality control process Claimant was performing was not done on behalf of Employer or for Employer's benefit, nor was the

distillate with which Claimant was working Employer's property. Mr. W[Redacted] testified that Employer did not perform distillation at the time of Claimant's injury. Mr. W[Redacted] testified that because Employer did not produce distillate, it did not run quality control processes on distillate. Instead, Employer's quality control process was run on the product that Employer produced – winterized crude. Mr. W[Redacted] testified that Employer's quality control process involved the suspension of winterized crude into ethanol or methanol, and then cooling the solution to negative eighty degrees to determine if an unacceptable level of fats, lipids and waxes remained in the solution. Mr. W[Redacted] testified that Employer's quality control process did not involve the use of heat or a heat gun and could be done much faster than a quality control test on distillate. Mr. W[Redacted] testified it would not be logical for Employer to process its winterized crude into distillate, and then run quality control tests on the distillate, because it would be adding unnecessary steps and time to the process.

12. Mr. W[Redacted], testified Employer did not produce distillate, did not use distillate in its business, and did not have distillate within its inventory as of September 30, 2019. Mr. W[Redacted] testified Claimant performing quality control on distillate on September 30, 2019 was not for the benefit of Employer.

13. Mr. W[Redacted] testified that Employer did not request that Claimant bring glass jars or distillation equipment to Employer's premises or that Claimant purchase distillation equipment.

14. Mr. W[Redacted]'s testimony was credible and persuasive.

15. With the exception of the heat gun, the equipment Claimant was using to perform quality control on the distillate, was owned and supplied by Claimant. Claimant brought the one-gallon glass jar to Employer's lab and purchased much of the other equipment on eBay in May 2019. The glass jar Claimant used was not made of heat-resistant glass, and instead was a normal glass jar one could purchase at Wal-Mart, similar to a Mason jar.

16. Although the heat gun was the Employer's property, Mr. W[Redacted] testified that Employer did not use the heat gun for quality control. Employer used the heat gun to assist in removing crude oil from buckets due to its high viscosity. Mr. W[Redacted] testified he was not aware Claimant was using the heat gun in the manner in which Claimant was using it on September 30, 2019.

17. Employer's chief financial officer, Mallery W[Redacted], testified that Employer's business on and before September 30, 2019 was crude oil extraction from industrial hemp. Ms. W[Redacted] testified Employer's end product for sale on and before September 30, 2019 was winterized crude. Ms. W[Redacted] testified Claimant was not hired to assist Employer in the production of distillate.

18. Ms. W[Redacted]'s testimony was credible and persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. See § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. See § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id.* at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

COMPENSABILITY

A claimant's right to recovery under the Workers Compensation Act is conditioned on a finding that the claimant sustained an injury while the claimant was "at the time of the injury, ... performing service arising out of and in the course of the employee's employment." § 8-41-301(1)(b), C.R.S.; *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The Claimant must prove his injury arose out of the course and scope of his employment by a preponderance of the evidence. § 8-41-301(1)(b) & (c), C.R.S.; see *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). "Arising out of" and "in the course of" employment comprise two separate requirements. *Triad Painting Co.*, 812 P.2d at 641.

An injury occurs "in the course of" employment where the claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. See *Triad Painting Co. v. Blair*, 812 P.2d at 641; *Hubbard v. City Market*, W.C. No. 4-934-689-01 (ICAO, Nov. 21, 2014).

The "arising out of" element is narrower and requires claimant to show a causal connection between the employment and the injury such that the injury "has its origin in an employee's work-related functions and is sufficiently related thereto as to be considered part of the employee's service to the employer in connection with the contract of employment." *Popovich v. Irlanda*, 811 P.2d 379, 383 (Colo. 1991); *City of Brighton v. Rodriguez*, 318 P.3d 496, 502 (Colo. 2014). The mere fact that an injury occurs at work does not establish the requisite causal relationship to demonstrate that the injury arose out of the employment. *Finn v. Industrial Commission*, 437 P.2d 542 (Colo. 1968); *Sanchez v. Honnen Equipment Company*, W.C. No. 4-952-153-01 (ICAO, Aug. 10, 2015).

The course of employment test does not necessarily require that the claimant be engaged in work or on the clock if the claimant's activity is a normal "incident" of the employment and not a substantial deviation. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Ventura v. Albertson's, Inc.*, 856 P.2d 35 (Colo. App. 1992). When the employer asserts a personal deviation from employment "the issue is whether the activity giving rise to the injury constituted a deviation from employment so substantial as to remove it from the employment relationship." *Roache v. Industrial Commission*, 729 P.2d 991 (Colo. App. 1986); *In Re Laroc*, W.C. 4-783-889 (ICAO, Feb. 1, 2010). "If the acts of an employee at the time of the injury are for the employee's sole benefit, then the injury does not arise out of and in the course of employment." *Kater v. Industrial Commission of State of Colorado*, 728 P.2d 746, 747 (Colo. App. 1986); *In Re Laroc*, W.C. No. 4-783-889 (ICAO, Feb. 1, 2010). The issue is thus whether the "claimant's conduct constitutes such a deviation from the circumstances and conditions of the employment that the claimant stepped aside from his job and was performing an activity for his sole benefit." *In Re Laroc*, W.C. 4-783-889 (ICAO, Feb. 1, 2010); see *Panera Bread, LLC v. Industrial Claim Appeals Office*, 141 P.3d 970 (Colo. App. 2006).

Claimant has failed to meet his burden to establish by a preponderance of the evidence that his September 30, 2019 injury arose out of and in the course of employment with Employer. At the time of his injury, Claimant was performing quality control on distillate not owned or supplied by Employer and not for any purpose related to Claimant's employment. Employer's quality control processes at that time did not involve distillate or heat. Employer's quality control processes at that time required the cooling of winterized crude. Claimant was conducting quality control on "fatty distillate" he supplied for use in Claimant's side-business or for another personal reason unrelated to Employer's business. In doing so, Claimant engaged in conduct for his own sole benefit and purpose which neither conferred a benefit on Employer nor was it related to or incidental to Claimant's employment duties. Accordingly, Claimant's injury, sustained while performing a task for his own benefit, did not "arise out of" Claimant's employment.

Similarly, because performing quality control on distillate was for his own purpose, it was not connected to his work function, and was not done in the course of his employment.

Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable work-related injury on September 30, 2019. His claim is denied and dismissed.

Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. § 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School District #11*, W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012).

Because Claimant has failed to establish that he sustained a compensable work-related injury on September 30, 2019, his request for medical treatment is denied and dismissed.

Temporary Total Disability Benefits & Average Weekly Wage

To prove entitlement to Temporary Total Disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. See Sections 8-42-(1)(g), 8-42-105(4); *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office*, 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term “disability” connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage-earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (citing *Ricks v. Industrial Claim Appeals Office*, P.2d 1118 (Colo. App. 1991)).

Because Claimant has failed to establish that he sustained a compensable work-related injury on September 30, 2019, his request for temporary total disability benefits is denied and dismissed. The determination of Claimant's average weekly wage is therefore moot.

Safety Violation

Section 8-42-112(1)(b), C.R.S. authorizes a fifty percent reduction in compensation for an employee's "willful failure to obey any reasonable rule adopted by the employer for the safety of the employee." A safety rule does not have to be either formally adopted or in writing to be effective. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office*, 907 P.2d 715, 719 (Colo. App. 1995). To establish that a violation of §8-42-112(1)(b), C.R.S. has been willful, a respondent must prove by a preponderance of the evidence that a claimant acted with "deliberate intent." *In re Alvarado*, W.C. No. 4-559-275 (ICAO, Dec. 10, 2003). Willful conduct may be proven by circumstantial evidence including evidence of frequent warnings, the obviousness of the risk, and the extent of deliberation evidenced by claimant's conduct. *See In re Heien*; W.C. No. 5-059-799-01 (ICAO, Nov. 29, 2018).

Because Claimant has failed to establish that he sustained a compensable work-related injury on September 30, 2019, the issue of whether his injury was the result of a safety violation is moot.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable work-related injury on September 30, 2019. His claim is denied and dismissed.
2. Claimant has failed to establish by a preponderance of the evidence an entitlement to medical benefits.
3. Claimant has failed to establish by a preponderance of the evidence an entitlement to temporary total disability (TTD) benefits.
4. All remaining issues are moot.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference,

see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: <http://www.colorado.gov/dpa/oac/forms-WC.htm>.

DATED: October 1, 2021

/s/ Steven R. Kabler
Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

- I. Has Claimant, by clear and convincing evidence, overcome the DIME opinion of Dr. Beatty on the issue of Maximum Medical Improvement?
- II. Has Claimant shown, by a preponderance of the evidence, that she is entitled to medical benefits, in the form of epidural steroid injections, as proposed by Dr. Agarwala?

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

Claimant's March 20, 2013 Injury and Ongoing Treatment

1. This is an admitted claim. In a prior admitted claim, involving the same Employer, on March 20, 2013, Claimant, a driving instructor at the time, injured her neck while administering a driving examination. According to Claimant's testimony at hearing, the driver hit a cement pole with "extreme" force, causing her "to jolt backwards." (Ex. 1).
2. Claimant initially treated for her 2013 neck injury with Dr. Wayne Hudson, DO, including physical therapy, massage, medications and steroid injections.
3. On August 19, 2013, Claimant had a MRI of her cervical spine. There were mild degenerative changes at C4-5, and minimal degenerative changes at C3-4, C6-7, and T2-3. There was "minimal, if any, stenosis" detected. (Ex. N, p. 193).
4. On January 29, 2014, Claimant had a cervical fusion at C5-6 performed by Dr. Amit Agarwala. (Ex. K, Deposition transcript). The Claimant was told after the fusion that if her symptoms returned the disc below would be "at fault." (Ex. L, p. 154).
5. After her 1/29/2014 surgery, the Claimant continued to treat her cervical pain with muscle relaxers and opioids.
6. On May 14, 2014, Claimant was placed at MMI for her 2013 injury with a 23% impairment rating for her cervical spine. (Ex. M, p. 177, Ex. 1).
7. On September 21, 2015, Claimant had a cervical MRI performed because she was having a recurrence of her pre-fusion symptoms. The MRI showed mild

degenerative changes from C2-3 to C4-5, and at C6-7. There was now noted to be evidence of stenosis at C6-7. Of the changes at C6-7, the radiologist stated: "The degenerative changes at this level are slightly worse than the previous exam." (Ex. N, p. 189).

8. On September 24, 2015, Claimant saw Dr. Hudson. She reported that her pain was not getting any better, even with physical therapy. The TINS unit provided no relief, and pain was noted with sudden weather changes. (Ex. L, p. 162).
9. On October 29, 2015, Claimant returned to Dr. Hudson. She stated that she had been "hurting for two and a half years." She stated that her pain got better for eight months after her January 2014 surgery, but then it started to come back to its pre-surgery levels. The benefits of physical therapy lasted about a week. (Ex. L, p. 160).
10. On December 10, 2015, Claimant saw Dr. Hudson for her neck pain and asked about getting epidural injections. (Ex. L, pp. 157, 159).
11. On January 14, 2016, Claimant saw Dr. Hudson with symptoms of a ruptured disc "again." Dr. Hudson diagnosed a ruptured disc on this date. Dr. Hudson's notes state: "PT claim was closed and has only maint[enance] now. She was referred back to Dr. Agarwala. (Ex. L, p. 154).
12. On February 5, 2016, Claimant saw Dr. Sandell. She complained of numbness and weakness in both her arms, particularly when she drove, did anything with her arms at shoulder level, or did any type of reaching with her arms. Claimant also complained at this time of cervical pain, particularly with extension, and associated dizziness. Dr. Sandell conducted an EMG test, and diagnosed Claimant with right carpal tunnel syndrome. There was no cervical radiculopathy. (Ex. J, pp. 38-41).
13. On February 9, 2016, the Claimant consulted Dr. Argawala, and complained of "constant" cervical pain. (Ex. K, p. 55).
14. On February 16, 2016, Claimant returned to Dr. Hudson, complaining of the "same pain pattern....crying that she can't live this way...played basketball for half hr yesterday and can hardly move today." (Ex. L, p.150).
15. On May 12, 2016, Claimant returned to Dr. Hudson, complaining of having a headache for one week that extended from her cervical area up into her head. (Ex. L, p. 140).
16. At hearing, Claimant testified that on June 7, 2016 she underwent bariatric surgery. With the bariatric surgery Claimant also began an exercise regime which she testified included walking six days a week and going to the gym four days a week. She testified that by the time she suffered her workers'

compensation injury in 2016, she was walking up to five miles a day. With the surgery and exercise, Claimant lost 110 pounds. Claimant testified that after the October 2016 injury she canceled her gym membership because her pain kept her from doing more than five minutes of exercise. She also noted that she had to limit her walking to about a mile per day, which was still painful.

17. On August 23, 2016, Claimant saw Dr. Hudson complaining of pain in her neck and hands. Her chief complaint was “*Work Comp follow-up. DOI 3/20/2013. Neck Injury*” She thought it was due to water aerobics. Dr. Hudson diagnosed cervicalgia, myalgia, muscle weakness and neuropathy. Dr. Hudson prescribed oxycodone on this date for Claimant’s pain and requested that she follow up in two months. (Ex. L, pp.136-37)(emphasis added).

18. At hearing, Claimant testified that there was no event which she could identify that had caused her condition to worsen during this period prior to her second accident [of 10/12/2016].

Claimant’s October 12, 2016 Injury and Ongoing Treatment

19. On October 12, 2016, Claimant was again administering a driving test. At hearing, Claimant testified that the driver “came back with full force again and actually jumped on top of [the stop stick] – it’s, like, a curb height, and then...we bounced back off of it.”

20. In her Employee Injury Report, Claimant indicated that “Employees inside were able to hear the hit.” (Ex. A, p. 4). Claimant also testified at hearing that conservative self-treatment was ineffective, so she went to the emergency room.

21. Claimant testified that the symptoms she experienced after the 10/12/2016 accident were the same as those she experienced after her 2013 injury, including numbness and weakness in her arms and headaches.

22. On December 13, 2016, Claimant saw PAC Bewley from Dr. Hudson’s office. PAC Bewley determined that Claimant had plateaued after completing physical therapy. (Ex. L, p. 134).

23. On February 14, 2017, Claimant saw PAC Bewley again, and reported almost a complete resolution of her stiffness after a massage. *PAC Bewley placed the Claimant at MMI on this date.* (Ex. L, pp. 130-31).

24. On March 28, 2017, Claimant saw Dr. Hudson and asked him to reopen her claim. Claimant opined that PAC Bewley had closed her case prematurely. (Ex. L, p.126). Dr. Hudson then filed a WC164 on that same date, indicating that Claimant’s “MMI date is unknown at this time because..WANTS TO REOPEN CLAIM.” (Ex. L, p. 129)(emphasis supplied).

25. On May 7, 2018, Dr. Scott Primack, DO, performed an Independent Medical Exam on behalf of Respondents. He is Level II accredited, and practices Occupational Medicine. Claimant stated to Dr. Primack that she was told {by persons unidentified} "it was not even technically an accident," although the car went over this curb stop "with great force." She also reported that there was not much damage to this vehicle.
26. Dr. Primack recommended a new cervical MRI to compare to those taken prior to this accident. (Ex. M, p. 178). Assuming nothing remarkable were revealed by this imaging, he would recommend that Claimant be placed at MMI with no impairment. *Id*
27. According to Dr. Primack's IME report, on May 11, 2018, Claimant had the cervical MRI he had recommended. (Ex. M, p. 172).
28. On May 28, 2018, Dr. Primack authored an addendum report to his IME. He stated that he had reviewed the imaging from the new cervical MRI compared with the September 21, 2015 MRI. He concluded that the Claimant suffered no new injury to her spine as a result of the accident.
29. At C6-7 specifically, Dr. Primack found only a worsening of her stenosis, which was not related to any acute injury. He agreed with PAC Bewley's assessment of MMI on February 14, 2017. He found no permanent impairment. He also determined that no maintenance treatment was necessary as a result of the 10/12/2016 work injury. (Ex. M, p. 172).
30. On March 4, 2019, the Claimant saw Dr. Agarwala. Dr. Agarwala's report indicated that Claimant "hit a cement pole head on" on October 12, 2016. Claimant complained of neck pain, bilateral shoulder pain, dizziness, headaches and muscle weakness. Dr. Agarwala's diagnosis included osteoarthritis of the spine, with radiculopathy, and degenerative disc disease of the cervical spine. Dr. Argawala stated, "If she does want to consider surgery would recommend a ACDF C6-7". (Ex. K, pp. 43, 46-47).
31. On March 5, 2019, Dr. Hudson diagnosed degenerative joint disease of the cervical spine and under his assessment, stated:

Intervertebral disc degeneration
Chronic tension-type headache without intractable headache
Nausea
Photophobia
Taking long-term analgesics
DID C SPINE CEPHALGEA NAUSEA PHOTOPHOBIA. THIS IS
BWC RELATED ON THE CLOSED CLAIM. (Ex. L, p. 84).

DIME Exam by Dr. Beatty

32. On March 20, 2019, Claimant was examined by Dr. Brian Beatty, DO for the DIME. After reviewing the medical history and examining Claimant, Dr. Beatty agreed with PAC Bewley that Claimant was at MMI as of February 14, 2017 for this incident. Dr. Beatty assigned a 1% impairment rating, after apportioning Claimant's prior impairment rating. Dr. Beatty concluded that Claimant had no physical restrictions from this work incident, and no need for further treatment. His diagnosis was 1. Cervical Strain, 2. Cervical disc disease. (Ex. O, pp. 209-210).
33. On December 11, 2019, Dr. Primack examined Claimant for a second time. Dr. Primack also reviewed the medical records since his last report, including Dr. Beatty's DIME report. Dr. Primack agreed with Dr. Beatty that Claimant reached MMI on February 14, 2017 for the Accident. Dr. Primack agreed with Dr. Beatty's causation analysis, his apportionment of permanent impairment, and his opinion that treatment was no longer needed for the Accident. (Ex. M, p. 170).

Deposition of Dr. Amit Agarwala

34. On May 20, 2020, the parties took the evidentiary deposition of Dr. Amit Agarwala, MD. Dr. Agarwala is an orthopedist, specializing in spine surgery, who had performed the C5-6 fusion on 1/29/2014. He is not Level II accredited.
35. Dr. Agarwala testified that his focus with regard to Claimant is treatment. "When I see a patient, my primary concern is diagnosis and to offer treatment options. I really don't focus on causation." (Deposition, p. 9).
36. Dr. Agarwala did not investigate causation in Claimant's case. He testified that he did not have enough information about this incident to determine if it caused the C6-7 changes resulting in Claimant's current symptoms.
37. When asked if Claimant's MRI findings would have required a significant amount of force, he replied:

No. You can get a disc herniation of advanced disk bulging with – you can sneeze. I had a disk herniation when I was 25. I don't even know what I did to cause it. (Deposition, p. 9).

38. Dr. Agarwala also testified that the changes at C6-7 he plans to target could be a natural progression of the Claimant's 2013 injury. He explained:

Well, first, disks that tend to degenerate and bulges happen even without injury, so *anybody can have an MRI and show those same changes without being in any sort of acute injury.*

Second, once you have a spinal fusion, *it is even more likely that there are increased stresses on the adjacent disk*, and you are more likely to develop degenerative or bulging-type changes that are similar to what we view on her MRI.

So both the natural progression in aging and the increased risk associated with previous surgery could all increase the chances that you would see those changes on an MRI *even if she hadn't had a second car accident*. (Deposition, pp. 12-13) (emphasis added).

39. Dr. Agarwala was asked if he had any disagreements with Dr. Primack's report. He replied:

No, I don't disagree with his review. Again, he talks a lot about some of the different evaluations around pain behaviors that certainly are concerning for this patient. There's nothing on the report that I disagree with, I don't think. (Deposition, p. 27).

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. §8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. §8-43-201, C.R.S.

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

C. Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The ALJ finds that while Claimant may have testified sincerely, her constellation of symptoms as time progressed has not provided the ALJ with sufficient information to overcome the findings of the DIME physician.

D. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968). In this instance, the only expert to actually testify, Dr. Agarwala, was careful, and to his credit, not to overstate his qualifications to opine on causation. In fact, he has no disagreement with the IME report, not the DIME report.

E. Further, courts are to be "mindful that the Workmen's Compensation Act is to be liberally construed to effectuate its humanitarian purpose of assisting injured workers." *James v. Irrigation Motor and Pump Co.*, 503 P.2d 1025 (Colo. 1972).

Overcoming the DIME Opinion on MMI, Generally

F. The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, *supra*; *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998); *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186, 189-190 (Colo. App. 2002); *Sholund v. John Elway Dodge Arapahoe*, W.C. No. 4-522-173 (ICAO October 22, 2004); *Kreps v. United Airlines*, W.C. Nos. 4-565-545 and 4-618-577 (ICAO January 13, 2005). The MMI determination requires the DIME physician to assess, as a matter of diagnosis, whether the various components of a claimant's medical condition are casually related to the injury. *Martinez v. ICAO*, No. 06CA2673 (Colo. App. July 26, 2007). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995) In other words, to overcome a DIME physician's opinion regarding the cause of a particular component of a claimant's overall medical impairment, MMI or the degree of whole person impairment, "there must be

evidence establishing that the DIME physician's determination is incorrect and this evidence must be "unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc.*, W.C. No. 4-476-254 (ICAP, Oct. 4, 2001).

G. "Maximum medical improvement" is defined in Section 8-40-201(11.5), C.R.S. as:

A point in time when any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition. The requirement for future medical maintenance which will not significantly improve the condition or the possibility of improvement or deterioration resulting from the passage of time shall not affect a finding of maximum medical improvement. The possibility of improvement or deterioration resulting from the passage of time alone shall not affect a finding of maximum medical improvement.

H. This enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appeals Office, supra*. Where the evidence is subject to conflicting inferences a mere difference of opinion between qualified medical experts does not necessarily rise to the level of clear and convincing evidence. Rather it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Oates v. Vortex Industries*, WC 4-712-812 (ICAO November 21, 2008).

I. As a matter of diagnosis the assessment of permanent medical impairment inherently requires the DIME physician to identify and evaluate all losses that result from the injury. *Mosley v. Industrial Claim Appeals Office*, 78 P.3d 1150 (Colo. App. 2003). Consequently, a DIME physician's finding that a causal relationship does or does not exist between an injury and a particular impairment must be overcome by clear and convincing evidence. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). The rating physician's determination concerning the cause or causes of impairment should include an assessment of data collected during a clinical evaluation and the mere existence of impairment does not create a presumption of contribution by a factor with which the impairment is often associated. *Wackenhut Corp. v. Industrial Claim Appeals Office*, 17 P.3d 202 (Colo. App. 2000).

Overcoming the DIME on MMI, as Applied

J. Claimant's symptoms from her 3/20/2013 work injury began to reappear in late 2014 or 2015. In September 2015, Claimant had a MRI of her cervical spine taken because she was having a recurrence of her pre-fusion symptoms. In particular, the presence of stenosis and degenerative changes at C6-7 were worse when compared with the pre-fusion MRI from 2013. Claimant's condition continued to worsen during the end of 2015 and beginning of 2016. By February 2016, Claimant was complaining of

“constant” cervical pain and even broke down in tears, telling Dr. Hudson that she could not “live this way.” Then, on August 23, 2016 (less than two months before this Incident), Claimant saw Dr. Hudson for her cervical pain and extremity weakness. He prescribed her oxycodone, and requested that she follow up with him in two months. Before that follow-up appointment was set to occur, however, Claimant was involved in this incident.

K. The symptoms and limitations Claimant currently complains of largely mirror those she expressed in the months leading up to the 10/12/2016 work incident. Claimant’s complaints to Dr. Sandell in February, 2016 are remarkably similar to her hearing testimony regarding her current symptoms. Her symptoms as described to Dr. Hudson on 8/23/2016 were noted by him to be related to her 3/20/2013 claim. Claimant indicated to Dr. Primack that {in someone’s opinion} what occurred on October 12, 2016 wasn’t forceful enough to even be considered an accident. Dr. Primack concurred in this assessment.

L. In the end, PAC Bewley, Dr. Primack, and the DIME all concur that Claimant was at MMI by 2/14/2017. Claimant was assessed with a cervical strain by the DIME physician, from which she has long recovered. While it is unclear what Dr. Hudson’s position currently is on Claimant’s MMI status for the 10/12/2016 work incident, to the extent he is now advocating for continued treatment for this second injury, it is insufficiently persuasive.

M. Perhaps even more supportive of the DIME’s findings, and those of Dr. Primack, is the testimony of Dr. Agarwala himself. Dr. Agarwala is not Level II accredited, and steered far clear from opining on causation. However, he made it clear that Claimant’s current symptomatology was more likely the result of adjacent disc disease, which would directly result from the 3/20/2013 injury. No acute injury would even be necessary to cause Claimant’s MRI results – it could even be from a sneeze – or of unknown etiology altogether. And Dr. Agarwala had no disagreement with *any* of Dr. Primack’s conclusions.

N. The evidence in this case is wholly insufficient for the ALJ to conclude, by clear and convincing evidence, that the DIME opinion on the date of MMI is highly probably incorrect. Instead, the evidence shows that Claimant has suffered the continuing effects of her first injury - for which she has received a 23% whole person impairment – along with degenerative conditions in her cervical spine.

Medical Benefits / Related to the 10/12/2016 Work Incident

O. While Dr. Agarwala’s recommendation for epidural steroid injections might indeed be reasonable to possibly diagnose and treat Claimant’s current condition, *such treatment is not related* to Claimant’s 10/12/2016 work incident, and the ALJ so finds. Claimant was at MMI for this incident as of 2/14/2017, after a minor cervical strain. Claimant is encouraged to seek such treatment outside the Workers Compensation system.

ORDER

It is therefore Ordered that:

1. The DIME opinion of Dr. Beatty has not been overcome. Claimant was at MMI effective February 14, 2017.
2. Claimant's request for medical benefits as proposed by Dr. Agarwala is denied and dismissed.
3. All matters not determined herein are reserved for future determination.

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

DATED: July 30, 2020

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

The issues set for determination included:

- Did Claimant suffer a compensable industrial injury while working for Employer?
- If Claimant suffered a compensable injury, is he entitled to medical benefits to cure and relieve the effects of the injury?

PROCEDURAL POSTURE

The undersigned issued a Summary Order on May 13, 2020. Respondent filed a timely Request for Specific Findings of Fact and Conclusions of Law on June 5, 2020. Claimant filed amended proposed Findings of Fact and Conclusions of Law, which was received on June 16, 2020. Respondent filed amended proposed Findings of Fact and Conclusions of Law. This Order follows.

FINDINGS OF FACT

1. Claimant works as a city driver for Employer. In this capacity, he drove a truck and made deliveries for Employer.
2. Claimant's medical history was significant in that he suffered a previous injury to his low back in 2015. No medical records related to this injury were admitted at hearing. Claimant testified that the symptoms he experienced were in the low back, not the right hip. He said his symptoms related to this injury resolved. No evidence which controverted this statement was introduced at hearing.
3. On September 17, 2018, Claimant was making a delivery and suffered a compensable injury. He testified he was making a hazardous material stop, which was about a 12,000-pound delivery. The material was on pallets and each pallet weighed approximately 1700 pounds. Claimant testified he was using a fork lift and was pushing a pallet toward the tail end of the lift gate when it hit a bump and pulled him off his feet.
4. Claimant testified he tried to break his fall, but was slammed down on his right side. The ALJ inferred that, given the weight of the pallet and the fact that it pulled Claimant off his feet, this exerted forces on Claimant's body, including Claimant's right side where he landed. Claimant was a credible witness when describing how the accident occurred.
5. Claimant said he felt right shoulder stiffness, lightheadedness, as well as pain in the hip and right side.

6. Claimant was evaluated in the same day by Emily Kuper, FNP-C at Advanced Urgent Care, the designated provider for Employer. Claimant completed a pain diagram, which showed pain on both sides of the right shoulder, arm (including scapula) and neck, but did not reference hip pain. FNP-C Kuper examined Claimant's shoulder, which had limited range of motion ("ROM") on flexion/extension and Claimant was unable to lift his arm above his head. Claimant testified he told FNP-C Kuper that his hip was tight at the first visit, but there was no reference to any hip complaints. FNP-C Kuper did not examine Claimant's neck despite the report of symptoms on the pain diagram.

7. FNP-C Kuper's assessment was: shoulder strain-right. X-rays were taken, which were negative for fracture and Claimant was begun on a course of physical therapy ("PT").

8. Claimant completed an employee statement dated September 18, 2018, and the description was consistent with his hearing testimony. (Claimant thought he completed this on the day of the injury). Claimant related that he was using the jack and got under the third pallet. He turned around pushed the pallet onto the lift gate. Claimant stated he was lowering the pallet down onto the plate and the valve was slowly releasing the air. He continued to squeeze the lever and attempted to slow down the speed of the pallet when his feet slipped out from underneath him. He attempted to break his fall with his right hand, to no avail and his right shoulder slammed with force into the trailer floor.

9. Over the next couple of days, Claimant testified he felt pain and tightness in various areas of his body, including his neck, right side and hip. Claimant specifically described tightness in the neck, trapezius and hip, saying it felt like he had been hit on the right side.¹ The ALJ found Claimant to be a credible witness both with regard to the severity of the impact and his pain complaints.

10. On October 9, 2018, Claimant was evaluated by Julie Parsons, M.D. at Advanced Urgent Care. Claimant reported muscle aches and joint pain, but no swelling. On examination, Dr. Parsons noted Claimant had tenderness and limited ROM, plus drop which presumably related to the right shoulder. The ALJ noted that this description of the musculoskeletal examination, with very little variation, was reproduced by Dr. Parsons every time she examined Claimant.²

11. Dr. Parson's assessment was: full thickness rotator cuff tear and right and she referred Claimant to an orthopedic surgeon.

¹ Hearing Transcript, p. 20:20-25.

² This description of the musculoskeletal examination was: "**Musculoskeletal**: Motor Strength and Tone: normal and normal tone. Joints, Bones, and Muscles: no contractures, malalignment, or bony abnormalities and **tenderness** and **limited ROM**; **+1 drop**. Extremities: no cyanosis, edema, or palpable cord". [emphasis added]

12. Claimant testified that he thought he mentioned hip symptoms to Dr. Parsons on this appointment, as it hurt to sit on a forklift and he experienced pain while using a broom on modified duty. Claimant said the focus of his treatment was on his shoulder and the ALJ found this was borne out by the initial treatment records.

13. Claimant returned to Dr. Parsons on November 20, 2018, at which time he reported muscle aches and joint pain. At that time, he complained of right hip and low back pain that went into the right groin. On examination, the musculoskeletal portion stated: Musculoskeletal: Motor Strength and Tone: normal and normal tone. Joints, Bones, and Muscles: no contractures, malalignment, or bony abnormalities and tenderness and limited ROM; Extremities: no cyanosis or edema. There was no indication that Dr. Parsons examined Claimant's hip. Dr. Parsons did not offer an opinion whether Claimant's hip pain was related to the work injury.

14. Dr. Parsons' assessment/plan was: full thickness rotator cuff tear-right. The ALJ noted the focus of this evaluation was on Claimant's shoulder. Dr. Parsons did not include a diagnosis even after Claimant complained of hip pain.

15. On November 28, 2018, Claimant underwent an arthroscopic rotator cuff repair on his right shoulder. The procedures included right shoulder arthroscopy, with rotator cuff repair, decompression, AC joint debridement, biceps tenotomy. The surgery was performed by Douglas Foulk, M.D.

16. After shoulder surgery, Claimant was evaluated by Dr. Parsons on December 12, 2018. He reported muscle aches and joint pain, but no swelling. In the musculoskeletal evaluation, Claimant had no contractures, malalignment, tenderness or bony abnormalities, with limited ROM. AROM was not tested. Dr. Parsons' assessment was: full thickness rotator cuff tear – right; postoperative visit.

17. Claimant returned to Dr. Parsons on January 10, 2019, at which time the same complaints were noted and he had just begun PT. Dr. Parsons' assessment/plan Also included pain of the right shoulder joint and muscle weakness of limb. There was no indication that there was a discussion of Claimant's hip or an evaluation by Dr. Parsons of this area of the body on January 10th. Dr. Parsons did not evaluate Claimant's hip at this appointment.

18. In the evaluation of February 28, 2019, Claimant reported muscle aches and joint pain, as well as neck and right hip pain. Dr. Parsons' musculoskeletal assessment was the same as the prior appointment, as was the assessment/plan. Dr. Parsons noted Claimant was again reporting right hip pain, as well as neck pain and headaches. The ALJ noted Dr. Parsons did not examine Claimant's hip and did not provide a diagnosis. Dr. Parsons noted, "I explained that I am only authorized to treat the shoulder".³ The ALJ inferred Dr. Parsons made no treatment recommendations for the hip because of her belief she was not authorized to treat this part of the body.

³ Exhibit 1, p.16; Exhibit B, p. 54.

19. When Claimant returned to Dr. Parsons on April 8, 2019, no hip pain was specifically documented and the musculoskeletal evaluation referred only to tenderness and limited ROM, which presumably related to the shoulder. Likewise, on June 10, 2019, Claimant was noted to be losing ROM and PT was just approved. The description of the musculoskeletal examination was nearly identical to the prior appointments, to wit: **Musculoskeletal:** Motor Strength and Tone: normal and **abnormal**. Joints, Bones, and Muscles: no contractures, malalignment, or bony abnormalities and **limited ROM**; Extremities: no cyanosis or edema or palpable cord.

20. On June 14, 2019, Claimant underwent an IME, which was performed by J. Raschbacher, M.D., requested by Respondent. Claimant reported his right hip and right low back got stiff on the way back to the terminal when he was injured. His right hip worsened when he was on light duty. On examination, Dr. Raschbacher noted some right shoulder infraspinatus muscle atrophy. Claimant also had right shoulder impingement sign. Claimant's gait was normal and tenderness was found at the right SI joint. The right lumbar quadrant test caused right joint SI pain. These were symptoms referable to the hip/SI joint/low back.

21. Dr. Raschbacher's assessment was: right shoulder rotator cuff tear, status post repairs; current complaints of low back pain.

22. Dr. Raschbacher noted Claimant belatedly reported low back discomfort or his hip discomfort. His current examination appeared to suggest SI joint as a pain generator, if a pain generator was present. Claimant did not report pain until quite some time after the injury claim date. Dr. Raschbacher opined that a hip/SI joint injury should have been apparent within the first day or two after the injury. He recommended not accepting liability for treatment of the lumbar or hip pain complaints.

23. Dr. Raschbacher testified as an expert in Occupational Medicine and is Level II accredited pursuant to the WCRP. Dr. Raschbacher found there was no work-relatedness to Claimant's hip and low back complaints. This was because he did not initially report the complaints of pain to Advanced Urgent Care. Dr. Raschbacher opined Claimant would have developed symptoms by the next day.

24. Dr. Raschbacher testified that for a medical provider not to document all of a patient's complaints is very uncommon. He said failing to document symptoms reported by a patient would put that medical provider at medicolegal risk and more importantly is simply not the right thing to do. He thought it was unlikely that two medical providers would not have listed hip complaints. Dr. Raschbacher believed that the first time when Claimant's complaints appeared on November 20, 2018 was the first day Dr. Parsons or other providers had heard about them. The ALJ noted Dr. Raschbacher's analysis did not include an analysis whether Claimant's fall to the ground could have caused a hip/low back injury, nor did he offer an opinion as to the cause of those complaints.

25. When Claimant returned to Dr. Parsons on July 9, 2019, the musculoskeletal examination description was **Musculoskeletal: Motor Strength and Tone: normal and abnormal; 4/5**. Joints, Bones, and Muscles: no contractures, malalignment, or bony abnormalities and **limited ROM**; Extremities: no cyanosis or edema or palpable cord. The description was the same on the July 30, 2019 evaluation. No diagnosis related to the hip was provided by Dr. Parsons. Dr. Parsons' treatment plan did not change.

26. Dr. Parsons responded to questions submitted by Respondent's counsel on or about August. 13, 2019. She stated Claimant was not at MMI and needed to finish PT to reach MMI. Dr. Parsons was not asked about Claimant's hip and this correspondence had no information concerning that injury.

27. Claimant testified his hip continues to hurt. He said the pain was in the front and back of the hip.

28. No ATP has provided treatment for Claimant's hip.

29. Claimant proved that he suffered an injury to his hip while working on September 17, 2018.

30. Respondent is required to provide medical benefits to cure and relieve the effects of the injury to Claimant's hip.

31. No evidence was submitted as to what treatment Claimant requires for his hip.

32. Evidence and inferences inconsistent with these findings were not persuasive.

CONCLUSIONS OF LAW

General

The purpose of the Workers' Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S.

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

Compensability

Claimant was required to prove by a preponderance of the evidence that at the time of the injury he was performing service arising out of and in the course of the employment and that the alleged injury was proximately caused by the performance of such service. §§ 8-41-301(1)(b) & (c), C.R.S. (2019). The question of whether Claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000). The ALJ found Claimant suffered a compensable injury to his hip on September 17, 2018. (Finding of Fact 29). The rationale for the ALJ's determination was first based upon the mechanism of injury and Claimant's testimony. As determined in Findings of Fact 3-4, Claimant was pulled off his feet by a pallet that weighed approximately 1700 pounds and slammed to the ground.). The ALJ was persuaded that it was more probable than not that the force of the impact caused an injury to Claimant's hip or SI joint. The ALJ credited Claimant's testimony vis a vis the mechanism of injury and his subsequent complaints. (Finding of Fact 4).

Second, a review of the medical evidence led the ALJ to conclude that Claimant's ATP, Dr. Parsons was focused on treatment for the shoulder. Dr. Parsons did not examine the hip, nor she include a diagnosis related to the hip, even after Claimant complained of hip pain. (Finding of Fact 14). Neither she, FNP-C Kuper examined Claimant's neck, even though he complained of pain at the outset. As found, in the subsequent appointments, the physical examination records document Dr. Parsons never examined Claimant's hip. The records of Dr. Parsons examination were focused on the shoulder and the examination descriptions were reproduced with little variation. As found, Dr. Parsons did not evaluate or perform causation analysis of the hip injury during any of her subsequent evaluations of Claimant. (Findings of Fact 14, 17-19, 25).

In coming to this conclusion, the ALJ considered Respondent's argument that Claimant did not initially report hip symptoms, including on the drawing of his initial pain complaints or in his statement. Respondent argued Claimant did not report right hip pain during the initial medical visit at Advanced Urgent Care or at the two subsequent visits. Respondent asserted the delay in reporting hip/low back symptoms was evidence that no injury occurred. Respondent also cited Dr. Raschbacher's opinion to support the conclusion Claimant would have complained of hip symptoms much earlier, if he had injured his hip on September 17, 2018.

The ALJ considered Dr. Raschbacher's opinions, including his expert testimony. On balance, the ALJ was persuaded that while there was a delay in reporting the

symptoms, this delay does not obviate the fact that Claimant suffered an injury to the hip. As found, Dr. Raschbacher's opinion was premised on the fact that Claimant did not report hip pain within the first couple of days, however, the record shows Claimant was evaluated the day after the accident and then not examined by a physician until three weeks after the injury occurred. His next appointment with Dr. Parsons was almost six weeks later and there was no evidence Dr. Parsons examined his hip at that time.

As noted, *supra*, given the reproduction of the nearly same text/description in her medical reports (musculoskeletal section), the ALJ could not conclusively discern what Dr. Parsons was told by Claimant and what she found on examination. Even when Claimant reported the hip symptoms, Dr. Parsons did not evaluate the hip, as she said she was not authorized to do so. (Finding of Fact 18). As found, the focus of Dr. Parson's treatment was on Claimant's shoulder and she never performed an analysis of whether Claimant's hip was injured on September 17, 2018. In the absence of a causation analysis of the etiology of Claimant's hip condition by Dr. Parsons, who was the ATP, the ALJ could not credit Dr. Raschbacher's conclusion that the delay in reporting hip symptoms meant the work injury did not include a hip injury. Also, Dr. Raschbacher did not analyze the mechanism of injury, nor the potential cause of the hip/SI joint complaints when he performed the IME. Based upon a totality of the evidence, the ALJ was persuaded that Claimant sustained an injury to the hip as a result of the work injury.

Medical Benefits

In the case at bar, Claimant suffered an injury to his hip on September 17, 2018 arising out of his employment. Respondent was therefore liable under the Act to provide treatment to cure and relieve the effects of the injury to Claimant's hip. Section 8-42-101(1)(a), C.R.S. Respondents are required to provide medical benefits to cure and relieve the effects of the work injury. (Finding of Fact 30).

By this decision, ALJ makes no findings as to the type of treatment Claimant requires, or indeed, if he requires any treatment. There was no evidence in the record as to a diagnosis or treatment of for his hip/SI joint. (Finding of Fact 31). As such, while this ALJ finds the hip condition to be related to the work injury, it is noted that no specific medical treatment, procedures, medications, or requests were made by the Claimant at the hearing. No specific medical benefits will be awarded by virtue of this Order.

ORDER

It is therefore ordered:

1. Claimant proved by a preponderance of the evidence that he sustained a compensable injury to his hip on September 17, 2018.
2. Respondent shall provide medical benefits to cure and relieve the effects of the injury to Claimant's hip.

3. All matters not determined herein are reserved for future determination.

DATED: July 31, 2020

STATE OF COLORADO



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Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-117-351-001**

ISSUES

Whether the respondents have demonstrated, by a preponderance of the evidence, that they are entitled to collect an overpayment of benefits from the claimant in the amount of \$18,699.17.

FINDINGS OF FACT

1. On July 25, 2018, the claimant was involved in a motor vehicle accident (MVA) while performing her duties for the employer. The employer admitted liability for the July 25, 2018 MVA. The claimant's average weekly wage (AWW) for this claim is \$752.27. Following the MVA, the claimant underwent medical treatment that included physical therapy, chiropractic treatment, and massage therapy.

2. On June 20, 2019, Dr. William Faragher determined that the claimant had reached maximum medical improvement (MMI). As Dr. Faragher is not Level II accredited, the claimant was referred to Dr. Craig Stagg to assess a permanent impairment rating.

3. On September 11, 2019, the claimant was seen by Dr. Stagg. At that time, Dr. Stagg agreed that the claimant reached MMI on June 20, 2019. With regard to permanent impairment, Dr. Stagg assessed zero impairment for the claimant's right knee, 11 percent whole person impairment for the claimant's cervical spine, and eight percent for the claimant's right upper extremity. Dr. Stagg noted that this resulted in a total impairment of 15 percent whole person.

4. On September 30, 2019, the respondents filed a Final Admission of Liability (FAL) admitting for the MMI date of June 20, 2019 and a permanent impairment rating of 11 percent whole person and eight percent for the claimant's right upper extremity. In addition, the FAL indicated that the respondents began paying the claimant permanent partial disability (PPD) benefits as of June 20, 2019.

5. On October 18, 2019, the claimant filed an Objection to Final Admission and requested a Division-sponsored independent medical examination (DIME).

6. The claimant testified that she believed that her PPD benefits would not be impacted by objecting to the FAL. The claimant also testified that if she had known that by objecting to the FAL she could jeopardize her PPD benefits, she would not have filed the objection.

7. On December 16, 2019, the claimant attended the DIME with Dr. Nicholas Kurz. In connection with the DIME, Dr. Kurz reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In his DIME

report, Dr. Kurz agreed that the claimant reached MMI on June 20, 2019. However, Dr. Kurz determined that the claimant had no permanent impairment.

8. On January 6, 2020, the respondents filed an FAL indicating the opinions of Dr. Kurz and noting an overpayment of PPD benefits in the amount of \$18,699.17. The claimant did not object to the January 6, 2020 FAL.

9. On February 10, 2010, the respondents filed an Application for Hearing on the issue of collecting the overpayment.

10. The claimant testified that as of the date of the hearing she continues working for the employer. The claimant also testified that after paying her monthly expenses, she has “a couple hundred dollars” remaining from her wages.

11. In the respondents’ position statement, they have requested that if the overpayment is found to be collectable, the claimant should be ordered to make monthly payments of \$500.00. In the claimant’s position statement, she has requested that (if the overpayment is collectable) she be ordered to pay \$97.80 per month.

12. After consideration of all evidence and testimony presented at hearing, the ALJ finds that the claimant received permanent partial disability (PPD) benefits that she was not entitled to receive. The DIME physician, Dr. Kurz, assessed no permanent impairment. Therefore, the ALJ finds that the overpayment of \$18,699.17, shall be repaid by the claimant.

CONCLUSIONS OF LAW

1. The purpose of the “Workers’ Compensation Act of Colorado” is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. Typically, a claimant in a Workers’ Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probable than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). However, in the present case it is the respondents’ burden, by a preponderance of the evidence, to prove that they are entitled to collect on an overpayment of benefits.

2. The facts in a Workers’ Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers’ Compensation case is decided on its merits. Section 8-43-201, *supra*.

3. The ALJ’s factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

4. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

5. Section 8-40-201(15.5), C.R.S. provides, in pertinent part, that an overpayment "means money received by a claimant that exceeds the amount that should have been paid, or which the claimant was not entitled to receive. . ." Section 8-42-113(1)(c) C.R.S., provides that an insurer may seek an order for repayment of an overpayment. Section 8-43-207(1)(q), C.R.S. provides that the ALJ has the authority to order repayment of an overpayment. In addition, the ALJ has the authority to set the rate of repayment. See *Turner v. Chipotle Mexican Grill*, WC 4-893-631-07 (ICAO February 8, 2018).

6. The claimant asserts that the difference between Dr Stagg's and Dr. Kurz's impairment ratings is based upon a difference of opinion. The claimant points to *City and County of Denver v. ICAO*, 58 P.3d 1162 (Colo. App. 2002) in support of this argument. That case involved claimant, Michelle Felix, and is referred to as the *Felix* case. The ALJ differentiates that case from the current matter in that in *Felix* the claimant applied for hearing disputing the FAL that relied upon a lower impairment rating. However, in the current case, although the claimant contested the first FAL and requested a DIME, she did not contest the later FAL that addressed the overpayment. The ALJ finds that if the claimant believed that the overpayment was incorrect, the remedy available to her was to object to the January 6, 2020 FAL. The claimant did not do so.

7. As found, the respondents have demonstrated, by a preponderance of the evidence that the claimant received PPD benefits that she was not entitled to receive. Repayment of the \$18,699.17 overpayment is appropriate in this matter.

8. The ALJ has considered the testimony of the claimant regarding her income and expenses and orders that she pay the insurer \$100.00 per month until the overpayment is paid in full.

ORDER

It is therefore ordered:

1. The claimant shall pay the insurer \$100.00 per month until the overpayment is paid in full.

2. All matters not determined here are reserved for future determination.

Dated this 3rd day of August 2020.



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

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

ISSUES

- Did Claimant prove his case should be reopened for additional medical treatment based on a change of condition?
- If the claim is reopened, is Claimant entitled to designation of a new ATP in Washington where he currently lives?
- If Claimant establishes entitlement to the new ATP, the parties agreed the new provider will be Dr. Edward Davila.

FINDINGS OF FACT

1. Claimant suffered an admitted neck injury on June 7, 2017 when he slipped on some stairs. He caught himself with his right arm to prevent falling, but “jerked” his neck.

2. He was initially treated at Integrity Urgent Care with primary complaints of neck pain radiating down the left arm.

3. A cervical MRI on July 3, 2017 showed an “acute/subacute” disc herniation at C5-6 compressing the left C6 nerve root, degenerative changes at C6-7 causing mild neural canal and neural foraminal narrowing but no nerve root impingement, and muscle spasm.

4. Claimant started treating at the UC Health occupational medicine clinic in October 2017. Dr. Walter Larimore became Claimant’s primary ATP in December 2017.

5. Claimant was referred to a surgeon, Dr. David Ou-Yang, because of persistent severe neck pain and left arm radiculopathy. He ultimately underwent artificial disc replacement surgery at C5-6 and C6-7 in March 2018.

6. Claimant continued to complain of severe pain and functional limitations after surgery. For example, on August 8, 2018, Claimant told Dr. Larimore his neck pain was “unchanged” with significantly limited range of motion. He described lateral posterior headaches “throughout the day,” ongoing left arm paresthesias, intermittent left arm tremors, and difficulty swallowing. He said he was in bed “60-70% of the day” because of pain. At the time, Claimant was seeing Dr. Stephen Sparr, who thought his persistent symptoms were related to myogenic thoracic outlet syndrome and cervical facet dysfunction triggering mild fasciitis, cervicogenic headaches and occipital neuralgia, and myogenic thoracic outlet syndrome. Dr. Sparr recommended aggressive manual therapy occluding deep tissue work for the cervical and parascapular muscles, weekly trigger point injections, bilateral occipital nerve blocks, and medications. Dr. Larimore concurred with and ordered the treatment recommended by Dr. Sparr.

7. Respondents obtained video surveillance of Claimant on August 11 and August 12, 2018. The video depicts Claimant performing various activities including washing his vehicle and carrying boxes with no apparent difficulty. Respondents forwarded the video to Dr. Larimore for his review.

8. Dr. Larimore viewed the video on August 29, 2018 and noted Claimant was,

[M]oving with no pain behavior whatsoever. Range of motion of the neck appears full (at least FLEX, ROT, SB). . . . At one point he spends 10-15 minutes detailing the wheel of a truck while seated with repetitive scrubbing using both arms above 90° flexion with significant repetitive movement and no experience of pain. During the same time he is turning frequently to talk to a female, laughing, and again, demonstrating no pain behavior. At the storage facility he is seen opening a truck door when a box falls. He reacts instantly by grabbing the box with both hands and lifting it up with no apparent pain. He is seen opening the truck door and closing it with no apparent lack of neck ROM or pain. This video is in my opinion incongruent and inconsistent with his presentation at multiple visits and his history of pain severe enough to keep him in bed or on the sofa up to 60-80% of the day and his history of being [un]able to sit or stand for any significant period of time without worsening severe pain. This videotape is not consistent with [Claimant's] prior representations to me regarding his physical abilities that formed the basis of my opinion to keep him off work completely.

9. Dr. Larimore spoke with Dr. Sparr regarding his impressions of Claimant. Dr. Sparr indicated Claimant had some improvement with occipital injections, but his lack of range of motion during exams appeared inconsistent with reports from the physical therapist describing full and pain-free passive range of motion.

10. Claimant saw Dr. Sparr on August 31, 2018. Dr. Sparr noted, “objectively [he] has shown tremendous improvement. Subjectively there is only 10% improvement. . . . [T]he objective findings do not match the subjective complaints with cervical myofascial tightness decreased dramatically from earlier evaluations.” He thought additional trigger points were not justified since Claimant perceived no benefit, nor did he recommend any other injections.

11. Claimant followed up with Dr. Larimore on September 5, 2018. Claimant again reported “minimal improvement.” The medications prescribed by Dr. Sparr helped briefly but Dr. Sparr stopped the medications because they “quit working.” The occipital injections provided mild pain relief for only about 30 minutes. Claimant said his left arm numbness, tingling, and tremors were “about 50% better.” Dr. Larimore brought up the surveillance video, which Claimant said was obtained on days he was “feeling improved.” Dr. Larimore “again discussed his pre-existing and significant, non-work-related, chronic degenerative disease” including multilevel cervical DDD and DJD, osteophytes, and multilevel foraminal stenosis. Dr. Larimore opined “almost all of his residual symptoms are in the upper half of the cervical spine and most likely relate to non-work-related

degenerative changes.” He put Claimant at MMI with no permanent work restrictions and referred him to Dr. Nicholas Kurz for an impairment rating.

12. Dr. Larimore further addressed the video and opined,

[It] appears . . . incongruent with [Claimant’s] reported symptoms and limitations. In fact, the video surveillance was quite surprising given how [Claimant] repeatedly presented to me complaining of pain so severe that it required him to be at bed or sofa rest, supine, 60-80% of the day. What I would have expected to see was [Claimant] being very protective of his neck with limited to no ROM and significant limitations with use of either arm (particularly left arm), and evidence of pain behavior and/or discomfort. What I saw was an individual and no apparent discomfort and with no apparent functional limitation of the neck or either upper extremity. The video showed this individual walking, driving, stooping, standing, lifting and catching a box, getting in and out of a truck multiple times, driving the truck at least once, and vigorously washing, scrubbing, and detailing a truck with no apparent pain behavior nor limitation and cervical range of motion. Again, at no time did he appear to be limited, hesitant in movement, functionally limited, or appear to be in pain.

13. Claimant saw Dr. Kurz for an impairment rating on September 14, 2018. Dr. Kurz assigned a 14% whole person cervical spine rating. He opined Claimant required no further injury-related treatment and should follow up with his PCP for any ongoing issues related to his “pre-existing, non-work-related, degenerative cervical issues.”

14. Claimant followed up with Dr. Ou-Yang on October 31, 2018. Dr. Ou-Yang opined, “the etiology of his left upper extremity pain is unclear. I have a low clinical suspicion for peripheral neuropathy or radiculopathy given his negative EMG. Regarding his axial neck pain, I continue to think his symptoms may be related to spondylo-arthritis with facet arthritis at multiple levels.” Dr. Ou-Yang recommended a physiatry consult to determine if Claimant was a candidate for radiofrequency ablation.

15. Claimant had an IME with Dr. Timothy Hall at his counsel’s request on November 16, 2018. Claimant reported multiple ongoing symptoms, including headaches “pretty much every day,” “constant” neck pain with electrical sensations shooting into his arms when he turned his head, numbness and tingling in an ulnar distribution in both hands, weakness and tremors in the left hand and difficulty gripping objects, episodes of lightheadedness and dizziness when turning his head, and impaired sleep. On physical examination, Claimant did “very poorly” on vestibular testing, demonstrated “marked” cervical range of motion, had tenderness and reduced oral range of motion on examination of the TMJ, “exquisite tenderness” on examination of the scalene muscles, active trigger points throughout the parascapular area and upper trapezius, immediate symptoms in an ulnar distribution of the left hand with palpation of Erb’s point on the left, and decreased pinprick sensation in an ulnar distribution bilaterally, and weakness of the intrinsic muscles of the hand. Dr. Hall opined Claimant “remains very symptomatic” and was not at MMI. He thought Claimant’s upper extremity symptoms were primarily related

to thoracic outlet, which had not been adequately treated. He recommended “therapies geared at the marked spasm, adhesions, and trigger points through the cervicothoracic and parascapular area. This could be accompanied by trigger point injections and/or Botox injections.” He also recommended treatment for TMJ dysfunction, which he thought was perpetuating Claimant’s headache and muscle spasm. Finally, Dr. Hall calculated a 23% whole person cervical spine rating.

16. Claimant attended a Division IME with Dr. John Douthit on December 17, 2018. He reported ongoing symptoms similar to those he described to Dr. Hall. Dr. Douthit agreed Claimant was at MMI as of September 5, 2018 as determined by Dr. Larimore. He opined,

[Claimant] had extensive and largely ineffective treatment which generated a 6-inch stack of medical records. . . . His MRI revealed a C5-C6 disc herniation of the left, which could explain radiating neck and left-sided arm pain. In March 2018, he underwent a two-level disc replacement from which he alleges not to have benefited. He continues to have posterior arm and neck pain complaints and many other complaints unrelated to the neck pathology. . . . He had weakness on grip, but no measurable atrophy. He has no measurable neurological loss in the left arm, although he does have intermittent radiating pain, which subjectively is a radiculopathy. . . . He has a myriad of other symptoms that appear unrelated and unexplained.

17. Dr. Douthit agreed with Dr. Hall’s 23% rating. He adopted Dr. Hall’s cervical ROM measurements because the measurements at the DIME were unreliable due to “extreme guarding.” Dr. Douthit opined Claimant would not benefit from any additional medical treatment.

18. Respondents filed a Final Admission of Liability based on Dr. Douthit’s report, and Claimant requested a hearing to challenge the DIME. In discovery, Claimant indicated he was seeking the treatment recommended by Dr. Hall. Claimant subsequently withdrew his application for hearing and the hearing scheduled in August 2019 was vacated.

19. Claimant concedes the claim is closed, subject to statutory reopening.

20. Claimant obtained a new position with Employer and relocated to the Seattle area in January 2019. The new position is primarily sedentary desk work.

21. Claimant sought no further treatment for any injury-related condition until September 9, 2019, when he went to the CHI Franciscan Health emergency department in Tacoma, Washington. He stated his neck pain was “progressively worse” and he could not sleep. He also reported tingling in his left 4th and 5th fingers. Examination showed muscle spasms and significant ROM deficits. He was diagnosed with an “exacerbation” of “chronic neck pain” and cervical radiculopathy. He was prescribed medications including muscle relaxers, NSAIDs, and steroids.

22. Claimant followed up with Dr. Edward Davila at CHI Franciscan Health on September 19, 2019. He said the muscle relaxer and NSAIDs did not help. He had been off work for a few days but felt “60-70%” better and was ready to return to work.

23. Claimant returned to Colorado on February 10, 2020 for a one-time the evaluation with Dr. Larimore. Claimant described “slowly worsening neck pain (left greater than right), left upper back pain, and pain radiating down the left arm from the anterior left shoulder to the lateral left elbow to the left fourth and fifth fingers.” In his deposition, Dr. Larimore testified “there was not much difference” in the physical exam findings compared to his last visit in September 2018. Dr. Larimore concluded,

Given Dr. Ou-Yang’s opinion that “his symptoms may be related to spondylo-arthrosis with facet arthritis at multiple levels,” Dr. Staudenmayer’s opinion that “he is not a good candidate to benefit from psychological intervention,” an inconsistent exam, evidence of significant pre-existing non-work-related degenerative changes, and my video surveillance report of 2018, it is my opinion that this case should not be reopened and that closure should be maintained at 09/05/2018 with no [permanent work restrictions].

24. Claimant was re-evaluated by Dr. Hall the same day he saw Dr. Larimore. Claimant said his neck pain was worse, but his arm symptoms were not as constant or extreme as they had been. His left shoulder was “quite a bit worse.” The physical examination findings were largely identical to Dr. Hall’s previous IME in November 2018. Claimant “again” did poorly with vestibular testing, neck range of motion was still “markedly limited,” the TMJ exam showed reduced motion, diffuse tenderness and active trigger points, Tinel’s was “still” positive at Erb’s point, and reduced sensation in an ulnar distribution “persist[ed].” The main difference from the November 2018 IME was severe pain and markedly limited range of motion of the left shoulder. Dr. Hall affirmed his opinion Claimant is not at MMI. He reiterated his prior recommendations regarding evaluation and treatment for TMJ, “aggressive therapies geared at the soft tissue findings including active trigger points and intractable spasm,” and Botox injections. The only new recommendation was a left shoulder MRI “since this has been worsening over time.”

25. Dr. Larimore testified in a deposition on May 21, 2020 to expand upon the opinions expressed in his reports. He reiterated Claimant requires no further treatment for his work-related injury, and any worsened symptoms are related to the natural progression of his pre-existing degenerative condition.

26. Dr. Larimore’s opinions, observations, and conclusions reflected in his reports and deposition testimony are credible and persuasive.

27. Claimant failed to prove his injury-related condition has worsened or changed in any meaningful way since he was put at MMI and his claim closed. The symptoms and limitations he is currently reporting are basically the same as those documented around the time of MMI. Dr. Hall’s findings and recommendations are largely unchanged from November 2018 to February 2020. The only significant change relates

to Claimant's left shoulder, but there is no persuasive evidence that any worsened shoulder symptoms are causally related to the work injury.

CONCLUSIONS OF LAW

Section 8-43-303 authorizes an ALJ to reopen any award on the grounds of error, mistake, or a change in condition. The opportunity to request reopening reflects a "strong legislative policy" that the goal of achieving a fair and just result overrides the interests of litigants in obtaining final resolution of their dispute. *Padilla v. Industrial Commission*, 696 P.2d 273, 278 (Colo. 1985). Thus, a "final" award means only that the matter has been concluded subject to reopening if warranted under the applicable statutory criteria. *Renz v. Larimer County School District Poudre R-1*, 924 P.2d 1177 (Colo. App. 1996). The authority to reopen a claim is permissive, and whether to reopen a claim if the statutory criteria have been met is left to the ALJ's discretion. *Berg v. Industrial Claim Appeals Office*, 128 P.3d 270 (Colo. App. 2005). The party requesting reopening bears the burden of proof. Section 8-43-304(4).

A "change in condition" refers to a change in the condition of the original compensable injury or a change in the claimant's physical or mental condition that can be causally related to the original injury. *Heinicke v. Industrial Claim Appeals Office*, 197 P.3d 220 (Colo. App. 2008); *Chavez v. Industrial Commission*, 714 P.2d 1328 (Colo. App. 1985). If a claimant's condition is shown to have changed, the ALJ should consider whether the change represents the natural progression of the industrial injury, or results from some other cause. *Goble v. Sam's Wholesale Club*, W.C. No. 4-297-675 (May 3, 2001).

As found, Claimant failed to prove his injury-related condition has worsened or changed in any meaningful way since he was put at MMI and his claim closed. Dr. Larimore's opinions are credible and persuasive. Dr. Larimore's longitudinal perspective as the primary ATP puts him in the best position to determine whether Claimant's condition has changed and whether any change is related to the original injury. There is no persuasive objective evidence of any change in Claimant's condition, and the ALJ is not inclined to give significant weight to Claimant's subjective reports given the inconsistencies documented by Dr. Larimore and shown on the video. In any event, the symptoms and limitations Claimant currently reports are basically the same as those documented around the time of MMI. Dr. Hall's most recent findings and recommendations are largely unchanged from November 2018, when he opined Claimant was not at MMI. The only substantial change relates to Claimant's left shoulder, but there is no persuasive evidence that any worsened shoulder symptoms are causally related to the work injury.

Moreover, even if we accept that Claimant's injury-related symptoms are somewhat more intense than before his claim closed, that does not automatically mean the claim should be reopened. Reopening is only appropriate if additional benefits will be awarded. *Richards v. Industrial Claim Appeals Office*, 996 P.2d 756 (Colo. App. 2000). Claimant has received no meaningful benefit from multiple treatment modalities including therapy, medications, injections, and surgery. Given his lack of response to prior

interventions, there is little reason to expect he will benefit from any other treatment that might be offered. Accordingly, the preponderance of persuasive evidence fails to show additional treatment is reasonably necessary.

Because Claimant's petition to reopen his claim has been denied, authorization of a new ATP in Washington is moot.

ORDER

It is therefore ordered that:

1. Claimant's petition to reopen his claim for additional medical treatment is denied and dismissed.

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

DATED: August 3, 2020

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUE

Whether Claimant has demonstrated by a preponderance of the evidence that the Brostrom-type lateral ankle stabilization surgery requested by Authorized Treating Physician (ATP) Eric C. Kuhlman, DPM, is reasonable, necessary and causally related to his admitted September 10, 2019 left ankle injury.

FINDINGS OF FACT

1. Claimant is a 37 year old male who works for Employer as a Wireline Operator. His job duties involve assembling and carrying equipment, setting tools and driving company vehicles. On September 10, 2019 Claimant was carrying a setting tool with a co-worker when he rolled his left ankle.

2. On September 14, 2019 Claimant visited Platte Valley for medical treatment. Radiographs of Claimant's left ankle revealed some lateral soft tissue swelling, but no acute osseous abnormalities.

3. On September 16, 2019 Claimant was evaluated by Respondents designated provider Advanced Urgent Care. He was examined by Physician's Assistant (PA) Sarah Kleinschmidt. Claimant reported he had visited Platte Valley where he was told he did not have a fracture, but needed to use a walking boot and crutches. Claimant's symptoms included a gait disturbance/imbalance and joint pain. PA Kleinschmidt diagnosed Claimant with a sprain of an unspecified ligament of the left ankle.

4. On September 30, 2019 Claimant returned to Advanced Urgent Care and was evaluated by Authorized Treating Physician (ATP) Julie Parsons, M.D. Dr. Parsons noted that Claimant was having "bruising off and on in different spots Mid-Saturday felt another pop in ankle." Upon physical examination, Dr. Parsons noted tenderness, limited range of motion, significant pain over the distal fibular and talar tilt. Dr. Parsons confirmed the diagnosis of sprain of an unspecified ligament of the left ankle and "other instability of left ankle." She referred Claimant for a left ankle MRI.

5. On September 30, 2019 Claimant underwent an MRI of the left ankle without contrast. The MRI revealed a full-thickness ligamentous injury in the lateral aspect of the ankle and severe flexor hallucis longus tenosynovitis. The tendons were intact and there was no acute bony injury.

6. On October 1, 2019 Claimant visited ATP Eric C. Kuhlman, DPM for an examination. Dr. Kuhlman diagnosed Claimant with a grade-3 sprain of the ATFL and CFL. He discussed both conservative and surgical treatment options for Claimant's left ankle. Dr. Kuhlman noted that conservative treatment options included "protected

weight bearing in an ankle brace/CAM boot, physical therapy, edema control with anti-inflammatory medications, if worsened to go completely nonweightbearing in a cast.” He remarked that “a surgical option does exist for this, which would include a Brostrom type lateral ankle stabilization.”

7. On October 17, 2019 Respondents filed a General Admission of Liability (GAL). The GAL acknowledged medical benefits and ongoing Temporary Total Disability (TTD) benefits.

8. On November 18, 2019 Claimant returned to Dr. Parsons for an evaluation. Claimant had limited ambulation with a slight limp. Upon physical examination, Dr. Parsons noted tenderness and restricted range of motion of the left ankle with limited talar tilt.

9. On November 19, 2019 Claimant visited Dr. Kuhlman for an examination. He reported that his instability, swelling and range of motion had all improved. His pain level remained at 1/10. Dr. Kuhlman noted that most patients with a grade 3 ankle sprain heal without surgical intervention. Nevertheless, he commented that Claimant could undergo a Brostrom-type lateral ankle stabilization or arthroscopy of the left ankle. However, Dr. Kuhlman remarked that the procedure would be necessary only if Claimant still experienced ligament laxity or difficulty with uneven terrain following conservative therapy.

10. On November 26, 2019 Claimant returned to Dr. Kuhlman. He reported difficulty with left ankle flexion. Claimant noted that it felt like there was something in the front of his ankle that was preventing it from flexing like his right ankle. However, his pain level remained at 1/10. Upon physical examination, Claimant’s left ankle ligaments felt stable. Dr. Kuhlman determined that Claimant should move forward with aggressive physical therapy. If that failed, he would attempt a steroid injection. Dr. Kuhlman remarked that, if the injection also failed, they would proceed to the arthroscopy procedure.

11. On December 2, 2019 Claimant visited Dr. Parsons for an evaluation. She noted that Claimant had decreased left ankle range of motion. However, she determined that Claimant exhibited stability without dislocation, subluxation or laxity of the left ankle. Claimant also had normal left ankle strength and talar tilt. Dr. Parsons diagnosed Claimant with a left ankle sprain, instability of the left ankle joint, an antalgic gait and ankle joint pain.

12. Claimant returned to Dr. Kuhlman on December 17, 2019. He reported his left ankle pain had improved significantly, though he did have lateral instability that caused him to feel unsteady. Based on a physical examination, Dr. Kuhlman determined that Claimant’s left ankle ligaments remained stable.

13. On January 14, 2020 Claimant again visited Dr. Kuhlman for an examination. Claimant reported continued instability and that physical therapy had not improved his left ankle symptoms. Dr. Kuhlman recounted that Claimant completed a

few sessions of physical therapy without improvement in his lateral ankle instability. He remarked that, if Claimant still noticed “ligament laxity or difficulty with uneven terrains we could then discuss surgical intervention if needed. At this time the ankle ligaments do feel stable.” Dr. Kuhlman concluded that “the patient has now failed two months of physical therapy, we will consider this a chronic lateral ankle instability, according to the workers’ compensation guidelines, the patient is now appropriate for surgical correction.”

14. On January 20, 2020 Claimant visited Michael Alday, M.D. for an examination. Claimant exhibited limited ambulation and wore an ankle brace for support. Dr. Alday noted decreased range of motion on physical examination. However, similar to Dr. Parsons he remarked that Claimant exhibited stability without dislocation, subluxation or laxity of the left ankle. Claimant also had normal left ankle strength and talar tilt.

15. On January 22, 2020 Orthopedic Surgeon Wallace K. Larson, M.D. performed a medical records review. He determined that Claimant did not have a specific intra-articular disorder that would likely respond favorably to an arthroscopic procedure. Furthermore, Dr. Larson explained that the medical records did not support a lateral ankle reconstruction because they did not reflect any left ankle laxity. He also noted that functional limitation alone was insufficient to establish that the recommended arthroscopic procedure was necessary. Dr. Larson explained that the Colorado Division of Workers’ Compensation *Medical Treatment Guidelines (Guidelines)* reflect that surgery is rarely necessary for an ankle sprain. He detailed that “if the proposed surgical procedure is a ligament reconstruction, ligamentous laxity should be demonstrated clinically.” Because the medical records did not demonstrate that Claimant had left ankle ligament laxity, Dr. Larson concluded that Dr. Kuhlman’s proposed surgery was not reasonable, necessary or causally related to Claimant’s September 10, 2019 work injury.

16. On January 23, 2020 Claimant was scheduled for a Brostrom-type lateral ankle stabilization based upon ATP Kuhlman’s opinion. However, Claimant testified that Respondents cancelled the procedure.

17. Claimant returned to Dr. Parsons on February 6, 2020. He reported mild pain with movement. Dr. Parsons again noted stability without dislocation, subluxation or laxity, and normal strength. However, Claimant exhibited instability with the talar tilt.

18. On February 24, 2020 Dr. Larson performed a second medical records review. He specifically considered records from Claimant’s visits with Dr. Kuhlman on January 14, 2020 and February 11, 2020. Dr. Larson noted that Claimant had a sense of instability, but no increase in lateral tilt on stress and a negative drawer test. Moreover, on physical examination Claimant did not demonstrate laxity. Dr. Larson thus concluded that it was unlikely ligamentous reconstruction would impact Claimant’s sense of instability. In the absence of demonstrable ligamentous laxity, Dr. Larson reiterated that Dr. Kuhlman’s proposed arthroscopy procedure was not recommended.

19. On June 3, 2020 the parties conducted the pre-hearing evidentiary deposition of Dr. Larson. Dr. Larson initially explained that the *Guidelines* require at least two months of participation in a non-operative therapy program with continued instability. He also commented that the *Guidelines* “seem to reference laxity.” Dr. Larson thus distinguished between “laxity” and “instability” He specified that “instability” is a “symptom of something giving out” while “laxity is looseness of ligaments.” The record reveals that Claimant frequently reported symptoms of left ankle instability. However, when physicians tested ligamentous integrity, there was no laxity. Specifically, Claimant had negative anterior drawer and talar tilt tests. Dr. Larson summarized that, because Claimant did not exhibit loose ligaments, he probably did not have mechanical instability. He commented that the proposed ligament reconstruction surgery would not be effective in the absence of loose ligaments. Notably, the *Guidelines* do not recommend ankle surgery to reconstruct normal ligaments. Accordingly, Dr. Larson maintained that Dr. Kuhlman’s proposed Brostrom-type lateral ankle stabilization surgery was not reasonable, necessary or causally related to Claimant’s September 10, 2019 left ankle injury.

20. Claimant has demonstrated that it is more probably true than not that the Brostrom-type lateral ankle stabilization surgery requested by ATP Dr. Kuhlman is reasonable, necessary and causally related to his admitted September 10, 2019 left ankle injury. Initially, on September 10, 2019 Claimant was carrying a setting tool with a co-worker when he rolled his left ankle. Claimant was diagnosed with a sprain of an unspecified ligament of the left ankle and instability. A September 30, 2019 MRI revealed a full-thickness ligamentous injury in the lateral aspect of the ankle and severe flexor hallucis longus tenosynovitis. The tendons were intact and there was no acute bony injury. On October 1, 2019 Dr. Kuhlman specifically diagnosed Claimant with a grade-3 sprain of the ATFL and CFL. He discussed both conservative and surgical treatment options for Claimant’s left ankle. By January 14, 2020 Claimant reported continued instability and that physical therapy had not improved his left ankle symptoms. Dr. Kuhlman explained that Claimant had “failed two months of physical therapy, we will consider this a chronic lateral ankle instability, according to the workers’ compensation guidelines.” Claimant was thus scheduled for a Brostrom type lateral ankle stabilization surgery but Respondents cancelled the procedure.

21. In contrast to Dr. Kuhlman’s surgical recommendation, Dr. Larson maintained that the proposed Brostrom-type lateral ankle stabilization surgery was not reasonable, necessary or causally related to Claimant’s September 10, 2019 left ankle injury. Dr. Larson initially explained that the *Guidelines* require at least two months of participation in a non-operative therapy program with continued instability. He also commented that the *Guidelines* “seem to reference laxity.” He thus distinguished between “laxity” and “instability” Dr. Larson specified that “instability” is a “symptom of something giving out” while “laxity is looseness of ligaments.” Although Claimant frequently reported symptoms of left ankle instability, physical examinations did not reveal left ankle ligament laxity. Specifically, Claimant had negative anterior drawer and talar tilt tests. In fact, during his course of treatment Dr. Parsons determined that Claimant exhibited stability without dislocation, subluxation or laxity of the left ankle. Dr.

Larson thus summarized that, because Claimant did not exhibit loose ligaments, the proposed surgery would not be effective in improving his condition.

22. Despite Dr. Larson's opinion, the record reflects that the Brostrom-type lateral ankle stabilization surgery requested by ATP Kuhlman to address Claimant's "chronic lateral ankle instability" is reasonable, necessary and causally related to his September 10, 2019 admitted left ankle injury. The medical records consistently reflect that Claimant has deficits "due to ankle instability and difficulty walking on uneven surfaces." Physical therapy and other measures have failed and there is no remaining conservative treatment to address Claimant's left ankle pain and instability. Dr. Larson's distinction between laxity and instability is not persuasive in considering whether the proposed surgery is reasonable. ATP Kuhlman explained that Claimant had failed two months of physical therapy and suffers from chronic left ankle instability. Based on Dr. Kuhlman's considerable treatment of Claimant and reasonable application of the *Guidelines*, Claimant is an appropriate surgical candidate. Accordingly, Claimant's request for left ankle stabilization surgery is granted.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. See *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994).

A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). The claimant bears the burden of demonstrating a causal connection between his industrial injuries and the need for additional medical treatment. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier*, W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

5. The *Guidelines* specifically provide, in relevant part:

There is no conclusive evidence that surgery as opposed to functional treatment for an uncomplicated Grade 1, 2, or 3 ankle sprain improves patient outcome. . . . Chronic indications are functional problems, such as recurrent instability remaining after at least 2 months of active participation in a non-operative therapy program including balance training.

See Rule 17, Exhibit 6 Lower Extremity Injury Guidelines, pp. 32-33.

6. As found, Claimant has demonstrated by a preponderance of the evidence that the Brostrom-type lateral ankle stabilization surgery requested by ATP Dr. Kuhlman is reasonable, necessary and causally related to his admitted September 10, 2019 left ankle injury. Initially, on September 10, 2019 Claimant was carrying a setting tool with a co-worker when he rolled his left ankle. Claimant was diagnosed with a sprain of an unspecified ligament of the left ankle and instability. A September 30, 2019 MRI revealed a full-thickness ligamentous injury in the lateral aspect of the ankle and severe flexor hallucis longus tenosynovitis. The tendons were intact and there was no acute bony injury. On October 1, 2019 Dr. Kuhlman specifically diagnosed Claimant with a grade-3 sprain of the ATFL and CFL. He discussed both conservative and surgical treatment options for Claimant's left ankle. By January 14, 2020 Claimant reported continued instability and that physical therapy had not improved his left ankle symptoms. Dr. Kuhlman explained that Claimant had "failed two months of physical therapy, we will consider this a chronic lateral ankle instability, according to the workers' compensation guidelines." Claimant was thus scheduled for a Brostrom type lateral ankle stabilization surgery but Respondents cancelled the procedure.

7. As found, in contrast to Dr. Kuhlman's surgical recommendation, Dr. Larson maintained that the proposed Brostrom-type lateral ankle stabilization surgery was not reasonable, necessary or causally related to Claimant's September 10, 2019 left ankle injury. Dr. Larson initially explained that the *Guidelines* require at least two months of participation in a non-operative therapy program with continued instability. He also commented that the *Guidelines* "seem to reference laxity." He thus distinguished between "laxity" and "instability" Dr. Larson specified that "instability" is a "symptom of something giving out" while "laxity is looseness of ligaments." Although Claimant

frequently reported symptoms of left ankle instability, physical examinations did not reveal left ankle ligament laxity. Specifically, Claimant had negative anterior drawer and talar tilt tests. In fact, during his course of treatment Dr. Parsons determined that Claimant exhibited stability without dislocation, subluxation or laxity of the left ankle. Dr. Larson thus summarized that, because Claimant did not exhibit loose ligaments, the proposed surgery would not be effective in improving his condition.

8. As found, despite Dr. Larson's opinion, the record reflects that the Brostrom-type lateral ankle stabilization surgery requested by ATP Kuhlman to address Claimant's "chronic lateral ankle instability" is reasonable, necessary and causally related to his September 10, 2019 admitted left ankle injury. The medical records consistently reflect that Claimant has deficits "due to ankle instability and difficulty walking on uneven surfaces." Physical therapy and other measures have failed and there is no remaining conservative treatment to address Claimant's left ankle pain and instability. Dr. Larson's distinction between laxity and instability is not persuasive in considering whether the proposed surgery is reasonable. ATP Kuhlman explained that Claimant had failed two months of physical therapy and suffers from chronic left ankle instability. Based on Dr. Kuhlman's considerable treatment of Claimant and reasonable application of the *Guidelines*, Claimant is an appropriate surgical candidate. Accordingly, Claimant's request for left ankle stabilization surgery is granted.

ORDER

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

1. Claimant's request for Brostrom-type lateral ankle stabilization surgery as requested by Dr. Kuhlman is granted.
2. Any issues not resolved in this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative

Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at <http://www.colorado.gov/dpa/oac/forms-WC.htm>.*

DATED: August 3, 2020.

DIGITAL SIGNATURE:


Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-921-243-001**

ISSUE

1. Whether Claimant's June 5, 2019 Petition to Reopen should be dismissed with prejudice.

FINDINGS OF FACT

1. Claimant sustained a work-related injury on June 5, 2013. On December 10, 2014, the parties entered into a Stipulation resolving the outstanding matters, and Claimant's claim was closed, subject to statutory reopening. Respondents filed a Final Admission of Liability on December 16, 2014. (Ex. C).
2. On June 5, 2019, Claimant, through counsel, filed a Petition to Reopen citing a change in Claimant's medical condition. Claimant's Petition to Reopen indicates Claimant's mailing address was 4650 Otis Street, Wheat Ridge, CO 80003. Claimant did not request a hearing related to his Petition to Reopen. (Ex. G). Claimant's Petition to Reopen was filed on the six-year deadline set forth in § 8-43-303(1), C.R.S.
3. On January 10, 2020, the Division of Workers' Compensation (Division), granted Claimant's attorney's request to withdraw from the case. (Ex. C & Ex. G). Claimant's former counsel submitted a "Written Notification of Service" advising that "official papers or documents shall be made at the Claimant's last known mailing address of 4650 Otis Street, Wheat Ridge, CO 80003." (Ex. C). Since Claimant's former counsel's withdrawal, no attorney has entered an appearance on behalf of Claimant.
4. On January 24, 2020, Respondents' counsel sent Claimant a letter to Claimant's last known mailing address of 4650 Otis Street, Wheat Ridge, CO 80003 conferring regarding a setting a hearing and a potential motion to dismiss. (Ex. C).
5. On April 10, 2020, Respondents filed an Application for Hearing with the Office of Administrative Courts. The certificate of mailing for Respondents' Application for Hearing certifies that a copy of the Application was mailed to Claimant at 4650 Otis Street, Wheat Ridge, CO 80003. (Ex. D).
6. Claimant did not file a response to the Application for Hearing.¹

¹The Court "may take judicial notice of its own records and adopt factual findings from a previous case as long as the previous case involved the same parties and the same

7. Respondents' Application for Hearing was set for hearing on July 30, 2020. The Office of Administrative Courts mailed a copy of the Notice of Hearing to Claimant's address on file -- 4650 Otis Street, Wheat Ridge, CO 80003), on May 26, 2020. The OAC has no email address on file for Claimant.
8. On April 28, 2020, a prehearing conference was held before Prehearing Administrative Law Judge (PALJ) David Gallivan pursuant to § 8-43-207.5, C.R.S. Notice of the April 28, 2020 prehearing conference was sent to Claimant's address of record (i.e., 4650 Otis Street, Wheat Ridge, CO 80003). Claimant did not appear, and the PALJ placed a call to Claimant at the phone number indicated in the Division's files, but Claimant did not answer. (Ex. E).
9. Following the April 28, 2020 prehearing conference, PALJ Gallivan issued an order permitting Respondents to engage in discovery with a self-represented (pro se) claimant. A copy of the April 28, 2020 Order was mailed to Claimant at 4650 Otis Street, Wheat Ridge, CO 80033. (Ex. E).
10. Respondents served discovery on Claimant at 4650 Otis Street, Wheat Ridge, CO 80003 on May 6, 2020. The post office returned the discovery requests to Respondents marked "return to sender." (Ex. F).
11. Respondents then scheduled a prehearing conference to address Claimant's failure to respond to the May 6, 2020 discovery requests. A prehearing conference was held on June 22, 2020 before PALJ Michael J. Barbo to address Claimant's failure to respond to discovery. Claimant did not attend the prehearing conference and the court's efforts to contact Claimant at his identified telephone number were unsuccessful. PALJ Barbo issued an order requiring Claimant to respond to Respondents' discovery requests on or before July 6, 2020. A copy of the July 22, 2020 Order was mailed to Claimant at 4650 Otis Street, Wheat Ridge, CO 80003. (Ex. F).
12. When Claimant did not respond to Respondents' discovery requests on or before July 6, 2020, Respondents scheduled a prehearing conference regarding Respondents' motion to dismiss or close claim for failure to participate in ordered discovery. On July 7, 2020, a prehearing conference was held before PALJ Susan D. Phillips pursuant to § 8-43-207.5, C.R.S. Respondents indicated to PALJ Phillips that notice of the July 7, 2020 prehearing conference was sent to the address on file, confirmed with the Division, but was returned by the U.S. Postal Service as undeliverable. Claimant did not appear at the hearing, and PALJ Phillips made two attempts to call the Claimant by phone at the number in the

issue." *In re C.A.B.L.*, 221 P.3d 433, 442 (Colo App. 2009); *Dauwe v. Musante*, 122 P.3d 15, 20 (Colo. App. 2004)

Division file and left two messages requesting a return phone call. Claimant did not return the phone call. (Ex. G).

13. The PALJ issued an order denying Respondents' motion to dismiss without prejudice, and imposing sanctions on Claimant for failure to respond to discovery, including prohibiting Claimant from presenting evidence at the July 30, 2020 hearing and from opposing Respondents' request to dismiss and close Claimant's workers' compensation case. (Ex. G).
14. The ALJ relies upon exhibits entered into evidence and finds that the Respondent has demonstrated that Claimant has failed to take any substantive action regarding his Petition to Reopen and has, effectively, abandoned the Petition to Reopen.

CONCLUSIONS OF LAW

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

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Claimant's Petition To Reopen

Section 8-43-303(1), C.R.S., provides that an award may be reopened on the ground of, *inter alia*, change in condition. The claimant shoulders the burden of proving his condition has changed and his entitlement to benefits by a preponderance of the evidence. § 8-43-201, C.R.S.; *Berg v. Industrial Claim Appeals Office*, 128 P.3d 270 (Colo. App. 2005); *Osborne v. Industrial Commission*, 725 P.2d 63 (Colo. App. 1986). A change in condition refers either to change in the condition of the original compensable injury or to a change in the claimant's physical or mental condition that can be causally related to the original injury. *Heinicke v. Industrial Claim Appeals Office*, 197 P.3d 220 (Colo. App. 2008); *Chavez v. Industrial Commission*, 714 P.2d 1328 (Colo. App. 1985). Reopening is warranted if the claimant proves that additional medical treatment or disability benefits are warranted. *Richards v. Industrial Claim Appeals Office*, 996 P.2d 756 (Colo. App. 2000); *Dorman v. B & W Construction Co.*, 765 P.2d 1033 (Colo. App. 1988).

The question of whether the claimant met the burden of proof to establish a causal relationship between the industrial injury and the worsened condition is one of fact for determination by the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *City of Durango v. Dunagan*, *supra*. Similarly, the question of whether the disability and need for treatment were caused by the industrial injury or by an intervening cause is a question of fact. *Owens v. Industrial Claim Appeals Office*, *supra*.

Claimant did not appear at the July 30, 2020 hearing on Respondent's Application for Hearing and presented no evidence in support of his Petition to Reopen. As a result, there is no persuasive evidence in the record to demonstrate any mitigating circumstances that would have resulted in Claimant's failure to prosecute his Petition to Reopen, appear for prehearing conferences, or comply with prehearing orders. The ALJ finds and concludes that the Claimant failed to prove it more likely than not that any grounds for reopening his claim exist.

Dismissal With Prejudice

Dismissal with prejudice of Claimant's Petition to Reopen is appropriate for several reasons. First, Claimant has failed to pursue his claim or otherwise take any action in furtherance of his Petition to Reopen. Although the record indicates that some documents sent to Claimant's address of record were returned as undeliverable/return to sender. This is the result of Claimant's failure to update his address as required by O.A.C.R.P. 6(C), which provides: "Parties not represented by attorneys shall inform the OAC and all other parties of their current address, telephone numbers, facsimile numbers and e-mail addresses, and of any changes to said information during the course of the proceedings within 10 business days." Claimant has not provided an updated address or other contact information to the OAC. At least through July 7, 2020, Division files reflect that Claimant's last known address is 4650 Otis Street, Wheat Ridge, CO 80003. Claimant's telephone number on file with the Division has also not been updated.

Second, Claimant was sanctioned for failing to comply with discovery orders. The ICAO has held that a claimant's failure to comply with orders is grounds for dismissing a claim with prejudice. See *Muragara v. Manitou & Pikes Peak Railway*, W.C. No. 4-698-365-07 (July 8, 2014) (The claim was properly dismissed with prejudice, based on claimant's failure to comply with discovery orders.)

Finally, the time for reopening of Claimant's claim based a change in condition has expired. Pursuant to § 8-43-303(1), C.R.S., a claim may be reopened within six years after the date of injury based on a change in condition. More than six years have elapsed since Claimant's June 5, 2013 injury. Consequently, Claimant's claim may not be reopened for any ground other than fraud or mutual mistake of material fact. *Id.*

The Claimant's failure to comply with discovery orders, combined with his failure to attend prehearing conferences, failure to attend the July 30, 2020 hearing, failure to take action in furtherance of his Petition to Reopen, and the expiration of the reopening period, justify dismissal with prejudice of Claimant's Petition to Reopen. Other than

initially filing his Petition to Reopen, Claimant has failed to pursue his Petition. Claimant's Petition to Reopen is dismissed with prejudice.

ORDER

It is therefore ordered that:

1. Claimant's June 5, 2019 Petition to Reopen is dismissed with prejudice.

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

DATED: August 3, 2020

/s/ Steven R. Kabler
Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

- I. Has Claimant shown, by a preponderance of the evidence, that she is entitled to a general award of post-MMI Maintenance Medical Benefits, as a result of her admitted July 17, 2017 work injury?

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

Claimant's History of Neck Pain and Treatment Before this Injury

1. Claimant has a long-standing history of neck pain and symptoms dating back to 1991. (Ex. I, pp. 158, 186; see also Ex. K). Claimant's symptoms were associated with both non-work injuries to her neck and previous Workers' Compensation claims. Claimant underwent a cervical disk replacement surgery with Dr. Jatana in 2006. (Ex. J).
2. To address her neck injuries, from 2009 through 2016 Claimant has undergone four Independent Medical Examinations (IMEs) with Dr. Rachel Basse. (Ex. C). Dr. Basse's IME reports summarize Claimant's extensive medical history and treatment for her neck. Her summary of Claimant's medical records show Claimant has continuously complained of pain symptoms in her neck, radiating down into her trapezius and shoulder girdles, with headaches since at least 1994. (Ex. C).
3. In 2013, Claimant was diagnosed with chronic cervicotrpezial myofascial pain syndrome by DIME Dr. Castrejon. (Ex. I, p. 168) Dr. Castrejon found that any maintenance medical care was attributable to her March, 2007 auto accident *Id at 169*. In 2014, Claimant was diagnosed with degeneration of cervical intervertebral disc, acquired spondylolisthesis, and kyphosis. (Ex. J, p. 190). In 2015, a CT of Claimant's cervical spine was reported to note "multilevel degenerative changes with minimal anterolisthesis of C3 on C4 and C4 on C5" and "severe right facet arthropathy at C3-4 and moderate left foraminal narrowing" with "mild narrowing at other levels." (Ex. C, p. 93).
4. Prior to this work injury of 7/17/2017, Claimant has reported neck pain ranging 3-9/10:
 - 4/14/09 - Claimant reported right greater than left cervical region symptoms of numbness and aching, "constant, waxing and waning in severity involve more the lateral cervical musculature, into the

sternocleidomastoid anteriorly and the upper mid-trapezius. High pain ratings are 8/10, low 4/10..." (Ex. C, pp. 31).

- 7/10/09 – “She continues with bilateral cervical pain, although also complains of upper cervical pain and headaches.” (Ex. J, p. 197). “Ms. West presented with 6-7/10 left and 5/10 right cervical pain with extension/rotation ipsilaterally.” *Id*
- 1/15/13 – “Ms. West completes a pain diagram shading in the entire anterior posterior aspect of the head, neck and upper shoulder girdle.” (*Id at 51*). “Her pain is 3/10 at the least, 7/10 at the worst...” *Id*.
- 5/29/13 – “She describes a daily average pain of anywhere from 3/10 up to 7/10.” (Ex. H, p. 154). “Maybe 3-4 times a month, she will need to call in sick because of the pain.” *Id*.
- 9/7/13 – “Her pain is 7/10, low pain is 3-4/10...” (Ex. C, p. 79).
- 10/8/13 – “...does still complain of some axial symptoms in the mid to upper cervical area...Pain scale today ranges anywhere from 3-7 out of 10.” (Ex. J, p. 192).
- 12/5/13 – “Regarding her neck the claimant describes a constant aching and stabbing pain that extends to her shoulders and results in headaches...She describes her condition as ‘worse’ with a pain level of 6-7/10...” (Ex. I, p. 161).
- 7/22/14 – “Pain: 4/10 currently, 7/10 at worst” (Ex. D, p. 116).
- 7/30/14 – “has noted increased neck symptoms, tightness, and near daily headaches. Occasionally she notes a stabbing posterior neck pain...” (Ex. J, p. 189). “Pain scales today range anywhere from 4-7/10.” *Id*.
- 3/29/16 – “Her primary discomfort is anterior and posterior cervical, shoulder girdle, and headache symptoms, constant waxing and waning in severity, primarily achy in quality, 7/10 at the worst, 3/10 at the least...” (Ex. C, p. 89).

Claimant Sought Medical Maintenance Care 6 Months Prior to 7/17/2017

5. Six months before the work injury in the present case, Claimant sought medical maintenance care for a Workers’ Compensation claim with a date of injury of August 30, 2007, for which the parties stipulated would also include any symptoms/injuries due to subsequent work incidents on October 5, 2007, October

29, 2007, and March 6, 2008. (Ex. K, p. 217, Finding of Fact #9 in ALJ Order dated 3/27/2017).

6. According to the ALJ's March 27, 2012 order, at hearing Claimant testified that she continued to be plagued by neck and low back symptoms at work. *Id. at 220*. She stated prolonged sitting necessary to write reports aggravates her neck pain. She also reported daily headaches. *Id. at 221*. Claimant also reported taking the following medications: Mobic for arthritis; Lyrica for nerve pain; Cymbalta for depression and nerve pain; Fioricet and Topamax for headaches; and Ambien and Trazadone to improve her sleep pattern/duration. Claimant testified that without these medications she could not function and would be unable to work. *Id.*

Work Injury of July 17, 2017

7. Claimant sustained a work injury on July 17, 2017 when she hit her head on a shelf while assisting a patient. Claimant was able to finish the remainder of her shift following the work incident.
8. Claimant testified she was unable to go to the ER immediately after the work incident because of a shortage at work and was required to stay until the end of her shift.
9. However, Claimant reported to Dr. Basse during the January 23, 2018 IME, that she drove home after her shift was over and went to work the following day, at which time she had been instructed by her employer to go to the ER. (Ex. C, p. 103).
10. According to the Final Admission of Liability filed in connection with this case, Claimant did not sustain any wage loss as a result of the July 17, 2017 work injury. (See Ex. 1).
11. At hearing, Claimant testified she wants to be able to return to the doctor if she feels she has a "flare-up". She stated she wanted to continue to work at the level she is currently working, she did not want to be stopped by "pain" or "concentration issues."

Medical Maintenance Care / Medically Reasonable or Necessary

12. Claimant treated for her July 17, 2017 work injury with the ATP, Dr. Zaremba, at Emergicare. On August 1, 2018, Dr. Zaremba opined Claimant was at maximum medical improvement (MMI) with no maintenance care required. (Ex. A, p. 6).
13. Claimant obtained a Division IME (DIME) with Dr. Jack Rook on December 3, 2018. (Ex. B, pp. 16-29). His report notes that Claimant had previously been diagnosed with fibromyalgia and possible Sjogren's syndrome vs. another connective tissue

disorder. *Id at 18*. Dr. Rook opined that Claimant was not at MMI. Instead, he recommended physical therapy, massage therapy and consideration for trigger point injections.

14. Claimant received the treatment recommended by the DIME, and was once again placed at MMI by Dr. Zaremba on August 12, 2019. Dr. Zaremba once again opined no maintenance care was required. (Ex. A, p. 2).
15. Claimant returned to Dr. Rook for a follow-up DIME on September 30, 2019. (Ex. B, pp. 10-14). Dr. Rook noted that Claimant “did not derive benefit from physical therapy” and the “massage therapy also did not help much.” *Id at 11*. Claimant reported her neck pain was about the same bilaterally. Dr. Rook opined that Claimant had reached MMI as of August 7, 2019. (*Id. at 14*). Dr. Rook did not recommend any maintenance care; only an independent exercise program. *Id.* Neither party challenged the MMI opinion of the DIME.

Maintenance Care / Related to the Work Injury

16. Prior to the July 17, 2017 work injury, Claimant had been recommended to undergo and received many different types of treatment for her ongoing pre-existing neck symptoms and headaches including:
 - Disk replacement surgery (Ex. J)
 - Cervical facet injections (Ex. C, p. 62; Ex. J, p. 190, 193, 195)
 - Cervical medial branch blocks (Ex. C, p. 62-63; Ex. J, p. 195)
 - Cervical epidural steroid injections (ESIs) (Ex. C, pp. 67, 68, 69, 70,; Ex. I, p. 179)
 - Cervical rhizotomy (Ex. C, p. 66)
 - Botox injections (Ex. C, p. 47)
 - Trigger point injections (Ex. C, p. 67)
 - Physical therapy (Ex. E, p. 121; Ex. J, p. 196)
 - Numerous medications (Ex. C, p. 44, 95; Ex. D, p. 116; Ex. E, p. 123; Ex. F, pp. 128-129).
 - Independent exercise program (Ex. C, p. 47, 92, 99)
17. In 2013, Claimant reported she was paying out of her own pocket for regular treatment of massage, acupuncture, and chiropractic. (Ex. H, p. 154; Ex. C, p. 78).

18. On March 30, 2017, Claimant presented to Dr. Sandell, and requested a referral for physical therapy for both her cervical and thoracic spines. (Ex. E, p. 121). Dr. Sandell's impression was *chronic* cervical pain and *persistent* increase in muscle tone and chronic daily headaches. It was noted authorization would be obtained for both physical therapy and Botox. *Id.* The medical records do not show whether Claimant actually received the physical therapy prescribed at the March 30, 2017 visit.
19. On July 10, 2017, (seven days before the work injury), Claimant presented to her primary care physician (PCP) Dr. Khosla. (Ex. F, pp. 126-133). Claimant reported that she has been seeing Dr. Sandell, who has helped her with her neck and back pain. Claimant requested a referral back to Dr. Sandell as she has chronic pain managed by him. *Id at 132.* In the review of systems, Claimant was noted to be positive for back pain and neck pain. Claimant's current medications were noted to be: Fioricet, Cymbalta, Lyrica, Mobic, Topamax, trazadone, and Ambien.
20. At hearing, Claimant testified that in the last three weeks she has had new left sided neck pain and 'cramping' that she never experienced before. Claimant also testified that she had right sided "chronic" tightness and aching in her trap[ezius] that she associates with her July 17, 2017 work injury.

Claimant's Testimony regarding the 2007 (non-work-related) Motor Vehicle Accident

21. When asked about her prior neck injuries, Claimant testified that the (non-work-related) 2007 motor vehicle accident was a minor incident in which she "bumped" into the back of a vehicle going approximately 10 mph.
22. However, medical opinions of numerous different physicians, including two prior DIME physicians (Drs. John Sacha and Miguel Castrejon), as well as, Claimant's treating surgeon, Dr. Jatana, and IME physician Dr. Basse, all support that the March 13, 2007 motor vehicle accident caused an exacerbation of her pre-existing cervical problem. Both DIMEs had opined that treatment provided after March 13, 2007 should have been done under Claimant's private insurance as being related to that motor vehicle accident. (Ex. C, p. 101; Ex. G, p. 148-149; Ex. I; see Ex. J, p. 203).
23. According to Dr. Castrejon's DIME report dated 12/5/2013:

The Claimant states she was at a full stop. She recalls reaching down to put away some tea at which time she let go of the brake and rear ended the vehicle ahead of her *She estimated the speed at impact of 20 mph.* (Ex, I, p. 159)(emphasis added).
24. However, in his March 27, 2017 Order, ALJ Lamphere found:

On March 12, 2007, Claimant was involved in a third motor vehicle accident where she rear-ended a *truck* while travelling at approximately *45 mph*. (See also Ex. I, p. 184). *This incident caused a marked increase in her neck pain* and an accompanying decrease in functioning. (Ex. K, p. 216, Finding of Fact #3)(emphasis added).

25. Claimant had similar complaints in her neck prior to the July 17, 2017 incident:

- 8/22/12 – “She notes she continues to experience headaches on a pretty frequent basis...She is also complaining of a sharp stabbing pain in the right shoulder as well as sharp pains in the posterior cervical spine that occur with particular movements. However, there is no clear pattern to the symptoms.” (Ex. J, p. 194).
- 5/28/13 – “She has daily neck pain. She feels stiff in the morning and the pain can be from her occiput down to the cervicothoracic junction...Over the past couple of years, she describes a worsening pain with rotation of her neck. There is stabbing discomfort, right worse than left.” (Ex. H, p. 153). She was diagnosed with “chronic neck pain, multifactorial” “components of myofascial pain and potentially some underlying structural discomfort” and “cervicogenic headaches”. *Id. at 155*.
- 9/7/13 – “Primary discomfort remains the cervical area...The cervical pain is stabbing and constant, minimally waxing and waning in nature.” (Ex. C, p. 79).
- 12/5/13 – “Regarding her neck the claimant describes a constant aching and stabbing pain that extends to her shoulders and results in headaches.” (Ex. I, p. 161). “She describes her condition as ‘worse’...” *Id.*
- 3/29/16 – “She is tender in most all musculature about the neck, anterior and posterior...She is tender over the right greater than left clavicle and spine of the scapula.” (Ex. C, p. 96).
- 1/12/17 – Claimant testified that she had difficulty concentrating and has occasional trouble with word finding. (Ex. K, p. 220). It was noted that Dr. Jenks had provided Claimant with a 25% impairment rating on August 6, 2013. (*Id.*). The ALJ notes that this is the same impairment rating found by Dr. Rook in the present case, before apportionment. (See Ex. B, p. 14).
- 2/7/17 – “She continues to have chronic cervical pain with daily headaches. This radiates into the bilateral upper trapezius and is resultant of some reduction in range of motion.” (Ex. E, p. 123).

26. In her January 23, 2018 IME report addressing the July 17, 2017 incident, Dr. Basse opined that the moderate to severe degenerative changes noted in the July 3, 2015 CT scan of Claimant's cervical spine "medically probably account for Claimant's ongoing cervical spine region pain symptoms." (Ex. C, p. 114). She opined that "these findings have their own natural course that can progress with time." She also noted that based on medical records, Claimant's symptoms have not significantly changed over the years." *Id.*

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado is to assure quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1)*. Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. *Section 8-43-201, C.R.S.* A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark, 197 Colo. 306, 592 P.2d 792 (1979)*.

B. In determining credibility, the Administrative Law Judge should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil 3:16*. The Administrative Law Judge, as the fact-finder, is charged with resolving conflicts in expert testimony. *Rockwell Int'l v. Trumbull, 802 P.2d 1182, 1183 (Colo. App. 1990)*.

C. In this instance, the Administrative Law Judge finds that Claimant has, unfortunately, suffered a number of injuries through the years, some compensable, some not. More often than not, such injuries have had some effect on her cervical region, involving pain, loss of function, or both. Assuming, arguendo, that Claimant has been sincere in each of her recollections at any point in time, her testimony in this case is at odds with her longstanding medical history. In but one example, Claimant has now downplayed the significance of her March, 2007 car accident, with impact speeds ranging from negligible, up to hitting a truck at 45 mph. Taken as a whole, Claimant's ongoing role as a historian is simply not one of reliability. Given the timing of some of these events, the ALJ cannot rule out issues of

secondary gain in seeking Grover Medical Benefits in connection with this particular episode.

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

Medical Treatment, Generally

E. Respondents are liable for medical treatment reasonably necessary to cure or relieve the effects of an industrial injury. *Section 8-42-101*. Even if the Respondents admit liability, they retain the right to dispute the reasonable necessity or relatedness of any particular treatment, and the mere occurrence of a compensable injury does not compel the Administrative Law Judge to approve all requested treatment. *Snyder v. City of Aurora, 942 P.2d 1337 (Colo. App. 1997)*; *McIntyre v. KI, LLC., W.C. No. 4-805-040 (July 2, 2010)*. The Claimant must prove that an injury directly and proximately caused the condition for which she seeks treatment, and that the treatment is reasonably necessary. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office, 989 P.2d 251 (Colo. App. 1999)*; *Snyder v. Industrial Claim Appeals Office, 942 P.2d 1337 (Colo. App. 1997)*.

Post MMI-Maintenance Medical Care, Generally

F. The need for medical treatment may extend beyond the point of MMI where claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Industrial Commission, 759 P.2d 705 (Colo. 1988)*; *Hanna v. Print Expeditors Inc., 77 P.3d 863, 865 (Colo. App. 2003)*; *Hobirk v. Colorado Springs School District #11, W.C. No. 4-835-556-01 (ICAO, Nov. 15, 2012)*. An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that the claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office, 992 P.2d 701 (Colo. App. 1999)*; *Hastings v. Excel Electric, W. C. No. 4-471-818 (ICAO, May 16, 2002)*. The claimant must prove entitlement to *Grover* medical benefits by a preponderance of the evidence. *Lerner v. Wal-Mart Stores, Inc., 865 P.2d 915 (Colo. App. 1993)*; *Mitchem v. Donut Haus, W.C. No. 4-785-078-03 (ICAO, Dec. 28, 2015)*. An award of *Grover* medical benefits should be general in nature. *Hanna v. Print Expeditors Inc., 77 P.3d 863 (Colo. App. 2003)*; *Anderson v. SOS Staffing Services, W. C. No. 4-543-730, (ICAO, July 14, 2006)*.

Post MMI-Maintenance Medical Care, Reasonable and Necessary, as Applied

G. There is currently no physician who has recommended any continued or ongoing medical maintenance care for Claimant's July 17, 2017 work injury. Dr. Zaremba has not, nor does the DIME physician, Dr. Rook. Nor is it recommended by Dr. Basse. Claimant argues that, since she received an Impairment Rating for this 7/17/2017 work injury, it must, ipso facto, follow that Grover Medical Benefits are necessary to maintain her condition. The ALJ does not concur with this reasoning, and finds that Grover Medical Benefits are *not reasonable and necessary* to maintain Claimant's post-MMI condition.

Post MMI-Maintenance Medical Care, Related to Work Injury, as Applied

H. The ALJ is persuaded by the medical opinion of Dr. Basse that Claimant's symptoms are more likely related to her pre-existing degenerative condition documented in July 2015, which can progress with time. The ALJ also finds that this opinion is supported by the medical records, which document a long history of neck pain and symptoms along with related ongoing treatment, prior to the July 17, 2017 work incident. Claimant now reports new left-sided neck symptoms ("cramps"), which Claimant testified she did not experience until three weeks prior to the hearing. If this is so, this cannot be causally connected to the July 17, 2017 work injury, almost three years after the fact. Even the recommendation for an independent exercise program pre-dates the July 17, 2017 work injury, as it had been recommended by Dr. Basse on numerous occasions before the July 17, 2017 incident. Therefore, and assuming arguendo that any such maintenance medical care is reasonable and necessary (which the ALJ does not so find), the ALJ further finds that any such care is *not related* to Claimant's 7/17/2017 work injury.

ORDER

It is therefore Ordered that:

1. Claimant's request for Post-MMI Maintenance Medical Care is denied and dismissed.
2. All matters not determined herein are reserved for future determination.

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

petition to review form at: <http://www.colorado.gov/dpa/oac/forms-WC.htm>. In addition, it is recommended that you send a copy of your Petition to Review to the Colorado Springs OAC via email at oac-csp@state.co.us.

DATED: August 3, 2020

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-124-692-001**

ISSUES

1. Whether Respondents have demonstrated by a preponderance of the evidence that Dean L. Prok, M.D. is an Authorized Treating Physician (ATP).
2. Whether Respondents have proven by a preponderance of the evidence that they may suspend Claimant's Temporary Disability (TTD) benefits pursuant to §8-42-105(2)(c), C.R.S. and WCRP 6-1(A)(5).

FINDINGS OF FACT

1. On December 2, 2019 Claimant sustained an admitted industrial injury to his left ankle. Claimant was walking to work when he slipped on ice, fell and broke his left ankle in three places.
2. Claimant was transported to the UCHealth Emergency Room. An x-ray of the left ankle revealed a posterior lateral ankle dislocation and a displaced trimalleolar fracture. After the initial triage, Claimant was treated by orthopedic surgeon, Melissa Ann Gorman, M.D. and Alisha Marie Meserve, PA-C. They placed his ankle in a splint.
3. On December 7, 2019 Claimant completed a Rule 8 letter and selected The University of Colorado Hospital, Anschutz Pavilion (UCHealth) as his medical provider. The letter provided that Claimant could seek treatment at a hospital for after hours care, but did not address whether he could see another provider after selecting UCHealth.
4. Dr. Gorman diagnosed Claimant with a closed trimalleolar fracture of the left ankle. On December 11, 2019 Dr. Gorman performed an open reduction and internal fixation of Claimant's left ankle fracture.
5. On December 13, 2019 Respondents filed a General Admission of Liability (GAL). Respondents acknowledged Claimant was entitled to receive medical benefits and ongoing Temporary Total Disability (TTD) benefits starting on December 3, 2019.
6. On approximately December 13, 2019 Claimant informed Nurse Case Manager Deborah L[Redacted] that he did not want to follow-up with his treating occupational health provider at UC Health. Instead, he sought treatment with a provider who was closer to his residence. Pursuant to Claimant's request, Ms. L[Redacted] reached out to him to coordinate an authorized treating provider closer to his home.
7. Ms. L[Redacted] provided Claimant with three options for continued treatment. The Claims Notes from December 22, 2020 specifically reflect that Claimant should "contact either one of the three clinics that I gave him or another if he had a preference. He stated he would call SCL as they were closest to his house after he talked

to Vicki and would call me back to tell me when his appointment is scheduled so I can set up transport with MTI.”

8. Claimant chose to visit Dean L. Prok, M.D. at SCL Health Medical Group Front Range and would call his office to schedule an appointment. The Claim Notes created December 31, 2019 specifically reveal that Claimant “is going to call Dr. Prok’s office and see when he can get in there as it is closest but he may go to Dr. Fox if he can be seen sooner. He will let me know after he has made the appointment.” Ms. L[Redacted] attempted to follow up with Claimant but she was unable to reach him and left a message with a woman on the phone. Ms. L[Redacted] subsequently scheduled an appointment for Claimant to visit Dr. Prok’s office on January 6, 2020 at 10:15 a.m. The December 31, 2019 Claim Notes also reflect that Ms. Lewinsky spoke to Claimant “after texting him and requesting he answer his phone.” She informed him that a car would pick him up at 9:15 a.m. on January 6, 2020 to transport him to the appointment.

9. On January 6, 2020 Claimant visited Dr. Prok for an examination. Dr. Prok diagnosed Claimant with a closed ankle fracture with routine healing. He discussed Claimant’s treatment options, including decreasing his usage of narcotics as well as physical therapy. Dr. Prok noted that Claimant would be seen again in a couple weeks to assess the progress of his recovery and implement ongoing recommendations from his orthopedic specialist Dr. Gorman. He estimated that Claimant would reach Maximum Medical Improvement (MMI) within three to four months. Dr. Prok requested Claimant’s medical records from his treatment with Dr. Gorman. Claimant scheduled a follow-up appointment for January 22, 2020.

10. Claimant testified about whether he had spoken to Ms. L[Redacted] about treating at a facility closer to his home. He noted that Ms. L[Redacted] contacted him and discussed some information about doctors. Claimant explained that he wanted to remain with UCHealth, but preferred a UCHealth facility closer to his home.

11. After Claimant’s January 6, 2020 appointment and before his next scheduled appointment Claimant retained McDivitt Law Firm for representation. Claimant testified that he spoke to his attorney about whether he should attend the second appointment.

12. Although a follow-up appointment with Dr. Prok had been scheduled for January 22, 2020, Claimant failed to attend. Claimant called Dr. Prok’s office on January 21, 2020 and informed his office that he would not be returning for treatment. Dr. Prok’s office contacted the claims adjuster about the missed appointment.

13. Respondents sent Claimant a letter dated January 24, 2020 stating that he missed his appointment with Dr. Prok, and therefore scheduled a demand appointment for February 5, 2020. The letter further stated, “[F]ailure to attend this appointment may affect your benefits.”

14. On February 5, 2020 Claimant returned to Dr. Prok for an evaluation. Claimant reported minor, gradual improvement in his left ankle symptoms. He noted that

he had started physical therapy based on Dr. Gorman's instructions. Dr. Prok reviewed Claimant's medical history and conducted a physical examination. Based on Claimant's history and mechanism of injury, Dr. Prok determined that Claimant's left ankle injury was greater than 50% likely caused by his work activities and assigned work restrictions. Dr. Prok also discussed Claimant's follow-up care and recommended continued physical therapy. He noted he would see Claimant again in a few weeks after an orthopedic evaluation.

15. Claimant testified that he returned to Dr. Prok because he had received the demand letter. He specifically remarked that he attended the February 5, 2020 appointment "because I received a letter stating that I needed to go."

16. On February 26, 2020 Claimant returned to Dr. Prok for an evaluation. Claimant reported gradual, slow improvement and that he was no longer wearing a walking boot. Dr. Prok referred Claimant for additional physical therapy sessions. He noted that Claimant would return in about two weeks and implement any recommendations offered by Dr. Gorman. Claimant was scheduled to visit Dr. Prok on March 11, 2020.

17. Claimant missed the March 11, 2020 appointment. He testified that he followed-up with Dr. Prok solely because he could not risk losing his benefits. He specifically remarked "Yes, due to the fact that I had received the demand letter, and I couldn't go without my – my benefits." Claimant subsequently ceased visiting Dr. Prok.

18. Based on the missed appointment, Respondents sent Claimant a letter on March 16, 2020. The letter specified that the failure to attend the demand appointment might affect Claimant's benefits. Respondents scheduled the demand appointment with Dr. Prok for March 30, 2020 at 3:45 p.m.

19. On April 4, 2020 SCL Health sent a letter to Claimant stating that he had missed his March 11, 2020 appointment. The appointment had been cancelled "by patient off automated reminder system."

20. On April 4, 2020 SCL Health sent a letter to Claimant stating that he had missed his March 30, 2020 appointment. Despite missing his demand appointments, Claimant testified that he has not lost any benefits to date.

21. Respondents filed a Petition to Terminate Compensation on April 14, 2020 after Claimant missed two demand appointments. Respondents specifically sought to terminate Claimant's TTD benefits based on the missed appointments.

22. Claimant filed an Objection to the Petition to Terminate Compensation on April 21, 2020. He asserted that he did not choose Dr. Prok as his ATP. Claimant further noted the right of selection had passed to him and whether Dr. Prok was an ATP is a question of fact.

23. On June 11, 2020 the parties conducted the pre-hearing evidentiary deposition of Dr. Prok. In addressing how he came to evaluate Claimant on January 6,

2020 Dr. Prok responded, “[m]y understanding is that he had already had significant treatment by Dr. Gorman as he presented to our office, and I don’t know why he chose to do so....” Dr. Prok remarked that he took Claimant’s history “to some degree” because he was already treating with Dr. Gorman and had an established plan of care. He sought Dr. Gorman’s medical records because he would become a treating provider “along with the recommendations of Dr. Gorman.” Dr. Prok explained that, because Claimant had undergone a major procedure with Dr. Gorman, she was “driving the care at this point.” Nevertheless, he was planning “to work with them and follow their recommendations.”

24. Respondents have demonstrated that it is more probably true than not that Dr. Prok is an ATP. Initially, on December 2, 2019 Claimant sustained an admitted industrial injury to his left ankle. On December 7, 2019 Claimant completed a Rule 8 letter and selected UC Health as his medical provider. On December 11, 2019 Dr. Gorman performed an open reduction and internal fixation of Claimant’s left trimalleolar ankle fracture.

25. On approximately December 13, 2019 Claimant informed Ms. L[Redacted] that he did not want to follow-up with his occupational health provider at UC Health. Instead, he sought treatment with a provider who was closer to his residence. In contrast, Claimant explained that he wanted to remain with UC Health, but preferred a facility closer to his home. Ms. L[Redacted] subsequently provided Claimant with three options for continued treatment. The Claims Notes from December 22, 2020 specifically reflect that Claimant should “contact either one of the three clinics that I gave him or another if he had a preference. He stated he would call SCL as they were closest to his house.” The Claim Notes created December 31, 2019 specifically reveal that Claimant “is going to call Dr. Prok’s office and see when he can get in there as it is closest but he may go to Dr. Fox is he can be seen sooner.”

26. The totality of the record reflects that Claimant sought treatment from a provider closer to his residence and selected Dr. Prok at SCL Health. Although he only visited Dr. Prok on three occasions and attended two of the appointments because he was concerned about losing his benefits, the persuasive evidence demonstrates that Claimant selected Dr. Prok for treatment. The Claim Notes specifically reflect that Claimant communicated with Ms. L[Redacted] about scheduling an appointment with Dr. Prok and attended the initial appointment on January 6, 2020. Claimant has thus demonstrated by his words or conduct that he chose Dr. Prok at SCL Health for treatment. Furthermore, Dr. Prok explained that he sought Dr. Gorman’s medical records because he would become a treating provider “along with the recommendations of Dr. Gorman.” He explained that, because Claimant had undergone a major procedure with Dr. Gorman, she was “driving the care at this point.” While recognizing that Dr. Gorman had performed surgery and was driving Claimant’s care, Dr. Prok nevertheless examined Claimant, reviewed medical records and prescribed additional physical therapy. Because Claimant chose Dr. Prok and visited him for purposes of examination, diagnosis, and treatment, he became an ATP.

27. Respondents have proven that it is more probably true than not that they may suspend Claimant’s TTD benefits. Initially, on April 14, 2020 Respondents filed a

Petition to Terminate Compensation after Claimant missed two demand appointments. Respondents specifically sought to terminate Claimant's TTD benefits based on the missed appointments. However, Claimant testified that, despite missing appointments, he has continued to receive TTD benefits. Respondents thus now seek a suspension of benefits and a credit for all TTD benefits that have been paid to Claimant since March 30, 2020 against future indemnity benefits until he returns to Dr. Prok for an examination.

28. The record demonstrates that after his January 6, 2020 visit with Dr. Prok, Claimant scheduled a follow-up appointment for January 22, 2020. However, Claimant missed the January 22, 2020 appointment. On January 24, 2020 Respondents sent Claimant a letter scheduling a demand appointment with Dr. Prok for February 5, 2020. The letter stated, "[F]ailure to attend this appointment may affect your benefits." Claimant attended the February 5, 2020 appointment as well as a follow-up visit on February 26, 2020. Dr. Prok referred Claimant for additional physical therapy sessions and noted Claimant would return in about two weeks. Claimant testified that he followed-up with Dr. Prok solely because he could not risk losing his benefits. However, he missed another appointment on March 11, 2020. On March 16, 2020 Respondents sent Claimant another letter scheduling a demand appointment with Dr. Prok for March 30, 2020. The letter specified that the failure to attend the demand appointment might affect Claimant's benefits. Nevertheless, Claimant failed to attend the March 30, 2020 appointment.

29. The record reflects that Claimant was notified that he missed scheduled appointments with Dr. Prok on two occasions. Both of the letters noted that Claimant's failure to attend the demand appointments might affect his benefits. Based on Claimant's failure to attend demand appointments with ATP Dr. Prok, Respondents are permitted to suspend his TTD benefits. However, Respondents continued to pay Claimant TTD benefits after March 30, 2020, but could have suspended payments without a hearing under 8-42-105(2)(c), C.R.S. The relevant statute and case law only permit the suspension of benefits and not the termination or retroactive recovery of benefits. Accordingly, Respondents' only remedy is to suspend benefits effective on the date of this Order until Claimant returns to Dr. Prok for an examination.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge’s factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. See *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *CJI*, Civil 3:16 (2007).

Authorized Treating Physician

4. Section 8-43-404(5)(a), C.R.S. permits an employer or insurer to select the treating physician in the first instance. *Yeck v. Indus. Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999). The term “select,” as it appears in the predecessor to §8-43-404(5)(a)(I)(A) is unambiguous and should be construed to mean “the act of making a choice or picking out a preference from among several alternatives.” *Squitieri v. Tayco Screen Printing, Inc.*, W.C. No. 4-421-960 (ICAO, Sept. 18, 2000); see *In re Loy*, W.C. No. 4-972-625-01 (ICAO, Feb. 19, 2016). Thus, a claimant “selects” a physician when she “demonstrates by words or conduct that [she] has chosen a physician to treat the industrial injury.” *Williams v. Halliburton Energy Services*, W.C. No. 4-995-888-01, (ICAO, Oct. 28, 2016); *Tidwell v. Spencer Technologies*, W.C. No. 4-917-514 (Mar. 2, 2015) The question of whether the claimant selected a particular physician as the ATP is one of fact for determination by the ALJ, and the ALJ’s resolution must be upheld if supported by the record. *Squitieri v. Tayco Screen Printing, Inc.*, W.C. No. 4-421-960 (ICAO, Sept. 18, 2000).

5. Authorization for treatment refers to a medical provider’s legal authority to provide medical treatment to the claimant with the expectation that the provider will be compensated by the insurer for treatment. *Bunch v. Industrial Claim Appeals Office*, 148 P.3d 381 (Colo. App. 2006); *One Hour Cleaners v. Industrial Claim Appeals Office*, 914 P.2d 501 (Colo. App. 1995). Authorized providers include those medical providers to whom the claimant is directly referred by the employer, as well as providers to whom an ATP refers the claimant in the normal progression of authorized treatment. *Town of Ignacio v. Industrial Claim Appeals Office*, 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). Whether an ATP has made a referral in the normal progression of authorized treatment is a question of fact for the ALJ. *Kilwein v. Indus. Claim Appeals Office*, 198 P.3d 1274, 1276 (Colo. App. 2008); *In re Bell*, W.C. No. 5-044-948-01 (ICAO, Oct. 16, 2018).

6. An insurer or employer may refer a claimant to a medical provider without the provider becoming authorized to “treat” the claimant. The referrals may occur when the purpose of the examination is limited to issuing an impairment rating or obtaining an opinion relevant to pending litigation. See §8-43-404(1), C.R.S. However, if a claimant is

referred to a physician for the purposes of examination, diagnosis, and treatment the physician becomes authorized to “treat” the claimant. See *Town of Ignacio v. Industrial Claim Appeals Office*, 70 P.3d 513 (Colo. App. 2002) (concluding that specialist was “an authorized treating physician” under §8-42-107(8)(b), C.R.S. because he examined the claimant “not in anticipation of litigation or simply for purposes of providing a disability rating, but to determine whether additional surgery was needed to alleviate claimant’s pain”).

7. As found, Respondents have demonstrated by a preponderance of the evidence that Dr. Prok is an ATP. Initially, on December 2, 2019 Claimant sustained an admitted industrial injury to his left ankle. On December 7, 2019 Claimant completed a Rule 8 letter and selected UC Health as his medical provider. On December 11, 2019 Dr. Gorman performed an open reduction and internal fixation of Claimant’s left trimalleolar ankle fracture.

8. As found, on approximately December 13, 2019 Claimant informed Ms. L[Redacted] that he did not want to follow-up with his occupational health provider at UC Health. Instead, he sought treatment with a provider who was closer to his residence. In contrast, Claimant explained that he wanted to remain with UC Health, but preferred a facility closer to his home. Ms. L[Redacted] subsequently provided Claimant with three options for continued treatment. The Claims Notes from December 22, 2020 specifically reflect that Claimant should “contact either one of the three clinics that I gave him or another if he had a preference. He stated he would call SCL as they were closest to his house.” The Claim Notes created December 31, 2019 specifically reveal that Claimant “is going to call Dr. Prok’s office and see when he can get in there as it is closest but he may go to Dr. Fox if he can be seen sooner.”

9. As found, the totality of the record reflects that Claimant sought treatment from a provider closer to his residence and selected Dr. Prok at SCL Health. Although he only visited Dr. Prok on three occasions and attended two of the appointments because he was concerned about losing his benefits, the persuasive evidence demonstrates that Claimant selected Dr. Prok for treatment. The Claim Notes specifically reflect that Claimant communicated with Ms. L[Redacted] about scheduling an appointment with Dr. Prok and attended the initial appointment on January 6, 2020. Claimant has thus demonstrated by his words or conduct that he chose Dr. Prok at SCL Health for treatment. Furthermore, Dr. Prok explained that he sought Dr. Gorman’s medical records because he would become a treating provider “along with the recommendations of Dr. Gorman.” He explained that, because Claimant had undergone a major procedure with Dr. Gorman, she was “driving the care at this point.” While recognizing that Dr. Gorman had performed surgery and was driving Claimant’s care, Dr. Prok nevertheless examined Claimant, reviewed medical records and prescribed additional physical therapy. Because Claimant chose Dr. Prok and visited him for purposes of examination, diagnosis, and treatment, he became an ATP.

Suspension of Benefits

10. Section 8-42-105(2)(c), C.R.S. addresses the suspension of benefits for failure to attend a medical appointment. The statute provides, in relevant part:

If an employee fails to appear at an appointment with the employee's attending physician, the insurer or self-insured employer shall notify the employee by certified mail that temporary disability benefits may be suspended after the employee fails to appear at a rescheduled appointment. If the employee fails to appear at a rescheduled appointment, the insurer or self-insured employer may, without a prior hearing, suspend payment of temporary disability benefits to the employee until the employee appears at a subsequent rescheduled appointment.

§8-42-105(2)(c), C.R.S. The statute specifies that the respondents may suspend, but not terminate, a claimant's benefits for failure to appear at an appointment "with the employee's attending physician." without a prior hearing. See *also* WCRP 6-1(A)(5).

11. In *Sigala v. Atencio's Mkt.*, 184 P.3d 40, 46-47 (Colo. 2008) the Colorado Supreme Court stated "the term 'suspend' as it is used in the temporary total disability benefits provision means to stop temporarily and not to bar or exclude." The Court reasoned "that a suspension of benefits, even if temporary, provides an adequate incentive for the claimant to cooperate with the employer to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers." *Id.* at 46. Because the term "suspend" as it is used in the temporary total disability benefits provision means to stop temporarily and not to bar or exclude, a claimant is entitled to receive the benefits withheld by his employer during the period of suspension. *Id.*

12. As found, Respondents have proven by a preponderance of the evidence that they may suspend Claimant's TTD benefits. Initially, on April 14, 2020 Respondents filed a Petition to Terminate Compensation after Claimant missed two demand appointments. Respondents specifically sought to terminate Claimant's TTD benefits based on the missed appointments. However, Claimant testified that, despite missing appointments, he has continued to receive TTD benefits. Respondents thus now seek a suspension of benefits and a credit for all TTD benefits that have been paid to Claimant since March 30, 2020 against future indemnity benefits until he returns to Dr. Prok for an examination.

13. As found, the record demonstrates that after his January 6, 2020 visit with Dr. Prok, Claimant scheduled a follow-up appointment for January 22, 2020. However, Claimant missed the January 22, 2020 appointment. On January 24, 2020 Respondents sent Claimant a letter scheduling a demand appointment with Dr. Prok for February 5, 2020. The letter stated, "[F]ailure to attend this appointment may affect your benefits." Claimant attended the February 5, 2020 appointment as well as a follow-up visit on February 26, 2020. Dr. Prok referred Claimant for additional physical therapy sessions and noted Claimant would return in about two weeks. Claimant testified that he followed-up with Dr. Prok solely because he could not risk losing his benefits. However, he missed another appointment on March 11, 2020. On March 16, 2020 Respondents sent Claimant

another letter scheduling a demand appointment with Dr. Prok for March 30, 2020. The letter specified that the failure to attend the demand appointment might affect Claimant's benefits. Nevertheless, Claimant failed to attend the March 30, 2020 appointment.

14. As found, the record reflects that Claimant was notified that he missed scheduled appointments with Dr. Prok on two occasions. Both of the letters noted that Claimant's failure to attend the demand appointments might affect his benefits. Based on Claimant's failure to attend demand appointments with ATP Dr. Prok, Respondents are permitted to suspend his TTD benefits. However, Respondents continued to pay Claimant TTD benefits after March 30, 2020, but could have suspended payments without a hearing under 8-42-105(2)(c), C.R.S. The relevant statute and case law only permit the suspension of benefits and not the termination or retroactive recovery of benefits. Accordingly, Respondents' only remedy is to suspend benefits effective on the date of this Order until Claimant returns to Dr. Prok for an examination.

ORDER

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

1. Dr. Prok is an ATP.
2. Respondents' may suspend Claimant's TTD benefits effective on the date of this Order until he returns to Dr. Prok for an examination.
3. Any issues not resolved in this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative

Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at <http://www.colorado.gov/dpa/oac/forms-WC.htm>.*

DATED: August 6, 2020.

DIGITAL SIGNATURE:


Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-129-281-001**

ISSUE

1. Whether Claimant established by a preponderance of the evidence that she sustained a compensable injury arising out of and in the course of employment with Employer on or about February 3, 2020.
2. Whether Claimant established by a preponderance of the evidence entitlement to temporary total disability (TTD) benefits from the date of injury until February 26, 2020.

RESPONDENTS' MOTION FOR DIRECTED VERDICT

OACRP 2(B) provides that the Colorado Rules of Civil Procedure apply to Workers' Compensation hearings unless they are inconsistent with the OACRP rules and the provisions of the Workers' Compensation Act. Because neither the Act nor the OACRP prohibits or limits the ability to resolve a case as a matter of law, the C.R.C.P. related to directed verdicts, and specifically, C.R.C.P. 50, is applicable to workers' compensation hearings.

A "motion for a directed verdict admits the truth of the adversary's evidence and of every favorable inference of fact which may legitimately be drawn from it." *Western-Realco Ltd. v. Harrison*, 791 P.2d 1139 (Colo. App. 1989). Every factual dispute must be resolved in favor of the non-moving party and the "strongest inferences reasonably deducible from the most favorable evidence should be indulged in his favor." *Gossard v. Watson*, 221 P.2d 353, 355 (Colo. 1950). "A motion for directed verdict should be granted only in the clearest of cases when the evidence is undisputed, and it is plain no reasonable person could decide the issue against the moving party." *Evans v. Webster*, 832 P.2d 951, 954 (Colo. App. 1991).

C.R.C.P. 50 permits a party to move for a directed verdict at the close of the evidence offered by an opponent or at the close of all the evidence. Respondents moved for directed verdict upon the conclusion of Claimant's case-in-chief. This required the Court to review the evidence admitted at that time, drawing every reasonable inference in favor of the Claimant. The Court took Respondents' motion under advisement, reserving ruling on the motion until this order. Because the Court finds, based on the complete record, that Claimant has failed to meet her burden of establishing a compensable injury arising out of and in the course of employment with Employer, Respondents' motion for directed verdict is denied as moot.

FINDINGS OF FACT

1. Claimant is a 52-year-old female who is employed by Employer as a nurse practitioner. Claimant has been employed by Employer since September 28, 2015.
2. The Parties stipulate that Claimant is a maximum wage earner for the purposes of average weekly wage.
3. On February 3, 2020, Claimant was preparing to go to work for Employer when she walked outside to warm up her car at her home. Claimant slipped and fell on ice on the sidewalk outside of her home. Claimant suffered an injury to her hip as a result of the fall. As the result of her injury, Claimant missed time from work from February 3, 2020 until and including February 26, 2020. Claimant returned to work at full duty on February 27, 2020.
4. Claimant testified she was leaving for work earlier than usual because she was required to be at a facility in Boulder, Colorado by 9:00 a.m. to complete discharge paperwork for a patient. Claimant testified that normally, when there are reports of poor road and weather conditions, she does not leave for work until later.
5. It is common for Claimant's start time to vary. On some days she is required to be at work earlier than on other days.
6. Employer's Human Resources and Payroll manager, Deain A[Redacted], testified that Claimant's job duties include going to assigned facilities to see patients. But Claimant was not contractually obligated to drive a vehicle to work. Ms. A[Redacted] testified that Claimant is contractually obligated to get to her assigned facilities. On the date in question, Claimant was working at a facility in Boulder, Colorado. Ms. A[Redacted] testified it would be acceptable for Claimant to use other forms of transportation to get to work such as public transit, Lyft, or Uber.
7. Ms. A[Redacted] testified that the facilities coordinate with Claimant to determine what time she is required to arrive to work based on a patient's needs. Ms. A[Redacted] testified it is common for facilities to require providers to arrive at different times. Ms. A[Redacted] testified that arriving at 9:00 a.m. is not unusually early for a nurse practitioner to begin working.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. See § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. See § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The

facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id.* at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Compensability

A claimant's right to recovery under the Workers Compensation Act is conditioned on a finding that the claimant sustained an injury while the claimant was "at the time of the injury, ... performing service arising out of and in the course of the employee's employment." § 8-41-301(1)(b), C.R.S.; *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The Claimant must prove her injury arose out of the course and scope of her employment by a preponderance of the evidence. § 8-41-301(1)(b) & (c), C.R.S.; see *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). "Arising out of" and "in the course of" employment comprise two separate requirements. *Triad Painting Co.*, 812 P.2d at 641.

An injury occurs "in the course of" employment where the claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. See *Triad Painting Co. v. Blair*, 812 P.2d at 641; *Hubbard v. City Market*, W.C. No. 4-934-689-01 (ICAO, Nov. 21, 2014).

The "arising out of" element is narrower and requires claimant to show a causal connection between the employment and the injury such that the injury "has its origin in an employee's work-related functions and is sufficiently related thereto as to be considered part of the employee's service to the employer in connection with the contract of employment." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991); *City of Brighton v. Rodriguez*, 318 P.3d 496, 502 (Colo. 2014). The mere fact that an injury occurs at work

does not establish the requisite causal relationship to demonstrate that the injury arose out of the employment. *Finn v. Industrial Commission*, 437 P.2d 542 (Colo. 1968); *Sanchez v. Honnen Equipment Company*, W.C. No. 4-952-153-01 (ICAO, Aug. 10, 2015).

Generally, injuries sustained by employees while they are traveling to or from work are not compensable because such travel is not considered the performance of services arising out of and in the course of employment. *Madden v. Mountain West Fabricators*, 977 P.2d 861, 863 (Colo. 1999). However, injuries incurred while traveling are compensable if “special circumstances” exist that demonstrate a nexus between the injuries and the employment. *Id.* at 864. In ascertaining whether “special circumstances” exist the following factors should be considered:

- Whether travel occurred during working hours;
- Whether travel occurred on or off the employer's premises;
- Whether travel was contemplated by the employment contract; and
- Whether obligations or conditions of employment created a “zone of special danger” out of which the injury arose.

Id. In considering whether travel is contemplated by the employment contract the critical inquiry is whether travel is a substantial part of service to the employer. *See id.* at 865.

“Special circumstances” may be found where the employment contract contemplates the employee’s travel, or the employer delineates the employee’s travel for special treatment as an inducement. *See Staff Administrators Inc. v. Reynolds*, 977 P.2d 866, 868 (Colo. 1999). “Special circumstances” may also exist when the employee engages in travel with the express or implied consent of the employer and the employer receives a special benefit from the travel in addition to the employee’s mere arrival at work. *See National Health Laboratories v. Industrial Claim Appeals Office*, 844 P.2d 1259, 1260 (Colo. App. 1992). The essence of the travel status exception is that when the employer requires the claimant to travel beyond a fixed location to perform her job duties the risks of the travel become the risks of the employment. *Breidenbach v. Black Diamond, Inc.*, W.C. No. 4-761-479 (ICAO, Dec. 30, 2009).

In considering whether travel was contemplated by the employment contract, case law reflects that the exception applies when a claimant is required by an employer to come to work in an automobile that is then used to perform job duties. The vehicle confers a benefit to the employer beyond the employee’s mere arrival at work. *See Whale Communications v. Osborn*, 759 P.2d 848 (Colo. App. 1988). As explained in 1 A. Larson, *Workmen’s Compensation Law*, §17.50 (1985), “[t]he rationale for this exception is that the travel becomes a part of the job since it is a service to the employer to convey to the premises a major piece of equipment devoted to the employer’s purposes. Such a requirement causes the job duties to extend beyond the workplace and makes the vehicle a mandatory part of the work environment.” *See In re Rieks*, W.C. No. 4-921-644 (ICAO Aug. 12, 2014) (where employer required the claimant to come to work in an automobile to attend appointments and meet with customers, transport of car was contemplated by the employment contract and the claimant’s motor vehicle accident on the way to work occurred in the course of and arose out of his employment); *Norman v. Law Offices of*

Frank Moya, W.C. No. 4-919-557 ICAO, Apr. 23, 2014) (where attorney was required to use car to travel from work to courthouse and was injured in motor vehicle accident while she was driving to her first court appearance of the day, injuries were compensable because travel was contemplated by employment contract and conferred benefit to employer beyond mere arrival at work); *Lopez v. Labor Ready*, W.C. 4-538-791 (ICAO, Sept. 26, 2003) (where the claimant's job required her to spend large parts of her day in her personal vehicle and she was injured in a motor vehicle accident while driving home for lunch, claim was compensable because it conferred a benefit to the employer beyond the claimant's mere arrival at work).

Claimant has failed to meet her burden to establish by a preponderance of the evidence that her February 3, 2020 injury arose out of and in the course of employment with Employer. The Claimant's injury did not occur on the Employer's premises or during working hours. Claimant was not injured while traveling or while performing job duties. Instead, Claimant was injured when she fell on an icy sidewalk located at her home, while walking outside to warm up her car. Accordingly, Claimant's injury, sustained at her home, before work hours, not performing a job-related duty, did not occur "in the course" of her employment.

Similarly, Claimant's injury sustained while walking to her car at her own home did not have its origin in work-related functions and cannot be considered part of the Claimant's service to Employer. As such, her injury did not "arise out of" her employment. That Claimant felt it necessary to leave her home earlier than she otherwise would have does not alter the conclusion that her injury did not arise out of and in the course of her employment.

The record does not contain evidence of "special circumstances" from which the Court could conclude that Claimant's injury arose out of her employment. Claimant's employment contract only contemplates travel insofar as Claimant is required to get to work at an assigned location, and the use of her personal vehicle (or any specific mode of transportation) not required by her employment contract.

Claimant has not established by a preponderance of the evidence that she sustained a compensable work-related injury on February 3, 2020. Her claim is denied and dismissed.

Temporary Total Disability Benefits

To prove entitlement to Temporary Total Disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. See Sections 8-42-(1)(g), 8-42-105(4); *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office*, 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage-earning

capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (citing *Ricks v. Industrial Claim Appeals Office*, P.2d 1118 (Colo. App. 1991)).

Because Claimant has failed to establish that she sustained a compensable work-related injury on February 3, 2020, her request for temporary total disability benefits is denied and dismissed.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish by a preponderance of the evidence that she sustained a compensable work-related injury on February 3, 2020. Her claim is denied and dismissed.
2. Claimant has failed to establish by a preponderance of the evidence an entitlement to temporary total disability (TTD) benefits.
3. All remaining issues are moot.

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

DATED: August 5, 2020

/s/ Steven R. Kabler
Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

- I. What is Claimant's Average Weekly Wage?
- II. Is Claimant entitled to Temporary Total Disability Payments from November 27, 2019 through January 4, 2020?

STIPULATIONS

The parties stipulated that Claimant would be entitled to Temporary Partial Disability from September 26, 2019, through November 26, 2019, and again from January 5, 2020 through March 24, 2020.

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

Work Injury and Initial Treatment

1. This is an admitted claim. On September 25, 2019, a co-worker dropped a pair of pliers, which fell onto Claimant's head from a raised platform.
2. Claimant began treating with Dr. Thomas Centi, as the authorized treating provider on September 27, 2019. Dr. Centi did not assign any work restrictions pertaining to light (light sensitivity was not noted at this appointment) or sound at Claimant's initial appointment. MMI was anticipated as of 10/18/2019. (Ex. A, pg. 3). He did assign work restrictions addressing lifting, carrying, pushing, and pulling, as well as sitting 50% of the time and no standing or walking greater than 30 minutes out of an hour. Claimant returned to work. *Id.*

Work Restrictions Regarding Bright Light

3. On October 9, 2019, Dr. Centi assigned work restrictions of "*No bright light exposure*" due to Claimant's complaints of photosensitivity. (Resp. Ex. A, pg. 10). The notes do not reflect whether Claimant asked for clarification from Dr. Centi as to what constituted *bright light*. According to payroll records, Claimant worked Monday through Friday, from 6:30 a.m. to 3:00 p.m. Claimant returned to work with the restriction of *no bright light exposure*. At hearing, Claimant testified that she ran errands during this time and thus she would have been exposed to bright light.

Modified Duty as Prescribed and Offered

4. Employer provided Claimant a modified job offer on October 30, 2019 as 'Administrative Light Duty'. As outlined in the letter, Claimant was already working this position. (Ex. B, pg. 49). According to the job description, Claimant would be located in the front foyer/reception area in the administrative building and the fluorescent lights could be turned off. (Resp. Ex. B, pg. 48). This job offer was approved by Dr. Centi and satisfied his assigned restrictions of "no bright light exposure" as well as the sitting and standing restrictions.

5. The job offer by Employer, dated 10/23/2019, contained five duty descriptions. On each of the five duty descriptions, Dr. Centi checked the box noting his approval. The final box (also checked off by Dr. Centi) read as follows:

Inventory office items (involves *walking, climbing stairs*, and standing; involves some reaching and gripping as well as recording data with pen and paper. *Id at 48* (emphasis added).

6. On 11/1/2019, Claimant returned to Dr. Centi, whereupon Claimant's light sensitivity continued to be noted. For the first time since treatment began, he added a 4th diagnosis of "Other peripheral vertigo, bilateral". (Ex. A, p. 16). The work restriction remained at "*No bright light exposure.*" *Id.*

Work Restrictions Regarding Fluorescent Lights

7. Claimant returned to Dr. Centi on November 26, 2019, with similar symptoms and diagnoses noted. However, on this visit, Dr. Centi changed Claimant's restriction from "no bright light exposure" to "no fluorescent light exposure". MMI was now anticipated for 1/10/2020. Claimant was scheduled for follow up with Dr. Centi on December 13, 2019. (Ex. A, p. 20). (There are no reports of any visit by Claimant to Dr. Centi for the scheduled visit of December 13, 2019 – it was apparently missed).

8. Claimant subsequently informed her employer that she could not return to work because of the no fluorescent light exposure restriction. Claimant also for the first time questioned the meaning of the sitting and standing/walking restrictions. Claimant did not report for work at all between November 26, 2019, and January 4, 2020.

9. Because Claimant refused to return to work despite the modified job offer already in place, Employer sent a letter to Dr. Centi on December 9, 2019 to address Claimant's questions regarding her restrictions pertaining to the fluorescent light exposure and the sitting, standing and walking restrictions. Specifically, Employer requested Dr. Centi review, for him to check the box, some additional duty descriptions/clarifications.

10. Those clarifications were:

Please acknowledge that Michelle is able to walk to her work area *through an area with fluorescent lights*, is able to walk to the

restroom/lunchroom *through an area with fluorescent lights*, is able to use a restroom *with fluorescent lights* during her work day. Michelle may use her work area for her break/lunch area in order for the fluorescent lights to be turned off.

Please acknowledge that the work restriction of “sitting 50% of time” actually means that Michelle may sit 50%-100% of her working hours.

Please acknowledge that “No standing/walking . 30 minutes/hour” does not mean that we are required to provide a standing / walking period for Michelle during her working hours. (emphasis added).

Dr. Centi checked off all three of those additional descriptions on 12/20/2019. (Ex. C, p. 52). A letter outlining this to Claimant was sent by Employer on 1/2/2020. (Ex. B, p. 51).

11. At hearing, Claimant testified that she clarified with Dr. Centi at her November 26, 2019 appointment about how the *no fluorescent light* exposure work restriction impacted her job as modified. Claimant testified that Dr. Centi indicated she could not be exposed to any fluorescent lighting, as it was more impactful than bright lights. (As noted, two weeks later, Dr. Centi clarified and approved, in writing, Claimant’s exposure to fluorescent lighting to walk to her work station, walk to the bathroom and lunchroom and to use the restroom. Dr. Centi also acknowledged that the sitting, walking and standing restrictions were given their plain and ordinary meaning).

12. Claimant returned to Dr. Centi on January 13, 2020. (Ex. A, pg. 23). The same diagnoses and work restrictions remained in place. MMI was now anticipated for 2/10/2020.

13. At her 2/12/2020 follow-up visit, Claimant still described light sensitivity to fluorescent lights, but Dr. Centi noted Claimant’s surveillance videos, as detailed below. All of Claimant’s medically-related work restrictions (including any reference to light exposure) were lifted, leaving only a prohibition on safety sensitive positions. MMI now anticipated 3/4/2020.

14. According to Dr. Centi’s records, Claimant was surveilled in December of 2019 while she was not working. The surveillance was subsequently provided to Dr. Centi. He commented that Claimant was videoed walking outdoors, into buildings, driving without sunglasses, and no appearance of photophobia. (Resp. Ex. A, pg. 26). One of the buildings Claimant was in was apparently a post office. At hearing, Claimant admitted that she went grocery shopping and ran errands during this time.

15. Claimant’s work restrictions re: light exposure never went back in to effect. After subsequent visits, she was placed at MMI, with no restrictions, and no permanent impairment, on 5/1/2020 (Ex. A, pp. 42-45).

16. In a subsequent Interrogatory thereafter, Dr. Centi clarified that: “Fluorescent light is clearly not as powerful as direct sunlight.” (Ex. A, p. 46).

Average Weekly Wage

17. The ALJ has reviewed wage records for the twelve weekly pay periods immediately preceding the week wherein Claimant was injured. The average weekly number of total hours worked for those 12 weeks is 41.8333 (Ex. C, pp 54-65). Beginning on the pay period of 9/1/2019, Claimant’s hourly pay rate was raised from \$12.6846 to \$13.2659. *Id* at 63. The corresponding hourly overtime rate after this pay raise was \$19.8988. *Id* at 64.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

1. The purpose of the Workers’ Compensation Act of Colorado (Act), Sections 8-40101, C.R.S. 2007, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers’ compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

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

3. Assessing the weight, credibility and sufficiency of evidence in a Workers’ Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness’s testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo.

1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

4. In this instance, the ALJ is not persuaded by Claimant's testimony. Her testimony regarding Dr. Centi's instructions on November 26, 2019 is not consistent with the available medical records. There has been no viable explanation for the missed appointment in December, whereupon any misunderstandings of her restrictions could have been spelled out for her at the ATP's office. Further, as noted by Dr. Centi in subsequent reports, he not only removed her light restrictions upon viewing the video; he was prompted to reference that fact specifically in his report. The ALJ could reasonably infer from this that Dr. Centi felt like he had been 'played'.

Average Weekly Wage, Generally

5. The average weekly wage of an injured employee is the basis upon which to compute compensation payments. C.R.S. § 8-42-102(2) provides that a claimant's average weekly wage is determined based on her earnings at the time of injury. A judge must calculate the money rate at which services are paid to the claimant under the contract of hire in force at the time of the injury. *Pizza Hut . ICAO*, 18 P.3d 867, 869 (Colo. App. 2001). However, C.R.S. § 8-42-102(3) authorizes a judge to exercise discretionary authority to calculate an average weekly wage in another manner if the prescribed methods will not fairly calculate the average weekly wage based on the particular circumstances of the case. *Campbell v. IBM Corp.*, 867 P.2d 77, 88 (Colo. App. 1993).

6. The objective in calculating an average weekly wage is to arrive at a fair approximation of a Claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO May 7, 1997). Therefore, C.R.S. § 8-42-102(3) grants a judge substantial discretion to modify the average weekly wage if the statutorily prescribed method will not fairly compute a claimant's wages based on the circumstances. *In re Broomfield*, W.C. No. 4-651-471 (ICAO, March 5, 2007).

Average Weekly Wage, as Applied

7. The ALJ finds that Claimant's new hourly rate of \$13.2659 (and corresponding overtime rate of \$19.8988) best represents her hourly rate of pay as of the date of injury. Her weekly, non-overtime, pay is therefore \$530.67 [$\13.2659×40 hours. = \$ 530.636] (rounded to \$530.67).

8. Claimant averaged 1.8333 hours of overtime during the preceding 12 weeks. Her average overtime pay, per week, therefore is \$36.48 [$\19.8988×1.83333 hours = \$36.48].

9. Adding her average weekly overtime pay (\$36.48) to her regular weekly pay (\$530.67) yields an Average Weekly Wage of **\$567.15**.

Temporary Total Disability, Generally

10. To prove entitlement to temporary total disability (“TTD”) benefits, the Claimant must prove: that the industrial injury caused a disability lasting more than three work shifts, that she left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office*, 954 P.2d 637 (Colo. App. 1997). C.R.S. § 8-42-103(1)(a), requires a claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The term “disability” as used in workers’ compensation connotes two distinct elements. The first element is “medical incapacity” evidenced by loss or restriction of bodily function. The second element is loss of wage-earning capacity as demonstrated by the claimant’s inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999) *Hendricks v. Keebler Co.*, W.C. No. 4-373-392 (June 11, 1999).

11. The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*.

12. Under section 8-42-105(3)(d)(I), the term “modified employment” means employment within the restrictions established by the attending physician. See *Flores-Arteaga v. Apple Hills Orchard Juice Co.*, W.C. No. 3-101-024 (ICAO Feb. 15, 1996). If there is a conflict in the record regarding a claimant’s release to return to work, the ALJ has discretion to resolve the conflict. *Imperial Headware Inc. v. Indus. Claim Appeals Office*, 15 P.3d 295, 296 (Colo. App. 2000).

13. The modified employment must be reasonably available to the injured worker under an “objective standard.” *Ragan v. Temp Force*, W.C. No. 4-216-579 (ICAO June 7, 1996). An injured worker’s subjective beliefs about his ability to perform a modified job are legally irrelevant, and do not provide a basis to refuse to begin modified employment. *Burns v. Robinson Dairy*, 911 P.2d 661, 663 (Colo. App. 1995) (“[A]ny evidence concerning claimant’s self-evaluation of his ability to perform his job was irrelevant.”). See also: *Alex Willhoit v. Maggie’s Farm*, WC No. 5-054-125-01 (ICAO July 23, 2018).

14. WCRP 6 – 1(A)(4) provides that an insurer may terminate temporary disability benefits without a hearing when a modified job offer is provided to the claimant and claimant does not attend work.

Temporary Total Disability, as Applied

15. Claimant was working modified duty as of November 26, 2019 based on the October 30, 2019 modified job offer. She had been working a modified job since the date of injury. Claimant's restrictions changed (from bright light to fluorescent light) on November 26, 2019, but no reasonable interpretation of that restriction would mean it became more restrictive. Claimant expressed no questions or concerns with returning to work under a *no bright light* exposure restriction. She was able to perform her modified job without issue. Claimant continued to run personal errands, apparently without incident, in the daytime during this period.

16. In fact, the original restrictions (put in place by Dr. Centi, clarified in writing by his check marks, and conveyed to Claimant on 10/30/2019) spelled it out, in pertinent part, to Claimant :

Inventory office items (involves *walking, climbing stairs*, and standing; involves some reaching and gripping as well as recording data with pen and paper. *Id at 48* (emphasis added).

17. The ALJ finds that it was patently, and objectively, unreasonable for Claimant to assume, *sua sponte*, that she could not be exposed to fluorescent lights **at all**, while walking around and climbing stairs in the process of performing her modified duties away from her work station. Claimant knew where she worked. She knew, at minimum, she would have to walk to and from her own work station. If there were fluorescent lamps in the employee bathrooms (as there likely were), she also knew about that already. It was, and remains, an objectively unreasonable interpretation that the ATP would send her back to work on a full-time basis, *but forbid her from entering the company bathrooms all day*. Simply stated, the ATP (based, of course, upon what Claimant had told him) wanted Claimant to avoid working around fluorescent lights *all day long* while performing her modified job duties. Staying out of the sun all day long would not doubt have been a good protocol as well for someone displaying mild post-concussive symptoms.

18. As noted, Claimant had no questions or concerns when her restrictions were "no bright light exposure," and she continued to work without incident in a modified position. Claimant's subsequent alleged confusion about her restrictions makes little sense when she had no concerns about the meaning and impact of the *no bright light* exposure. Any argument that Claimant was simply following the specific restriction is blunted by the fact that during December 2019, she was apparently seen running errands, in daylight, and likely entering buildings that employ fluorescent lamps. Thus, if Claimant were truly attempting to now adhere to her restriction of no fluorescent lighting, she would not have been running errands during this time and subjecting herself to fluorescent lighting. So even her *textualism ad absurdum* argument fails.

19. Claimant's restrictions were accommodated by the Employer, and Claimant had been working without issue. Claimant chose not to return to work after

November 26, 2019 and only returned to work on January 5, 2020 when it became readily apparent that Claimant's interpretation dispute regarding her restrictions lacked any credibility, and could continue to result in non-payment of wages. Claimant further compounded her own problems by missing, without apparent explanation, her December appointment with her ATP, who to that point had been quite attentive to her symptoms. Claimant ran errands, while declining to obtain clarification of which job duties she could perform.

20. Employer has shown, by a preponderance of the evidence, that Claimant's wage loss was not the result of her disability; instead, it was Claimant's unreasonable refusal to report to work and perform her modified duty, which had been presented to her in writing by the ATP and Employer.

ORDER

It is therefore Ordered that:

1. Claimant's Average Weekly Wage is \$567.15.
2. Claimant's claim for Temporary Total Disability payments is denied and dismissed.
3. All matters not determined herein are reserved for future determination.

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

DATED: August 6, 2020

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

➤ Whether Respondent has proven by a preponderance of the evidence that they should be allowed to withdraw their General Admission of Liability ("GAL") that admitted for workers' compensation benefits?

FINDINGS OF FACT

1. Claimant was employed with Employer as a Senior Park Ranger at Ridgeway State Park ("State Park"). Claimant is trained as an emergency medical responder and has law enforcement training. Claimant testified his job duties include responding to emergencies inside the state park, patrolling the park, supervising another full-time ranger, enforces rules and regulations regarding boating, fishing, swimming and boating and helping the public in any way he can.

2. Claimant was injured on June 18, 2017. Claimant was scheduled to work from 7:00 a.m. to 3:30 p.m. Claimant testified he left his home in Montrose, Colorado and drove his personal vehicle, a green Ford F-150 pickup truck, south on US Highway 550 toward the State Park. Claimant testified he carries in his personal truck while traveling to work his emergency medical response ("EMR") bag, his duty belt and police band radios. Claimant passed the northern entrance to the State Park (Pa-Co-Chu-Puk) and was proceeding to the southern entrance to the State Park (Dutch Charlie) which was his normal course of travel to work. Claimant testified that normally when he arrives at work, he would park his personal vehicle and use a park ranger truck that has insignia on the truck identifying claimant as a park ranger. Claimant was traveling on US Highway 550 adjacent to the State Park when another vehicle crossed the center lane and stuck claimant's truck in a head on collision. According to the police report, the motor vehicle accident at milepost 109 at 7:29 a.m. Claimant testified he was approximately 1-2 miles away from the visitor center when the accident occurred.

3. Following the head on collision, claimant was tended to by members of the public who were the first individuals on the scene. Claimant was later tended to by state patrol officers who arrived on the scene and was taken by ambulance to the hospital before being transported by flight-for-life to St. Mary's Hospital in Grand Junction, Colorado. While still at the scene of the accident, the state patrol contacted claimant's supervisor, Officer Kristin C[Redacted], who was not on duty, and advised her of the accident. Officer C[Redacted] testified at hearing that upon learning of claimant's accident, she proceeded to the accident scene that was located between the first and second entrance to the State Park and was able to speak to claimant. Officer C[Redacted] testified claimant told her he was going to be late to work. Officer C[Redacted] testified claimant was scheduled to work the shift from 7:00 a.m. to 3:30 p.m. on the day of the accident.

4. Officer C[Redacted] testified she was contacted regarding the motor vehicle accident approximately 7:20 to 7:30 a.m. Officer C[Redacted] testified claimant's truck was on its side and claimant was still in the truck when she arrived. Officer C[Redacted] testified that claimant was not asked to survey the park while driving into the park and was not performing any work duties for employer at the time of the accident to her knowledge. Officer C[Redacted] also testified that Park Rangers will assist with regard to motor vehicle accidents that occur on Highway 550 in the vicinity of the State Park.

5. Officer C[Redacted] testified employees are required to be in their uniform at the start of the shift, but not required to wear their uniforms to work. Officer C[Redacted] testified claimant's presence on Highway 550 prior to the accident did not provide a benefit to employer beyond claimant's arriving at work. Officer C[Redacted] testified the claimant is not paid mileage for travel in his personal vehicle. Officer C[Redacted] testified that the area where the accident occurred is not on State Park property. Officer C[Redacted] testified that the area next to the highway is a private ranch that abuts up to the State Park.

6. Officer C[Redacted] testified that Park Ranger will respond to Highway 550 and have made arrests on Highway 550. Officer C[Redacted] testified that law enforcement operations are fluid around the State Park. Officer C[Redacted] testified she will wear a duty belt at all times when traveling to and from the State Park. Officer C[Redacted] testified that the duty belt carries handcuffs, a taser, a tourniquet, a weapon and ammunition, and a leatherman knife. Officer C[Redacted] testified that she does not want Park Rangers to leave the duty belts at the State Park.

7. Officer C[Redacted] testified as to state business that may be performed by Park Rangers when traveling into work, including picking up supplies. Claimant testified he was not picking up supplies on the day of the motor vehicle accident. Officer C[Redacted] testified that the State Park was short one Park Ranger in June 2017.

8. Officer C[Redacted] testified that she would have expected for claimant to call in and provide assistance for any motor vehicle accident he would have seen while traveling on Highway 550 outside the State Park. Officer C[Redacted] testified that claimant would have a duty to respond to any crimes he would witness while off duty.

9. Claimant testified that he normally wears his uniform to work when driving each day. Claimant testified after the motor vehicle accident, his first concern was to secure the weapons he had in the truck. Claimant testified he was not wearing his duty belt at the time of the accident, but the duty belt was in his vehicle. Claimant testified he requested Officer C[Redacted] be notified as he was concerned about the State Park and he knew Officer C[Redacted] would notify his family. Claimant testified that if the motor vehicle accident had not involved his vehicle, and he had simply come upon the accident, he would have responded to the accident.

10. On rebuttal, Officer C[Redacted] testified claimant is not required to carry his EMR bag in his personal vehicle. Officer C[Redacted] testified Park Rangers are not assigned to patrol Highway 550, as the Colorado State Patrol has primary jurisdiction over this area if there is a motor vehicle accident. Officer C[Redacted] did confirm, however, that the State Parks would have legal authorization to respond to emergencies on Highway 550, including medical emergencies.

11. Following the accident, respondent admitted liability for the injury and paid workers' compensation benefits to claimant.

12. The issues in this case involve whether claimant was in the course and scope of his employment at the time of the work injury. There are a number of factors working in favor of claimant in this case. Claimant was in uniform with necessary belongings from work that his supervisor wanted employees to carry with them (the duty belt) in his personal vehicle and had passed an entrance to the State Park at the time of the motor vehicle accident. The injury occurred during claimant's scheduled work shift, although claimant had not actually arrived at the State Park when the accident occurred.

13. Conversely, there are a number of factors working against claimant in this case. Claimant had not yet arrived on the State Park property (although he had passed one entrance that did not lead to where his office was located), claimant was not in a vehicle provided by employer, his travel was not reimbursed, and claimant was not in a zone of special danger at the time of the injury.

14. Complicating matters in this case, respondent admitted liability for the claim and therefore, the burden of proof in this case rests with respondent.

15. The ALJ finds the testimony of claimant and Officer C[Redacted] to be credible in this case and finds very little conflict between the testimony of the two witnesses. The only area in which there was any significant conflict between the testimony of claimant and Officer C[Redacted] involved whether a Park Ranger would be required to respond to an emergency if the Park Ranger was off duty and available (Officer C[Redacted] testified a Park Ranger would not be required to respond and claimant testified he felt he would be required to respond if he was available). Insofar as this testimony was irrelevant to the fact scenario involving claimant's injury, the ALJ does not give any weight to either side with regard to this testimony.

16. When considering the totality of the circumstances, claimant's motor vehicle accident occurred during claimant's scheduled shift and on an area of the highway, between two of the entrances to the State Park, in which the Park Rangers would answer calls involving emergencies. Claimant was carrying his duty belt in his vehicle and was in uniform. Under the circumstances of this case, the ALJ finds that respondent has failed to establish that claimant was not in the course and scope of his employment at the time of the motor vehicle accident.

CONCLUSIONS OF LAW

1. The purpose of the “Workers’ Compensation Act of Colorado” is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers’ Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers’ Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2016. A party seeking to modify an issue decided by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification. Section 8-43-201, *supra*. A Workers’ Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

3. To qualify for recovery under the Workers’ Compensation Act of Colorado, a claimant must be performing services arising out of and in the course of his employment at the time of the injury. *See* Section 8-41-301(1)(b), C.R.S. For an injury to occur “in the course of” employment, the claimant must demonstrate that the injury occurred within the time and place limits of the employment and during an activity that had some connection with the work-related function. *See Triad Painting Co. v. Blair*, 812 P.2d 638 641 (Colo. 1991). The “arising out of” requirement is narrower than the “in the course of” requirement. *See Id.* For an injury to arise out of employment, the claimant must show a causal connection between the employment and injury such that the injury has its origins in the employee’s work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *See Id.* at 641-642.

4. In general, a claimant who is injured while going to or coming from work does not qualify for recovery because such travel is not considered to be performance of services arising out of and in the course of employment. *See Madden v. Mountain West Fabricators*, 977 P.2d 861 (Colo. 1999); citing *Industrial Commission v. Lavach*, 165 Colo. 433, 437-438, 439 P.2d 359, 361 (1968); *Berry’s Coffee Shop, Inc. v. Palomba*, 161 Colo. 369, 373 423 P.2d 2, 4-5 (1967). This principle is known as the “going to and from work” rule. *See Berry’s Coffee Shop, Inc.*, 161 Colo. At 373, 423 P.2d at 4-5. However, the Supreme Court has recognized many exceptions to the rule to account for varying and unusual circumstances that create a causal connection

between the employment and an injury that occurred while the employee is going to and from work. *Madden, supra*, at 863-864; *see also Lopez v. Boulder County*, W.C. No. 4-594-294 (Industrial Claim Appeals Office, August 31, 2004) (finding that injury resulting from travel to and from work was compensable when it occurred during claimant's scheduled shift and claimant had permission to leave with the expectation that claimant would immediately return to the jail if requested to do so by a radio transmission).

5. In an attempt to categorize these exceptions, the Supreme Court in *Madden v. Mountain West Fabricators, supra*. has laid out four factors to consider whether there is a sufficient causal relationship between the travel and employment such that resulting injuries may be found compensable. These factors include: (1) whether the travel occurred during work hours, (2) whether the travel occurred on or off the employer's premises; (3) whether the travel was contemplated by the employment contract, and (4) whether the obligations or conditions of employment created a "zone of special danger". *Id. at 864*.

6. Generally, the burden of proof for establishing a compensable injury is on the claimant. However, because an admission of liability has been filed in this case, respondent must demonstrate that claimant was not in the course and scope of his employment and that the injury did not arise out of his employment.

7. As found, the injury in this case occurred during claimant's scheduled shift as claimant was scheduled to work from 7:00 a.m. to 3:30 p.m. and the injury occurred at 7:29 a.m. according the State Patrol report. As found, the injury occurred in an area of US Highway 550 that is between the two entrances to the State Park. Although the injury did not occur on an area of land within the State Park, it did occur on an area of the highway that runs adjacent to the State Park and, as testified to by Officer C[Redacted], an area that Park Rangers may respond to when medical emergencies or other emergencies occur. While claimant's travel was not necessarily contemplated by the employment contract (claimant was in a personal vehicle and was not reimbursed for his travel), Officer C[Redacted] did testify that claimant would have been expected to respond to any emergencies or accidents he may have witnessed along this stretch of the US Highway 550.

8. As found, respondents have failed to prove by a preponderance of the evidence that claimant's injury is not compensable under the Colorado Workers' Compensation Act.

ORDER

It is therefore ordered that:

1. Respondents request to withdraw the general admission of liability is denied and dismissed.
2. All matters not determined herein are reserved for future determination.

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

DATED: August 10, 2020



Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

- I. Whether Claimant overcame the opinion of the DIME physician, Dr. Kawasaki, that Claimant is at maximum medical improvement.

FINDINGS OF FACT

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

1. Claimant suffered an admitted work injury on March 13, 2018. Claimant injured his lumbar spine when he lifted a 100 to 120-pound hose full of oil overhead. As he lifted the hose Claimant felt a pop in his back and experienced pain in his left low back.
2. Claimant testified that in May 2018 he began experiencing symptoms which ran down his left leg to his foot. He described the symptoms as numbness, tingling, pain, and his toes twitching. *Hearing Transcript, p. 12, l. 11-18.*
3. Claimant began treatment with Julie Parsons, M.D. of Advanced Urgent Care. During the first two months of treatment, Claimant's symptoms mostly involved left sided low back pain. Claimant's care mainly involved lidocaine patches and medical massage. Claimant reported the massage was helping the back pain. *Claimant's Ex. 5, p. 28.* Claimant continued to work full duty but reported that lifting, twisting, and bending caused more pain. *Id.* at 41.
4. An MRI of the lumbar spine was ordered with a notation that the need for the MRI was for lumbar radiculopathy. *Id.* at 43. The MRI was performed on June 30, 2018. It found Claimant had suffered disc herniations at L4-L5 and L5-S1 with the protrusion at L4-L5 impinging on the left foramen and the L5-S1 protrusion impinging on the S1 nerve root. *Id.* at 176.
5. Claimant was seen on July 25, 2018 and it was noted that he had numbness into his left calf. Dr. Parsons referred Claimant to Dr. Anderson-Oeser for a psychiatry consultation for consideration of injections. *Id.* at 89.
6. Dr. Roberta Anderson-Oeser first saw Claimant on August 8, 2018. On that date, Claimant continued to complain of left low back pain as well as numbness and tingling down the posterior of his left leg. *Claimant's Ex. 8, p. 178.* On physical examination, Dr. Anderson-Oeser noted palpable spasms as well as a positive straight leg raise. Part of her diagnosis included left lumbar radiculopathy. *Id.* at 179. She recommended left L5-S1 transforaminal epidural steroid injections.
7. Before receiving the injections, Claimant was seen at Advanced Urgent Care by Shasta Van Sickle, PA-C who noted radicular symptoms into the left calf and documented a positive straight leg raise on the left side. *Claimant's Ex. 8, p. 186.*

8. Claimant underwent the L5-S1 epidural steroid injection on August 20, 2018 performed by Dr. Anderson-Oeser. He reported significant improvement of both his low back and left leg symptoms. *Claimant's Ex. 8, p. 188*. Dr. Anderson-Oeser referred Claimant for OMT treatments and encouraged Claimant to maintain an active stretching routine. Unfortunately, the improvement from the injections was short-term. Claimant returned to Dr. Anderson-Oeser in September and reported some increase in symptoms and reported that he had numbness in the toes of his left foot but no numbness in his left leg. On examination she noted some spasms but documented a negative straight leg raise. *Id.* at 192.
9. Dr. Brooks Conforti first evaluated Claimant for OMT treatment on October 3, 2018. He noted that on examination he found evidence of a recurrent left sided lumbar radiculopathy. He arrived at this conclusion based on his finding of radicular symptoms which appeared at about 40 degrees of the straight leg raise. *Claimant's Ex. 8, p. 196*. Dr. Conforti notes that he reported his findings to Dr. Anderson-Oeser who requested a second set of epidural steroid injections. *Id.* Claimant returned to Dr. Conforti on October 17, 2018. Claimant reported that he felt the injection had worn off but noted that his symptoms were less intense than before. *Id.* at 199.
10. Claimant underwent a second set of epidural steroid injections at L5-S1 on October 29, 2018. He returned to Dr. Conforti on November 14, 2018 and reported that the injections worked but not as well as the first set. He reported that his left leg symptoms continued despite the injection. *Claimant's Ex. 8, p. 206*. Physical examination showed a straight leg raise suggestive of radiculopathy on the left side. *Id.* Dr. Conforti noted that an EMG had been recommended but not yet performed. *Id.* at 207.
11. Dr. Anderson-Oeser saw Claimant in follow up on November 21, 2018. Claimant reported that he had fallen recently because of his left leg giving out on him but that his symptoms were improved based on the injection. She noted spasms as well as increased muscle tone on the left side of Claimant's low back and she documented equivocal straight leg raise on the left side. *Claimant's Ex. 8, p. 209*. Based on her findings and Claimant's symptoms, she again recommended an EMG study. *Id.* at 210.
12. On December 19, 2018, Claimant returned to Dr. Anderson-Oeser. At this visit, she noted that Claimant's pain complaints had decreased. Claimant rated his current pain level at a 0-1/10 with a maximum pain level of 2/10. But despite decreasing pain levels, Claimant still had radicular symptoms involving his left leg. The radicular symptoms included:
 - Paresthesia in his left leg.
 - Tingling in his left foot.
 - Burning and aching into the buttocks region.
 - Pins and needles sensation in the left lower extremity in an L5 distribution.

For his neuropathic and chronic pain, Dr. Anderson-Oeser advised Claimant to continue using the lidocaine topical ointment. For his pain and inflammation, she directed Claimant to continue using the diclofenac topical gel.

Dr. Anderson-Oeser also noted Claimant stated that his symptoms were gradually improving with the passage of time. Dr. Anderson-Oeser concluded by indicating Claimant had an excellent response to the injections. *Claimant's Ex. 8, pp. 216, 217.*

13. Despite the improvement in Claimant's pain during December 2018, he still had radicular symptoms. As a result, Dr. Anderson-Oeser performed an EMG study. She concluded that the study was abnormal and that it suggested, but did not meet the strict criteria for, a left lumbar radiculopathy. She recommended Claimant finish OMT with Dr. Conforti and continue with a home exercise program. She also stated that Claimant would be a candidate for future epidural steroid injections if his symptoms flared up. Despite Claimant's improvement in pain, but because Claimant continued to have radicular symptoms, she kept Claimant on modified work duty. *Claimant's Ex. 8, p. 219.*
14. On January 16, 2019, Claimant returned to Dr. Anderson-Oeser. She noted similar symptoms to those reported previously by Claimant. She again documented spasms, increased tone and equivocal straight leg raise on examination. At this visit, Claimant stated that the numbness and tingling in his left lower extremity and the pain in his leg was significantly improved. As a result, she felt Claimant might be at MMI at the next visit. She also recommended a trial return to full duty but did not modify his work restrictions at that time. But she again stated that Claimant could return as needed for injections in case of any flare ups. *Claimant's Ex. 8, p. 222.*
15. On April 24, 2019, after Claimant completed his work hardening program, Dr. Anderson-Oeser evaluated Claimant for placement at MMI. At this appointment, Claimant was still having pain in his left low back and buttocks. It was also noted that his symptoms waxed and waned based on his activity level. She also noted Claimant was still having occasional numbness and burning in his left foot. Dr. Anderson-Oeser performed straight leg testing bilaterally and it was negative. It is not clear whether Dr. Anderson-Oeser realized Claimant's pain level – when compared to his last visit in January - had doubled. His current pain level had increased from a 0-1/10 to a 2-3/10. Moreover, his maximum pain level had increased from 2/10 to 4/10. Despite Claimant's persistent back pain, which was increasing, and his concurrent radicular symptoms, Dr. Anderson-Oeser placed Claimant at MMI. She also assessed Claimant for an impairment rating and determined Claimant's permanent impairment was 14% of the whole person. Based on Claimant's work injury and ongoing symptoms, she concluded Claimant would require maintenance medical treatment in the form of physician follow ups and lumbar injections for any flare ups. And despite her recommendation in January that Claimant try a trial return to full duty, it appears she abruptly returned Claimant to full duty at this appointment. *Claimant's Ex. 8, p. 228.*
16. As a result, Dr. Anderson-Oeser placed Claimant at MMI at a time when he had increasing pain complaints and ongoing radicular symptoms. And, despite

completing his work hardening program, it was unknown whether Claimant could handle the physical requirements of full duty work.

17. Upon being placed at MMI and being provided an impairment rating, Respondents filed a final admission of liability and admitted for the impairment rating and date of MMI assigned by Dr. Anderson-Oeser. The Respondents also admitted for maintenance medical treatment.
18. After being placed at MMI, Claimant requested a DIME to address MMI and impairment. Dr. Robert Kawasaki was selected to perform the DIME.
19. On June 26, 2019, and before the DIME, Claimant returned to Dr. Anderson-Oeser for a maintenance care. At this visit, his maximum pain level was still at 4/10. His physical findings were like previous visits with some palpable spasms and an equivocal straight leg raise on the left. Dr. Anderson-Oeser did prescribe tizanidine for his spasms but said Claimant could not drive while taking the medications. She concluded her appointment by allowing Claimant to remain at full duty work without restrictions. She did, however, state she would see Claimant on an as needed basis and that future treatment might include injection therapy, osteopathic manipulation, and medication management. *Claimant's Ex. 8, p. 233.*
20. Despite Dr. Anderson-Oeser placing Claimant at MMI on April 24, 2019, and returning Claimant to full duty, Claimant's symptoms had not stabilized. Claimant's symptoms continued getting worse. Although it may have appeared to Dr. Anderson-Oeser that Claimant's increase in his maximum pain level when she placed him at MMI was a temporary spike, such was not the case. Instead, Claimant's symptoms continued to increase. In retrospect, on April 24, 2019, Claimant had not reached a plateau – where his pain and radicular symptoms waxed and waned from a level of 0/10 to no more than 2/10. Instead, his symptoms were increasing and progressing in an upward trend which continued.
21. After Claimant's June 2019 appointment with Dr. Anderson-Oeser, his symptoms continued to get worse. Because of his increasing pain and radicular symptoms, Claimant was prescribed another series of epidural steroid injections.
22. On October 7, 2019, due to his increasing symptoms, Claimant underwent his third round of bilateral S1 transforaminal epidural steroid injections. *Respondents' Ex. F, p. 115.*
23. According to the Medical Treatment Guidelines (*Guidelines*), epidural steroid injections provide short-term relief by reducing pain and inflammation. The *Guidelines* provide that:

The purpose of spinal injections is to facilitate active therapy by providing short-term relief through reduction of pain and inflammation.¹

¹ See 7 C.C.R. § 1101-3:17 Exhibit 1, Low Back Pain, Medical Treatment Guidelines, p. 20.

24. The *Guidelines* also state that for the treatment of radicular symptoms, injections are not expected to provide long-term reduction in symptoms. The *Guidelines* provide:

Regarding short term benefits from injections, there is strong evidence that epidural steroid injections have a small average short-term benefit for leg pain and disability for those with sciatica.

Regarding long term benefit from injections, there is strong evidence that epidural steroid injections (ESI) do not, on average, provide clinically meaningful long-term improvements in leg pain, back pain, or disability in patients with sciatica (lumbar radicular pain or radiculopathy).²

25. On October 18, 2019, just eleven days after receiving his epidural steroid injections – to reduce his pain, inflammation, and radicular symptoms - Claimant underwent a DIME with Dr. Kawasaki. As noted in Dr. Kawasaki's report, before the injections, Claimant's pain had increased from a maximum level of 4/10 up to 7-8/10. And, according to the *Guidelines*, Claimant's reduction in pain and radicular symptoms would be short-lived.

26. Dr. Kawasaki described Claimant's response to the recent injections. Dr. Kawasaki noted that at first, the injections did not provide Claimant any relief. Then, shortly after the injections, Claimant had an increase in pain. But, at the time of the DIME appointment with Dr. Kawasaki, Claimant had a decrease in pain. Dr. Kawasaki also noted that on the day of the DIME, Claimant did not have any radicular symptoms into his legs. And, according to Claimant, he thought his recent improvement stemmed from the recent injections performed by Dr. Anderson-Oeser. (*Respondents' Ex. F, p. 118.*)

27. Even though Dr. Anderson-Oeser had yet to make a referral to a surgeon, Dr. Kawasaki also addressed surgical options. He stated that surgical intervention is unlikely to be helpful when there is axial back pain – without radicular symptoms. Dr. Kawasaki concluded that because Claimant was not having any radicular symptoms - that day - Claimant was not a surgical candidate and was therefore at MMI.

28. Dr. Kawasaki's conclusion that Claimant was at MMI was premised mainly on a lack of radicular findings on the day of the DIME. Yet Dr. Kawasaki did not have the most recent medical records for review. For example, he did not have the June 26, 2019, report from Dr. Anderson-Oeser. Nor did he have any records documenting Claimant's increasing symptoms that ultimately led to Claimant undergoing a third set of bilateral epidural steroid injections shortly before the DIME. Dr. Kawasaki also failed to address why he thought the most recent reduction in Claimant's pain and radicular symptoms after the injections would be long-term, when the *Guidelines* state the opposite.

29. Thus, Dr. Kawasaki failed to address in his report the waxing and waning nature of Claimant's radicular symptoms and how that played into his determination that

² *Id.* at 44.

Claimant was at MMI. Dr. Kawasaki took a very myopic view in assessing whether Claimant was at MMI. As a result, Dr. Kawasaki erred by focusing mainly on Claimant's symptoms and his findings during his examination and not historically. Dr. Kawasaki also erred by overlooking the expected short-term effects of the injections. Such errors caused Dr. Kawasaki to miss the trend of Claimant's worsening symptoms that started before Dr. Anderson-Oeser prematurely placed Claimant at MMI in April 2019.

30. On November 13, 2019, Claimant returned to Dr. Anderson-Oeser. By this time, Claimant reported that the injection he had shortly before the DIME appointment provided no significant improvement of his radicular leg symptoms. Claimant's symptoms were also causing him to work less. At this visit, Claimant was having the following radicular symptoms:
- Numbness and tingling in both feet, left greater than right.
 - Left sided numbness, tingling, and burning of his toes.
 - Balance problems.
31. At this follow up visit, Dr. Anderson-Oeser noted Claimant used the countertop in her office to move from a seating to standing position. She also noted palpable spasms in the left lumbar paraspinals as well as positive straight leg raise on the left. Based on Claimant's history and objective findings on examination, she referred Claimant to Dr. Bryan Castro for a spine surgery consultation to determine the extent of Claimant's work injury and to determine whether surgery was reasonable and necessary to cure Claimant from the effects of his work injury. *Claimant's Ex. 8, pp. 235-238.*
32. Claimant attended the consultation with Dr. Castro on January 17, 2020. Dr. Castro's physical examination revealed a negative straight leg raise, but Dr. Castro noted Claimant's subjective reports of radicular symptoms. Dr. Castro concluded that he did not think it was likely Claimant would be a surgical candidate but, considering Claimant's increasing radicular symptoms, he recommended Claimant undergo a repeat MRI to assess any progressive neural encroachment. He asked to see Claimant again once the MRI was completed to determine whether Claimant was a surgical candidate. *Claimant's Ex. 11, p. 260.* As a result, the MRI and follow up appointment with Dr. Castro have a reasonable prospect of diagnosing or defining Claimant's condition and suggesting a course of further treatment.
33. At the request of Respondents, Dr. John Raschbacher performed a records review to assess whether the repeat MRI was reasonably necessary. Dr. Raschbacher, without citing the Medical Treatment Guidelines, concluded that because Dr. Castro doubted surgery would be recommended, the repeat MRI was not reasonably necessary. Dr. Raschbacher referenced the DIME report recommending against surgical consult but failed to acknowledge this hinged on Dr. Kawasaki's finding that Claimant had no radicular symptoms on the day of the examination – which appears to have been an isolated finding due to the short-term effects of the injections. He also disregarded the radicular symptoms found by Dr. Anderson-Oeser that justified her referral to Dr. Castro. Finally, his opinion relied on the fact that Claimant's ATP's

position on maintenance treatment in April 2019 did not include an MRI. This of course ignored the obvious fact that one of Claimant's ATP's, Dr. Anderson-Oeser, made the referral to Dr. Castro for a surgical evaluation. Thus, the ALJ does not find Dr. Raschbacher's opinions to be credible or persuasive.

34. Dr. Raschbacher also testified by deposition. He testified consistent with his reports. During, his deposition, it appeared Dr. Raschbacher sought to confirm MMI rather than determine whether Claimant was appropriately placed at MMI. And when pressed about how he would assess a patient with the findings documented by Dr. Anderson-Oeser and described by Claimant, Dr. Raschbacher became evasive. He also discounted data that did not support his conclusions. For example, he was asked whether he had any reason to believe that Dr. Anderson-Oeser did not find spasms on her physical examination of Claimant on November 13, 2019. In response, Dr. Raschbacher stated:

No. She may well have found them or thought she found them. (*Deposition Transcript*, p. 20.)

Dr. Raschbacher again demonstrated his predilection to exclude or discount data that did not support his conclusion by stating that Dr. Anderson-Oeser really did not find the spasms she said she found.

35. In other parts of his testimony, he also seemed to focus on certain information, but take it out of context. For example, he testified that his opinion was supported because Claimant was still released to full duty. (*See Deposition pp. 14-15.*) That said, merely being released to full duty work does not mean Claimant can perform full duty work. And, in this case, Claimant reported to Dr. Anderson-Oeser that his symptoms were causing him to work less and that he could not perform the full duties of his job during an entire workday. (*Claimant's Ex. 8, p. 235.*) Plus, there was no credible and persuasive evidence presented to even support a contention that Claimant was not accurately reporting his symptoms and limitations to Dr. Anderson-Oeser or anyone else. Thus, the ALJ does not find Dr. Raschbacher's opinions and conclusions in his deposition testimony to be credible or persuasive.
36. Dr. Hughes conducted a medical record review at Claimant's request. Dr. Hughes concluded that the surgical consultation recommended by Dr. Anderson-Oeser was appropriate under the Medical Treatment Guidelines. Dr. Hughes also concluded that Dr. Castro's recommendation for the repeat MRI was reasonable to make an informed decision about surgical intervention. He finally concluded that Dr. Raschbacher's opinion that the MRI should be denied was not based on any accepted medical standard. (*Claimant's Exhibit 13.*)
37. Dr. Hughes also testified by deposition. Dr. Hughes testified that the weight of the objective and subjective findings by several physicians supported a surgical consultation as performed by Dr. Bryan Castro on January 20, 2020. Dr. Hughes testified that the EMG study was abnormal. He testified that while the findings did not meet the strict criteria for left lumbar radiculopathy, it was not a normal examination. *Deposition Transcript*, p. 16, ll. 9-14. He testified that the abnormality documented by Dr. Anderson-Oeser was "muscular denervation" which he stated

was “fairly specific for a neuropathic or radiculopathic process.” *Id.* at p. 16, ll. 19-24.

38. Dr. Hughes testified that the referral to a spine surgeon was reasonable given the results of objective testing as well as findings by different providers on physical examination. Dr. Hughes testified that the Colorado Medical Treatment Guidelines for the treatment of the lower back support the recommendation for a referral to a spine surgeon. The Medical Treatment Guidelines outline three factors which should be met to consider lumbar surgery. Those criteria are: (1) radicular symptoms or symptoms of neurogenic claudication, often with clinical evidence of radiculopathy that correlates with the patient’s pain and findings; (2) evidence of nerve root compressions proven by MRI or CT myelogram; and (3) failure of non-surgical care. *Deposition Transcript*, pp. 24-26.
39. Dr. Hughes testified that Claimant met the first criteria based on examination findings both objective and subjective. *Deposition Transcript*, pp. 24-25.
40. Dr. Hughes also concluded that Claimant met the second criteria for surgical consultation. He testified that the MRI study previously performed revealed nerve root compression. He also agreed with Dr. Castro’s recommendation for a follow-up MRI to assess any progression of any neural impingement prior to recommending for or against surgical intervention. *Deposition Transcript*, p. 25.
41. Dr. Hughes also testified that Claimant met the third criteria. He testified that Claimant had plateaued in his improvement after the epidural steroid injections and Claimant had “maximized the benefit of nonsurgical care.” *Deposition Transcript*, p. 26.
42. Dr. Hughes stated that Dr. Raschbacher repeatedly mischaracterized medical records in a way that seemed to be deliberate. According to Dr. Hughes, Dr. Raschbacher appeared to have selectively omitted – or cherry picked – the records and data used to support his conclusion. For example, he noted Dr. Raschbacher mischaracterized the EMG findings as not finding any evidence of lower extremity radicular findings. He also noted that Dr. Raschbacher mischaracterized Dr. Castro’s conclusions by omitting the history documented by Dr. Castro that Claimant’s radicular symptoms were getting worse - particularly in his leg. *Deposition Transcript*, pp. 27-29.
43. Dr. Hughes testified that in his opinion Dr. Kawasaki’s opinion was not based on complete information. Dr. Hughes testified that considering all the medical evidence he disagreed with Dr. Kawasaki’s opinion that Claimant was at MMI.
44. The medical history used by Dr. Hughes aligns with the medical record and Claimant’s testimony at hearing. Dr. Hughes’ testimony and opinions are also consistent with, and supported by, the Colorado Medical Treatment Guidelines. Lastly, the ALJ agrees with Dr. Hughes’ conclusion that Dr. Raschbacher mischaracterized Claimant’s medical records. As a result, the ALJ finds Dr. Hughes’ testimony to be credible, well founded, and highly persuasive.
45. At hearing Claimant testified on his behalf. Claimant testified that he had experienced very consistent pain in his left low back from the beginning of the claim.

He testified that a couple of months after the accident he started to develop pain, numbness, and tingling into his left leg. He testified that he received three injections in his low back. He testified the first provided almost complete relief of the left leg symptoms, the second provided some relief from the leg symptoms and that the third did provide some relief from this left leg symptoms.

46. Claimant testified that while he continued to work during his claim, he was never really pain free. He testified that he had to pick and choose job tasks to perform and sometimes needed to ask for help to lift heavy objects. He testified that he experiences pain with activities as simple as mowing his grass and that he has had to avoid activities he used to enjoy as a sportsman.
47. Claimant testified that he reported the symptoms in his low back as well as symptoms into his left toes to Dr. Kawasaki. He also testified that he did talk about the periodic radicular pain he would feel in his left leg. He testified those problems, the low back and left foot, were constant problems that never really went away. Finally, he testified that he wants to undergo the repeat MRI to find out if there is another treatment option which will provide him relief.
48. The ALJ finds Claimant's testimony to be reliable, credible, and persuasive.

CONCLUSIONS OF LAW

Based on these findings of fact, the Judge draws these conclusions of law:

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). But, when attempting to overcome a finding of MMI, Claimant shoulders the burden of overcoming a finding of MMI by clear and convincing evidence. C.R.S. § 8-42-107(8)(b)(III). Clear and convincing evidence is highly probable and free from serious or substantial doubt. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered “to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence.” See *Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency, or inconsistency of the witness’s testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJ1, Civil 3:16 (2007). A workers’ compensation case is decided on its merits. C.R.S. § 8-43-201.

Medical Treatment Guidelines

When determining whether Claimant is in need of additional medical treatment – before being placed at MMI - the ALJ may consider the provisions of the Medical Treatment Guidelines because they represent the accepted standards of practice in workers’ compensation cases and were adopted pursuant to an express grant of statutory authority. However, the *Guidelines* are not dispositive and the ALJ need not give them any more weight than he determines they are entitled to considering the totality of the evidence. See *Cahill v. Patty Jewett Golf Course*, WC 4-729-518 (ICAO February 23, 2009); *Siminoe v. Worldwide Flight Services*, WC 4-535-290 (ICAO November 21, 2006).

I. Whether Claimant overcame the opinion of the DIME physician, Dr. Kawasaki, that Claimant is at maximum medical improvement.

MMI exists at the point in time when “any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition.” Section 8-40-201(11.5), C.R.S. A DIME physician’s finding that a party has or has not reached MMI is binding on the parties unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(III), C.R.S.; *Magnetic Eng’g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000); *Kamakele v. Boulder Toyota-Scion*, W.C. No. 4-732-992 (ICAO, Apr. 26, 2010).

MMI is primarily a medical determination involving diagnosis of the claimant’s condition. *Berg v. Indus. Claim Appeals Office*, 128 P.3d 270 (Colo. App. 2005); *Monfort Transp. v. Indus. Claim Appeals Office*, 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant’s medical condition are causally related to the industrial injury. *Martinez v. Indus. Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007); *Powell v. Aurora Public Sch.* W.C. No. 4-974-718-03 (ICAO, Mar. 15, 2017). A

finding that the claimant needs additional medical treatment (including surgery) to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Indus. Claim Appeals Office*, 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Indus. Claim Appeals Office*, 794 P.2d 1090 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.*, W.C. No. 4-320-606 (ICAO, Mar. 2, 2000). Similarly, a finding that other diagnostic procedures offer a reasonable prospect for defining the claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Abeyta v. WW Construction Management*, W.C. No. 4-356-512 (ICAO, May 20, 2004).

The party seeking to overcome the DIME physician's finding on MMI bears the burden of proof by clear and convincing evidence. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, *supra*. "Clear and convincing evidence" is evidence that establishes that it is "highly probable" the DIME physician's finding is incorrect. See *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998); *Lafont v. WellBridge D/B/A Colorado Athletic Club* W.C. No. 4-914-378-02 (ICAO, June 25, 2015). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect, and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc.*, W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The mere difference of opinion - between well reasoned medical opinions - does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.*, W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); see *Shultz v. Anheuser Busch, Inc.*, W.C. No. 4-380-560 (ICAO, Nov. 17, 2000). It is, however, the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Oates v. Vortex Indus.*, WC 4-712-812 (ICAO, Nov. 21, 2008); *Licata v. Wholly Cannoli Café* W.C. No. 4-863-323-04 (ICAP, July 26, 2016).

The Industrial Claim Appeals Panel has repeatedly held that diagnostic procedures constitute a compensable medical benefit which must be provided before MMI if such procedures have a "reasonable prospect" of diagnosing or defining the claimant's condition so as to suggest a course of further treatment. Section 8-42-101(1)(a), C.R.S. 2001; *Villela v. Excel Corp.*, W.C. No. 4-400-281 (February 1, 2001); *Hatch v. John H. Garland Co.*, W.C. No. 4-368-712 (August 11, 2000); cf. *Merriman v. ICAO*, 120 Colo. 400, 210 P.2d 448 (1949); *Reynolds v. ICAO*, 794 P.2d 1080 (Colo. App. 1990). In addition, there is no requirement that a treating or DIME physician render an opinion that a recommended diagnostic procedure is "likely" to indicate a course of treatment. *Nelson v. Fitzgerald's Casino*, W.C. No. 4-374-519 (Nov. 15, 2001). In *Nelson*, the Panel stated:

A physician may well conclude that various diagnostic procedures are advisable prior to placing the claimant at MMI so as to rule out the possibility of dangerous conditions or diseases. This is true even if the physician believes it is more probable than not that the claimant does not suffer from the dangerous condition or disease.

Nelson v. Fitzgerald's Casino, *supra*.

The ALJ finds and concludes that Claimant overcame Dr. Kawasaki's opinion on MMI by clear and convincing evidence. As found, the totality of the medical evidence, including the highly credible and persuasive opinion of Dr. Hughes, established Claimant has yet to reach MMI for his work injury.

As found, Claimant's back pain and radicular symptoms waxed and waned. On April 24, 2019, Dr. Anderson-Oeser evaluated Claimant for placement at MMI. At this appointment, Claimant was still having pain in his left low back and buttocks. Claimant was also having radicular symptoms that included occasional numbness and burning in his left foot. At this appointment, however, Claimant's pain level – when compared to his last visit in January - had doubled. Claimant's current pain level had increased from 0-1/10 to 2-3/10. Moreover, his maximum pain level since his last visit had increased from 2/10 to 4/10. Despite Claimant's persistent and increasing back pain, combined with his radicular symptoms, Dr. Anderson-Oeser placed Claimant at MMI. And despite her recommendation in January 2019 that Claimant attempt a trial return to full duty, it appears she also abruptly returned Claimant to full duty. As a result, Dr. Anderson-Oeser placed Claimant at MMI at a time when his condition was not stable as evidenced by his increasing pain and continuing radicular symptoms. As shown by the progression of his symptoms, Claimant needed additional diagnostic and medical evaluations to define the extent of his injury and to determine whether surgery is reasonable and necessary to cure Claimant from the effects of his work injury.

On June 26, 2019, before the DIME, Claimant returned to Dr. Anderson-Oeser for more medical treatment. At this visit, Claimant's maximum pain level was still 4/10 and Dr. Anderson-Oeser's physical findings were much like previous visits with some palpable spasms and an equivocal straight leg raise on the left. But because of an increase in spasms, Dr. Anderson-Oeser prescribed tizanidine. She concluded her appointment by allowing Claimant to remain working full duty work without restrictions. She did, however, state that future treatment might include injection therapy, osteopathic manipulation, and medication management.

After Claimant's June 2019 appointment with Dr. Anderson-Oeser, his symptoms continued to get worse. Based on his increasing pain and radicular symptoms, Claimant was prescribed a third round of epidural steroid injections.

On October 7, 2019, due to his increasing symptoms, Claimant underwent his third round of bilateral S1 transforaminal epidural steroid injections. But, according to the *Guidelines*, epidural steroid injections only provide short-term relief by reducing pain and inflammation. The *Guidelines* provide:

The purpose of spinal injections is to facilitate active therapy by providing short-term relief through reduction of pain and inflammation.”³

The *Guidelines* also state that for the treatment of radicular symptoms, injections are not expected to provide long-term reduction in symptoms. The *Guidelines* provide:

Regarding short term benefits from injections, there is strong evidence that epidural steroid injections have a small

³ 7 C.C.R. § 1101-3:17 Exhibit 1, Low Back Pain, Medical Treatment Guidelines, p. 20.

average short-term benefit for leg pain and disability for those with sciatica.

Regarding long term benefit from injections, there is strong evidence that epidural steroid injections (ESI) do not, on average, provide clinically meaningful long-term improvements in leg pain, back pain, or disability in patients with sciatica (lumbar radicular pain or radiculopathy).⁴

On October 18, 2019, just eleven days after receiving his epidural steroid injections – which were administered to reduce his pain, inflammation, and radicular symptoms - Claimant underwent a DIME with Dr. Kawasaki. As noted in Dr. Kawasaki's report, before the most recent injections, Claimant's pain had increased from a maximum level of 4/10 up to 7-8/10.

Dr. Kawasaki described Claimant's response to the injections. Dr. Kawasaki noted that at first the injections did not provide Claimant any relief. Then, shortly after the injections, Claimant had an increase in pain. But at the time of the DIME appointment, Claimant had a decrease in pain. Despite Claimant testifying that he told Dr. Kawasaki that he was still having radicular symptoms, Dr. Kawasaki noted that on the day of the DIME, Claimant did not have any radicular symptoms into his legs. But Dr. Kawasaki did note that Claimant thought his recent improvement stemmed from the recent injections performed by Dr. Anderson-Oeser.

Even though Dr. Anderson-Oeser had yet to make a referral to a spine surgeon, Dr. Kawasaki addressed surgical options. He stated that surgical intervention is unlikely to be helpful when there is axial back pain – without radicular symptoms. Dr. Kawasaki concluded that because Claimant was not having any radicular symptoms - that day - Claimant was not a surgical candidate and was therefore at MMI.

In reaching his conclusion that Claimant was at MMI, which was premised mainly on a lack of radicular findings the day of the DIME, Dr. Kawasaki did not have the most recent medical records for review. For example, he did not have the June 26, 2019, report from Dr. Anderson-Oeser. Nor did he have any records documenting Claimant's increasing pain and radicular symptoms that ultimately led to Claimant undergoing a third set of bilateral epidural steroid injections shortly before the DIME.

Dr. Kawasaki also erred by overlooking the short-term nature of the injections and that Claimant's decrease in symptoms would most likely be temporary and short-lived. Dr. Kawasaki also failed to address in his report the waxing and waning nature of Claimant's radicular symptoms and how that played into his determination that Claimant was at MMI. As a result, Dr. Kawasaki took a very myopic view in assessing whether Claimant was at MMI. By focusing mainly on Claimant's symptoms during his examination, and not historically, Dr. Kawasaki erred and missed the worsening trend of Claimant's symptoms that started shortly before Dr. Anderson-Oeser prematurely placed Claimant at MMI. Dr. Kawasaki also failed to consider that based on the *Guidelines*, Claimant's symptoms would likely reemerge shortly after the injections.

⁴ *Id.* at p. 44.

Plus, Dr. Kawasaki failed to document and address Claimant's report of ongoing radicular symptoms – even if they were improved by the recent injections.

As found, and consistent with the *Guidelines*, the epidural steroid injections performed just 11 days before the DIME provided only short-term relief. As a result, the upward trend regarding Claimant's worsening symptoms that began shortly before he was prematurely placed at MMI by Dr. Anderson-Oeser continued.

On November 13, 2019, after the DIME, Claimant returned to Dr. Anderson-Oeser. By this time, Claimant reported that the injection he had shortly before the DIME appointment provided no significant improvement of his radicular leg symptoms. Claimant's symptoms were also causing him to work less. At this visit, Claimant was having the following radicular symptoms:

- Numbness and tingling in both feet, left greater than right.
- Left sided numbness, tingling, and burning of his toes.
- Balance problems.

At this follow up visit, Dr. Anderson-Oeser noted Claimant used the countertop in her office to move from a seating to standing position. She also noted palpable spasms in the left lumbar paraspinals as well as positive straight leg raise on the left. Based on Claimant's history and objective findings on examination, she referred Claimant to Dr. Bryan Castro for a spine surgery consultation. Claimant attended the consultation with Dr. Castro on January 17, 2020. Dr. Castro's physical examination revealed a negative straight leg raise, but Dr. Castro noted Claimant's subjective reports of radicular symptoms. Dr. Castro concluded that he did not think it was likely Claimant would be a surgical candidate but, considering Claimant's increasing radicular symptoms, he recommended Claimant undergo a repeat MRI to assess any progressive neural encroachment. He asked to see Claimant again once the MRI was completed to determine whether Claimant was a surgical candidate.

Dr. Anderson-Oeser's referral to Dr. Castro was made to determine the extent of Claimant's injury and to determine whether more treatment, in the form of surgery, might be reasonable and necessary to cure Claimant from the effects of his work injury. And the MRI recommended by Dr. Castro was prescribed to determine the extent of Claimant's work injury and the nature of additional treatment that might be reasonable and necessary to cure Claimant from the effects of his injury. And, as found, the referral to Dr. Castro and the MRI have a reasonable prospect of diagnosing or defining Claimant's condition so as to suggest a course of further treatment to cure Claimant from the effects of his work injury. As a result, such finding is inconsistent with a finding of MMI.

Dr. Kawasaki's also failed to consider the *Guidelines* in relation to assessing surgical options for the lumbar spine and failed to address the objective and subjective findings of radiculopathy as evidenced in Claimant's medical records. Throughout Claimant's course of treatment, he consistently complained of radicular symptoms radiating down his left leg and into his left foot. More importantly, both objective examinations, the MRI, and EMG study, found evidence consistent with radiculopathy.

Claimant's testimony also bolsters the argument that Dr. Kawasaki ignored symptoms consistent with radiculopathy in concluding that Claimant was at MMI. Claimant testified that he reported radicular symptoms to Dr. Kawasaki at the DIME. Claimant's testimony is credible on this point because even though the radicular symptoms improved temporarily because of the injections, it fits with essentially all the medical records before and after the DIME appointment. For example, in the last documented appointment with Dr. Anderson-Oeser on June 26, 2019, Claimant reported several symptoms consistent with ongoing left lumbar radiculopathy including paresthesia in his left leg as well as equivocal straight leg raise test. Then, on October 7, 2019, just eleven days before the DIME, Claimant underwent another epidural steroid injection performed by Dr. Anderson-Oeser. Given that Dr. Anderson-Oeser had always couched the need for more injections in terms of "flare-ups", it is reasonable to conclude that she noted worsened symptoms and for that reason recommended the injection.

Based on Claimant telling Dr. Kawasaki that he still had radicular symptoms, Dr. Kawasaki also erred by failing to follow the recommendations of the *Guidelines*. At the time of the DIME, Claimant arguably met all of the criteria for consideration of lumbar surgery. The first criteria, "radicular symptoms...with clinical evidence of radiculopathy that correlates with the patient's pain and findings" is met given Claimant's MRI and EMG findings as well as his reported symptoms to multiple providers. The findings described in the MRI report meet the second criteria, "evidence of nerve root compressions proven by MRI." Again, these records were available for Dr. Kawasaki to review and address in his report. Finally, the medical records as well as Dr. Hughes' testimony reveal that nonsurgical treatment options have provided no lasting relief of his symptoms.

In Claimant's examination with Dr. Anderson-Oeser just after the DIME appointment, she again identified several findings consistent with left lumbar radiculopathy including decreased pinprick response in an S1 dermatomal pattern, positive straight leg raise test and Claimant continued to complain at that time of ongoing symptoms into his left lower extremity. Claimant would probably not complain of symptoms sufficient to justify a third injection just prior to the DIME appointment as well as just after the DIME and not complain of radicular symptoms at the DIME. But to the extent that he did not, it is more than reasonable to accept Claimant's radicular symptoms were temporarily alleviated because of the injections. This explanation, while reasonable, does not justify Dr. Kawasaki's failure to address this finding given the overwhelming evidence of radicular symptoms in the medical records.

The opinions and conclusions of Dr. Hughes are found to be more credible than those offered by Dr. Kawasaki or Dr. Raschbacher. The ALJ also finds Dr. Hughes' opinions and conclusions to be highly persuasive. Dr. Hughes' opinions and conclusions fit with the weight of the medical evidence and reasonably rely upon the Colorado Medical Treatment Guidelines. Dr. Raschbacher's opinions and conclusions are not credible. As found, Dr. Raschbacher cherry-picked portions of the medical records to support his contention without taking account for the physical examination findings and objective testing which was inconsistent with his opinions and conclusions.

The ALJ finds and concludes Claimant overcame the opinion of Dr. Kawasaki regarding MMI by clear and convincing evidence. Claimant was not at MMI on April 24,

2019. Moreover, Claimant has still not reached MMI because another diagnostic test – the MRI - has been recommended by an authorized treating physician, Dr. Castro, and has not been performed. Plus, Dr. Castro must review the MRI to determine treatment options, such as surgery, to cure Claimant from the effects of his work injury.

ORDER

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

1. Claimant is not at MMI.
2. Issues not expressly decided herein are reserved to the parties for future determination.

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

DATED: August 13, 2020.

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that his 16% upper extremity Impairment Rating should be converted to the Whole Person?

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

1. Claimant injured his right shoulder when he tripped on a bent piece of rebar at a work site on February 14, 2019, and fell to the ground (Ex. G, p. 165). He fell on his right shoulder (Ex. A, p. 10). Claimant went to Memorial Hospital for urgent treatment on February 14, 2020, where he had an x-ray of his right shoulder, which was read as normal (Ex. A, pp. 12-13). The physical exam done on the date of injury at the emergency room at Memorial Hospital revealed, “[S]ignificant tenderness to palpation of the right anterior lateral shoulder.”
2. Claimant’s clavicle was not noted to be tender, and he had no tenderness in his cervical spine or thoracic spine regions. His right shoulder had decreased range of motion due to pain (Ex. A, p. 12). Claimant’s neck was, “[S]upple with no midline tenderness.” Claimant was discharged from the hospital’s emergency room on February 14, 2020, and refused the offered sling (Ex. A, p. 13).
3. Claimant had medical treatment for his right shoulder before this work injury occurred. On December 18, 2018, he saw John Ho Pak, M.D., an orthopedic surgeon in Colorado Springs, for evaluation of four weeks of right shoulder symptoms that arose when he was doing yard work. There was no specific injury tied to his symptoms. Claimant said he had sharp, aching, and burning pain, and felt popping and weakness. He reported minimal symptom relief with over the counter ibuprofen, and icing. Claimant said it was difficult for him to lift and do his activities of daily living.
4. Dr. Pak diagnosed Claimant with right shoulder impingement bursitis, and administered a cortisone injection. (Ex. A, pp. 1-5). Dr. Pak saw Claimant again on January 15, 2019. Dr. Pak felt Claimant had, “[A] little posterior capsular tightness” He recommended stretching. (Ex. A, pp. 6-9).
5. Claimant returned to Dr. Pak’s office, seeking treatment of his right shoulder the day after this work injury. Dr. Pak’s nurse practitioner, Trisha Finnegan, saw Claimant February 15, 2019. NP Finnegan’s Plan noted the following:

Patient comes to clinic today for evaluation of his right shoulder. Patient has been previously treated for right shoulder bursitis. He underwent a

right shoulder subacromial cortisone injection on 1/15/2019. He did respond well to the injection therapy; however *he reports over the last couple weeks he has had recurrence of pain and difficulty* his home exercise program secondary to his pain. Patient *also* sustained a mechanical fall yesterday landing on the lateral aspect of the right shoulder onto concrete.....*Prior to his fall his shoulder symptoms have continued to impede his ability to work.* (Ex. A, p. 15)(emphasis added).

6. Claimant stated, "His pain is mostly about the anterior and lateral aspect of the shoulder(s) [sic]." (Ex. A, p. 16). Ms. Finnegan compared Claimant's February 14, 2019, x-ray to his December 18, 2018, right shoulder x-ray and saw no changes. She recommended claimant have an MRI of the right shoulder. Ms. Finnegan examined claimant's neck at this appointment. She stated that his range of motion was normal, and that there was, "[N]o neck tenderness on palpation." (Ex. A, p. 19).
7. The right shoulder MRI done February 19, 2019 showed a full-thickness anterior distal supraspinatus tendon tear, with mild retraction and underlying bursitis. There was also, "Complete biceps tendon disruption with retraction to the upper arm. There appears to be subtle distal superior subscapularis partial tearing. Complex superior labral tearing." Ms. Finnegan and Dr. Pak reviewed these findings, and physical exam findings that confirmed these findings, on February 19, 2019 (Ex. A, p. 25).
8. Dr. Pak diagnosed Claimant with a rotator cuff tendon tear and proximal bicep tendon rupture. Claimant elected to have surgery as suggested by Dr. Pak (Ex. A, p. 26). Dr. Pak examined Claimant's neck at this visit, and found, as before, "Normal range of motion and neck supple." (Ex. A, p. 29) Dr. Pak's neck exam revealed:

Neck lateral bend left is normal. Neck lateral bend right is normal. Able to extend neck normally. Able to flex neck normally. There is no neck tenderness on palpation. There is abnormality of the bicep consistent with proximal bicep rupture. *Id.*

Dr. Pak and Ms. Finnegan never diagnosed Claimant with a cervical spine injury, upper back or scapula injury, or found that Claimant had symptoms above his arm at the shoulder.

9. Claimant selected HealthQuest Medical Services, where Frank Polanco, M.D. practices, as his designated provider. Dr. Polanco saw Claimant for the first time on February 20, 2019, and referred Claimant to Dr. Pak for the surgery he had already elected to undergo (Ex. B, p. 64). Dr. Polanco did a physical examination at this appointment. Claimant said his pain was in his right shoulder, radiating down the biceps (Ex. B, p. 62). Dr. Polanco examined claimant's neck, and (consistent with Dr. Pak's and Ms. Finnegan's exams) found:

Head/Neck Exam:

Normocephalic. PERRLA. EOMs are intact. There are no areas of

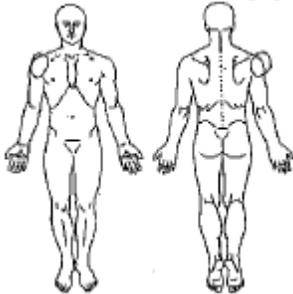
bruising or abrasions about the head or neck. There is good range of motion with normal stability. Strength and muscle tone are within normal limits. Neck is supple with no thyroid enlargement.

Cervical Spine Exam:

Patient demonstrates normal alignment of the cervical spine. There is full and fluid motion for flexion, extension, rotation, and lateral bending....bony palpation is unremarkable and soft tissue palpation demonstrates *normal muscular tone with no evidence of muscular spasm or tenderness...*(Ex. B, pp. 62, 63)(emphasis added).

10. Dr. Polanco examined Claimant's right shoulder, and found a normal clavicle, and no symptoms in the scapulae when palpated. There was tenderness along Claimant's bicipital groove and biceps head with 'pop-eye' deformity. (Ex. B, p. 63) Dr. Polanco diagnosed Claimant with a right proximal biceps tear, right supraspinatus tear, and right labral tear Claimant completed a questionnaire himself at this appointment. When asked, "Where is the location of your pain?" Claimant wrote, "Right shoulder." He circled the area of his pain on a body diagram:

Please draw a circle around area on graph below:



(Ex. B, pg. 67).

11. Dr. Pak performed a right shoulder arthroscopic debridement, subacromial decompression with acromioplasty along with rotator cuff repair and an open biceps tenodesis on 2/27/2019. He noted that Claimant had sustained a large rotator cuff tear involving supraspinatus with retraction, and that his subacromial space showed abundant bursitis. (Ex. 1, pp. 12-13). The surgery was uneventful, and Claimant made what the Division IME provider John Hughes, M.D. termed, "[A] good functional recovery." (Ex. D, p. 128) Claimant attended physical therapy, was diligent about his home exercise program, and by August 9, 2019, told Dr. Polanco that he felt as though, "He's made great improvement." (Ex. B, p. 102).

12. Claimant saw Dr. Polanco on March 21, April 4, April 11, April 26, June 21, and July 19, 2019. At each of these visits, Dr. Polanco examined his neck, upper back, and right shoulder region. At each of those appointments, Dr. Polanco found Claimant's neck was normal, supple, with full and fluid motion. There was no neck region muscle spasm or tenderness. Claimant's scapula was normal without pain to palpation. Claimant consistently told Dr. Polanco that his pain was confined to his right shoulder. Claimant never complained of pain above his right arm at the shoulder. (See Ex. B, pp. 72-73;

77-78; 82-83; 87-88; 92-93; 97-98).

13. On Claimant's April 4, 2019 follow-up with Dr. Polanco, Dr. Polanco reported that Claimant had only a mild decrease of range of motion in his right arm and that physical therapy was going well. On his intake form, Claimant reported that he was experiencing pain with overhead reaching and activities of daily living such as reaching behind to clean his back in the shower. (Ex. B, pp. 81-82).
14. On April 9, 2019 Laura Rodholm, MSPT, reported that Claimant was experiencing tenderness in his upper trapezius upon palpation (Ex. 5, p. 41).
15. On April 11, 2019 Claimant reported on his pain diagram that he was experiencing pain in his right shoulder and circled his right shoulder and bicep. Once again, he did not indicate anywhere beyond the shoulder. He stated that raising his right arm causes pain (Ex. 5, p. 42).
16. On May 17, 2019, the physical therapist reported that Claimant was having pain in his upper trapezius and levator scapula, along with tenderness upon palpation at his right upper trapezius and right levator scapula (Ex. 5, p. 44).
17. On June 21, 2019 Dr. Polanco changed work restrictions to include limiting lifting and carrying to no more than 20 pounds, avoiding reaching overhead and limiting repetitive movements with right upper extremity (Ex. 4, p. 29).
18. On July 19, 2019 Claimant reported to Dr. Polanco that his pain worsened with lifting greater than 25 pounds, trying to tuck in his shirt in the back, and reaching overhead for too long. He also reported pain washing his back, putting on shirts, or trying to pull his shirt overhead, as well as reaching to high shelves. (Ex. 4, p. 30).
19. Claimant had his final physical therapy appointment on September 16, 2019, at which he reported he was feeling pain in his "right shoulder area" and experienced pain with lifting and pulling the cord to start his lawn mower. (Ex. 5, p. 49).
20. At each of these visits with Dr. Polanco, Claimant completed a questionnaire himself. In every questionnaire Claimant completed, he wrote that his pain was located in his right shoulder or right bicep muscle. He never wrote that he had pain or symptoms in his neck, or upper back, or above his right arm at the shoulder. Claimant circled his right arm at the shoulder in the pain diagram portion of those questionnaires he completed at these appointments. He never circled or endorsed symptoms above his right arm at the shoulder in those pain diagrams (Ex. B, pgs. 70; 76; 80; 85; 90; 95; 100). These questionnaires, and Claimant's statements to Dr. Polanco remained consistent throughout his treatment.
21. Claimant also continued to see Dr. Pak after his February 27, 2019, surgery. On April 1, 2019, Dr. Pak noted that Claimant stated he had neck pain (Ex. A, p. 47). This is the only such notation in the records where Claimant complained of neck pain. Claimant

did not tell Dr. Pak or other providers at Dr. Pak's office in those subsequent visits that he had symptoms above his right arm at the shoulder. Claimant continually described his symptoms as being at and below his right arm at the shoulder (Ex. A, pp. 41-61). Claimant last saw Dr. Pak on July 16, 2019, and said his right shoulder, "[I]s doing well. He states he only has pain with over use." Claimant did not say he had symptoms in his neck, back, scapula, or any body part or area above his right arm at the shoulder (Ex. A, p. 58).

22. Claimant attended 16 physical therapy appointment at HealthWorks Rehabilitation from June 14 through August 27, 2019 (Ex. C). The notes from those visits do not mention any symptoms above Claimant's arm at the shoulder, in the neck, upper back, or scapula regions. A May 17, 2019, physical therapy report, (Ex. 5, p. 44), shows that Claimant stated he was tender in his trapezius. This visit was more than three months before claimant reached MMI. At no subsequent visit to this or any other provider is this symptom noted once again.
23. On August 9, 2019, Claimant told Dr. Polanco that his pain was a "1" on a 10-point pain scale, increasing to 3/10 with heavy lifting, or trying to tuck the back of his shirt into his pants. (Ex. B, p. 102). Claimant said his symptoms were, "[A] dull ache in the right shoulder." Claimant told Dr. Polanco, "[H]e feels as though, 'He's made great improvement.'" Dr. Polanco found normal range of motion in claimant's neck, no tenderness in claimant's scapulae, and did not mention any symptoms above the arm at the shoulder. (Ex. B, pp. 102-103).
24. Dr. Polanco placed Claimant at MMI on September 16, 2019. He found Claimant had no range of motion deficits or impairment, and could work without restrictions. He gave claimant a 10% rating of his shoulder for joint crepitation. Dr. Polanco did not document or discuss any symptoms in Claimant's neck, trapezius/rhomboid muscles, or upper back. He released Claimant to work without restrictions. Claimant, on the 9/16/2019 diagram, did not indicate any symptoms above his arm at the shoulder, and again wrote that his pain was located in his right shoulder (Ex. B, pp. 106-107).
25. On October 18, 2019, Respondents filed a Final Admission of Liability, accepting Dr. Polanco's MMI date, and impairment rating (Ex. I). Claimant objected to that admission, and requested a DIME. Claimant, in that DIME Application, requested that Dr. Hughes evaluate his right shoulder, and cervical spine.
26. John Hughes, M.D. saw Claimant on January 6, 2020, for the DIME. Claimant told Dr. Hughes he was pleased with how he healed after surgery, saying his surgery, "Got everything back where it needed to be." (Ex. D, p. 129) Weather changes, Claimant said, made his shoulder ache. His right shoulder pops and cracks. Reaching behind his back with his right hand was difficult. Dr. Hughes noted Claimant denied neck injury after his fall on February 14, 2019 *Id* at 127. Dr. Hughes compared Claimant's symptoms at this appointment to the symptoms endorsed in the pain diagrams he had completed for Dr. Polanco, and found them similar *Id* at 129. Claimant did not tell Dr. Hughes that he had symptoms in his neck or in his upper back, and stated his

symptoms were in his right shoulder.

27. Dr. Hughes, pursuant to Claimant's request in the Division IME application, stated he would examine Claimant's cervical spine. He did range of motion measurements of Claimant's neck, and wrote that he found those reduced. However, he opined that these limitations were, "[W]ithout a clear relationship to injuries Mr. Skattum sustained when he fell on February 14, 2019." He continued, "There is no evidence that he sustained a cervical spine injury when he fell on February 14, 2019. Findings of examination today are consistent with cervical spondylosis with reduced ranges of motion but I do not believe that Mr. Skattum meets the criteria for an impairment rating of the cervical spine in accordance with Table 53 of the AMA Guides." (Ex. D, p. 131)
28. Dr. Hughes did find that Claimant had range of motion limitations in his right shoulder and (consistent with Dr. Polanco's opinion), found an impairment for residual crepitation of the right shoulder. Dr. Hughes found Claimant's total right upper extremity impairment was 16%, converting to a 10% whole-person impairment. By this time, Claimant had a light duty job with a new employer, and was able to do all aspects of that job without pain, restrictions, symptoms, or accommodations. Dr. Hughes also said claimant did not require maintenance medical treatment *Id* at 132.
29. Claimant has not returned to Dr. Polanco, or Dr. Pak, or his physical therapists for additional care after Dr. Polanco found Claimant had attained MMI.
30. Claimant had sustained previous work-related injuries to his neck resulting in medical treatment and evaluations before this work injury occurred. On November 26, 2007, Claimant told Dr. Delos Carrier that he had aching and pain in his neck (Ex. E, p. 147). Dr. Carrier found Claimant had a possible injury to his disc at the C5-C6 level, and recommended an MRI. That MRI, done November 29, 2007, showed "[D]isk [sic] degeneration at C3-C4, C4-C5, and C5-C6 with moderate to large central to right-sided disk [sic] protrusion indenting the dural sac on the anterior margin and a minimal central right paracentral disk [sic] protrusion at the C6-C7 level and a minimal impression on the dural sac anterior margin at C7-T1 region." *Id* at 149.
31. Claimant still reported neck pain when he saw Dr. Carrier on December 31, 2007 (Ex. E, p. 151). Dr. Carrier, on February 28, 2008, found claimant had cervical spondylosis (Ex. E, p. 154). He stated that diagnosis and disc degeneration and disc pathology was not related to the work injury for which he was treating Claimant. When Claimant returned to Dr. Carrier on May 28, 2008, with continued pain in his neck, Dr. Carrier told Claimant to see treatment for those symptoms and right-sided disc pathology with his personal physician (Ex. E, p. 156).
32. In 2014, Claimant stated he had peripheral neuropathy to his hands (Ex. F, p. 157). On December 8, 2014, claimant said he had neck pain, and was referred to a cervical spine x-ray (Ex. F, pg. 164). Claimant complained of neck pain to Dr. Henley on February 17, 2015 (Ex F, pg. 168).

33. Claimant testified at hearing. He explained that he already had an existing relationship with Dr. Pak from December, 2018. “On December when I went in, I had a shoulder problem *that just never got better.*” (Transcript, p. 19)(emphasis added). Claimant noted that as of July of 2019, he was having trouble washing his back, putting on shirts overhead, and reaching high shelves. He described the pain as occurring “Basically, between the shoulder area and the neck area....” *Id* at 26. He would avoid doing anything unless he “absolutely had to.” Even as of today, he described cramping and muscle problems in the shoulder, which caused sleep issues as well.
34. He testified that he had “actually ..very little pain, if any, between...the last time I saw Dr. Pak and the accident itself. It basically got to the point of very little pain ever doing anything.” *Id* at 20. When asked by Dr. Polanco to describe the location of his pain, Claimant testified that he told Dr. Polanco that it was “my shoulder area between my shoulder and my neck area.” *Id* at 25. He did not have an explanation why Dr. Polanco did not note this. Dr. Polanco did not palpate this area either.
35. Claimant was asked why, if his trapezius region was hurting, he did not circle that on his pain diagrams. He replied: “I guess because they were mainly working on the right shoulder trying to get it loosened up, not thinking about that particular muscle.” *Id* at 35.

Q Were you ever asked by Dr. Polanco where did it hurt when you performed your daily activities?

A He asked me, and I said basically it was *between the shoulder and the neck area it hurt the most.* *Id* at 36 (emphasis added).

.....

Q ...Did they ask you, when you were pushed on or palpated, where it hurt?

A Yes

Q And did you tell them where it hurt?

A Basically, when they were pushing it on it, it was between the shoulder and neck area on that—on the trapezius muscle and the point in between.

Q And that was your answer to their question?

A That was my answer to their question.

36. On cross-examination, Claimant acknowledged that he had had neck pain and neck symptoms for many years prior to this 2/14/2019 work injury, but it was “Not the same.” *Id* at 41. He did not recall ever being told by previous medical providers that he had degenerative disc changes in his cervical spine. *Id.* He was confident he had provided the most accurate information to his medical providers when asked about the location of his symptoms.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

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

2. The ALJ’s factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness’s testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). A Workers’ Compensation case is decided on its merits. Section 8-43-201, C.R.S.

Permanent Partial Disability / Conversion, Generally

4. Section 8-42-107, C.R.S., sets forth two different methods of compensating medical impairment. Subsection (2) provides a schedule of disabilities and subsection (8) provides for whole person ratings. The threshold issue is application of the schedule and this is a determination of fact based upon a preponderance of the evidence. The question of whether the Claimant sustained a whole person medical impairment compensable under § 8-42-107(8), C.R.S., is one of fact for determination by the ALJ. Claimant must prove a whole person impairment by a preponderance of the evidence. The application of the schedule depends upon the “situs of the functional impairment” rather than just the situs of the original work injury. The term “injury” as used in § 8-42-107(1)(a)-(b), C.R.S., refers to the part or parts of the body which have been impaired or disabled, not the situs of the injury itself or the medical reason for the ultimate loss. *Langton v. Rocky Mountain Health Care Corp.*, 937 P.2d 893 (Colo. App. 1996); *Strauch v. PSL Swedish Health Care System*, 917 P.2d 366 (Colo. App. 1996).

5. “Functional impairment” is distinct from physical (medical) impairment under the *AMA Guides* and as noted above, the site of functional impairment is not necessarily the site of the injury itself. The site of functional impairment is that part of the body

which has been impaired or disabled. *Strauch, supra*. Physical impairment relates to an individual's health status as assessed by medical means. Disability or functional impairment, on the other hand, pertains to a person's ability to meet personal, social, or occupational demands, and is assessed by non-medical means. Consequently, physical impairment may or may not cause "functional impairment" or disability. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office*, 984 P.2d 656, 658 (Colo. App. 1998). Physical impairment becomes a disability only when the medical condition limits the claimant's capacity to meet the demands of life's activities. *Id.* "Functional impairment" need not take any particular form. See *Nichols v. LaFarge Construction*, W.C. No. 4-743-367 (October 7, 2009); *Aligaze v. Colorado Cab Co.*, W.C. No. 4-705-940 (April 29, 2009); *Martinez v. Alberston's LLC*, W.C. No. 4-692-947 (June 30, 2008). In fact, "referred pain from the primary situs of the industrial injury may establish proof of functional impairment to the whole person." *Hernandez v. Photronics, Inc.*, W.C. No. 4-390-943 (July 8, 2005). Nonetheless, symptoms of pain do not automatically rise to the level of a functional impairment. To the contrary, there must be evidence that such pain limits or interferes with Claimant's ability to use a portion of his body to be considered functional impairment. See *Mader v. Popejoy Construction Co., Inc.*, W.C. No. 4-198-489 (August 9, 1996), *aff'd Popejoy Construction Co., Inc.*, (Colo. App. No. 96CA1508, February 13, 1997) (not selected for publication).

6. Permanent disability benefits are determined at the time Claimant reaches MMI. "This is true because the Claimant's condition has become stable and the permanent effects of the injury are ascertainable. Section 8-40-201(11.5), C.R.S.; *Golden Animal Hospital v. Horton*, 897P.2d 833, 838 (Colo. 1995)." *Olivas-Soto v. Genesis Consolidated Services*, W.C. No. 4-518-876 (2005).

Conversion to Whole Person, as Applied

7. Claimant reported no pain, symptoms, or diagnosis of any injury, above his right arm at the shoulder, for weeks beyond February 14, 2019. The one occasion where Claimant did complain of symptoms about his right arm at the shoulder was on May 17, 2019. This was months before he was placed at MMI, and he did not repeat these symptoms at subsequent visits. Claimant's extensive medical records from multiple providers and physical therapists does not document that Claimant sustained an impairment above his right arm at the shoulder. Had Claimant experienced such an impairment, the ALJ finds that it would be documented in the medical records from these various providers and voiced by Claimant. While Claimant testified at hearing that he told his providers, including the physical therapist and Dr. Polanco, that his trapezius was painful, the ALJ finds otherwise. It is the role and function of the ATP to document pain and lack of function when it is complained of, so treatment may then be tailored. The ALJ cannot conclude that the medical providers ignored his complaints, because they were focused on his shoulder joint only.

8. Claimant wrote on every pain questionnaire given before he saw Dr. Polanco for care that his pain and symptoms were at his right shoulder, and consistently stated in the body pain diagram in those questionnaires that his symptoms were at his right

arm at the shoulder. Nothing above the glenohumeral joint was ever marked by Claimant. Claimant's providers did not find, nor did the DIME, that Claimant had any symptoms or impairment above his right arm at the shoulder. While Claimant now complains of certain limitations on his activities of daily living, the evidence falls short that his whole person is affected. Pain and soreness at the glenohumeral joint, and not above, can still interfere with activities of daily living, much in the same way a painful elbow can. It is further noted that, to the extent Claimant could argue that his symptoms at MMI compromised the Whole Person, he was already complaining to Dr. Pak of similar symptoms in the weeks *before* the work injury.

9. Claimant has not met his burden of proof here. Claimant's impairment causally related to this claim will remain on the schedule of impairments, and is 16% of his right upper extremity as found by the DIME Dr. Hughes.

ORDER

It is therefore Ordered that:

1. Claimant's request to convert his 16% upper extremity Impairment Rating to the Whole Person is denied and dismissed.
2. All matters not determined herein are reserved for future determination.

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

DATED: August 13, 2020

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

- I. Whether Claimant established by a preponderance of the evidence that he sustained a compensable industrial injury on January 2, 2020.
- II. Whether Claimant established by a preponderance of the evidence that he is entitled to reasonable and necessary medical treatment.
- III. Whether Claimant established by a preponderance of the evidence that Banner Health and Dr. Mackintosh are authorized treating providers.
- IV. Whether Claimant established by preponderance of the evidence that he is entitled to temporary total disability benefits.

FINDINGS OF FACT

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

1. Claimant is employed with Employer. Claimant's job requires him to process animal feed at Employer's feed processing plant.
2. Before the alleged injury, Claimant reported problems with his back that prevented him from working in June 2019. (*Hearing TR*, p. 43. 21-25).
3. Claimant also complained of being harassed by coworkers in December 2019. (*Hearing TR*, p. 43. 15-18; *Respondents' Exhibit H*, p. 76).
4. On January 2, 2020, Claimant was working in the course and scope of his employment with Employer.
5. That morning, Claimant was short mixing animal feed and mixing animal feed to be transferred to the pellet mill to be made into pellets for animal feed. (*Hearing TR*, p. 9. 4-7; p. 12. 12-14).
6. Claimant alleges that while pulling ingredients from a rack, he noticed trash on the ground. He claims he picked up the trash and when he stood up, he realized a forklift was 20 feet away. To avoid being "hit" by the forklift being driven by his colleague Tyler M[Redacted], Claimant testified he, "thrusted (sic) my upper body out, and I kind of went over the weight (sic) of the back of the forklift." (*Hearing TR*, p. 14. 9-16).
7. At hearing, Mr. M[Redacted] specifically testified he did not strike Claimant with the forklift. (*Hearing TR*, p. 31. 11-13).

8. According to his witness statement taken on the alleged date of injury, Mr. M[Redacted] stated he looked back, then put the forklift in reverse, and then heard someone yell as he was backing up the forklift. (*Respondents' Exhibit H*, p. 68).
9. Upon hearing the yell, Mr. M[Redacted] testified he immediately stopped the forklift. (*Hearing TR*, p. 31. 17-20). Mr. M[Redacted] testified, and his testimony is found credible and persuasive and corroborated by other evidence, that Claimant was standing about 20 feet away from the forklift at the time of the alleged incident. (*Hearing TR*, p. 32. 1). Mr. M[Redacted]'s testimony contradicts Claimant's testimony about the alleged accident.
10. According to Mr. M[Redacted] Claimant would not communicate with him so he continued with his work. (*Respondents' Exhibit H*, p. 68).
11. At hearing, Claimant's colleague Melissa C[Redacted] testified she was working at the plant on the date of the alleged incident in the area where the incident allegedly occurred and did not see the forklift strike Claimant. (*Hearing TR*, p. 36. 20-22). According to her witness statement taken on the date of the alleged injury, Claimant was nowhere near the forklift while it was in motion. (*Respondents' Exhibit H*, p. 69). Moreover, Claimant did not tell Ms. C[Redacted] that he had been struck by the forklift. (*Hearing TR*, p. 37. 12-14). Ms. C[Redacted]' testimony is found to be credible and persuasive and contradicts Claimant's testimony about the alleged accident.
12. Claimant testified that after the alleged incident he went to the main office of the plant where he alleges he yelled "Tyler hit me." (*Hearing TR*, p. 15. 21-22). At hearing, Claimant testified he did not receive a response from anyone in the office after yelling out he had been hit by the forklift. He then voluntarily walked off the job by proceeding out to his car to seek medical attention as he alleged, "nobody was helping me." (*Hearing TR*, p. 16. 10-19; p. 22. 7-15).
13. Claimant's colleague, and supervisor, Joshua L[Redacted], a production supervisor with Employer, was in the office at the time of the alleged accident. At hearing, Mr. L[Redacted] testified he heard Claimant say, "hit by the forklift." He then repeatedly asked Claimant what happened, trying to get Claimant to stop walking and explain what happened, only to have Claimant keep repeating the phrase, "he hit me with a forklift," as he walked out of the plant. (*Hearing TR*, p. 39. 22-25).
14. Mr. L[Redacted] did not observe Claimant walking with a limp or limitation in his gait as he left the plant. (*Hearing TR*, p. 41. 16-24).
15. Mr. L[Redacted] then had Claimant's colleagues complete witness statements on what they had observed. Based on that investigation, Mr. L[Redacted] testified he had been unable to confirm an incident had occurred that day. (*Hearing TR*, p. 46. 3-15).
16. Mr. L[Redacted]'s testimony is found to be credible and persuasive and contradicts Claimant's testimony.

17. After voluntarily walking off the job and leaving his place of employment, Claimant first presented at the Emergency Department at Sterling Regional Medical Center. Claimant alleges he presented to a Dr. Mackintosh, who he is asserting is the authorized treating physician. (*Hearing TR*, p. 9. 20-21, p. 16. 21-25).
18. That said, according to the emergency room report from that initial visit, Claimant presented to Michael Baier, D.O. (*Respondents' Exhibit A*, p. 1).
19. At the emergency department, Claimant reported his toe had been caught by a forklift at work however the toe did not get run over. (*Hearing TR*, p. 23. 22-25). He reported extreme lower back pain and right-sided pain. It was also noted he was extremely frustrated as the forklift driver had not stopped to see if he was okay and instead yelled at him. (*Respondents' Exhibit A*, P. 1).
20. Despite having sent text messages of his inability to work in June 2019 due to back pain, Claimant reported he had no history of back pain in the past. (*Id.*; *Respondents' Exhibit H*, p. 65).
21. Dr. Baier opined it was unclear why Claimant was guarding and had weakness in his plantar flexion. (*Respondents' Exhibit A*, p. 3). Nor was there any evidence of objective findings or evidence of trauma to Claimant's body. (*Respondents' Exhibit F*, *Burriss depo.* p. 10. 3-5).
22. Claimant underwent an MRI of the lumbar spine without contrast. The MRI revealed degenerative disc space narrowing and a small central disc protrusion at the L5-S1 level that was not causing any compromise of the canal or foramen. The MRI also revealed mild facet arthritis at the L5-S1 level. (*Respondents' Exhibit A*, p. 5).
23. The next day, January 3, 2020, Claimant's wife presented a written statement to David J[Redacted], the plant manager, about his alleged injury. Claimant testified at the hearing, despite this written statement about the injury that his wife produced to Mr. J[Redacted], he was not contacted by any representatives from Employer about where to seek medical treatment for his alleged injury. (*Hearing TR*, p. 17. 20-24).
24. At hearing, Mr. J[Redacted] testified based on the information he was provided on the alleged incident, including the statement Claimant's wife dropped off and witness statements from Claimant's colleagues, he determined an incident had not occurred as alleged by Claimant. (*Hearing TR*, p. 55. 8-14).
25. Further, based on his knowledge of the tightness of where the alleged incident occurred and the speed of the forklift, together with the information provided by Claimant's colleagues on where he was standing at the time of the alleged incident, it did not make sense that the incident could have occurred as Claimant alleged. (*Hearing TR*, p. 64. 7-11).
26. Mr. J[Redacted] then painstakingly went through the photographs of the forklift and the area where the incident allegedly occurred. Mr. J[Redacted]'s testimony is found to be credible and persuasive. It fits with and corroborates the testimony

of Mr. M[Redacted] and Ms. C[Redacted] and directly refutes Claimant's testimony about the alleged incident.

27. Claimant asserts he was unable to return to work. He also testified that Employer did not provide any modified job offers and that he is currently unemployed and unable to return to any type of work. (*Hearing TR*, p. 10. 2-5).
28. Claimant also testified no representative from Employer has contacted him about his injury to investigate what happened or to get a statement from Claimant about the alleged injury. (*Hearing TR*, p. 19. 18-23).
29. That said, at the hearing, Mr. L[Redacted] credibly testified he tried to contact Claimant multiple times to investigate what happened. Claimant, however, never called him back and basically abandoned his job. (*Hearing TR*, p. 44-45).
30. On January 9, 2020, Claimant presented at Banner Health to Keri Ann McKay, PA. He reported the forklift had caught his left toe and smacked him in the right hip. He reported numbness, bilaterally, in his feet and legs. Upon physical examination, there were no abrasions or bruises noted. (*Respondents' Exhibit B*, pp. 7-8).
31. PA McKay also noted Claimant was not happy with how Employer had treated him about his alleged injury. (*Claimant's Exhibit 7*, p. 32).
32. The claim was put on a Notice of Contest on January 16, 2020 to allow Respondents to conduct further investigation into the compensability of Claimant's alleged injury. (*Claimant's Exhibit 5*, p. 9).
33. When Claimant was seen by PA McKay on January 30, 2020, he reported back spasms, numbness, and decreased strength down both legs. As a result of the self-reported numbness and weakness, Claimant alleged he was falling at home because of his legs giving out under him. Yet PA McKay did not find any objective evidence to support Claimant's contention that his legs were numb and weak and causing him to fall. Thus, there were no findings of bruising or abrasions caused by Claimant allegedly falling. Plus, Claimant's contention that he was falling also seems doubtful since PA McKay noted Claimant presented to her office using a walker. In other words, Claimant's use of a walker should have prevented him from falling. (*Claimant's Exhibit 7*, p. 29).
34. Claimant was again seen by PA McKay again on February 20, 2020. He again reported having leg numbness and was using a cane for support. PA McKay also noted Claimant was not working as he felt he could not perform his job as lifting caused him pain. (*Claimant's Exhibit 7*, p. 23).
35. When Claimant was seen by Gene Cook, PA at Banner Health on March 11, 2020, he reported he had developed severe spasms and worsening leg functions in the months that followed the alleged incident. PA Cook noted he had undergone no therapy, chiropractic, or other alternative therapy. PA Cook also noted Claimant had reportedly gained 60 lbs. since the alleged incident. That said, PA Cook's physical examination of Claimant seems to reflect there were only subjective symptoms of pain and worsening leg functions without objective findings to support Claimant's complaints. (*Respondents' Exhibit C*, p. 10).

36. As a result, PA Cook opined a new MRI was unnecessary to evaluate any other changes and that Claimant did not have any pathology that required surgical intervention. (*Respondents' Exhibit C*, p. 12). He diagnosed Claimant with acute back pain with radiculopathy and noted the mild central disc bulge at L5-S1 with underlying disc degeneration revealed in an MRI taken that day. (*Claimant's Exhibit 8*, p. 38).
37. On May 5, 2020, Claimant underwent an Independent Medical Evaluation with John Burris, M.D. (*Respondents' Exhibit F, Burris depo.* p. 8. 24-25).
38. At his deposition, Dr. Burris opined Claimant had many subjective reports of pain and there were inconsistencies in those subjective reports. (*Respondents' Exhibit F, Burris depo.* p. 8. 9-12).
39. As to the date of injury, Claimant reported to Dr. Burris his left foot had been pinched/trapped under the pivoting tire of the forklift and the back of the forklift contacted him on the right side, specifically the front of his right hip. This caused him to contort his body. (*Respondents' Exhibit F, Burris depo.* p. 9. 7-12).
40. Based on that report, Dr. Burris opined he would have expected to see some type of contusion, a sprain, or a strain. (*Respondents' Exhibit F, Burris depo.* p. 9. 22-24). Review of the medical evidence contemporaneous to the alleged date of injury does not support any evidence of a contusion, sprain, or strain.
41. Claimant then underwent an IME at his lawyer's request with Anjmun Sharma, M.D. on June 5, 2020. (*Respondents' Exhibit G, Sharma depo.* p. 5. 13-14).
42. At the IME Claimant reported developing low back pain immediately following the alleged injury. (*Claimant's Exhibit 6*, p. 10). Claimant reported his foot had been pinched and trapped under the pivoting tire of the forklift and the back of the vehicle. (*Claimant's Exhibit 6*, p. 11).
43. At his deposition, Dr. Sharma admitted he did not know if the alleged incident even occurred. Dr. Sharma also admitted that he based his opinions on the subjective reporting of what Claimant told him. (*Respondents' Exhibit G, Sharma depo.* p. 10. 9-11).
44. At the IME, Dr. Sharma noted Claimant demonstrated pain behaviors that could be consistent with a low back injury. That said, at his deposition, Dr. Sharma admitted these pain behaviors could also be attributed to the three-hour drive Claimant had to the IME. (*Respondents' Exhibit G, Sharma depo.* p. 15. 4-8).
45. Dr. Sharma's office is in Monument, Colorado outside Colorado Springs. Claimant resides in Sterling in northeast Colorado.
46. Upon physical examination with Dr. Sharma, Claimant demonstrated good range of motion of the lumbar region. (*Respondents' Exhibit G, Sharma depo.* p. 16. 17-19). Yet he only raised his legs about 15 degrees from the bottom of the table. (*Claimant's Exhibit 6*, p. 15).

47. Although Dr. Sharma made recommendations for more medical care, he admitted at his deposition that all the recommendations he made should be carried out by Claimant irrespective of whether he was injured at work. (*Respondents' Exhibit G, Sharma depo.* p. 32. 3-12).
48. Claimant was seen by Adam Mackintosh, D.O. on May 20, 2020. Claimant reported he had undergone an MRI that had come back normal, but he was still in pain. (*Claimant's Exhibit 7, p. 20*).
49. Based on a review of additional medical records, Dr. Burris issued an addendum to his IME report on June 8, 2020. Based on his review of those records, he opined there was a similar pattern in the records as documented in his IME report of Claimant's complaints about his employer as well as examinations obscured by guarding, pain behaviors, and poor effort. Nor were there any objective findings documented in any of the other medical records he reviewed to support Claimant's self-reported symptoms. (*Respondents' Exhibit E, p. 20*).
50. Upon review of Dr. Sharma's IME Dr. Burris again opined Claimant had several inconsistencies in his subjective complaints and symptomology yet there were no objective findings to support those complaints. (*Respondents' Exhibit F, Burris depo.* p. 19. 2-10).
51. At his deposition, Dr. Burris also testified Claimant still harbored a great deal of anger during the IME with Dr. Sharma as when Dr. Burris saw him at the May 5, 2020 IME. Dr. Burris opined psychological factors could be driving Claimant's ongoing subjective pain complaints. (*Respondents' Exhibit F, Burris depo.* p. 22. 6-15).
52. The ALJ finds Dr. Burris' opinions in his reports and deposition testimony to be credible and persuasive.
53. The ALJ does not find Claimant's version of events about the incident with the forklift to be credible for many reasons. First, each Employer witnesses who was working with Claimant during the alleged incident and testified at hearing credibly and persuasively testified that they did not see the alleged incident or see any indication that the incident even occurred.
54. Second, Claimant's self-reported symptoms are inconsistent. For example, when Claimant was evaluated by Dr. Sharma in June 2020, he told Dr. Sharma that he lost bowel and bladder function one time. Based on Claimant's report, Dr. Sharma stated Claimant was consistent about reporting his loss of bowel and bladder function. Claimant, however, has not been consistent about the reporting of his bowel and bladder problems. Claimant saw Dr. Burris in May 2020, one month earlier, and told Dr. Burris that he has lost his bowel and bladder function 4 times. So, although Claimant might be consistent about mentioning the issue, he is inconsistent about its frequency.
55. Third, many of Claimant's self-reported symptoms are not supported by any objective findings. For example, Claimant contends that since the incident at work, he suffers from bowel and bladder incontinence. Dr. Sharma also noted that such condition is called "cauda equinus syndrome" and is identifiable on an

MRI. In this case, however, Claimant's MRI did not show cauda equina syndrome. As a result, Dr. Sharma found the report of such symptoms, without MRI findings to support those symptoms, to be "puzzling." (*Burris Deposition* pp. 17-18.)

56. Furthermore, Claimant's subjective complaints suggest radiculopathy. These symptoms include the following:

- Numbness and tingling in his legs.
- Numbness and tingling in his feet.
- Numbness and tingling in his thighs.
- Bilateral weakness in his legs.
- The need to use a walker and cane at times.

However, despite his subjective complaints being indicative of radiculopathy, even Dr. Sharma's findings on physical examination do not support Claimant's subjective complaints. For example, objective testing revealed Claimant had the following:

- Normal and excellent strength in legs.
- Normal reflexes bilaterally.
- Normal findings revealing no atrophy in his lower extremities, particularly the thighs and legs.

57. Based on the totality of the evidence, the ALJ does not find Claimant's statements his Employer and co-workers regarding the alleged accident to be credible, reliable, or persuasive. The ALJ also does not find Claimant's statements made to the various medical providers regarding the alleged accident and his symptoms to be credible, reliable, or persuasive.

58. Based on the totality of the evidence, the ALJ also does not find Claimant's testimony regarding the alleged accident and his symptoms to be credible, reliable, or persuasive.

59. Dr. Sharma's opinions and conclusions about the cause of Claimant's symptoms and Claimant's need for medical treatment depends on the information provided by Claimant. The ALJ does not find the information Claimant provided to his medical providers, including Dr. Sharma, to be credible or reliable. As a result, the quality of Dr. Sharma's opinion is no better than the data on which he relies. Thus, the ALJ does not find Dr. Sharma's opinions and conclusions to be reliable or persuasive.

CONCLUSIONS OF LAW

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

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles about credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Claimant established by a preponderance of the evidence that he sustained a compensable industrial injury on January 2, 2020.

Claimant was required to prove by a preponderance of the evidence that at the time of the injury he was performing service arising out of and in the course of the employment and that the alleged injury was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability

or need for medical treatment. *Duncan v. Indus. Claim Appeals Office*, 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). Whether the claimant met the burden of proof to establish a compensable injury is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000).

Claimant was engaged in the course and scope of his employment on January 2, 2020. But Claimant failed to prove by a preponderance of the evidence that he suffered an injury that day.

The ALJ concludes Claimant has failed to prove by a preponderance of the evidence that the alleged forklift incident occurred at all. Claimant failed to establish he was struck by the forklift being driving by his colleague, Mr. M[Redacted]. Based on the evidence presented at hearing, the ALJ finds and concludes the forklift did not make contact with Claimant that day. The ALJ also finds and concludes Claimant failed to establish by a preponderance of the evidence that any other incident occurred that day involving the forklift that caused an injury and necessitated the need for medical treatment or caused any disability.

As found, the medical evidence submitted at hearing do not support Claimant's contention that he suffered an injury at work. Instead, the medical evidence contains mainly Claimant's subjective reports of symptoms. There are a few medical records that suggest Claimant might have had some muscle spasms. And the MRI shows a small central disc protrusion at the L5-S1 level. Claimant, however, had preexisting back problems. As a result, Claimant failed to establish any incident at work caused any muscle spasms, disc protrusion, or other condition that required medical treatment or caused any disability. Claimant also failed to establish that any incident at work aggravated or accelerated a preexisting condition.

As a result, the ALJ concludes Claimant failed to establish by a preponderance of the evidence that any incident at work caused, aggravated, accelerated, or combined with any pre-existing disease or infirmity and caused the need for medical treatment or caused any disability. Thus, the ALJ concludes Claimant has failed prove by a preponderance of the evidence that he sustained a compensable work injury on January 2, 2020.

ORDER

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

1. Claimant's claim for benefits is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed

it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: <http://www.colorado.gov/dpa/oac/forms-WC.htm>.

DATED: August 19, 2020.

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Did Claimant prove by a preponderance of the evidence he suffered a compensable injury on February 13, 2020?

If Claimant proved a compensable injury, the ALJ will determine:

- Did Claimant prove entitlement to reasonably necessary medical treatment?
- Which providers are authorized?
- What is Claimant's average weekly wage (AWW)?
- Is Claimant entitled to TTD benefits from February 14 through February 16, 2020, TPD benefits for February 17, 2020, and TTD benefits commencing February 18, 2020 and continuing?

FINDINGS OF FACT

1. Claimant works for Employer as a Field Technician. He performs maintenance and repair services at Walgreens stores across Colorado. The job entails a wide variety of repair and installation services, including electrical work, plumbing, installing countertops, and replacing glass. The job is physically demanding and would reasonably be classified as medium to heavy work.

2. Claimant worked out of his home and used his personal vehicle, a 2004 Chevrolet pickup truck, for work-related travel.

3. At approximately 12:52 PM on February 13, 2020, Claimant was involved in a motor vehicle accident while returning from a job at a Walgreens store in Aurora, Colorado. Claimant's vehicle was rear ended while he was stopped in traffic. The impact pushed his truck into the vehicle in front of him.

4. Claimant credibly testified he felt "very shaken up" immediately after the accident. He noticed an abrasion on his right leg from hitting the steering column but appreciated no other specific injuries at that time.

5. Shortly thereafter, Claimant discussed the accident by phone with his dispatcher, Jonathan Hughes. Claimant was heading home to rest. He told Mr. Hughes he hurt his leg in the accident, was "shooked up," and planned to get checked out later.

6. Claimant texted his supervisor, Scott S[Redacted], after arriving home. He stated, "I have been in an accident today as I was coming home. . . . I need to take a sick day for Friday, I am already starting to feel the stiffness in my left arm in my right leg." Claimant planned to see his doctor "to see if I can get some muscle relaxers," and assumed he would be "good by Monday."

7. He felt progressively worse over the weekend, with increasing back pain, neck pain, and headaches.

8. Claimant tried to work on Monday, February 17, 2020, and repaired a broken window at a Walgreens store. At 9:01 AM, he texted Mr. S[Redacted] that he could not keep working and needed to see a doctor. He stated, "Sorry but I am not ready to come back to work in full force because my right there [sic] is something pulled or out of alignment. I am going to try to get an appointment today." The ALJ infers this brief work activity corresponds to the 2.13 hours shown on Claimant's pay stubs for the period beginning February 17, 2020.

9. Claimant initially tried to see his PCP at Springs Medical Associates, but they had no available appointments for several days, so he went to the UC Health emergency department instead.

10. Claimant saw Kimberly Paine, NP at the emergency department. The report stats Claimant complained of low back and right buttock pain, shooting into his right leg and foot with "certain movements," particularly walking. He also reportedly described "occasional" headaches since the accident, although "he is unable to tell me if he truly hit his head or not." Ms. Paine documented, "Patient has had previous problems with his right lower back and leg from a previous car accident. He states that he did see a chiropractor and physical therapist after his last car accident and had his hip 'put back into place.' He is concerned that he is can [sic] have that same problem again." Although Claimant reported low back pain, and his symptoms were bad enough to bring him to the emergency room, NP Paine reported "no thoracic or lumbar spine tenderness with the exam." The remainder of NP Paine's physical exam was also reported as entirely normal.

11. At hearing, Claimant disputed NP Paine's account of his reported symptoms and physical condition. He testified he told her about neck and upper back pain in addition to the severe low back and leg symptoms. Claimant testified Ms. Paine primarily spoke with him and performed no detailed physical exam. Given the apparent internal incongruities in the report, coupled with closely contemporaneous reports from other providers, the ALJ is persuaded the emergency department report does not accurately depict the symptoms Claimant was having at the time.

12. Claimant texted Mr. S[Redacted] the next morning, February 18, and stated, "If have a doctor's appointment tomorrow at 8:30 AM. I'll let you know what they tell me and what [is] going to be done. I still have these massive headaches in the morning in my right leg feels like it's going to pop out of its socket. Emergicare¹ thinks it's my sciatic nerve because sit aggravate and triggers the nerve when sitting for a short period of time but the doctor didn't take any x-rays where [sic] yesterday."

13. Employer did not direct Claimant to a physician or clinic or give him a list of designated providers. Respondents conceded at hearing Claimant had the right to select his own treating physician.

¹ The ALJ infers Claimant meant "emergency room" when referring to "Emergicare."

14. Claimant was seen in the office of Dr. Scott Oliphant on February 19, 2020. He completed a pain diagram endorsing headaches, low back and right leg pain, pain in both shoulders, pain and numbness in his left arm and hand, right groin pain, and “pulling feels like my hip is popping out.” In response to the question whether he hit his head, Claimant replied, “I really don’t know?” For unknown reasons, Dr. Oliphant could not complete the examination that day and scheduled Claimant to return on February 22.

15. Claimant texted Mr. S[Redacted] after leaving Dr. Oliphant’s office. He stated, “I know you’re probably busy right now and that’s probably why you couldn’t answer your phone but I won’t to be coming back to work this week. Unfortunately the doctor postponed his visitation with me but he will see me Saturday. Meanwhile I am out for this week. I’m just going to use the rest of whatever time I have left I [sic] my PTO time and just put it towards this week.”

16. Dr. Oliphant evaluated Claimant on February 22, 2020. Dr. Oliphant observed, “[Claimant] has no symptom magnification or pain fixation findings and is a good historian. He gave a good effort on the effort test. He appears in some pain, related distress” Claimant described aching neck pain extending to his shoulders and upper back. His left shoulder was more painful than the right. He also reported low back pain, worse on the right side, radiating into his right leg. The physical examination revealed abnormalities in multiple areas, including the neck, upper back, shoulders, low back, and right leg. Dr. Oliphant appreciated hypertonicity and muscle spasms throughout the suboccipitals, splenius capitis, splenius cervicis, scalenes, trapezius, levator scapulae, erector spinae, and deltoids. He diagnosed cervical, thoracic, lumbar, and sacroiliac sprain/strain, muscle spasm resulting in myofascial pain syndrome, bilateral shoulder sprain/strain with muscle spasms resulting in myofascial pain syndrome, post-traumatic headaches with neck pain, post-concussive syndrome, and possible lumbar radiculopathy. He referred Claimant to Dr. Michael Ament for a neurological evaluation, Dr. Brock Bordelon to rule out an inguinal hernia, and Optima Rehabilitation for physical therapy. He also ordered cervical and lumbar x-rays and a lumbar MRI. The significant symptoms reported by Claimant and documented in Dr. Oliphant’s detailed report contrast sharply with the report from the emergency department just a few days earlier.

17. Claimant underwent a lumbar MRI on February 25, 2020. It showed disc protrusions at L3-4, L4-5, and L5-S1 that appeared to irritate and compress the bilateral L3 nerve roots, L4 nerve roots, and right L5 nerve root, respectively. The radiologist opined the L4-5 and L5-S1 disc protrusions compressing the nerve roots “may relate to acute to subacute pathology.”

18. On February 28, 2020, Claimant wrote to Charlene Purtlebaugh in Employer’s HR department, regarding his injuries. He described the accident and stated, “I am unable to come back to work because of headaches causing my equilibrium to be unbalanced, possible slip disc in my lower back and possibly a hernia that will be checked out on the 10th of March 2020. I am filing for workers’ compensation because I will not be able to come back to working at this [sic] and cannot work with my current injuries that I have sustained in the accident on February 13, 2020.”

19. Claimant saw Dr. Ament, a neurologist, on March 3, 2020. Dr. Ament noted, “within the first 24 hours after the collision, the patient developed jaw pain, headaches, bilateral shoulder pain, right hip pain, right knee pain, bilateral elbow pain, bilateral ankle pain, tinnitus, sensitivity to bright light, cognitive difficulties Within the first week, he developed neck and lower back pain.” Dr. Ament was most impressed with Claimant’s headaches and cervical issues. Dr. Ament documented, “The patient has a history of bilateral ulnar nerve repositioning surgeries . . . and has some decrease in intrinsic hand strength and ability to oppose digits 1 and 5. Against this background, he has now developed more difficulty with holding objects, and finds that he is dropping items. . . . In addition, his reflexes in the upper extremities are asymmetric, and taken in combination, there is concern for radicular pattern and potentially for relative cervical cord stenosis.” Significant examination findings included increased tone through the trapezius, reduced cervical range of motion, tenderness to palpation of the occipital cervical junction, and bilateral scalene pain. Vision examination showed convergence insufficiency and diplopia suggesting residual effects of a concussion. Dr. Ament opined,

Based on the patient’s reports and data available, there appears to be a plausible mechanism and sufficient force present to cause injury, and a temporal relationship between the injury and the onset of symptoms. The symptoms reported are consistent with the occurrence of a mild traumatic brain injury (mTBI)/concussion at the time of the accident. The patient reports being functional and asymptomatic with regard to the above-mentioned symptoms just prior to the referenced injury, with the exceptions noted in the body of the report. It is more likely than not that the patient’s symptoms as outlined are secondary to injuries sustained on the above indicated injury date. The patient’s pre-injury medical condition was fairly complicated as noted in the body of the report.

20. Dr. Ament ordered a cervical MRI and referred Claimant to Dr. Joshua Watt, a vision specialist. He also referred Claimant for cervical injections.

21. Claimant saw his PCP, Jessica Roberts, NP, on March 6, 2020. Nurse Robertson noted, “Accident 2-13-20, dx with mild concussion: drops car keys, stumbles but catches self, left-sided weakness, currently seeing neurologist. . . . New onset of lower back pain and bilateral groin. Walking increases sharp stabbing pain. +Chronic back pain. Polyneuropathy. Saw a neurologist decreased coordination, right eye vision, has started to have migraines.” NP Roberts’ assessment was “cervical disc disorder with radiculopathy; Pt is currently seeing several specialists related to car accident, as having concussion symptoms as well. Continue with neuro, gastro, and D.C. for treatments.”

22. There is no persuasive evidence Dr. Oliphant, Dr. Ament, or any other authorized provider referred Claimant to NP Roberts for any injury-related treatment.

23. Claimant had the cervical MRI on March 11, 2020. Significant findings included (1) multilevel facet arthropathy, (2) a C4-5 disc bulge and protrusion causing moderate left and mild right neuroforaminal narrowing possibly compressing and irritating the exiting left C5 nerve root, and (3) disc and facet pathology at C3-4 and C6-7 causing

neuroforaminal narrowing that “may abut and irritate the exiting right C4 and right C7 nerve roots” respectively.

24. Dr. Watt performed sensorimotor and neurobehavioral vision testing on April 20 and 21, 2020. He noted multiple abnormalities including visual field deficits, reduced ocular tracking, accommodation problems, a left visual midline shift, and possible vestibular issues. Dr. Watt opined “[Claimant] suffers from many conditions consistent with Post-Traumatic Vision Syndrome. He has deficits with his visual field, pursuit and saccadic eye movements, accommodative/focusing control, binocular fusion stability, visual perception, visual memory, visual midline shift, and visual motion sensitivity. . . . It is my professional opinion that the diagnosed conditions and previously mentioned visual deficits are 100% caused by the MVA that [Claimant] sustained on 02/13/2020.” Dr. Watt recommended optometric vision therapy, which he anticipated would probably require 24-28 sessions to remediate Claimant’s vision problems.

25. Claimant followed up with Dr. Ament on April 24, 2020 to review the cervical MRI. Dr. Ament opined, “the imaging shows multilevel moderate to severe abnormalities. I would not clear the patient for chiropractic maneuvers but would recommend engagement in physical therapy. The plan was to have him referred to interventional pain for cervical injections. Due to the Corona virus situation, this was not accomplished.” He referred Claimant to Pikes Peak Spine & Joint (“PPS&J”) for consideration of cervical and lumbar injections.

26. Claimant saw Patrice Kiesling² at PPS&J on May 6, 2020. Ms. Kiesling noted, “Neck pain was rated as a 6/10 radiating to all digits, right worse than left. The radicular symptoms affect his ability to grab and hold items in his hands. He has experienced multiple episodes of dropping dishes, coffee cups. He has now purchased only plastic-ware for safety measures. [After the] motor vehicle accident he started to experience headaches. These headaches are being treated by Dr. Ament. . . . Complains of low back pain. This pain is constant and is rated as an 8/10 based on the visual analog scale. He experiences radicular symptoms to the bilateral lower extremities right greater than left. Pain is exacerbated with activity and movement. The pain also affects his ability to sleep.” Cervical spine examination showed painful and limited range of motion, taught muscle bands and trigger points in the bilateral upper trapezius and rhomboid muscles, and reduced sensation in the right arm. Lumbar examination showed extreme tenderness, limited range of motion, and reduced sensation and strength in the right leg. Ms. Kiesling diagnosed neck pain, cervical radiculopathy, low back pain, lumbar radiculopathy, and myalgia. She recommended cervical and lumbar ESIs.

27. Dr. Kerry Latch at PPS&J performed a lumbar ESI on May 13, 2020.

28. Dr. John Raschbacher performed a record-review for Respondents on May 22, 2020. He also testified at hearing. Dr. Raschbacher agreed Claimant suffered injuries in the February 13 MVA but opined his injuries were minor and confined to the low back and right leg as referenced in the emergency room report. Dr. Raschbacher opined any

² The ALJ infers Ms. Kiesling is probably a PA or NP at the clinic.

symptoms related to the MVA would have been present when he went to the emergency room. Dr. Raschbacher saw no indication of a direct head injury. He opined whiplash can occasionally cause concussion but does not believe Claimant suffered whiplash because there were no reports of neck pain or cervical exam findings at the emergency room. Dr. Raschbacher acknowledged Claimant reported headaches at the emergency room, but opined they were probably related to “agitation or nervousness after trauma,” as opposed to a head injury. Dr. Raschbacher indicated he probably would have “had [Claimant] on some type of light-duty restricted work” immediately after the accident but does not know whether he would have Claimant under any restrictions as of the hearing. Dr. Raschbacher believes Claimant’s complaints are exaggerated and sees no “clear reason to believe him.”

29. Claimant has a history of conditions affecting or overlapping some of the body parts involved in his work-related injury. He treated with Dr. Malabre at Colorado Springs Health Partners in 2015, and Springs Medical Associates from 2017 through 2020. Dr. Malabre’s records contain a diagnosis of diabetic polyneuropathy, although Claimant disagrees that was a significant problem before the February 2020 work accident. It is not clear when the diagnosis was originally made or what diagnostic criteria were used. Respondents argue the record contains positive diabetic foot exams, but the cited page (Ex. D, p. 33) shows no observable problems with the feet or toes, and “normal” monofilament sensory testing bilaterally. There is no evidence Claimant ever underwent neurological testing and it appears the diagnosis was made based on symptoms. Claimant tried Neurontin and Lyrica in 2015, but there is no persuasive evidence of any specific treatment for diabetic neuropathy in the past several years.

30. Claimant injured his right shoulder in an MVA in April 2016. A June 3, 2016 MRI showed rotator cuff tendinosis, a SLAP tear, and a posterior inferior labral tear. The record does not conclusively show whether Claimant underwent surgery or other definitive treatment for the shoulder. A shoulder MRI on October 30, 2018 showed AC joint degenerative changes and a partial undersurface tear of the distal supraspinatus tendon, but “[the] rotator cuff appears otherwise normal. Remainder negative.”

31. At the time of the work accident, Claimant was taking Tramadol daily for lumbar and thoracic pain and lower extremity “symptoms.” There are few documented abnormalities on physical examinations aside from mild tenderness to palpation of the lumbar and thoracic paraspinal muscles and limited shoulder range of motion. Claimant’s pain was repeatedly described as “well controlled” with Tramadol, which supports Claimant’s testimony. A thoracic MRI on October 30, 2018 was largely unremarkable, with diffuse disc desiccation throughout the cervical spine and a small disc bulge at T7-8, but no significant canal or foraminal stenosis. An October 24, 2018 lumbar MRI showed only mild degenerative changes, mild stenosis at L2 through L4, and moderate bilateral neural foraminal stenosis at L4. There was no indication nerve root compression as referenced in the February 25, 2020 MRI report. Comparing the reports of the 2018 and 2020 MRIs supports the radiologist’s interpretation that the disc protrusions and nerve root compression at L4-5 and L5-S1 represent “acute to subacute pathology.”

32. Claimant's PCP records are filled with cloned passages carried over from one appointment to the next. For example, the following passages are recited verbatim multiple times from November 2017 through September 2019:

Right shoulder pain: MVA on 4-24-16. His symptoms include throbbing, constant ache, limited rom, and interference with general ADL. He's used heat, ice, massage, Epsom salts, and ibuprofen. He feels like it is not getting better.

Chronic Back Pain: He continues to take the tramadol 50 mg 5x day for subsequent symptoms down both legs.

On October 19, 2018, the notation regarding "Chronic Back Pain" changed slightly to:

Back pain began at MVA see above. Pain today is 2/10 localized in the thoracic back. He also states that he has RLS³ that is better with tramadol. Will obtain imaging today. He continues to take the tramadol 50 mg 5x day for subsequent symptoms down both legs.

The reference to Tramadol "5x day" persisted even after it was increased to six times per day.

33. Similar issues are seen in the Physical Examination section of the reports, with the following language repeated verbatim multiple times:

EXTREMITIES: on visual inspection there was no effusion, ecchymosis, conclusions, or bony deformities of the lumbar spine. The patient had mild tenderness to palpation over the lumbar and thoracic paraspinous muscles. The patient had FAROM. The patient strength was 5-5 and symmetric of the lower extremities. sensation was intact to light touch along the Sural, saphenous, deep and superficial peroneal nerves.

On visual inspection there was no effusion, ecchymosis, conclusions, or bony deformities of the Shoulders bilaterally. The patient had no tenderness to palpation. He has limited ROM due to pain. his strength was 5 5 and symmetric. sensation was intact to light touch at C5, C6, C, C8 and T1.

Negative Speeds Test

Negative cross arm impingement

Positive obrien's

Negative Jobes test

34. Nurse Roberts' office switched to a different format of EMRs in December 2019. On December 27, 2019, Claimant was seen for a medication refill, complaining of left leg pain and sleep issues. He denied any weakness, headaches, or visual changes. Examination of his spine was described as "on visual inspection there was no effusion,

³ The meaning of this acronym in this context is unclear, although in this ALJ's experience, "RLS" typically refers to Restless Leg Syndrome.

ecchymosis, conclusions, or bony deformities of the lumbar, thoracic or cervical spine. The patient had moderate tenderness to palpation over the bilateral paraspinous muscles at approximately L4-S1." He had full range of motion and strength of the upper and lower extremities. His pain was "well controlled" with medication with no significant functional deficits noted. The findings were the same on January 8, 2020, the last primary care visit before the work accident.

35. The usefulness of the previously described records is compromised by the large amount of cloned information, which raises questions regarding the accuracy of the descriptions of Claimant's condition at any given appointment. All this ALJ can glean with confidence is Claimant had low-level right shoulder, lumbar and thoracic back pain, and some degree of leg symptoms, all of which were "well controlled" on stable doses of Tramadol. This conclusion is buttressed by Claimant's working a physically demanding job without difficulty before the accident.

36. Claimant was seen at the St. Francis Medical Center emergency department on August 26, 2019 for left hamstring pain. PA Sharon Sawyer noted, "he awoke with the symptoms today. He reports feeling pain in his right hip Friday that has since resolved. He reports working in maintenance and having a labor-intensive job. He denies any acute onset of pain or known injuries or trauma. . . . No back pain. Pain is isolated to the hamstring region." The physical examination showed tenderness along the hamstring and inability to fully extend his knee because of pain. There was no tenderness to palpation around the hip, pelvis, thoracic, or lumbar areas. Claimant was diagnosed with left thigh pain and given an off-work note for three days.

37. The findings, conclusions, and opinions of Claimant's treating physicians are more persuasive than the contrary opinions offered by Dr. Raschbacher.

38. Claimant proved by a preponderance of the evidence he suffered a compensable injury on February 13, 2020.

39. The preponderance of persuasive evidence shows Claimant injured his neck, low back, right leg, and probably suffered a mild concussion/TBI from acceleration/deceleration forces (i.e., whiplash). His headaches are probably related to his neck pain, the concussion, or some combination thereof. Claimant's low back injury either represents a new injury or an aggravation of a pre-existing condition. The neck injury is new because there is no persuasive evidence of any pre-existing neck problems. Claimant's upper and lower extremity symptoms are compensable consequences of his neck and back injuries to the extent they are radicular in nature as opposed to symptoms of unverified polyneuropathy. There is no persuasive evidence Claimant suffered any structural injury to his shoulders. His bilateral shoulder pain probably represents muscle strains or referred pain from his neck. The ALJ agrees with the concession in Claimant's brief there is insufficient evidence to establish groin or pelvic symptoms and/or a hernia were caused by or related to the accident.

40. Claimant proved the evaluations and treatment provided by Dr. Oliphant, Dr. Ament, Dr. Watt, and PPS&J were reasonably needed to diagnose, cure, and relieve

the effects of Claimant's compensable injury. Treatment at the UC Health emergency room on February 17, 2020 was reasonably necessary emergent treatment.

41. Claimant had the right to choose his own treating physician because Employer never referred him to a provider. Claimant chose Dr. Oliphant, who became the primary ATP. Dr. Ament, Dr. Watt, and PPS&J are authorized based normal progression of authorized referrals.

42. Nurse Roberts and Springs Medical Associates are not authorized because there is no persuasive evidence of a referral from any authorized provider.

43. Claimant was paid a base rate of \$22.50 per hour, plus overtime. He was paid "portal to portal," including travel time to and from jobs. He was also paid an allowance for use of his personal vehicle for work and the upkeep of his tools, which is identified on his paystubs as "Vehicle Tool AI." The Vehicle Tool AI was included in Claimant's gross taxable wages and subject to F.I.C.A. and income tax withholding.

44. Claimant earned \$15,317.36 in gross taxable wages in the eleven full weeks immediately preceding the injury. This equates to an AWW of \$1,392.49, with a corresponding weekly TTD rate of \$928.32, and a daily TTD rate of \$132.62.

| Pay period end date | Gross Pay |
|--------------------------------|--------------------|
| 2/9/2020 | \$1,272.65 |
| 2/2/2020 | \$1,136.15 |
| 1/26/2020 | \$1,654.66 |
| 1/19/2020 | \$1,511.42 |
| 1/12/2020 | \$1,212.04 |
| 1/5/2020 | \$1,370.59 |
| 12/29/2019 | \$1,135.75 |
| 12/22/2019 | \$1,788.31 |
| 12/15/2019 | \$1,379.47 |
| 12/8/2019 | \$1,657.25 |
| 12/1/2019 | \$1,199.07 |
| TOTAL: | \$15,317.36 |
| No. weeks: | 11 |
| AWW: | \$1,392.49 |
| TTD rate: | \$928.32 |
| Daily TTD: | \$132.62 |

45. Claimant proved he was disabled by the effects of the work injury and suffered a wage loss commencing February 14, 2020. Claimant could not reasonably have tolerated the physical demands or the prolonged travel required by his job. Although he tried to return to work on February 17, the pain prevented him from continuing. Employer offered no modified duty and Claimant has been off work since February 18.

Claimant is entitled to TTD from February 14 through February 16, 2020 and from February 18, 2020 continuing until terminated by law.

46. Claimant earned \$47.93 for 2.13 hours of work on February 17, 2020. His average daily wage is \$198.93 ($\$1,392.49 \div 7 = \198.93), resulting in a wage loss of \$126.82. This equates to **\$98.97 in TPD benefits** ($\$198.93 - \$47.93 = \$151 \times 2/3 = \100.67).

CONCLUSIONS OF LAW

A. Claimant proved a compensable injury.

To receive compensation or medical benefits, a claimant must prove he is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo. App. 2001). The claimant must prove that an injury directly and proximately caused the condition for which he seeks benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). A pre-existing condition does not disqualify a claim for compensation if a work accident aggravates, accelerates, or combines with the underlying condition to cause disability or a need for treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990).

The mere fact a claimant is involved in a work-related “accident” does not automatically mean they suffered a compensable “injury.” The term “accident” refers to an “unexpected, unusual, or undesigned occurrence,” whereas an “injury” is the physical trauma caused by the accident. Section 8-40-201(1). In other words, an “accident” is the cause, and an “injury” is the result. *City of Boulder v. Payne*, 426 P.2d 194 (Colo. 1967). Workers’ compensation benefits are only payable if an accident results in a compensable “injury.” A compensable injury is one that requires medical treatment or causes a disability. *E.g.*, *Montgomery v. HSS, Inc.*, W.C. No. 4-989-682-01 (August 17, 2016). The mere fact that a claimant seeks medical treatment or receives work restrictions after an accident does not automatically establish a compensable injury if the symptoms that triggered the need for treatment or disability were not proximately caused by the accident. *E.g.*, *Madonna v. Walmart*, W.C. No. 4-997-641-02 (August 21, 2017); *Washburn v. City Market*, W.C. No. 5-109-470 (June 3, 2020); *Fay v. East Penn*, W.C. No. 5-108-430-001 (April 24, 2020).

As found, Claimant proved he suffered a compensable injury because of the MVA on February 13, 2020. The accident caused a need for treatment and disability. There is no dispute Claimant was involved in a rear-end MVA, and even Dr. Raschbacher agreed he suffered minor injuries to his low back and leg that reasonably required evaluation at the emergency room. Dr. Raschbacher also agreed he would have put Claimant on “light duty” restrictions for at least some undefined period.

B. Treatment rendered by Dr. Oliphant, Dr. Ament, Dr. Watt, PPS&J was reasonably necessary to diagnose, cure, and relieve the effects of Claimant's compensable injury.

The respondents are liable for medical treatment reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101. The mere occurrence of a compensable injury does not compel the ALJ to approve all requested treatment. Where the respondents dispute the claimant's entitlement to medical benefits, the claimant must prove the treatment is recently necessary and causally related to the industrial accident. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). The claimant must prove entitlement to disputed medical benefits by a preponderance of the evidence. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

As found, the preponderance of persuasive evidence shows Claimant injured his low back, neck, right leg, and probably suffered a mild brain injury from acceleration/deceleration forces (i.e., whiplash). His headaches are probably related to his neck pain, the concussion, or some combination thereof. Claimant's upper and lower extremity symptoms are also compensable consequences of his neck and back injuries to the extent they are radicular in nature as opposed to symptoms of an unverified polyneuropathy. There is no persuasive evidence Claimant suffered any structural injury to his shoulders; his bilateral shoulder pain likely represents muscle strains or referred pain from his neck. There is insufficient evidence to establish groin or pelvic symptoms and/or a hernia were caused by or related to the accident.

The evaluations and treatment provided by Dr. Oliphant, Ament, Watt, and PPS&J were reasonably needed to diagnose, cure, and relieve the effects of Claimant's compensable injury. The ALJ credits the findings and causation opinions of Claimant's treating physicians over the contrary opinions offered by Dr. Raschbacher. Dr. Raschbacher's exclusive reliance on the emergency room report to delineate the accident-related body parts is unpersuasive when viewed in the context of the entire record, particularly the pain diagram Claimant completed two days later and Dr. Oliphant's detailed report of February 22, 2020. The ALJ is not persuaded by Respondents' insinuation that Claimant's counsel orchestrated the expansion of Claimant's complaints between the February 17 emergency room visit and the February 19 appointment at Dr. Oliphant's office. It is more probable and consistent with the expected role of emergency rooms that Claimant received a cursory examination to rule out any condition that required immediate aggressive treatment or hospitalization and, finding none, was given palliative treatment and released with instructions to follow up with other providers. Respondents' argument that Claimant's current complaints are merely the continuation of multiple pre-existing conditions is refuted by the fact Claimant pursued minimal treatment and worked a physically demanding job with no apparent difficulty or limitation until the work accident. Claimant's back pain appears substantially more severe than before the accident, and there is no persuasive evidence of significant pre-injury neck pain, headaches, or vision issues like those Dr. Watt ascribed to the effects of the injury.

C. Dr. Oliphant, Dr. Ament, Dr. Watt, and PPS&J are authorized

Besides proving treatment is reasonably necessary, the claimant must prove the provider is “authorized.” *Bunch v. Industrial Claim Appeals Office*, 148 P.3d 381 (Colo. App. 2006). Authorization refers to a provider’s legal right to treat the claimant at the respondents’ expense. *Mason Jar Restaurant v. Industrial Claim Appeals Office*, 862 P.2d 1026 (Colo. App. 1993). Providers typically become authorized by the initial selection of a treating physician, agreement of the parties, or upon referrals made in the “normal progression of authorized treatment.” *Bestway Concrete v Industrial Claim Appeals Office*, 984 P.2d 680 (Colo. App. 1999); *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985).

Under § 8-43-404(5)(a)(I)(A), the employer has the right to choose the treating physician in the first instance. The employer must tender medical treatment “forthwith, ” or the claimant has “the right to select a physician or chiropractor.” *Id.*; *Rogers v. Industrial Claim Appeals Office*, 746 P.2d 565 (Colo. App. 1987). Here, Employer never referred Claimant to a physician, and Respondents agree the right of selection passed to Claimant. A claimant “selects” a physician when he demonstrates by words or conduct he has chosen a physician to treat the industrial injury. *Squitieri v. Tayco Screen Printing, Inc.*, W.C. No. 4-421-960 (September 18, 2000). The persuasive evidence shows Claimant chose Dr. Oliphant. Although he tried to get in with his PCP first, they had no available appointments soon enough, so he went to Dr. Oliphant instead. Thereafter he pursued treatment under Dr. Oliphant’s direction. Dr. Ament, Dr. Watt, and PPS&J became authorized upon referral from Dr. Oliphant.

D. Treatment at the UC Health emergency department was reasonably necessary emergency treatment

Emergency treatment for a work-related injury is authorized without regard to whether the claimant had a referral or prior approval from the respondents. *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990); see also WCRP 8-2. The emergency exception is not necessarily limited to life-threatening situations, and the existence of a “bona fide emergency” is a question of fact for the ALJ. *Hoffman v. Wal-Mart Stores*, W.C. No. 4-774-720 (January 12, 2010). As found, Claimant’s treatment at the UC Health emergency department on February 17, 2020 was reasonably necessary emergency treatment for his compensable injury.

E. Nurse Roberts and Springs Medical Associates are not authorized

Once a claimant exercises the right to choose a treating physician, they cannot unilaterally engage other providers without obtaining permission from the respondents or following the statutory procedures for a change of physician. *Pickett v. Colorado State Hospital*, 513 P.2d 228 (Colo. App. 1973). As found, NP Roberts and Springs Medical Associates are not authorized because Claimant had already selected Dr. Oliphant and there is no persuasive evidence Claimant was referred by Dr. Oliphant or any other provider within the chain of authorized referrals.

F. Claimant’s AWW is \$1,392.49

The term “wages” is defined as “the money rate at which the services rendered are recompensed under the contract of higher in force at the time of the injury.” Section 8-40-201(19)(a). “Wages” includes per diem payments that are included in the claimant’s federal taxable wages. Section 8-40-201(19)(c). Section 8-42-102(2) provides that compensation shall be based on the employee’s average weekly earnings “at the time of the injury.” The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. But § 8-42-102(3) gives the ALJ wide discretion to “fairly” calculate the employee’s AWW in any manner that seems most appropriate under the circumstances. The entire objective of AWW calculation is to arrive at a “fair approximation” of the claimant’s actual wage loss and diminished earning capacity because of the industrial injury. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993).

As found, Claimant’s average weekly wage is \$1,392.49, based on his gross taxable earnings in the eleven full weeks immediately preceding the injury, including the Vehicle Tool AI. See *Stonebraker v. American Merchandising Special*, W.C. No. 4-959-213-01 (December 1, 2015) (presence or absence of tax withholding is “the most significant” factor determining whether per diem is included in the AWW). The corresponding TTD rate is \$928.32 per week or \$132.62 per day.

G. Claimant is entitled to TTD benefits from February 14 to February 16, 2020 and from February 18, 2020 ongoing.

A claimant is entitled to TTD benefits if the injury causes a disability, the disability causes the claimant to leave work, and the claimant misses more than three regular working days. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term disability connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function, and (2) impairment of wage-earning capacity as demonstrated by claimant’s inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no requirement that a claimant have restrictions from a treating provider, and disability can be established by any competent evidence. *Savio House v. Dennis*, 685 P.2d 141 (Colo. App. 1983).

As found, Claimant was disabled and suffered a wage loss commencing February 14, 2020. Claimant returned to work briefly on February 17 and has been continuously off work since February 18, 2020. Although Dr. Oliphant did not put Claimant on work restrictions, Claimant’s testimony coupled with the functional limitations documented in medical records shows he was disabled by the effects of the work injury. Even Dr. Raschbacher agreed he would have put Claimant on “light duty” restrictions immediately after the accident. Respondents owe Claimant \$397.86 from February 14 through February 16, 2020 ($\$132.62 \times 3 = \397.86), and \$928.32 per week commencing February 18, 2020.

H. Claimant is entitled to TPD benefits for February 17, 2020.

Claimant's brief return to work on February 17, 2020 terminated his eligibility for TTD benefits for that date. Section 8-42-105(3)(b). Because he could not complete the full day, he is entitled to TPD benefits based on his wage loss on February 17. Section 8-42-106(1). As found, Claimant earned \$47.93 for 2.13 hours of work on February 17. His average daily wage is \$198.93, resulting in a wage loss of \$126.82. This equates to \$98.97 in TPD benefits.

ORDER

It is therefore ordered that:

1. Claimant's claim for workers' compensation benefits based on injuries sustained on February 13, 2020 is compensable.
2. Insurer shall cover all medical treatment from authorized providers reasonably needed to cure and relieve the effects of Claimant's compensable injury, including but not limited to, charges from Dr. Oliphant, Dr. Ament, Dr. Watt, Pikes Peak Spine & Joint, imaging studies ordered by Dr. Oliphant and Dr. Ament, and the February 17, 2020 visit to the UC Health emergency department.
3. Claimant's request for medical benefits related to treatment rendered by Jessica Roberts, NP and Springs Medical Associates is denied and dismissed.
4. Claimant's average weekly wage is \$1,392.49, with a corresponding TTD rate of \$928.32 per day and \$132.62 per day.
5. Insurer shall pay Claimant \$397.86 in TTD benefits for February 14 through February 16, 2020.
6. Insurer shall pay Claimant \$98.97 in TPD benefits for February 17, 2020.
7. Insurer shall pay Claimant TTD benefits at the weekly rate of \$928.32 commencing February 18, 2020 and continuing until terminated by law.
8. Insurer shall pay Claimant statutory interest of 8% per annum on all benefits not paid when due.
9. All issues not decided herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to

the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: <http://www.colorado.gov/dpa/oac/forms-WC.htm>. **In addition, please send a courtesy copy of your Petition to Review to the Colorado Springs OAC office via email at oac-csp@state.co.us**

DATED: August 20, 2020

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

- I. Has Claimant shown, by a preponderance of the evidence, that she suffered a compensable work injury on October 22, 2019?
- II. Has Claimant shown, by a preponderance of the evidence, that the left shoulder surgery as proposed by Dr. Pak is reasonable, necessary, and causally related to Claimant's work injury?
- III. Have Respondents shown, by a preponderance of the evidence, that Claimant was responsible for her own termination of employment, thus severing her claim for TPD or TTD payments?

STIPULATIONS

By agreement of the parties, the issue of Average Weekly Wage was held in abeyance, pending the outcome of this hearing. The ALJ accepted this stipulation.

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

The Work Accident

1. Claimant began working for Employer in October 2015 as an auto parts delivery driver. At hearing, Claimant testified that she earned \$12.50 per hour and worked 30 to 40 hours on average per week.
2. On October 22, 2019, Claimant was involved in a motor vehicle accident while delivering auto parts for Employer. She was driving a Nissan Frontier pickup truck, and wearing a seatbelt when the collision occurred. Claimant came to a stop in the right-hand turn lane at Austin Bluffs and Academy Boulevard in Colorado Springs. She was preparing to make a right turn onto South Academy, when her vehicle was rear-ended by a Honda Pilot that was traveling at a speed unknown to Claimant. Claimant did not anticipate the impact when the collision occurred.
3. At hearing, Claimant testified that she had her left arm on the armrest of the driver-side door and her left hand was holding onto the steering wheel. The collision caused her body to go 'flying forward'. Claimant's seatbelt caught, and she was then thrown backwards in her seat. The seatbelt was situated over her left shoulder at the time of the collision. Claimant testified that she was not able to undo her seatbelt due to the amount of pain. The airbags on her vehicle did not deploy.

4. Following the crash, police arrived at the scene. The traffic accident report indicates that Claimant's vehicle sustained 'moderate' damage to the rear end. The other vehicle's damage to the front end was described as 'slight'. (Ex. 8). The report also reflects that Claimant was complaining of left shoulder pain following the collision. *Id.*
5. At hearing, Claimant testified that she was unable to use her left arm to undo her seatbelt. She was asked if she wanted an ambulance, and she said yes. She then called her employer.

After that, I was examined by the fire department in the ambulance, and I told them I couldn't move my arm. That's when they went ahead and put my arm in a sling, and one of the police officers unbuckled my seat- belt.

And after that happened, that's when I was helped out of the vehicle and transported into the ambulance and moved from there to the hospital. *Hearing transcript.*

Emergency Treatment

6. Claimant testified that she was taken by ambulance to Penrose Hospital. The AMR report indicated that Claimant reported that her left shoulder felt 'dislocated'. (Ex. 2, p. 50). Claimant reported pain in her left shoulder that extended down her left arm. *Id at 48.* Claimant also reported loss of feeling in her left fingers.
7. At Penrose Hospital, the attending physician noted that Claimant was involved in a rear-end collision less than an hour ago. Claimant complained of left shoulder pain. (Ex. 2, p. 26). Claimant underwent a left shoulder x-ray. The x-ray was noted to be negative for acute fracture or dislocation. *Id.*
8. The ER records indicate that there was no sign of bony tenderness, no signs of dislocation, normal distal neurovascular exam, full range of motion and no clavicular tenderness. (Ex F: p. 111). There was no evidence of any significant traumatic injury. Claimant was diagnosed with a left shoulder strain and discharged. (Ex. 2, p. 29).

Treatment at Concentra, and Referrals

9. The next day, Claimant went to Concentra. (Ex. 3, p. 51). Claimant was examined by PA Mendy Peterson. PA Peterson noted that Claimant was a restrained driver sitting at a red light and was rear-ended. Claimant denied prior injury to her left shoulder, but numbness down to her fingers. *Id at 54.* Claimant reported that she was experiencing decreased range of motion. Claimant also reported having difficulty lifting her two-year old daughter.

10. Physical examination of Claimant's left shoulder revealed no distal clavicle deformity, no midshaft clavicle deformity, no proximal clavicle deformity, no ecchymosis, no effusion, no erythema, no scapular winging, and no swelling. There was noted to be limited range of motion in all directions. The physical examination also revealed tenderness in the bicipital groove, trapezius muscle, and anterior/posterior shoulder. (Ex. 3, p. 54).
11. Claimant was referred to physical therapy. PA Peterson agreed that Claimant's history and mechanism of injury appeared to be consistent with her presenting symptoms and physical exam. *Id* at 56.
12. On October 29, 2019, Claimant returned to Concentra reporting 'minimal' range of motion in her left shoulder. (Ex. 3, p. 62). Claimant reported that her shoulder constantly felt like it had to pop. Claimant also reported pain radiating down her left side. PA Peterson noted that Claimant had some signs of impingement, instability, clunk, and scapular winging. *Id*. PA Peterson referred Claimant for an MRI, and an orthopedic consult. *Id*.
13. Claimant underwent an MRI on October 29, 2019. (Ex. 6, p. 189). The MRI's *Impressions* revealed:
 - 1.) Changes *suspicious of* posterior glenohumeral dislocation with small reverse Hill-Sachs impaction fracture. Posterior inferior labral irregularity *could be subacute* tear with scarring of the labrum and posterior band inferior glenohumeral ligament attachment to the glenoid. No *acute* labral tear is seen.
 - 2) No rotator cuff or biceps tendon abnormality. *Id*. at 190. (emphasis added).

Also noted, under *Miscellaneous*: Subtle bone *edema* and *questionable minimal impaction injury* at the anterior inferior medial aspect of femoral head....(emphasis added).

The MRI was read by Trystain Johnson, MD, who is fellowship trained in musculoskeletal radiology.
14. Orthopedic surgeon, Dr. Michael Simpson, examined Claimant on November 5, 2019. (Ex. 3, p. 69). Dr. Simpson noted that Claimant seemed to have an acute posterior shoulder subluxation/dislocation. *Id*. at 70. He recommended Claimant undergo a structured physical therapy program two times per week for four weeks. The program was to work on shoulder range of motion, stabilization, scapular stabilization, and rotator cuff strengthening. Claimant was given a sling and a Medrol Dosepak. Dr. Simpson noted that he would order an EMG if Claimant remained symptomatic with numbness and tingling. *Id*. Despite the MRI results, and the suspicion of a dislocation, Dr. Simpson still did not recommend surgery. *Id*.
15. Claimant was reexamined at Concentra on November 11, 2020. (Ex. 3, p. 73). Claimant was continued on light duty work restrictions. *Id*.

16. Claimant returned to Concentra on November 28, 2020. (Ex. 3, p. 76). Claimant reported that she did not feel better, was still in a lot of pain, and did not feel like she was improving. She was given a cortisone injection. *Id.*
17. Claimant returned to Dr. Simpson on December 10, 2019. (Ex. 3, p. 86). Dr. Simpson noted that Claimant had evidence of a posterior fracture dislocation of the left shoulder with a Hills-Sachs lesion and a lesion to the posterior labrum in the posterior band of the inferior glenohumeral ligament. *Id.* Claimant had some dysesthesias in her arm that has worsened. Claimant reported numbness in all fingers and tension style headaches. Dr. Simpson noted that therapy seemed to aggravate her symptoms. He then referred Claimant for an EMG and nerve conduction study. *Id. at 87.*
18. Claimant had also been examined by PA Peterson at Concentra on November 11, 2019. (Ex. 3, p. 81). No changes were made to Claimant's treatment plan. *Id.*
19. On December 26, 2019, Claimant underwent an EMG with Dr. Randall Scott. *Cl. Ex. 7.* Dr. Scott interpreted the EMG results to be a normal study. *Id.*
20. On January 14, 2020, Dr. Simpson opined that Claimant was not a good surgical candidate, "as her symptoms and response to provocative maneuvers are not consistent with this just being an isolated glenohumeral process" (Ex. 3, p 102). In his report, he tacitly noted that Claimant still had MRI evidence of posterior fracture dislocation of her left shoulder. *Id at 98.*
21. He opined that Claimant had 'inexplicable pain from beyond what he would anticipate for an isolated shoulder injury'. Dr. Simpson was not able to explain the numbness and weakness in Claimant's hand. Dr. Simpson recommended chiropractic treatment and a psychological evaluation. Dr. Simpson also suggested that Claimant get a second orthopedic opinion regarding surgery. *Id at 102.*
22. That same day, Claimant was also examined by Dr. George Johnson, the ATP at Concentra. (Ex. 3, p. 93). Dr. Johnson referred Claimant to Dr. Pak, an orthopedic surgeon specializing in shoulder surgery, for a second opinion.
23. On January 27, 2020, Claimant was examined by Dr. John Pak. (Ex. 5, p. 168). Dr. Pak agreed that Claimant's mechanism of injury was consistent with her diagnosis. Dr. Pak explained that Claimant's physical examination was consistent with moderate posterior instability in the left shoulder. He noted that Claimant did not have much in the way of anterior apprehension, but she did have posterior apprehension on examination. The MRI was consistent with a posterior inferior labral pathology. Dr. Pak recommended surgical labral repair since Claimant had not improved with nonsurgical options. *Id.*
24. On January 28, 2020, Claimant returned to Concentra and was examined once again by Dr. Johnson, her ATP. (Ex, 3, p. 106). Dr. Johnson noted that the

surgery recommended by Dr. Pak was pending approval. At this visit, Dr. Johnson agreed with the surgery recommended by Dr. Pak. *Id. at 109.*

25. Between October 23, 2019 through May 1, 2020, Claimant attended eight physical therapy sessions. (Ex. 4). At hearing, Claimant testified that the physical therapy did not help her shoulder condition.

Respondents approve Conservative Treatment only

26. Respondents filed a Notice of Contest on February 3, 2020. (Ex. 5, p. 186). The claim was denied for further investigation. On February 5, 2020, Respondents sent Dr. Pak a letter denying the recommended surgery because compensability had not been established. *Id at 184.*
27. On February 13, 2020, Claimant returned to Concentra. (Ex. 3, p. 111). PA Peterson noted that the surgery was denied because the MRI “subacute tear”. Ms. Peterson noted that Claimant was not improving. *Id at 114.*
28. On March 6, 2020, Claimant returned to Concentra. PA Peterson noted that Claimant continued to have popping and decreased range of motion. Claimant was instructed to continue physical therapy. Claimant returned to Concentra on March 19, 2020, reporting that her symptoms were unchanged. *Id at 122.* On April 15, 2020, Dr. Johnson referred Claimant for additional physical therapy. *Id at 130.*

IME Report by Dr. O’Brien

29. On March 20, 2020, Claimant underwent an independent medical examination at the Respondents’ request with Dr. Timothy O’Brien. (Ex. A). Dr. O’Brien opined that Claimant suffered a minor shoulder injury that would have healed on or before her first evaluation with Dr. Simpson on November 5, 2019. He agreed that Claimant suffered an injury to her left shoulder on October 22, 2019.
30. Dr. O’Brien opined that Claimant’s ongoing pain is not caused by an ongoing injury. Rather, Dr. O’Brien thought that the pain was caused by secondary gain issues. *Id at 10.* Dr. O’Brien said this about the MRI:

The MRI scan is being *dramatically over interpreted*. When a radiologist uses nomenclature such as “subtle” and “suggested”, they are informing their reading audience of the fact that the findings they are observing are not definitive.....The radiologist’s over-read of the MRI scan and his “suggestion” that a dislocation had occurred was a great disservice to Ms. Newell and it *mislead the physicians who utilize those clinically insignificant “suggestions” to validate their desire to perform surgery*, which is never indicated. (emphasis added).

Dr. O'Brien also stated that the MRI "was also read by Dr. Bower (sic). [The ALJ notes Dr. O'Brien to be incorrect: Dr. Paul *Bauer*, DO, performed the pre-MRI arthrogram protocol by injecting Claimant under CT guidance. That is what Dr. Bauer signed-not the MRI report] (Ex. 6. p. 191).

31. Dr. O'Brien also criticized Dr. Pak's (in his opinion) lack of understanding of Claimant's nonorganic factors. Referring to the surgery proposed by Dr. Pak, Dr. O'Brien stated, "It will categorically fail if it is performed." (Ex. A, p. 11).

32. He went on to criticize even Dr. Simpson's referral for a second opinion, stating:

Thus, Dr. Simpson was inappropriately advocating for Ms. Newell rather than calling a spade a spade and indicating that this was a Workers Compensation claim that was inherently associated with secondary gain issues...Just because Dr. Simpson was unwilling to indicate that nonorganic factors best explained the symptomology and exam findings that he noted, it does not mean that his ongoing desire to exercise investigative efforts was appropriate and indeed, it was not. *Id.*

33. On March 31, 2020, Respondents sent a letter to Dr. Pak denying the labral repair surgery. (Ex. 5, p. 170).

34. In the interim, Claimant continued to see not only PA Peterson at Concentra, but also her ATP, Dr. Johnson as well. In visits on 1/14/2020, 1/28/2020, and 4/15/2020, Dr. Johnson continued to note the *Assessment* as 1. Closed Hill-Sachs fracture of left humerus, initial encounter, and 2. Injury of superior glenoid labrum of left shoulder joint. In each visit, he continued to note pain with range of motion. (Ex. 3, pp. 96, 110, 126). He initially agreed with Dr. Pak's recommendation for surgery on 1/28/2020. *Id at 109.*

35. Then, on 4/15/2020 (and while noting the same symptoms, and carrying a similar *assessment*, Dr. Johnson notes: "IME Dr. O'Brien report did not recommend surgery. I still do not have the report." *Id at 126.*

36. On 5/1/2020 Dr. Johnson now noted: "IME Dr. O'Brien report states that the injury that she has was minor and would not cause a significant injury. He states that she is at MMI. *Still with significant pain.*" *Id at 132* (emphasis added). Dr. Johnson then released Claimant at maximum medical improvement because he now opined that Claimant's condition was *not work related*. *Id at 135.* He recommended by Claimant see her own provider for care of the condition. *Id.*

IME Report by Dr. Rook

37. Claimant underwent an independent medical evaluation with Dr. Jack Rook on May 11, 2020. (Ex. 1). Dr. Rook diagnosed Claimant with left shoulder pain, brachial plexus injury/irritation post MVA, and myogenic thoracic outlet syndrome due to pectoralis minor muscle, and sleep disturbance. Dr. Rook opined that

Claimant's clinical presentation is consistent with the mechanism of injury of the on-the-job motor vehicle accident on October 22, 2019. Dr. Rook reasoned that Claimant has been struggling with left shoulder pain, involvement of the periarticular musculature, and experiencing upper extremity symptoms since October 22, 2019. The symptoms have been consistently documented throughout the medical records. *Id.*

38. Dr. Rook opined that based on Claimant's history, "it is likely that she sustained a posterior joint subluxation of her left shoulder post-impact with some degree of trauma to her brachial plexus caused by the posteriorly subluxed humeral head." *Id.* Claimant "reported that immediately post-impact she was experiencing left arm pain that extended from her shoulder to her left hand with paresthesias in the ulnar distribution." Dr. Rook explained that this is suggestive of injury to the lower cord of Claimant's brachial plexus, which consists of nerve fibers that coalesce to become the ulnar nerve. *Id.*
39. Dr. Rook commented on Dr. O'Brien's opinions contained in his IME report. Dr. Rook noted that Dr. O'Brien's suggestion that Claimant had some sort of migrating chronic pain syndrome suggesting malingering is not supported by the medical records. *Id at 12.* Dr. Rook explained that the medical documentation suggests that Claimant has had problems in all the areas that she complains of currently dating back to her injury. The Claimant reports that many of her symptoms have worsened over time. Dr. Rook explained that it is expected that Claimant's symptoms would worsen over time because she is over seven months post-injury, with unrelenting pain emanating from her left shoulder joint, and with frequent popping in her shoulder is perpetuating the surrounding muscle spasms. *Id.*
40. Dr. Rook explained that from a pathophysiological perspective, the Claimant likely sustained a posterior subluxation at the time of her injury when her seatbelt caught and pushed her humeral head backwards, injuring the shoulder capsule and the humeral head.
41. Dr. Rook opined that the term "subacute" on the MRI is not indicative that Claimant had a preexisting condition. He explained that the medical definition of subacute is "Rather recent onset or somewhat rapid change." Dr. Rook further explained that "in contrast, the term chronic indicates indefinite duration or virtually no change." Dr. Rook explained that the presence of edema on an MRI typically represents an inflammatory response to some sort of recent trauma. *Id.*
42. Dr. Rook concluded that he agreed with Dr. Pak and Dr. Johnson's *original* opinion that Claimant should proceed with surgery. *Id at 14.* He opined that the surgery recommended by Dr. Pak is reasonable, necessary, and directly related to the on-the-job injury that occurred on October 22, 2019.

Dr. O'Brien's Deposition

43. Dr. O'Brien testified via a deposition prior to the hearing. Dr. O'Brien testified consistent with his IME report. Dr. O'Brien testified that there was a 0% chance that Claimant would have full range of motion in her shoulder if she had just dislocated the shoulder. Dr. O'Brien also testified that seatbelt sign is never positive in a rear-end collision. Dr. O'Brien testified that seatbelt signs are only positive in a front-end collision. *Id.*

44. Dr. O'Brien testified that a rear-end collision cannot cause a posterior dislocation injury. However, he agreed that Claimant suffered an injury to her shoulder when she was rear-ended on October 22, 2019. *O'Brien Depo, p. 31-32.* He also testified that the absence of blood in the MRI images proves there was no acute fracture to claimant's shoulder.

45. Dr. O'Brien also agreed that there was no evidence that Claimant required medical treatment for her left shoulder prior to October 22, 2019. He also agreed that Claimant did not have work restrictions prior to October 22, 2019. *Id.*

46. After taking issue with Drs. Pak and Simpson's conclusions, Dr. O'Brien went on to explain why his IME physical exam was better than Dr. Simpson's:

A And that's the difference. I took my exam to the next level; whereas Dr. Simpson didn't. And when I say "next level," what I mean is *I looked at* the hand and wrist, and I said there is not difference in hair growth, there is not difference in temperature or hydration.

So just by observation, I ruled out the presence of claudication or neurogenic pain. (Depo transcript, pp. 23-24) (emphasis added).

47. However, Dr. O'Brien made the following clarification of what he meant about what he had called a "normal" MRI up to that point. **"I believe she injured her shoulder at some point in the past"**. *O'Brien Depo, p. 41.*

A You can't have what looks like a cleavage fracture in the front part of the humeral head and not determine that, well, there was something that caused that. And we know[what] causes those type[s] of V-impaction injuries is a dislocation. So it's highly medically probable that at a remote time in the past there was a posterior impaction fracture/dislocation of the left shoulder.

Q So would you agree then that the MRI is consistent with a dislocation-type injury?

A Yes

Qwould you agree [that Claimant] is a good surgical candidate—was surgery reasonable to treat this type of condition?

A Hypothetically, if the take away the cause, the motor vehicle issue, and if you take away everything except the MRI scan – so I’m not even factoring in the exam, which proves that she’s not unstable, at least based on the two orthopedists who tried to evaluate her and my exam—if you take all that away and just look at the MRI scan, then yes, *surgery could be considered reasonable. Id at 42-43.* (emphasis added).

48. Dr. O’Brien testified that, scarring of the labrum and glenohumeral ligament where it attaches to the glenoid demonstrates that the glenohumeral dislocation had occurred well before the motor vehicle accident. He opined that scarring does not develop within a week of a dislocation or accident.
49. Dr. O’Brien testified that the findings contained in the Concentra records from the day after the alleged injury are inconsistent with Claimant’s allegations. Specifically, a fracture/dislocation injury is such a traumatic injury that it always results in massive bleeding, and that there would be a seat belt sign, abrasion and bruising. The absence of any sign of trauma proves that there was not enough energy dissipated as a result of the collision to break tissue in Ms. Newell’s left shoulder. Furthermore, he opined, the initial exam and MRI scan are consistent with each other as they both show a complete absence of trauma. He testified that if an alleged injury occurred, it was extremely minor and would have healed fully without the need for any formal medical care.

Claimant’s Hearing Testimony

50. Claimant testified that she has never gone to the doctor before the October 22, 2019 crash for left shoulder pain. Claimant testified that she has never injured her left shoulder prior to October 22, 2019.
51. Claimant testified that she is no longer employed for Employer. Claimant testified that her last day working for Employer was January 8, 2020. *Hr. Tr., p. 19.* Claimant was terminated due to missing too many consecutive days of work within a quarter. *Id.* Claimant testified that she missed work because of her injury. *Id.* Claimant testified that she has not started working again due to her injury and the COVID pandemic. *Hearing transcript, p. 28.*
52. Claimant testified that she has a two-year old daughter. She is a single parent and does not have anyone to help lift her child. She testified that her two-year-old daughter is not able to get in and out of the car by herself. Claimant testified that she tries to use her right arm to do most of the lifting. She testified that she struggles to do anything that involves using both arms. When she reaches for something, her shoulder still “pops.”
53. Claimant testified that she had bruising in “her whole entire shoulder area and collarbone area...” and when referring to the ATP exam, stated “the doctor never asked to actually see my shoulder”. *Hearing transcript*

Claimant's Disciplinary Work History

54. However, Claimant began to accrue disciplinary write-ups, beginning on 9/22/2015 (noted to be a month before Claimant stated before she began work for Employer). (Ex. M, p. 187). Claimant had failed to call in sick to work twice within a 6-month period. *Id.*
55. On 5/14/2019, Claimant was issued a 'First Warning': "[Claimant Name Redacted] was absent on Friday, May 10 [2019] and provided no doctor's note. [Claimant Name Redacted] is often late clocking in"...(Ex. M, p. 191).
56. On 8/8/2019, Claimant was issued a 'Second Warning': "[Claimant Name Redacted] was absent 8/5/19 and late 8/7/19" (Ex. M, p. 192).
57. On 9/12/2019, Claimant was issued a 'Final Warning': "attendance [Claimant Name Redacted] called off 8/13/19, 8/14/19, 9/6/19, 9/12/19". (Ex. M, p. 193).
58. On 1/8/2020 Claimant was issued a Termination Notice: "Excessive attendance occurrence's (sic) have taken place. Occurrence dates: 12/23/2019, 12/30/2019, 1/3/2020, 1/6/2020, 1/7/2020, 1/8/2020." Ex. M, p. 194). In each instance, Claimant electronically signed the disciplinary notices. *Id.* The ALJ further notes that none of the above dates of absence correlates with any authorized treatment dates.

Surveillance Video of Claimant

59. Respondents submitted brief, edited, video footage of Claimant as an exhibit at hearing. The first, dated 6/5/20, and 6/7/20 is 1 minute, 42 seconds in total length. It shows Claimant getting in and out of her car, and grocery shopping. She appears to be right-hand dominant, in no apparent distress, and displaying no apparent disability. However, her left arm is not challenged in any fashion, so no range of motion abilities or deficiencies are observed. The second, dated 6/11/20 is 37 seconds long. Claimant can be seen lifting her toddler age daughter into her car seat, then is later seen carrying her *from* a store using both arms, but carrying the child more with her right arm. In neither instance does Claimant display any distress or disability, but as noted, no range of motion is detectable.
60. However, the surveillance narrative (Ex. L) indicates that Claimant was observed for over 28 minutes over that three-day period. It even indicates that between 1:01 pm and 1:25 pm on June 7, 2020, Claimant lifted and carried her child *towards* the store (not visible in the edited versions of the video), and then filled her car, and "utilized a window cleaning device". The narrative does not state which arm Claimant used to clean her windshield, nor does this activity appear in any of the videos submitted into evidence.

Dr. Rook's Hearing Testimony

61. Dr. Rook testified live at hearing. Dr. Rook was accepted as an expert in the field of physical medicine and rehabilitation with Level II training. Dr. Rook has treated patients with physical injuries and motor vehicle accidents for 35 years. He testified that Claimant's physical examination findings and imaging were absolutely consistent with her mechanism of injury. Dr. Rook explained that the compression of Claimant's seatbelt pushed the humeral head backwards causing it to impact against the posterior shoulder capsule. The impact caused both a bony and ligamentous injury to the left shoulder. Dr. Rook opined that the impact caused a mild impaction fracture and an irritation of the brachial plexus.
62. Dr. Rook also explained that, given the relatively minor nature of this injury, one would not necessarily expect to see a massive amount of internal bleeding on the MRI as predicted by Dr. O'Brien, but the edema was indicative of some fairly recent event. Dr. Rook posits that, given the relatively minor nature of the subluxation, Claimant's shoulder could have returned to its normal position on its own by the time she arrived at the ER; thus her normal range of motion and x-ray at that time.
63. Dr. Rook (like, at various times, Drs. Simpson, Pak, and Johnson) noted a positive apprehension sign in her shoulder, indicating some instability. Some tenderness on the left side was noted, as was a diminished range of motion.
64. Dr. Rook opined that Claimant is not at maximum medical improvement. It is not surprising, given her untreated condition, which would not be made better with physical therapy. He explained that Claimant requires the shoulder surgery recommended by Dr. Pak, an orthopedic surgeon specializing in shoulder surgeries. However, he noted: "I would agree that the surgery by itself would be insufficient in alleviating her current pain presentation. She will require multiple modalities and perhaps pharmacologic measures once her shoulder is stabilized surgically to improve her chance of recovery." (Ex. 1, p. 13).
65. Dr. Rook also explained that, regardless of how one might construe the age of the injuries noted on the MRI, his analysis does not change, inasmuch as if there were a prior (undocumented) subluxation, her symptoms now (including occasional popping) are more likely to be the result of the loss of integrity in the joint.

Accident Reconstruction by Mark Passamaneck

66. At hearing, Mark Passamaneck was accepted as an expert in the field of accident reconstruction. Mr. Passamaneck is a mechanical engineer. His accident reconstruction report concluded that the rear car struck Claimant's pickup at a one mile per hour differential. Mr. Passamaneck testified that he only looked at 13 photos of the outside of the vehicles and the police report. Mr.

Passamaneck did not look at photos of the underbody or the interior of Claimant's vehicle.

67. Mr. Passamaneck opined that there was no indication of frame bending, buffering of rear fenders, and nothing broken, dislodged or significantly marred which indicates a fairly low indication of impact. He further testified that airbag deployment occurs over 8 miles per hour, and the fact that no airbags deployed in either vehicle indicate the impact was certainly below 8 miles per hour.
68. Based upon all of the information reviewed, Mr. Passamaneck testified that the impact velocities of these vehicles upon impact, along with the basic weights of the vehicles indicates that upon impact, the Claimant's car would have gone from zero to 1 mph, and the rear car would have gone from 2 to 3 mph down to 1 mph. He explained that there were no skid marks on the roadway and it was a very low speed accident, similar to pulling into a parking space and bumping a car, or hitting a concrete curb with your tires going one to two miles an hour.
69. Mr. Passamaneck explained that the accident would have caused Claimant to go gently backwards into the seat instead of moving forward toward the seatbelt. He further testified that there would not be enough energy involved with the accident to move the Claimant back into her seat and then rebound into the seatbelt. He could not tell from the available data whether the rear car was accelerating, decelerating, or going at a constant speed at the time of impact.
70. Dr. Rook testified that the accident reconstruction report does not change his opinion that Claimant suffered from a dislocation injury on October 22, 2019. Dr. Rook explained that the speed that the vehicle was traveling does not change his opinion regarding causation:

A ...it doesn't change my opinion because the forces I'm concerned about are the...pounds per square inch that developed underneath the seatbelt and between the seatbelt and her....shoulder joint. And there are multiple factors that....contribute to whatever that number was.

I think that the positioning of the arm, the fact that she was gripping the steering wheel, that fact that she was thrown forwards, the fact that the seatbelt was directly over the shoulder, and there might have been a very isolated focus generated underneath the seatbelt, perhaps overlaying the humeral head – and I think all of those things contribute to the ...actual biological effects of the impact with the patient at the time of the accident. *Hearing transcript.*

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. §8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. §8-43-201, C.R.S.

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

C. Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). In this instance, while the Claimant is not a flawless historian, the ALJ is not persuaded that she is driven purely by secondary gain issues. In fact, the ALJ is not at all convinced that Claimant, unsophisticated as she is, had the guile or sense of opportunism to fake her injuries from the moment of impact, through the emergency room, through her ATP and referred surgeons, through two IMEs, and into a court hearing. This is someone who apparently thought her own toddler weighed 65 pounds. In summary, the ALJ finds that Claimant's reported symptoms reasonably correlate to the available objective data.

D. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55, P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968). In this instance, while both Dr. O'Brien and Dr. Rook are both sincere in delivering their opinions, as will be discussed in greater detail, the ALJ finds Dr. Rook to be more persuasive overall.

E. Further, courts are to be "mindful that the Workmen's Compensation Act is to be liberally construed to effectuate its humanitarian purpose of assisting injured workers." *James v. Irrigation Motor and Pump Co.*, 503 P.2d 1025 (Colo 1972).

Jurisdictional Issue

F. Respondents argue that the ALJ is without jurisdiction to decide the medical benefit issue, since the ATP placed Claimant at MMI on 5/1/2020. The ALJ does not concur. Claimant was denied the shoulder surgery, as recommended by Dr. Pak, on 2/5/2020. Claimant timely filed her Application for Hearing on 3/10/2020, requesting a determination of compensability, and contesting the denial of this surgery. A hearing date on these issues of 7/7/2020 was then agreed upon by the parties, with a Notice of Hearing being sent by the OAC on 4/6/2020. The ALJ does not conclude that Dr. Johnson's subsequent change of heart, after reviewing Dr. O'Brien's IME report, and placement of Claimant at MMI on 5/1/2020 renders this hearing a nullity. To the contrary, the ALJ finds all issues before him to be ripe for determination. If a FAL was issued after this MMI finding, such issue is not part of this hearing.

Compensability, Generally

G. A claimant's right to compensation initially hinges upon a determination that "at the time of the injury, the employee is performing service arising out of and in the course of the employee's employment." C.R.S. § 8-41-301(1)(b). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.*, 124 Colo. 210, 236 P.2d 2993. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the proximate causal relationship between an incident/injury and the need for medical treatment, plus entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. (2013). See *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985).

H. There is a distinction between the terms "accident" and "injury". The term accident refers to an "unexpected, unusual or undersigned occurrence." Section 8-40-201(1), C.R.S. 2002. In contrast, an "injury" refers to the physical trauma caused by the accident. In other words, an "accident" is the cause of and an "injury" is the result. *City of Boulder v. Payne*, 426 P.2d 194 (1967). No benefits flow to the victim of an industrial

accident unless an “accident” results in a compensable “injury.” Compensable injuries involve an “injury” which requires formal medical treatment or causes disability. H & H Warehouse v. Victory, 805 P.2d 1167, 1169 (Colo.App. 1990). All other “accidents” are not compensable injuries. Ramirez v. Safeway Steel Products Inc., W.C. No. 4-538-161 (September 16, 2003).

Compensability, as Applied

I. This injury is compensable. Claimant was driving a work pickup truck in the furtherance of her employment when she was struck from behind by the other driver. She felt immediate pain, and appropriately enough, was taken for treatment in the emergency room. Considerable medical treatment, authorized by her ATP, ensued. Even Respondent’s IME, Dr. O’Brien conceded that she at least suffered a shoulder strain in this accident.

Medical Benefits Generally

J. Respondents are liable for medical treatment *reasonably necessary* to cure or relieve the employee from the effects of the injury. C.R.S. § 8-42-101. However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was *proximately caused* by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000). The question of whether a particular medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office, supra*; *Wal-Mart Stores, Inc. v. Industrial Claims Office*, 989 P.2d 251 (Colo. App. 1999). The claimant bears the burden of proof to establish the right to specific medical benefits. *HLJ Management Group, Inc. v. Kim*, 804 P.2d 250 (Colo. App. 1990).

K The question of whether a particular medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office, supra*; *Wal-Mart Stores, Inc. v. Industrial Claims Office*, 989 P.2d 251 (Colo. App. 1999). Factual determinations related to this issue must be supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. Substantial evidence is that quantum of probative evidence which a rational fact finder would accept as adequate to support a conclusion without regard to the existence of conflicting evidence. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411, 415 (Colo. App. 1995).

L. The Claimant has a compensable injury if the employment-related activities aggravate, accelerate or combine with the preexisting condition to cause a need for medical treatment or produce the disability for which benefits are sought. *Section 8-41-301(1)(c), C.R.S. 2015; Snyder v. Industrial Claims Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). An industrial aggravation is the “proximate cause” of a Claimant’s disability if it is the “necessary precondition or trigger” of the need for medical

treatment. *Subsequent Injury Fund v. State Compensation Insurance Authority*, 768 P.2d 751 (Colo. App. 1988).

Shoulder Surgery, Reasonable and Necessary, as Applied

M. Claimant, albeit imperfectly, has regularly reported symptoms consistent with a minor shoulder dislocation- not merely a minor sprain. She reported to fire personnel an inability to move her arm while still in her car. She told ER personnel that her arm felt “dislocated.” She reported limited range of motion to Concentra, and tenderness consistent with a shoulder injury. Physical therapy was unhelpful, consistent with a structural defect, as was a popping sensation. Provocative maneuvers were consistent with a dislocation.

N. Objectively, the MRI was also consistent with a minor dislocation. Contrary to Dr. O'Brien's assertion, the MRI was not “normal.” In fact, Dr. O'Brien eventually conceded that, based upon the MRI results, such procedure could indeed be considered reasonable and necessary. At some point in the past, he also conceded that an injury to Claimant's shoulder had likely occurred - his ultimate argument was against the recency of such an injury. Shoulder orthopedist Dr. Pak felt the surgery was reasonably necessary, as does Dr. Rook.

O. The surveillance video, all 2½ minutes of it, is arguably consistent with someone with a normal shoulder. However, it is also arguably consistent with someone with an 8-month-old untreated, minor dislocation. At no point does Claimant display any range of motion ability, nor is range of motion described in the narrative. According to that narrative, Claimant was observed using a squeegee to clean her windshield, but that scene got lost on the cutting room floor. Had Claimant been observed, and documented, using her *left* arm (as one might expect while standing by the driver's side door), this could have proven quite problematic. However, what is left to view is Claimant using her left arm to hold up some groceries (milk-or bread?), and placing her toddler straight into the car. She was also seen carrying her, cradled more in her right arm. Perhaps it hurt, perhaps it didn't, but Claimant had to get on with the business of life as a single mom while her case was pending.

P. Dr. Johnson placed Claimant at MMI on 5/1/2020, even while noting that Claimant was still in pain. He did not find the proposed surgery to be unreasonable or unnecessary – in fact, he suggested that Claimant pursue treatment outside the Workers Compensation system. While Dr. Simpson felt that Claimant's constellation of symptoms was not wholly explained by the dislocation (thus his hesitancy to operate), Dr. Rook posited a plausible explanation; to wit: Claimant has other symptoms *in addition to* an unstable shoulder; the shoulder instability must be addressed surgically, then the other symptoms must be addressed separately. The ALJ finds Dr. Rook's reasoning to be persuasive. The shoulder surgery as proposed by Dr. Pak is *reasonably necessary* to cure Claimant of her current shoulder condition.

Shoulder Surgery, Related to the Work Injury, as Applied

Q. Claimant has testified that she has not previously injured her left shoulder, nor has she been placed on any left shoulder work restrictions in the past. She also testified that while she had been treated for some unrelated condition at Ft. Carson in the past, this did not include her shoulder. As of this Order, the ALJ has no information to the contrary, despite Respondents' protestations. If Respondents uncover such information moving forward, they may pursue appropriate remedies at that time. At this juncture, the ALJ finds Claimant to be credible in her denial of prior left shoulder injuries. If the ALJ is to deny this claim based upon Dr. O'Brien's theory of pure secondary gain, Claimant will have to be caught with her hand far deeper into the proverbial cookie jar than has been shown to date. Assuming arguendo, that Claimant had (unbeknownst to her or not) a pre-existing condition in her left shoulder rendering her more susceptible to this injury, the analysis does not change. Claimant (unless shown otherwise after the fact) was not symptomatic until this work accident occurred. Thus, her need for treatment came about as a direct result of this low-speed traffic collision.

R. As a result, there is MRI evidence, ultimately even according to Dr. O'Brien, of a prior shoulder injury. To paraphrase a former US President, *it depends on your definition of subacute*. Dr. Rook opines that *scarring* (undefined herein by Dr. Trystain Johnson) could show in the MRI within one week of her injury. Dr. O'Brien thinks such interpretation is untenable. There is, however, also some evidence, however subtle, of edema as well. This is suggestive of a more recent injury than from some undefined, perjuringly denied, chronic shoulder injury, as posited (sans evidence) by Dr. O'Brien. While Dr. O'Brien castigates Dr. Johnson for *dramatically over interpreting* the MRI (along with the physicians who read his report), the ALJ notes the following: Dr. Johnson is fellowship trained in musculoskeletal radiology - Dr. O'Brien is not. Further, Dr. Johnson actually looked at the films - Dr. O'Brien did not. All he did was critique Dr. Johnson's interpretation of those films. Indeed, and to his credit, Dr. Johnson hedged his bets, and qualified what he saw, instead of being 100% certain about everything under the sun. This actually renders Dr. Johnson more persuasive, in the eyes of this ALJ. The ALJ finds that it is more likely than not that the MRI evidence is consistent with a week-old injury.

S. The ALJ finds Mr. Passamaneck's testimony and report to be sincere, based upon expertise, and free of unwarranted bias. There has certainly been no testimony, even from Claimant, to contradict his opinions. While admittedly an inexact science, this was plainly not a high impact accident. However, (and understandably so), he was not able to determine Claimant's position within the driver's seat at the point of impact, relative to the seatback. Nor would he know the position of Claimant's shoulder, relative to the seatbelt. If Claimant were already seated firmly against the seatback, greater kinetic energy would be available to then move her forward into the seatbelt on the rebound. Dr. O'Brien posits that a rear end collision could *never* result in this type of injury. The ALJ would only concur only insofar as such injury would not occur during her initial rearward press into the seat. Upon rebound, as posited by Dr. Rook, such

subluxation, however minor, could indeed occur even at low speeds, and the ALJ so finds. While no 'seatbelt sign' was observed in the ER, this incident occurred in October in Colorado; Claimant could have been wearing anything from a t-shirt to a padded jacket, and the record is silent on what she had on that day.

T. The ALJ finds, by a preponderance of the evidence, that the surgery being proposed by Dr. Pak (and initially seconded by ATP Dr. George Johnson, before he read Dr. O'Brien's IME report) is also *causally related* to Claimant's work injury.

Claimant Responsible for Termination of Employment, Generally

U. Under the termination statutes in §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. a Claimant who is responsible for his or her termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and wage loss. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1131 (Colo. App. 2008). The termination statutes provide that, in cases where an employee is responsible for her termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, W.C. No. 4-631-681 (ICAO, Apr. 24, 2006). A claimant does not act "volitionally" or exercise control over the circumstances leading to her termination if the effects of the injury prevent her from performing her assigned duties and cause the termination. *In re of Eskridge*, W.C. No. 4-651-260 (ICAO, Apr. 21, 2006). Therefore, to establish that Claimant was responsible for her termination, respondents must demonstrate by a preponderance of the evidence that Claimant committed a volitional act, or exercised some control over her termination under the totality of the circumstances. *See Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994). An employee is thus "responsible" if she precipitated the employment termination by a volitional act that she would reasonably expect to cause the loss of employment. *Patchek v. Dep't of Public Safety*, W.C. No. 4-432-301 (ICAP, Sept. 27, 2001).

V. Violation of an employer's policy does not necessarily establish the claimant acted volitionally with respect to a discharge from employment. *Gonzales v. Industrial Commission*, 740 P.2d 999 (Colo. 1987). An "incidental violation" is not enough to show that the claimant acted volitionally. *Starr v. Industrial Claim Appeals Office*, 224 P.3d 1056, 1065 (Colo. App. 2009). However, a claimant may act volitionally, and therefore be "responsible" for the purposes of the termination statute, if they are aware of what the employer requires and deliberately fails to perform accordingly. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008). This is true even if the claimant is not explicitly warned that failure to comply with the employer's expectations may result in termination. *See Pabst v. Industrial Claim Appeals Office*, 833 P.2d 64 (Colo. App. 1992) (claimant disqualified from unemployment benefits after discharge for unsatisfactory performance when aware of expectations, even if not explicitly warned that job was in jeopardy). Ultimately, the question of whether the claimant was responsible for the termination is one of fact for determination by the ALJ. *Apex Transportation, Inc. v. Industrial Claim Appeals Office*, 321 P.3d 630, 632 (Colo. App. 2014).

Termination from Employment, as Applied

W. While Claimant no doubt suffered from some pain during December, 2019, and January, 2020, Respondents had made reasonable accommodations with modified duty, based upon what information they had from the ATP during this period. The ALJ finds that Claimant, despite her discomfort, was not somehow rendered incapable of reporting to work. Instead, she had a long, well-documented history of unexcused absence from work. She was already on the bubble before this work injury occurred in October. The ALJ finds and concludes, by a preponderance of the evidence, that Claimant knew what was (reasonably) required of her, to wit: simply showing up for work, unless medically excused. She failed to do so on six (6) occasions, none of which appear to correlate with appointment dates set by her ATP. Claimant was responsible for her own termination from employment, effective 1/8/2020, and her resultant wage loss is not attributable to her work injury. Claimant is not entitled to TPD or TTD from that day forward.

ORDER

It is therefore Ordered that:

1. Claimant suffered a compensable work injury on October 22, 2019.
2. Respondents shall pay for all reasonable, necessary, and causally related medical expenses in connection with her work injury, to include the shoulder surgery as proposed by Dr. Pak.
3. Claimant was responsible for her own termination from employment, effective 1/8/2020, and is not entitled to TTD payments from that time forwards.
4. Respondents shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.
5. All matters not determined herein are reserved for future determination.

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

petition to review form at: <http://www.colorado.gov/dpa/oac/forms-WC.htm>. In addition, it is recommended that you send a copy of your Petition to Review to the Colorado Springs OAC via email at oac-csp@state.co.us.

DATED: August 25, 2020

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

- Whether Respondent has proven by clear and convincing evidence that the Division Sponsored Independent Medical Examination (“DIME”) physician erred in his determination of permanent partial disability (“PPD”)?
- Whether claimant has proven by a preponderance of the evidence that Dr. Cynthia Manninen is authorized to provide medical treatment to claimant?

FINDINGS OF FACT

1. Claimant was injured on December 15, 2015 when he was involved in a motor vehicle accident (“MVA”) while traveling from Durango to Telluride for a work related meeting. Claimant testified that the MVA occurred in snowy weather when the vehicle lost control, and went down a forty (40) foot embankment, rolling one half time and landing on its’ roof.

2. Claimant testified that following the MVA, he knocked out the window of the side door, climbed out of the vehicle, and assisted another passenger in the vehicle to get out the rear hatchback of the vehicle. Claimant testified that he and the co-workers who were in the vehicle then climbed the embankment and received assistance from a passing vehicle. Claimant was then transported by ambulance to the emergency room (“ER”) at Southwest Memorial Hospital in Cortez, Colorado.

3. In the ER, the physician noted that claimant was traveling approximately 35 miles per hour when the vehicle rolled after spinning in the snow. Claimant reported some right lateral neck pain with palpation. Claimant also reported some tenderness to the right paralumbar soft tissue. Claimant testified he was later taken back to his car in Durango by a co-worker.

4. Claimant was referred for medical treatment with Dr. Jernigan. Claimant was initially examined by Dr. Jernigan on December 17, 2015. Dr. Jernigan noted claimant was involved in an MVA and had to crawl up an embankment. Dr. Jernigan evaluated claimant and diagnosed him with right shoulder contusion, cervical strain and thoracolumbar strain. Dr. Jernigan also noted claimant reported a persistent headache.

5. Claimant returned to Dr. Jernigan on December 23, 2015. Dr. Jernigan noted claimant presented with persistent right neck pain and shoulder pain with range of motion of the neck and shoulder limited. Dr. Jernigan noted that claimant’s low back also remained sore. Claimant was referred for chiropractic care for his injury.

6. Dr. Jernigan recommended a cervical magnetic resonance image (“MRI”) which was performed on January 13, 2016. The cervical MRI demonstrated moderate posterior disc protrusion at C5-C6 and mild to moderate central disc protrusion at C6-7.

7. Claimant was referred to Spine Colorado for consultation. Claimant was examined by physician assistant (“PA”) LaBaume on February 8, 2016. PA LaBaume noted claimant was reporting that he had significant pain following the MVA in his neck and right shoulder. Claimant also reported problems with his right shoulder dislocating. PA LaBaume also noted claimant complaining of numbness and tingling in his medial forearm and down into his 4th and 5th digits.

8. Claimant subsequently underwent a lumbar MRI on April 12, 2016. The lumbar MRI demonstrated a broad-based right paracentral disc protrusion at L5-S1 with annular fissuring and a mild broad based annular disc bulge at L5-S1.

9. Claimant testified he was referred by Dr. Jernigan to Dr. Anderson for his right shoulder after December 31, 2015. Claimant testified Dr. Anderson recommended claimant undergo an MRI of his right shoulder. Claimant underwent the MRI of the shoulder on March 23, 2016. The MRI showed two small tears, a small chronic impaction fracture of the humeral head. After reviewing the MRI, Dr. Anderson diagnosed a separation of the anterior superior labrum and recommended physical therapy. Claimant testified he was discharged from further care with Dr. Anderson in April 2016.

10. Claimant underwent a C5-C6 bilateral facet joint nerve block on April 25, 2016 under the auspices of Dr. Santos. Claimant subsequently underwent a radiofrequency lesioning of the right C5 and C6 medial branch nerves on May 9, 2016.

11. Dr. Bohachevsky performed a right L5-S1 transforaminal epidural steroid injection on May 16, 2016. Dr. Bohachevsky performed a second transforaminal ESI on November 4, 2016 to the right SI joint.

12. Dr. Santos performed a right L4-5 L5-S1 facet joint nerve block on February 21, 2017. Dr. Santos performed a radiofrequency lesioning of the right L3 and L4 medial branch nerves and the L5 dorsal ramus nerve supplying the L4-5 and L5-S1 facet joints. Claimant only reported minimal relief from this procedure. Dr. Santos performed an additional radiofrequency procedure on March 17, 2017 to the left 3rd occipital nerve and C3-C4 medial branch nerves supplying the left C2-3 and C3-4 face joints.

13. Respondents obtained an independent medical examination (“IME”) with Dr. O’Brien on November 21, 2017. Dr. O’Brien reviewed claimant’s medical records, obtained a medical history and performed a physical examination in connection with his IME. Dr. O’Brien noted in his report that claimant had full range of motion of his cervical spine and right shoulder. Dr. O’Brien opined that claimant did not sustain a shoulder injury in the MVA. Dr. O’Brien noted that when claimant reported to the ER following the accident, he complained of neck pain and back pain, but not shoulder pain. Dr. O’Brien opined that if claimant had sustained a shoulder injury in the MVA, he would not have been able to assist his co-workers up the embankment after the MVA. Dr. O’Brien diagnosed claimant with a minor cervical strain and minor lumbosacral strain as a result of the MVA.

14. Dr. Jernigan reviewed Dr. O'Brien's report on January 30, 2018 and opined that claimant was not at MMI.

15. Claimant underwent SI joint injections on August 2, 2018 under the auspices of Dr. McLaughlin.

16. Respondents requested a 24 month Division-sponsored Independent Medical Examination ("DIME"). Claimant was examined in connection with the DIME by Dr. Gordon on September 18, 2018. Dr. Gordon opined in his DIME report that claimant was not at MMI. Dr. Gordon opined that claimant would likely be at MMI after his right SI joint radiofrequency ablation.

17. Claimant underwent the right SI joint radiofrequency ablation on October 10, 2018. Claimant subsequently underwent a functional capacity evaluation ("FCE") on April 2, 2019. Claimant was placed at MMI and underwent a permanent impairment evaluation with Dr. Burns on July 29, 2019. Dr. Burns determined that claimant's permanent impairment included 18% for the lumbar injury, and 15% for the cervical injury which combined for a whole person impairment rating of 30%. Dr. Burns opined that claimant's shoulder symptoms were related to claimant's cervical injury and did not provide a rating for claimant's shoulder.

18. Respondents requested a follow up DIME on the issue of permanent impairment. Claimant returned to Dr. Gordon for the follow up DIME. Dr. Gordon provided claimant with a permanent impairment rating of 7% for the lumbar spine, after invalidating the lumbar spine range of motion measurements, 14% for the cervical spine, and 4% for the right shoulder. Dr. Gordon combined the impairment ratings to come to a 23% whole person impairment rating.

19. The Division of Workers' Compensation issued an incomplete notice to Dr. Gordon on November 1, 2019, noting that the straight leg raising test validates the lumbar flexion only, not lumbar extension and lateral flexion as long as those are internally valid. Dr. Gordon issued an addendum to his report on November 22, 2019 that provided claimant with an impairment rating of 11% for the lumbar spine. Dr. Gordon combined the 11% lumbar spine impairment rating with the 14% of the cervical spine and 4% of the shoulder and provided claimant with a final combined rating of 26% whole person.

20. Respondents referred claimant to Dr. O'Brien for another IME on March 16, 2020. Dr. O'Brien opined in his IME report that claimant did not have an impairment rating based on his minor injuries. Dr. O'Brien opined that all an examiner has to do is look at claimant and "we see that there is no visible impairment."

21. Dr. O'Brien testified by deposition in this matter. Dr. O'Brien testified that the MRI scans showed normal age-related changes and opined that none of the findings would correlate to claimant's symptoms. Dr. O'Brien's testimony was consistent with his medical reports.

22. Claimant testified at hearing that he had a previous injury to his right shoulder when playing football in high school. Claimant testified following that injury he would experience right shoulder dislocations. Claimant had undergone a right shoulder surgery in 2010 to repair a torn labral. Claimant testified that despite this prior injury, his shoulder had recovered and he had full range of motion of his shoulder prior to the MVA.

23. The ALJ credits the testimony of claimant at hearing and the medical reports of Dr. McLaughlin, Dr. Jernigan, Dr. Burns and Dr. Gordon over the reports and testimony of Dr. McLaughlin and finds that respondents have failed to overcome the impairment rating provided by Dr. Gordon by clear and convincing evidence. The ALJ notes that Dr. Gordon's DIME report properly recites claimant's medical history and found that claimant had permanent impairment to his lumbar spine, cervical spine and right shoulder.

24. Claimant presented a note from a nurse practitioner, Kelly MacLaurin, dated March 13, 2020 that indicated that claimant should follow up with his primary medical provider regarding the medication amitriptyline. Claimant testified at hearing that his primary medical provider is Dr. Manninen at Mercy Family Medicine. Claimant requests that Dr. Manninen be authorized as a treating physician in this case.

25. The ALJ finds that claimant has shown that Dr. Manninen is within the chain of referrals from his authorized treating physician and is therefore authorized to treat claimant for his work related injuries.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2016. A party seeking to modify an issue decided by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and

actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. Section 8-42-107(8)(b)(III) and (c), C.R.S. provides that the DIME physician's finding of MMI and permanent medical impairment is binding unless overcome by clear and convincing evidence. Clear and convincing evidence is highly probable and free from substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it is highly probably the DIME physician is incorrect. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). A fact or proposition has been proved by clear and convincing evidence if, considering all of the evidence, the trier-of-fact finds it to be highly probable and free from substantial doubt. *Metro Moving & Storage, supra*. A mere difference of opinion between physicians fails to constitute error. See *Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-356 (March 22, 2000).

4. As found, respondents have failed to establish by clear and convincing evidence that Dr. Gordon's impairment rating set forth in the DIME report is incorrect. As found, the ALJ credits the reports of Dr. Jernigan, Dr. McLaughlin, Dr. Burns and Dr. Gordon over the conflicting opinion expressed by Dr. O'Brien and finds that respondents have failed to meet their burden of proof of overcoming the DIME report on the issue of permanent impairment.

5. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; see *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Pursuant to Section 8-43-404(5), C.R.S., Respondents are afforded the right, in the first instance, to select a physician to treat the industrial injury. Once respondents have exercised their right to select the treating physician, claimant may not change physicians without first obtaining permission from the insurer or an ALJ. See *Gianetto Oil Co. v. Industrial Claim Appeals Office*, 931 P.2d 570 (Colo. App. 1996).

6. "Authorization" refers to the physician's legal authority to treat, and is distinct from whether treatment is "reasonable and necessary" within the meaning of Section 8-42-101(1)(a), C.R.S. 2008. *Leibold v. A-1 Relocation, Inc.*, W.C. No. 4-304-437 (January 3, 2008). Section 8-43-404(5)(a) specifically states: "In all cases of injury, the employer or insurer has the right in the first instance to select the physician who attends said injured employee. If the services of a physician are not tendered at the time of the injury, the employee shall have the right to select a physician or chiropractor." "[A]n employee may engage medical services if the employer has expressly or impliedly conveyed to the employee the impression that the employee has authorization to proceed in this fashion...." *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985), citing, 2 A. Larson, *Workers' Compensation Law* § 61.12(g)(1983).

7. As found, claimant's authorized treating physician has referred claimant to seek medications for his work injury through his primary care physician. As found, Dr. Manninen is claimant's primary care physician and is therefore authorized to provide treatment for claimant for his work related injury.

ORDER

It is therefore ordered that:

1. Respondents shall pay claimant PPD benefits based on the impairment rating provided by the DIME physician, Dr. Gordon.
2. Dr. Manninen is authorized to treat claimant for his work injury.
3. All matters not determined herein are reserved for future determination.

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

DATED: August 27, 2020



Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

- I. Has Claimant shown, by a preponderance of the evidence, that he suffered a compensable work injury on August 31, 2019?
- II. If such injury is compensable, are Respondents responsible for medical benefits in connection with this injury?
- III. If such injury is compensable, are Respondents responsible for Temporary Total Disability payments?

STIPULATIONS

The parties stipulated that, if compensable, Claimant's Average Weekly Wage is sufficient to result in the maximum TTD rate of \$1,022.56, minus any offsets. The period of disability would run from the date of injury, until October 28, 2019.

Further, that if compensable, then UCHealth would serve as the Authorized Treating Physician(s), and the treatment Claimant received from UC Health, including from the UCHealth physicians, was reasonable and necessary to treat Claimant's injuries.

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

1. Claimant has been employed by Employer for approximately 33 years. Employer is a company that provides its customers with 24/7 unified communication services including network infrastructure and monitoring. Those IT engineering services include VoIP service, BTC, Jabber services, etc. In order to provide 24/7 services, the Employer has three work shifts. Claimant is classified as a Senior Network Engineer. His duties include working with clients in resolving various technical issues for Employer's clients, one of which is the United States Government.
2. Claimant's typical work schedule at the Employer was Monday through Friday, 6:00 a.m. to 2:00 p.m. Claimant testified that in the year prior to his work accident, he was called into work outside of his normal shift somewhere between "five and ten" times. Claimant testified that on August 31, 2019, there was no specific procedure to follow when being called into work on a weekend or holiday, but that the policy had now changed. It was not common for him to be

called into work on a weekend. When it did occur, he was called in by a watch officer or supervisor at the Employer. Claimant testified that he was not required to go into the office 24/7 when asked. If he was not able to go into the office, the Employer would have to call "someone else." Claimant further testified that he had not been told when he was hired that the job was, in effect, 24/7.

3. On August 31, 2019, at approximately 12:00 P.M., Claimant was called by the watch officer, who is a U.S. government employee, to obtain assistance with a technical problem. Claimant attempted to resolve the problem from his home phone to no avail. As a result, the watch officer asked Claimant to come into Employer's office located at 8610 Explorer Drive in Colorado Springs. Claimant testified that there are special encrypted phones at Employer's office that are required to be used in resolving technical issues for employer's clients.
4. Claimant testified that his office at the Employer was approximately 7 minutes from his home. He testified that he arrived at the office "around 1:00 (p.m.)" and then left the office at 2:15 or 2:20 p.m.
5. Claimant rode his personal motorcycle to Employer's office where he spent approximately 1 ¼ hours resolving the technical issue for Employer's client. After Claimant finished his work, he started home on his motorcycle. As he was riding home, Claimant's motorcycle veered into the median near the intersection of Research Parkway and Union Blvd. Claimant's route back home from his office was essentially straight down Research to Channel Drive where he would take a left turn. Claimant did not stop or [significantly] deviate from his route home prior to the accident.
6. Claimant testified that he was an experienced motorcycle rider who had ridden the involved motorcycle for over 19 years at the time of the accident. Claimant has a motorcycle endorsement on his driver's license.
7. Claimant is a salaried employee. Even though salaried, he is still required to keep track of the hours he works on any given day. Claimant and other employees are required to enter their hours they work outside of work hours, into a computer system. The extra hours worked are approved by Claimant's supervisors at the end of each week. Employees are on the honor system when entering their hours.
8. Claimant testified that when he goes into work on a weekend, he enters the hours worked but he does not get extra pay for said hours. He gets "comp time." He was not paid for mileage or for his time going into work. He was not paid overtime or additional pay, he received no extra pay for working on a Saturday, since it was part of his salary. Claimant stated that while he was a salaried employee, he still documented his time in in the "company web portal." It was not a time clock. Claimant testified that it was his understanding that when called into work on a weekend, he was to enter into the computer a minimum of 4

hours call-out time. He further stated that he would track his hours “portal to portal.”

9. Claimant testified that prior to this accident, he could be called into work on weekends not only by his supervisor, but also by the watch commander, who is a government employee. Claimant testified that prior to the accident it was common for him to go into the office when called by the watch commander, and not merely one of his supervisors. He was unaware of any policy requiring his supervisor’s approval before going into work for these on-call requests. Claimant testified that *after* this accident, he was then advised by Employer that he was to come into the office on weekends *only* when requested by one of his supervisors.
10. Claimant’s manager, Jessica H[Redacted], testified that Employer provides 24/7 services of networking and unified communication services divided into three shifts: the daytime shift, the swing shift, and the midnight shift. Ms. H[Redacted] explained that the unified communications team (of which Claimant is a member), provides onsite services on Monday through Friday from 6:00 A.M. to 6:00 P.M. and then after 6:00 P.M., the team members go into an on-call status.
11. According to Ms. H[Redacted], Claimant can be called in at any given time, including weekends and holidays, to assist with a mission-critical issue. According to Ms. H[Redacted] each issue is unique. Whether or not an issue is mission-critical is determined by Employer or by Employer’s customers.
12. Ms. H[Redacted] testified that Claimant’s on-call status was a specific element of his employment at the time of his accident. Furthermore, Ms. H[Redacted] testified that an employee in Claimant’s position should have an expectation that he or she could be called into the office outside of their scheduled shift. She explained that an employee could decline to come in when asked, as it is understood that employees have personal lives.
13. Ms. H[Redacted] then testified that the procedure for an employee being called into work outside their normal hours starts with a customer reporting a mission critical issue to the watch officer. The watch officer then reaches out to the employer’s team or “NOC”, who then determines if the issue is mission-critical. If the issue is mission- critical, the “NOC” will call the technician in. Ms. H[Redacted] explained that Employer does not like the watch officers to call the technicians directly, as many times the issue turns out not to be mission-critical. Ms. H[Redacted] acknowledged that many times the watch commander circumvents the “NOC” and contacts the technician directly, to ask him or her to come into the office and resolve the issue. She testified that in those instances where the watch commander contacts the technician directly, the expectation is that the technician contacts their supervisor, manager, or someone in the chain so that Employer is aware of the technician’s activity.

14. Ms. H[Redacted] also testified that Claimant's normal work schedule is Monday through Friday and outside of these days is considered "on-call". Furthermore, Ms. H[Redacted] testified that if Claimant is called into work outside of normal work hours by the watch commander and can't reach any of his supervisors in the chain of command, Claimant should go ahead into the office and deal with whatever issue is pending.
15. Ms. H[Redacted] testified that the four hours Claimant entered into his time sheet for this date do not impact Claimant's pay. She testified that the Employer had no policy permitting an employee to bill 4.00 hours as a standard minimum call-out time when the employee had actually worked fewer hours. She was surprised to hear Claimant testify to such a protocol. Ms. H[Redacted] stated that employees are responsible for entering their time worked into the Employer's system, and the Employer must rely on the integrity of employees to charge [the client] the correct number of hours they actually worked. She also testified that Claimant's prior manager told her that at one time there was a minimum 2-hour charge for callout time. Ms. H[Redacted] said that she does not know if Claimant was ever advised of what the procedure was concerning call-out time. Ms. H[Redacted] confirmed that Claimant is a good employee, and has never been counseled for time clock violations.
16. Ms. H[Redacted] confirmed Claimant's testimony that employees are not paid for mileage to travel to and from the office outside of the employee's scheduled shift. She testified that employees are not paid after the time they leave the office at the end of their workday, and they should not be billing for travel time from the office. She explained that the Employer cannot account for the activities of an employee after the employee departs the office, so an employee is not permitted to charge time for traveling from work to home. Ms. H[Redacted] testified that the Employer does not require any certain type of transportation to and from the office.
17. Regarding Claimant's Exhibit 6, with the name of Peter D. Fredericks on page 1, and signed by Claimant on September 6, 2019, Ms. H[Redacted] testified that she had not seen the document previously. She had not provided the document to any medical provider. She advised that Peter D. Fredericks is not an employee of Employer. She was unaware who had filled out the form. Ms. H[Redacted] stated that she had not presented the document to Dr. Fredericks for him to fill out.
18. A review of the dash cam video of the accident shows Claimant riding his motorcycle in the inside lane next to a rock lined median when he slowly drifted into the median. After Claimant hit the median, he was thrown off the motorcycle and tumbled over the rocks, coming to a stop a short distance from where the motorcycle hit the median. It is unclear as to why the motorcycle drifted into the median from a review of the video.

19. As a result of the accident Claimant sustained significant and serious injuries to include the following: closed fracture of fourth metacarpal bone of left hand, lumbar transverse process fracture, L2 and L5, phalanx distal fracture of left finger, left tibial plateau fracture, and left great toe fracture.
20. Claimant treated at UCHealth for his injuries. A review of the medical records reveals that there are various histories noted which slightly differ. For example, one E.R. note indicates that Claimant was riding a motorcycle when he struck the curb and was ejected onto some large rocks while another history from the same E.R. record indicates Claimant took his eyes off the road for a second when his front tire hit the curb and he landed in the median that had some rocks in it. Another history from the E.R. note of August 31, 2019 indicates Claimant was riding his motorcycle between 30 to 40 miles an hour, when he failed to pay attention and “drifted into a car.”
21. The traffic accident report reflects that Claimant gave a history that it was his son’s first day of working at Taco Bell and that while looking [presumably to see if his son’s car was parked in the Taco Bell lot], he drifted slightly to the left and hit the curb, riding up on it and being thrown from the motorcycle. In addition, Claimant’s Workers’ Claim for Compensation reveals that Claimant struck an unseen object then hit a curb.
22. Claimant agreed on cross-examination that he did not describe having looked to see his son’s vehicle at Taco Bell. He further did not describe swerving to miss an object in the road.
23. Claimant testified that his memory of the accident is foggy due to the injuries he sustained coupled with the medication given to him at the hospital. Claimant further testified he is unsure as to what exactly happened in this accident.
24. By agreement of the parties the care provided by and under the providers at UCHealth is reasonable, necessary, and authorized.
25. Claimant testified that as a result of his motorcycle accident on August 31, 2019, he missed time from work until he was released to return to work by Dr. Frederick. Dr. Frederick opined in his letter/report of October 28, 2019, that “Lewis may return to work on 10/28/19.” (Ex. I) Claimant testified that he in fact returned to work on October 28, 2019.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), *Sections 8-40-101, C.R.S. 2007, et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S.* In general, the Claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. *Section 8-43-201, C.R.S.* A preponderance of the evidence is that which leads the trier-of fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page V. Clark, 197 Colo. 306, 592 P.2d 792 (1979)*. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of the Respondents. *Section 8-43-201, C.R.S.*

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

C. Assessing weight, credibility and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University park Care Center v. Industrial Claim Appeals Office, 43, P.3d 637 (Colo. App. 2001)*. Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. cline, 57 P.2d 1205 (Colo. 1936)*; *Bodensieck v. Industrial Claim Appeals Office, 183 P3d 684 (Colo. App. 2008)*; *Kroupa v. Industrial Claim Appeals Office, 53 P.3d 1192 (Colo. App. 2002)*.

D. In this instance, the ALJ finds both Claimant and Ms. H[Redacted] to be equally sincere and credible in recounting what they *understood*, at least, to be the company protocols in placing employees on call, the call-in procedures, and how and when to bill for one's time. Suffice it to say, the written vs. unwritten codes of conduct are less than airtight, and are not spelled out with great specificity. Incidents such as this often serve as teachable moments for all concerned. Nonetheless, the legal analysis required at this point does not hinge

upon finding one party more credible than the other. Likewise, Claimant has, perhaps due to trauma, provided differing details in how this accident occurred. The ALJ likewise finds these details not to be outcome determinative in this no-fault analysis. In any event, the video best tells the tale, consistent with his initial version of events. Claimant lost focus for just an instant on his way back home, hit the curb, and was injured.

Compensability, Generally

E. To sustain his burden of proof concerning Compensability, Claimant must establish that the condition for which he seeks benefits was proximately caused by an “injury” arising out of and in the course of employment. *Loofbourrow v. Industrial Claim Appeals Office*, 321 P. 3d 548 (Colo. App. 2001), aff’d *Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 214); Section 8-45-301(1)(b), C.R.S.

F. The phrases “arising out of” and “in the course of” are not synonymous and a Claimant must meet both requirements for the injury to be compensable. *Younger v. City and County of Denver*, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals*, 759 P.2d 1720 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando*, 811 P2d 379, 381 (Colo. 1991). An injury occurs in the course of employment when it takes place within the time and place limits of the employment relationship and during and activity connected with the employee’s job-related functions. *In Re Question submitted by U.S. Court of Appeals, Supra; Deterk v. Times Publishing Co.*, 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976).

Travelling To or From Work

G. Generally, an injury sustained while traveling to or from work is not considered to have occurred within the scope of employment. *Varsity Contractors v. Baca* 709 P.2d 55 (Colo. App. 1985); *Berry’s Coffee Shop, Inc. v. Palomba*, 161 Colo. 369, 423 P.2d 2 (1967). However, there is an exception when “special circumstances” create a causal relationship between the employment and the travel beyond the sole fact of the employee’s arrival at work. *Madden v. Mountain West Fabricators*, 977 P.2d 861,863 (Colo. 1992); *Staff Administrators, Inc. v. Reynolds*, 977 P.2d 866 (Colo. 1999).

H. In *Madden v. Mountain West Fabricators, Inc.*, supra. The Supreme Court set forth four categories of evidence that *may* establish a travel injury to be an exception to the coming and going exclusion:

- 1.) Whether the travel occurred during working hours,
- 2.) Whether the travel occurred on or off the employer’s premises,

3.) Whether the travel was *contemplated by the employment contract*, and

4.) Whether the obligations or conditions of the employment created a “zone of special danger” out of which the injury arose.

I. Claimant concedes that this accident occurred on a public roadway, using his own vehicle. He further concedes that it did not occur during regular work hours. He further concedes (and the ALJ concurs) that the obligations of this assignment did not create some sort of “zone of special danger”, such as driving in a blizzard, or during serious domestic unrest. The remaining category to be examined is whether this travel is *contemplated by the employment contract*.

J. There are three categories of cases generally recognized as exceptions to the coming and going exclusion because travel is *contemplated by the employment contract*:

- a. The particular journey was assigned or directed by the employer,
- b. The travel was at the express or implied request of employer or conferred a benefit to employer beyond the employee’s arrival at work, and
- c. The travel was singled out for special treatment as an inducement to employment.

Madden v. Mountain West Fabricators, Supra; In the Matter of the Claim of Kurt Barnes v. City and County of Denver, Denver Police Department, W.C. No. 5-003-724-04, (ICAO April 20, 2017).

K. Such distinctions drawn are critical to distinguish injuries which would ordinarily occur in the simple business of going to or from work, lest the exception swallow the rule. In the ordinary employment situation, employees are expected to report for work at (or at least near), specified hours. How they get there does not matter; they can drive their personal vehicle, take the bus, walk, bike in, ride with a friend, or take an Uber. As a result of those choices available, they alone assume the associated risks - at least until arriving on the employer’s premises. Employees can take a less efficient means to get to work (e.g., walk vs. drive), as long as they arrive on time. There is also no requirement that employees go straight to work. They can stop at the cleaners, go to the Y to work out, or stop and order the Grand Slam Breakfast - as long as they get to work on time. Similarly, they need not go straight home after work. They can stop at the cleaners, go to the Y to work out, or stop and order the Grand Slam Breakfast (available 24/7!) - as long as they maintain domestic bliss. Such travel itself is not at the express request of the employer, nor does the travel itself confer a

benefit beyond employee's arrival at work.

L. The ALJ has reviewed *Teller County v. Industrial Claim Appeals Office*, 410 P. 3d 567 (Colo. App. 2015), along with *Colorado Civil Air Patrol vs. Hagans and Industrial Commission of Colorado*, 662 P. 2d 194 (Colo. App 1983). In those and related cases, while the distinction was not *expressly* made between going **into** work, as opposed to leaving **from** work, in the compensable cases, the claimant was in fact going *into* work, and as an implied condition of employment, be it volunteer or paid. The ALJ finds such distinction, at least in this case, to be pivotal.

M. Claimant's duties include resolving technical issues for Employer's clients one of which is the U.S. government. Claimant's normal work hours are from 6:00 A.M. to approximately 2:00 P.M. Monday through Friday. Claimant does not work outside of his normal work hours *unless* specifically called in to "troubleshoot" a technical issue for Employer's clients. Claimant, as part of his job, is required to be on call to assist Employer's clients when necessary. Claimant does not meet the traditional criteria of being "on call", i.e., carrying a phone at all times, remaining within a certain radius, refraining from alcohol, etc. Nor is he assigned a certain "on call" status for certain periods; he is just on the list, subject to being called, but at liberty to decline for a wide variety of personal reasons. If so, Employer just goes down the list until they find a volunteer, perhaps one looking for comp time down the road. Nonetheless, the ALJ infers that if Claimant were to continually, habitually turn down call-ins, his employment status could be affected. In all fairness, he must share the load in the long run. Thus, it was part of Claimant's contract, and it was Employer's reasonable expectation, that Claimant go into the workplace outside normal work hours when asked, if not otherwise engaged.

N. Employer contends that Claimant was only to go into the workplace when requested by one of his supervisors as opposed to the watch commander. The ALJ makes no such distinction. In any event, Claimant credibly testified he was unaware of such policy prior to his accident. Furthermore, Ms. Howard testified that it is common for the watch commander to call the Senior Technicians directly to have them come into the office on weekends. On the day of the accident, it was necessary for Claimant to go *into* the workplace to handle a technical issue. He was required to use an encrypted phone to perform his job duties, and the ALJ so finds. However, the ALJ makes the following distinction:

O. When he was called in to solve this problem, what was implicit (if not explicit) in his employment relationship was that *we need you right now* – not just to come in at some point on Saturday, and put in a couple hours. Regardless of who was to label his call-in as 'mission-critical', it certainly was not Claimant's to make. Once he accepted the job, he had to head straight in, in the most efficient way possible (car or motorcycle), with no Grand Slam Breakfast on the way. Thus, Claimant's trip **into** work was assigned or directed by Employer. Such trip

also conferred a benefit to employer, to wit: Employer's contractual obligation was thereby met with the client, by solving this problem asap and in person. It also appears from the testimony that the client (Uncle Sam) got billed in some fashion, since comp time had to be awarded to the employee.

P. Had Claimant been injured on the trip *into* work, this result could well have been different – at least assuming he went in with reasonable dispatch. But that is not what happened. He was hurt *after leaving* Employer's premises. Claimant stated he was heading back home, and the ALJ finds this to be true, at least in large part. What is a distinction without a difference is whether Claimant drifted into the curb, or swerved to avoid some object in the roadway. Fault or neglect does not matter. What is also a distinction without a difference is whether Claimant's momentary, fatherly glance over towards Taco Bell constituted some deviation from his trip home. Lastly, another distinction without a difference here is whether Employer characterizes his travel both ways as unpaid, vs. Claimant's entering his own billing as being "portal to portal." Function over form here.

Q. However, what is of critical distinction is that once Claimant completed the mission, and thereby left the premises of his Employment, he was no longer acting at the behest of Employer. While of course Claimant would have to go back home at some point, he was not, as a condition of his employment, required to head straight for home. Nor was he required to run any errands for Employer. Claimant became the master of his own fate, and of his own choices. He was free to go straight home, stop by Taco Bell and order the #3 and say hi, or brave the I25 Gap, head to the Tech Center, and walk the rat maze at IKEA for a couple hours. He just had to be back at work Monday at 6:00 a.m.

R. The ALJ finds and concludes that this unfortunate accident did not occur in the course and scope of his employment; thus, Claimant's claim is not compensable.

Medical Benefits

S. Claimant has failed to establish that he sustained a compensable work-related injury; therefore, he is not entitled to an award for medical treatment.

Temporary Total Disability Benefits

T. Claimant has failed to establish that he sustained a compensable work-related injury; therefore, he is not entitled to an award of temporary total disability benefits.

ORDER

It is therefore Ordered that:

1. Claimant did not suffer a compensable work injury.
2. Claimant's claim for medical benefits is denied and dismissed.
3. Claimant's claim for Temporary Total Disability benefits is denied and dismissed.
4. All matters not determined herein are reserved for future determination.

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

DATED: August 27, 2020

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-078-582-002**

ISSUES

- I. Whether Claimant sustained a compensable work-related injury on or about September 25, 2017.
- II. If Claimant sustained a compensable work injury on or about September 25, 2017, whether the medical treatment she has received since that date is reasonable, necessary, and related to her work injury.
- III. If Claimant sustained a compensable work injury on or about September 25, 2017, whether the arthroscopic surgery recommended by Dr. John Reister is reasonably necessary treatment related to Claimant's work injury.

STIPULATION

- The parties agree that if Claimant sustained a compensable work-related injury on or about September 25, 2017, Front Range Occupational Medicine and On The Mend Occupational Medicine – which includes Dr. Miller and Dr. Walker - are authorized providers and Respondent should be ordered to pay their bills.

FINDINGS OF FACT

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

1. Claimant was employed by Employer as a second-grade teacher at Kendrick Lakes Elementary School on September 25, 2017 when she stepped into a hole in the grass on her way to her car for lunch with her right foot while in the course and scope of her employment.
2. Claimant twisted her right knee, heard a loud pop, had immediate pain in the right lower part of the knee below the kneecap and had difficulty walking to her car.
3. Claimant had to call the office for help because she was unable to walk on the right leg at that point and another teacher came to assist Claimant into the school health room.
4. Claimant's knee was swelling and the school health aide gave her ice to help with the pain and swelling. Claimant did, however, stay and taught the remainder of the day in her chair with ice on her knee.
5. Claimant's husband picked her up from work and took her to the emergency room at SCL Community Hospital Southwest. (*Claimant's Exhibit 8.*) Claimant was diagnosed with a sprain of the right medial collateral ligament of the right knee. (*Claimant's Exhibit 8, p. 14.*)

6. Claimant provided a history of right knee pain after feeling like she twisted her knee and then heard a pop after stepping into a pothole. She reported that she had some soreness knee due a foot issue and walking awkwardly to try and avoid exacerbating her foot pain, so the knee had been sore for a couple of months. She was actively seeking care from a podiatrist for her foot condition in an outpatient setting. (*Claimant's Exhibit 8, p. 2.1*) She advised the ER doctor that she stepped in uneven ground and her foot fell into a possible (pothole) causing her knee to twist to avoid falling and since than had been painful and she was having a hard time bearing weight. (*Claimant's Exhibit 8, p. 22.*)
7. Claimant provided a history of previous bilateral arthroscopic lateral release surgeries, two on the left knee and one on the right. (Claimant's Exhibit 8, p. 22.)
8. Claimant testified she did take a couple of days off from work following the injury. She was also referred to Dr. Matt Miller of Front Range Occupational Medicine. She was initially evaluated on September 26, 2017. Dr. Miller provided work restrictions of no prolonged walking or standing; seated work 95% of the time and use of crutches as needed. (*Claimant's Exhibit 9, p. 34.*) Dr. Miller was provided with a history of Claimant's pre-existing right knee condition and found that the incident was work related, noting that Claimant had some ongoing pain in the knee at the time of the injury but had a distinct aggravation with the incident.
9. Claimant returned to work and was working within her restrictions, however, she continued to have sharp pain in her right knee that was not improving. Dr. Miller ordered an MRI to rule out a meniscal tear of the right knee. (*Claimant's Exhibit 9, p. 42.*) Because Claimant was extremely claustrophobic the MRI was requested in an open MRI. (*Claimant's Exhibit 9, pp. 41-42.*)
10. Claimant underwent an MRI of her right knee on October 13, 2017 at Upright MRI of Colorado. (*Claimant's Exhibit 10.*) Per the radiologist there was no discrete meniscal tear with mild medial and lateral femorotibial joint degenerative changes. There was moderate sized right knee joint effusion.
11. Claimant testified that she has treated with Dr. Reister for several years starting with medical care and treatment for her low back following a slip and fall at work for Jefferson County and subsequent treatment for her bilateral knee problems.
12. Claimant testified that she has a problem with her kneecaps. Claimant testified that it is her understanding that her kneecaps tend to move toward the outside of her knees. As a result, they do not sit in the joint correctly and this leads to tears in the cartilage. Such condition caused pain and swelling in her knees. Therefore, Claimant had her first lateral release surgery on left knee while she was college. She testified that it is her understanding that the surgery required them to cut muscle off of the patella so the inner muscle will pull the kneecap back over to where it should sit.
13. Dr. Reister performed two lateral releases to the left knee and one to her right. The lateral release surgery to her right knee was performed in 1999. Claimant had ongoing bilateral knee problems that would require treatment for exacerbations. The exacerbations were generally pain and swelling. Claimant's treatment also included taking Celebrex on and off for her knee pain.

14. Claimant testified that she was not in active treatment at the time of her work injury for her knees, but the problems she was having with her right foot that she was treating for had caused some increased right knee pain because of the way she was walking due to the foot issues.
15. Claimant described extreme swelling after her work fall, greater than she had with her routine exacerbations, pain that was in a different part of the knee, straightening and bending the knee were painful, and she had pain all of the time that never went away despite care including up until the date of hearing. She also felt unstable on her right knee and was concerned that the knee was going to give out and she would fall. (*Claimant's Exhibit 9, p. 45; Exhibit 13, p. 61.*) This was a new problem for her. She used crutches until November of 2017 and kept them with her in the event she was feeling unsteady on her leg after that.
16. On November 3, 2017 Claimant requested that Dr. Miller refer her to Dr. Reister because of her ongoing problems that were not improving because of his knowledge of her orthopedic medical conditions. Dr. Miller would not make the referral because he did not know Dr. Reister and would only refer to orthopedic doctors that he worked with that understood workers compensation. (*Claimant's Exhibit 9, p. 50.*)
17. Claimant sought a change of physician to Dr. Sharon Walker at On the Mend Occupational Medicine. Her first evaluation was on December 11, 2017. Dr. Walker was familiar with Dr. Reister and referred Claimant to him for evaluation of her right knee condition. Dr. Walker provided ongoing work restrictions, prescribed Celebrex and cyclobenzaprine. (*Claimant's Exhibit 13, pp. 63-64.*)
18. Claimant was evaluated by Dr. Reister on January 4, 2018. Dr. Reister indicated that Claimant had been his patient for over 20 years. He indicated that there had been a delay in treatment as a result of the workers compensation system. Dr. Reister indicated that the MRI showed advancing mediolateral osteoarthritis, which was mild in the tibial femoral compartments and some very advanced chondromalacia patella. According to Dr. Reister the chondromalacia patella is an interesting diagnosis as it goes from degenerative to mechanical quite easily and Claimant was having large effusions and significant pain. He noted that she was having more difficulty with stairs, chairs, getting up from the ground and not as much of a problem with level plantigrade walking. (*Claimant's Exhibit 14, p. 80.*)
19. Dr. Reister diagnosed Claimant with acute right knee pain and chondromalacia of the patella, right with effusion and mechanical symptoms. His treatment plan was to inject the right knee with an anti-inflammatory to try to get it calmed down. If that worked, he would repeat it as necessary. If that did not work and the problem had become mechanical, then an arthroscopic debridement of the patellar cartridge may be necessary.
20. Claimant returned to Dr. Reister on February 18, 2018 post injection indicating that she had substantial relief from the that injection for 4 weeks, but the pain had returned. Based upon his examination and the ongoing problems he was of the opinion that he needed to determine whether or not there had been acute damage to the meniscus in the knee and ordered an MRI. (*Claimant's Exhibit 14, p. 82.*)

21. An MRI of the right knee was performed on March 27, 2018 at Touchstone Imaging Highline. It was read as showing a medial meniscus tear of the posterior horn root attachment of the medial meniscus with peripheral extrusion of the medial meniscal body. (*Claimant's Exhibit 11, p. 53.*)
22. Claimant was referred to pool therapy by Dr. Walker on March 12, 2018. (*Claimant's Exhibit 13, p. 67.*) she continued with work restrictions and medications.
23. Dr. Walker also performed a Comprehensive Outcome Management Technologies psychological assessment, which showed Claimant was functioning poorly, but scored normal in the psychological category indicating that she did not need psychological counselling. (*Claimant's Exhibit 13, p. 68.*)
24. Claimant returned to Dr. Walker on April 8, 2018 who indicated that because the first MRI did not show a meniscal tear and the second one did that she could not say that the tear and need for surgery were related to the work injury. (*Claimant's Exhibit 13, p. 73.*) Claimant denied any other injury in between and explained that Dr. Reister indicated that the first MRI was an open one and of such poor quality that he ordered a repeat MRI in a closed MRI machine. Dr. Walker indicated Claimant should return to Dr. Reister who could compare the two MRI's and provide his opinion about whether the meniscal tear and need for surgery are related to her work injury. MMI was deferred, prescriptions written, and work restrictions continued.
25. Claimant returned to Dr. Reister on April 11, 2018 advising him of the workers compensation physician's opinions that the two MRI findings were so different that they do not believe the meniscal tear is related to the work injury. Dr. Reister indicated that the knee has been different since the injury, and he would review the two MRI's and provide an opinion. (*Claimant's Exhibit 14, p. 85.*)
26. On May 31, 2018, Dr. Reister provided Claimant the following diagnoses regarding her right knee:
 - Acute medial meniscus tear.
 - Arthritis of the right knee.
 - Chondromalacia of the patella.
 - Acute pain.(*Claimant's Exhibit 14, pp. 88-89.*)
27. Dr. Reister further noted Claimant had failed conservative management for improvement and was not a candidate for a total knee or arthritis surgery at her current young age of 50 and is an appropriate candidate for a diagnostic and therapeutic arthroscopy which he recommended. (*Claimant's Exhibit 14, pp. 88-89.*)
28. Moreover, the findings on MRI do not dictate whether the surgery recommended by Dr. Reister is reasonable, necessary, and related to the work injury. As credibly noted by Dr. Reister, "There are many other internal derangements that do not show up on MRI." Dr. Reister went on to state:
 - Claimant has paid the test of time and is not improving.

- Claimant is still complaining of pain and swelling of the knee on a regular daily basis.
- Claimant has failed conservative treatment of her knee symptoms.
- Claimant is not a candidate for a total knee replacement due to her current age of 50.
- Claimant is a candidate for a diagnostic and therapeutic arthroscopy.

(Claimant's Exhibit 14, pp. 88-89.)

29. On June 4, 2018 Dr. Reister requested authorization for outpatient right knee diagnostic scope and debridement. He attached his May 31, 2018 report that indicated that the different MRI findings were not significant in his opinion because of her diagnostic response to corticosteroids with a classic response to the steroid of a mechanical injury instead of a degenerative response, and appropriate for a scope because of the 8 months of ongoing pain and swelling and appropriate medical care. *(Claimant's Exhibit 2, p. 4.)*
30. On June 7, 2018 Employer denied authorization of the requested surgery pending a medical review. *(Claimant's Exhibit 3.)*
31. On June 11, 2018, a subsequent denial was sent to Dr. Reister including a medical record review dated June 9, 2018 from Dr. Mark Failing that the requested care was not reasonable, necessary, or appropriate for the Claimant. *(Claimant's Exhibit 4.)* Dr. Failing performed a record review and indicated that the surgery was not reasonable based upon the MRI findings, and Claimant's morbid obesity. He recommended a repeat cortisone or viscosupplementation as an alternative to surgery. Dr. Failing indicated that if a procedure were to be performed that it should be a total knee replacement. Dr. Failing indicated that he understood Dr. Reister's desire to prolong the life of the patient's knee prior to a knee replacement given her age, that it was his opinion that the arthroscopic meniscus repair had a low probability of improving her situation. *(Respondent's Exhibits 5-6.)*
32. On June 28, 2018 Claimant presented to Denver Foot and Ankle Clinic for a preoperative appointment for a tibial sesamoid ectomy of the right foot right with excision of matrix ectomy hallux right. *(Claimant's Exhibit 12, p. 56.)*
33. Claimant returned to Dr. Reister on August 6, 2019 following her foot surgery with multiple complications including an infection. Dr. Reister found her right knee to be effused, the medial joint line was tender, and the posteromedial joint line is tender with a positive McMurray with pop and pain. Dr. Reister related the need for care to the workers compensation injury of September 25, 2017 and recommended the arthroscopic surgery as the appropriate treatment. He once again requested authorization for the surgery.
34. Respondent's filed a Notice of Contest on August 8, 2019 on the same day that Dr. Reister re-requested the right knee scope. *(Claimant's Exhibit 5, p. 7.)*

35. Claimant was evaluated by Dr. Failinger on January 16, 2020. Dr. Failinger diagnosed Claimant with right knee severe degenerative joint disease with exacerbation of symptoms which are persistent and unrelenting, as well as a degenerative medial meniscus tear. (*Respondent Exhibit 1, p. 20.*) He was of the opinion that her symptoms were not solely related to the work injury of September 25, 2017. He was of the opinion that although there was an increase of symptoms that there was not new pathology.
36. Dr. Failinger agreed that surgery was the only option at this point but did not think that arthroscopic surgery was appropriate and that a total knee replacement for the arthritis was the only option.
37. Dr. Reister opined that September 25, 2017 workers compensation injury is the reason that Claimant currently needs medical care and treatment because the work incident described caused a worsening of her right knee pain and an acute change in her ambulatory capacity which did not get better with time, rest and conservative management. (*Claimant's Exhibit 15, p. 95.*)
38. Dr. Reister indicated that he was in a better position to determine claimant's baseline having treated her for over 20 years and previously operated on the right knee. Dr. Reister indicated that Claimant's knee is arthritic and the Claimant had day to day knee pain as a baseline, but was able to work on her feet as an elementary school teacher with her baseline pain and after the September 25, 2017 incident the pain worsened and has been unrelenting since the injury. It requires medical intervention.
39. Dr. Reister indicated that the injury of September 25, 2017 aggravated and increased the symptoms associated with her preexisting degenerative joint disease of the right knee. Specifically, the preexisting arthritic condition was aggravated, and Claimant has new onset mechanical symptoms from the meniscus tear.
40. Dr. Reister is of the opinion that a right knee arthroscopy is the appropriate medical treatment rather than a total knee replacement. He indicated that the literature does support that operating on arthritic knees does not have significant benefit when the arthritis is the only diagnosis. According to Dr. Reister in Claimant's case, the extruded meniscus tear is a degenerative condition, but if the posterior horn of the extruded meniscus is unstable it certainly can be incarcerating the back of the joint and producing mechanical symptoms on top of the degenerative condition that is her baseline.
41. Based upon Claimant's weight and age, she is young for consideration of a total knee replacement, Dr. Reister indicates that putting in a total knee will set her up for early failure of the total knee replacement, and that he would work continuously to preserve her own joint for as many years as possible.
42. Claimant's description of the extent of her preexisting knee condition and how it got significantly worse is consistent with the medical record and the findings and recommendations of Dr. Reister. Claimant has been open and honest about her prior knee problems. Moreover, Claimant's description of the accident and injury is consistent with her actions after the accident, which included having her husband drive her to the emergency room for medical treatment. As a result, the ALJ finds Claimant's statements to her medical providers and her testimony at hearing to be credible and persuasive.

43. The ALJ has considered the reports and testimony of Dr. Failinger. Dr. Failinger relies heavily on the September 14, 2017 report from Trista Swift and her notation that Claimant's right knee flexion was limited to 40 degrees.
44. At this appointment, Claimant complained primarily of foot pain. For example, according to the medical report from that visit, Claimant's chief complaint (CC) was foot pain. The report provides that Claimant's foot pain:
- [I]s located on the right and at the MP joint of the great toe followed by podiatry until she lost her insurance – was supposed to get an MRI but has to wait now until she has insurance with Kaiser – 2 weeks from now.
45. At this visit, Claimant also complained of knee pain. However, after reviewing Ms. Swift's notes, the ALJ finds that Ms. Swift's notes lack clarity, precision, and consistency. For example, Ms. Swift indicated that her inspection of Claimant's right knee revealed upon inspection a "normal exam." Then, despite indicating Claimant's knee inspection was normal, Ms. Swift noted Claimant's knee was tender, had a small effusion, and had a tender joint line. And, despite noting a normal exam, she then indicates Claimant's knee range of motion – flexion – is limited to 40 degrees. (*Respondent's Exhibit C, pp. 32–34.*)
46. Ms. Swift, in a conclusory fashion, stated Claimant suffered from a "right foot and knee injury, possible soft tissue damage." In other words, Ms. Trist did not explain and provide any detail as to whether she concluded Claimant suffered from an acute injury or whether she concluded Claimant was having pain in her foot and knee due to an underlying condition. The most likely scenario, which Claimant provided, was that she was being seen for her foot pain, which was causing her to walk in a manner that was also causing her some pain in her right arthritic knee.
47. In addition, Dr. Failinger notes in his reports that Ms. Swift is a Physician Assistant. However, Ms. Swift's report does not indicate her designation or credentials which might give some insight into her qualifications to perform a thorough and accurate orthopedic evaluation of Claimant's knee. For example, her report does not indicate whether she is a Registered Nurse (RN), Nurse Practitioner (NP), Physicians' Assistant (PA), Physician, or something else.
48. Although Dr. Failinger relied heavily on the range of motion measurement noted by Ms. Swift to conclude Claimant's need for treatment preexisted her date of injury and relates solely to her preexisting arthritis, there is no indication how Ms. Swift determined Claimant's flexion was limited to 40 degrees. For example, was Claimant merely asked to flex her knee until she started to feel pain? Or, was Claimant told to flex her knee until she could no longer flex her knee because of pain and/or swelling?
49. Moreover, Dr. Failinger stated that Claimant had better range of motion after the work accident. And, although Dr. Failinger concluded that supported his opinion that Claimant's knee was really symptomatic before the injury, he failed to consider why such a finding did not make the notation of Ms. Swift questionable. And, there is no indication that when he examined Claimant, he tried to determine whether the 40 degrees of flexion noted by Ms. Trist was accurate. For example, it does not appear he

asked Claimant whether her flexion was limited to 40 degrees when she saw Ms. Trist. Plus, there is no indication that he tried to determine how Ms. Trist measured the flexion of Claimant's knee during the examination.

50. As a result, the ALJ does not put much weight on the amount of flexion noted by Ms. Trist and the conclusions drawn by Dr. Failinger based on such.
51. The ALJ has also considered Dr. Failinger's testimony regarding the MRI findings which did not note any "interarticular bodies" that might have revealed "pieces of cartilage knocked off and floating around." (*Hrg. tran.* at 88, L21-24). Despite there being a lack of such findings, there is a lack of credible and persuasive evidence indicating such findings must be present to establish an aggravation of preexisting condition or a new injury.
52. On the other hand, the ALJ has also considered Dr. Reister's opinions and conclusions regarding the MRIs as set forth in his reports. The ALJ finds that Dr. Reister is of the opinion that Claimant's MRIs demonstrate an extruded medial meniscus with an acute tear as well as arthritic changes. As a result, the ALJ finds Dr. Reister concluded that Claimant's twisting injury resulted in an acute injury in the form of an aggravation of Claimant's arthritis and an aggravation of her degenerative meniscal tear in the form of an acute tear that resulted in an increase in pain as well as mechanical problems for which he has recommended surgery. Moreover, he opined that Claimant might have additional pathology that was caused by her work injury that cannot be identified by MRI.
53. As a result, Claimant's work injury resulted in new pathology which resulted in an acute injury and an acute change in Claimant's ambulatory capacity, i.e., increase in right knee pain and it has not gotten better with time, rest, and conservative treatment. (*Claimant's Ex. 15, p. 95.*)
54. Claimant needs additional medical treatment, which includes the surgery recommended by Dr. Reister, to cure her from the effects of her work injury.
55. When comparing the opinions of Dr. Reister and Dr. Failinger, the ALJ finds Dr. Reister's opinions and conclusions to be credible and more persuasive than those of Dr. Failinger. The primary reason for crediting Dr. Reister's opinions and conclusions over Dr. Failinger's is because Dr. Reister's opinions are consistent with Claimant's statements and testimony – which the ALJ finds credible - regarding the mechanism of injury and onset of increased symptoms that immediately followed the twisting injury at work and which have continued.
56. The ALJ also credits and finds persuasive Dr. Reister's opinions regarding the need for additional medical treatment, including arthroscopic surgery, to cure Claimant from the effects of her work injury.

CONCLUSIONS OF LAW

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

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Claimant sustained a compensable work-related injury on or about September 25, 2017.

Respondent agrees that while in the course and scope of employment Claimant stepped in a hole in the parking lot at work. Respondent, however, contends Claimant did suffer a "compensable" injury.

A "compensable" industrial accident is one which results in an injury requiring medical treatment or causing disability. *H and H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990); *Subsequent Injury Fund v. State Compensation Insurance Authority*, 768 P.2d 751 (Colo. App. 1988). Where pain triggers the claimant's need for medical treatment, the claimant has established a compensable injury if the industrial injury is the cause of the pain. See *Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 448 (1949). The term medical treatment includes diagnostic procedures required to ascertain the extent of the industrial injury. See *Merriman v. Industrial Commission, supra*; *Villela v. Excel Corp.*, W.C. No. 4-400-281 (February 1, 2001); *Hatch v. John H. Harland Co.*, W.C. No. 4-368-712 (August 11, 2000).

A preexisting disease or susceptibility to injury does not disqualify a claim if the injury aggravates, accelerates, or combines with the preexisting disease or infirmity to produce the need for medical treatment. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). The ICAO has noted that pain is "a typical symptom from the aggravation of a pre-existing condition" and a claimant is entitled to medical treatment for pain as long as the pain was proximately caused by the injury and is not attributable to an underlying preexisting condition. *Rodriguez v. Hertz Corp.*, WC 3-998-279 (ICAO February 16, 2001).

However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any preexisting condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a preexisting condition that is unrelated to the employment. See *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Breeds v. North Suburban Medical Center*, WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.*, WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000).

Here, before the accident at work, Claimant had preexisting symptomatic arthritis involving her right knee. She also had a right foot problem that caused her to walk in a manner that resulted in an increase in right knee pain. Despite her preexisting knee condition, Claimant was able to drive herself to work, walk without assistance, perform her job, and manage her knee pain. However, on September 25, 2017, while at work, Claimant:

- Stepped in a hole with her right foot.
- Twisted her right knee.
- Heard and felt a loud pop in her right knee.
- Suffered an acute meniscal tear.
- Had the immediate onset of pain in her right knee.

- Had an immediate increase in swelling in her right knee.
- Was unable to walk on her right leg due to her knee pain.
- Was disabled due to her knee injury.
- Was unable to drive her car to get medical treatment.
- Required medical treatment to diagnose and treat the injury that resulted from twisting her knee.

As a result, after Claimant injured her right knee at work, Claimant's husband picked her up from work and took her to the emergency room at SCL Community Hospital Southwest. Claimant was diagnosed with a sprain of the right medial collateral ligament of the right knee. Claimant was also referred for medical care and treatment to Dr. Matt Miller who provided work restrictions and ordered medical testing including an MRI. Medications were provided and Claimant was referred to physical therapy.

A compensable injury is one that causes the need for medical treatment or disability. In this case there was both. As a result, the ALJ concludes Claimant established by a preponderance of the evidence that she suffered a compensable injury to her right knee.

II. Whether the medical treatment Claimant has received since September 25, 2017 to treat her knee is reasonable, necessary, and related to her work injury.

The Respondent is liable for medical treatment, reasonably necessary, to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a); *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997). Claimant is not required to prove the extent of the injury or that a permanent disability flowed from that injury. As a result, compensable medical treatment includes evaluations or diagnostic procedures to investigate the existence, nature, or extent of an industrial injury. *Garcia v. Express Personnel*, W.C. No. 4-587-458 (August 24, 2000).

In this case, Claimant established by a preponderance of the evidence that she suffered a compensable injury on September 25, 2017 that caused the need for medical treatment. On the day of the accident, and due to injuring her knee, Claimant went to the emergency room. Due to her work injury, Claimant was also referred for medical care and treatment to Dr. Matt Miller who provided work restrictions and ordered medical testing including an MRI to determine the extent of the injury and the need for future medical treatment. Dr. Miller also prescribed medications and referred Claimant to physical therapy. As result, the ALJ concludes Claimant has established by a preponderance of the evidence that the treatment provided to Claimant to treat her right knee since the accident has been reasonable, necessary, and related to her work accident.

III. Whether the arthroscopic surgery recommended by Dr. John Reister is reasonably necessary treatment related to Claimant's work injury.

The Claimant is required to prove by a preponderance of the evidence that the conditions for which she seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. The Claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.*, 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. See *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center*, WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.*, WC 4-606-563 (ICAO August 18, 2005). The question of whether Claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000).

In this case, Claimant sustained an acute injury to her right knee when she stepped into a hole and twisted her right knee and aggravated her pre-existing symptomatic arthritic knee and also suffered an acute meniscal tear causing the need for medical care as a result of the twisting injury at work.

In determining whether Claimant has sustained an acute injury, the lower extremity *Medical Treatment Guidelines* indicate that the physician should take a history and perform a physical examination. As part of that the physician should record:

The Mechanism of injury. This includes details of symptom onset and progression. It should include such details as: the activity at the time of the injury, patient description of the incident, and immediate and delayed symptoms. The history should elicit as much detail about these mechanisms as possible. (*Guidelines*, Ex. 6, p. 5.)

Dr. Failinger agreed that the mechanism of injury as described by Claimant could cause a meniscal tear. Dr. Matt Miller opined that the incident was work related as patient had been having ongoing pain but there was a distinct aggravation with the incident. Dr. Failinger did not disagree with that opinion.

The *Guidelines* indicate that for determination of whether there is an acute injury of the lower extremity that the physician should determine:

- Did the patient hear a pop at the time of the injury?

- Was he or she able to bear weight immediately following the injury?
- Could he or she straighten the knee and did it swell immediately? (*Guidelines*, Ex. 6, p. 5.)

In this case, Claimant met all three requirements for the determination of an acute injury under the *Guidelines*. As found, at the time of the accident Claimant heard a pop, was unable to bear weight immediately following the accident, and developed swelling immediately following accident.

As a result, Dr. Reister provided Claimant the following diagnoses regarding her right knee:

- Acute medial meniscus tear.
- Arthritis of the right knee.
- Chondromalacia of the patella.
- Acute pain.

As found, Claimant suffered an acute injury to her right knee. The injury resulted in an aggravation of her preexisting arthritis and an acute meniscus tear. Claimant's acute injury caused an exacerbation of her underlying condition which resulted in a significant increase in symptoms and disability. Moreover, the increase in symptoms and disability caused by the work accident are persistent and unrelenting.

Dr. Failinger agreed that there can be acute injuries in pre-existing arthritic joints. Dr. Failinger agreed that Claimant probably does have increased pain since the incident, but did not believe that she sustained an acceleration, worsening or acute injury because of the work injury. However, based on the facts of this case, the ALJ cannot conclude that a permanent and significant increase in Claimant's pain and disability occurring contemporaneously to the work accident does not flow from an acute injury as well as an acceleration and aggravation of Claimant's preexisting knee condition.

Dr. Failinger agreed that Claimant presented with a classic symptom presentation of an exacerbation of pre-existing arthritis. Dr. Reister did not disagree with this opinion, but did explain that in his opinion that the current need for care is as a result of the work injury is based upon Claimant's presentation of a mechanical issue in the knee rather than the underlying degenerative condition in the knee that requires care. As found, the mechanical part of the knee problem is related to the work injury based upon history, increased pain and loss of function, the medical treatment response, and a failure to improve with time.

Dr. Reister credibly opined there was a mechanical component within the degenerative knee as early as January of 2018 when he initially examined her post injury, prior to the MRI. Dr. Reister performed a cortisone injection prior to the MRI, which according to Dr. Reister post injection was consistent with a mechanical defect in the knee rather than a degenerative response. Dr. Reister once again indicated that even if the meniscus tear is degenerative, there remains a distinct possibility in

Claimant's case that it has caused a mechanical problem in the back of the knee that cannot be seen or evaluated without an arthroscope, which would be both diagnostic and therapeutic.

Moreover, the findings on MRI do not dictate whether the surgery recommended by Dr. Reister is reasonable, necessary, and related to the work injury. As credibly noted by Dr. Reister, "There are many other internal derangements that do not show up on MRI." Dr. Reister went on to state:

- Claimant has paid the test of time and is not improving.
- Claimant is still complaining of pain and swelling of the knee on a regular daily basis.
- Claimant has failed conservative treatment of her knee symptoms.
- Claimant is not a candidate for a total knee replacement due to her current age of 50.
- Claimant is a candidate for a diagnostic and therapeutic arthroscopy.

More weight is given to Claimant's authorized treating physician, Dr. Reister, who has a doctor patient relationship with Claimant and has evaluated and treated Claimant both before and after the work accident and injury. Dr. Reister has been articulate and deliberative in his recommendations and treatment of Claimant. Plus, his reluctance to perform a total knee replacement and instead opt for a less invasive treatment based on the facts of this case is found to be credible and persuasive. The ALJ credits Dr. Reister's opinion that the arthroscopic surgery is both diagnostic and therapeutic to cure Claimant from the effects of her work injury. Dr. Reister credibly stated that the arthroscopic surgery is the best option at this time to help preserve Claimant's knee joint and avoid a knee replacement for as long as possible.

As a result, the ALJ finds and concludes Claimant has established by a preponderance of the evidence that the arthroscopic surgery recommended by Dr. Reister is reasonable and necessary to cure her from the effects of her work injury.

ORDER

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

1. Claimant has proven by a preponderance of the evidence that she sustained a compensable injury to her right knee within the course and scope of her employment.
2. Claimant has proven her entitlement to medical benefits including the right knee arthroscopic surgery recommended by Dr. Reister.

3. The medical treatment Claimant has received since the date of injury is reasonable, necessary, and related to her work injury.
4. Respondent shall pay for Claimant's reasonable, necessary, and related medical treatment, subject to the Colorado Medical Fee Schedule.
5. Issues not expressly decided herein are reserved to the parties for future determination.

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

DATED: August 28, 2020

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

➤ Whether claimant has proven by a preponderance of the evidence that the cervical discectomy and fusion surgery is reasonable medical treatment necessary to cure and relieve claimant from his admitted work related injury?

FINDINGS OF FACT

1. Claimant sustained an admitted work related injury on March 6, 2018 when he was working on a job in New Castle, slipped on a thin sheet of ice and injured his cervical spine. Claimant testified at hearing that he fell to the ground when he slipped. Claimant testified that following the injury, he had pain in his back, neck, right elbow and right hand. Claimant testified that while the low back symptoms started following his fall, the neck pain started to just compound. Claimant testified reported the injury to his employer and tried to stay at work, but went home around 11:00 a.m. after the injury. Claimant testified that the following day he was in severe pain and sought treatment in the emergency room ("ER").

2. Claimant was evaluated in the Grand River Health ER on March 7, 2018. Claimant reported to the ER physician that he had pain in his low back after slipping two days earlier. Claimant reported he did not fall to the ground. Claimant reported that when he tried to catch himself, he sprained his lower back. Claimant was diagnosed with a lumbar sprain.

3. Claimant was subsequently referred to Grand River Health by Employer and came under the care of physicians' assistant ("PA") Bjerstedt who initially evaluated claimant on March 9, 2018. Claimant reported to PA Bjerstedt a prior history of a vertebrae fracture in the lumbar spine from approximately 30 years prior. Claimant reported that he had jerked his back on or about March 5, 2018 when he was at work and slipped on ice. Claimant also reported that approximately two weeks prior, he slipped on ice at work and injured his neck. Claimant reported some neck discomfort on the right side of his lower neck. Claimant reported that after this incident two weeks prior, he never reported the incident and did not seek treatment, but felt as though he had aggravated his neck during the March 5 incident. Claimant filled out a pain diagram in connection with his evaluation and noted pain in the right side of his neck along with low back pain.

4. PA Bjerstedt diagnosed claimant with a lumbar strain with spasm and an aggravation of the cervical strain with spasm. PA Bjerstedt recommended physical therapy and prescribed Flexeril. Claimant was released to return to work on Monday, March 12 with a 20 pound lifting restriction.

5. Claimant returned to Grand River Health on March 30, 2018. Claimant reported improvement with his low back pain, but noted his cervical pain was getting

worse. PA Bjerstedt noted claimant was tender along the right paracervical musculature from the high cervical down to the upper thoracic region. PA Bjerstedt diagnosed claimant with a lumbar strain, resolved, and a cervical strain, worsening. PA Bjerstedt refilled claimant's Flexeril prescription and ordered a cervical x-ray. The cervical x-ray showed loss of disc space as well as osteophytes and osteoarthritis. The x-ray showed mild anterolisthesis of C2 on C3, of C3 on C4, of C6 on C7, and of C7 on T1. The x-ray also showed mild retrolisthesis of C4 on C5 and of C5 on C6.

6. Claimant reported to his physical therapist on April 24, 2018 that his neck had been feeling better since his prior physical therapy visit, but after he did some yard work two days prior, his neck pain had increased.

7. Claimant returned to PA Bjerstedt on April 26, 2018 and noted reported that he had been doing a little bit better, but after he mowed his law, it flared his neck pain. Claimant denied any pain down the arm and denied any numbness or tingling. PA Bjerstedt recommended adding cervical traction to the physical therapy modalities.

8. Claimant testified he stopped working for employer approximately one month after his work injury.

9. Claimant next returned to PA Bjerstedt on June 17, 2019. PA Bjerstedt noted that claimant had discontinued care while his claim was denied. Claimant reported to PA Bjerstedt that he was experiencing non-stop pulling in the high right side of his neck. PA Bjerstedt returned claimant to physical therapy and recommended another cervical x-ray and magnetic resonance image ("MRI") of the cervical spine.

10. Claimant returned to PA Bjerstedt on July 23, 2019. Claimant's x-ray from that date showed no changes in the cervical spondylosis and spondylolisthesis, with questionable mild left C3-4, right C5-6 and right C6-7 neural foramen stenosis. Claimant reported he had experienced some flare ups in his symptoms, including one time while getting out of a car, but could not relate the other flare ups to anything else. Claimant reported he was still unable to mow his lawn without triggering severe neck pain. Claimant reported riding his motorcycle, but not for more than 45 minutes. Claimant reported riding a bicycle with his grand kids. Claimant reported using ibuprofen and marijuana for the discomfort.

11. Claimant returned to PA Bjerstedt on August 21, 2019. PA Bjerstedt noted claimant was still having aching and right low neck discomfort that would radiate into the right ear that was now associated with some pain, and numbness in the right palm when he rides his motorcycle. PA Bjerstedt noted that the therapist would like to try dry needling. PA Bjerstedt recommended an MRI of the cervical spine.

12. The MRI was performed on August 27, 2019. The MRI demonstrated anterior spondylolisthesis of C2 in relation to C3 with a right paracentral disc bulge with slight stenosis and mild right neural foraminal narrowing. At the C3-4 level, broad-based bulge and joints of Luschka osteophytes resulting in mild bilateral neural foraminal narrowing was noted. At the C4-5 level, broad-based bulge with a right paracentral disc protrusion that resulted in stenosis, broad-based disc impingement with

right sided cord flattening (especially on the right) and bilateral neural foraminal narrowing was noted. At the C5-6 level, broad-based protrusion and posterior osteophytes resulting in stenosis, broad-based disc impingement with right sided cord flattening and bilateral neural foraminal narrowing was noted. At the C6-7 level, broad-based disc bulge with a right paracentral disc protrusion which appeared to touch/impinge on the cord with mild left neural foraminal narrowing was noted.

13. Claimant was referred by PA Bjerstedt to Dr. Krauth. Dr. Krauth evaluated claimant on September 10, 2019. Dr. Krauth noted claimant's accident history of slipping on ice at work and injuring his neck. Dr. Krauth noted claimant reported chronic pain that is stabbing and severe under his right scapula and right at the base of the neck on the right side. Claimant reported that if he turns his neck to the right he will get a sharp jolt that sometimes goes up and down his spine.

14. Dr. Krauth reviewed claimant's cervical MRI and noted that it demonstrates a swan neck deformity with reversal of the cervical lordotic curve from C4-C5 and C5-C6. Dr. Krauth noted claimant's MRI demonstrated a chronic degenerative process and recommended surgery.

15. Claimant returned to PA Bjerstedt on September 18, 2019. PA Bjerstedt noted claimant had been evaluated by Dr. Krauth who had recommended surgery. Claimant reported to PA Bjerstedt that he had a flare up earlier when he fell while trying to plug in his electric garage door opener. Claimant reported that his symptoms returned to baseline following a massage from his wife. PA Bjerstedt further noted that Dr. Krauth had taken claimant off of work until the surgery. PA Bjerstedt issued work restrictions consistent with the recommendations of Dr. Krauth.

16. Claimant returned to Dr. Krauth on October 17, 2019. Dr. Krauth noted that he had reviewed the case with his colleagues and they had agreed that claimant's best course of action would be surgical intervention consisting of an anterior cervical discectomy and fusion at C4-5 and C5-6 with anterior plating. Dr. Krauth noted that he would like to perform the procedure in October.

17. Claimant returned to PA Bjerstedt on November 21, 2019. PA Bjerstedt noted that claimant reported he still had not heard if the surgery had been approved.

18. Claimant was examined by Dr. Krauth on December 3, 2019. Dr. Krauth noted that the recommended surgery had still not yet been approved.

19. Respondents obtained a records review from Dr. Janssen regarding the surgery on December 14, 2019. Dr. Janssen noted that he reviewed the medical records and the MRI. Dr. Janssen recited the history of claimant slipping but not falling, and opined that the mechanism of injury involving a slip and a twist, but not falling, resulting in myofascial pain, did not warrant surgical intervention for a work related condition. Dr. Janssen opined that the findings on MRI were not related to the accident history of slipping at work, but not falling. Dr. Janssen opined that the surgery should not be approved.

20. Claimant returned to PA Bjerstedt on January 9, 2020. Claimant reported to PA Bjerstedt that he attempted to return to work because he needed money and had an intense flare up of his pain. Claimant reported it felt like his left hand had a bunch of needles stabbing his palm. Claimant reported his flare up lasted 7 days and was relieved after a long massage from his wife. Claimant was instructed to return in a month.

21. Claimant returned to PA Bjerstedt on February 4, 2020. Claimant reported he had not been sleeping well and was have more spasms in his back and his hands were getting more numb. Claimant reported he had not returned to the neurosurgeon because his surgery had been denied. Claimant again returned to PA Bjerstedt on March 4, 2020. Claimant reported his neck pain continued with pain radiating to his wings. Claimant reported dropping several coffee mugs. PA Bjerstedt requested authorization for a referral to a pain management physician.

22. Respondents had the request for referral for pain management reviewed by Dr. Orgel on March 23, 2020. Dr. Orgel noted that there was a report from Dr. Janssen from December 14, 2019 stating that he believed claimants cervical condition was related to a long standing prior condition and not a work related injury and opined that the underlying abnormality was not a compensable injury and suggested claimant pursue the treatment through his private insurance. Dr. Orgel opined that any further treatment for claimant be denied until after an independent medical examination ("IME") is concluded.

23. Respondents obtained a records review IME with Dr. Reiss on April 21, 2020. Dr. Reiss reviewed claimant's medical records and surveillance video of claimant from September and October 2019. Dr. Reiss opined that it was possible that claimant strained his cervical spine in the work incident causing some myofascial pain, but from his review of the surveillance, Dr. Reiss opined that claimant was not significantly disable or limited by his symptomatology. With regard to the surveillance video, Dr. Reiss found that there was no pain behaviors depicted in the video and claimant is able to rotate his head.

24. The surveillance video entered into evidence in this case demonstrates claimant performing chores and running errands. The surveillance demonstrated claimant lifting a battery and driving a vehicle. Dr. Reiss identified the battery as a car battery. Claimant testified it was a battery for a lawn mower. While claimant had been taken off of work completely by the recommendations of the neurosurgeon, Dr. Krauth, at this point, the actions of claimant are consistent with the work restrictions set forth by Dr. Bjerstedt from August 2019 and prior that included a 20 pound lifting restriction and no extreme neck positions.

25. Claimant returned to Dr. Bjerstedt on May 4, 2020. Dr. Bjerstedt discussed referring claimant to a counselor due to his increasing depression.

26. Dr. Reiss testified by deposition in this matter. Dr. Reiss testified consistent with his medical reports. Dr. Reiss testified that multilevel cervical disc fusions don't generally work unless you can prove that the deformity is leading to the

pain. Dr. Reiss testified that the more levels that are involved, the less likely the surgery is going to resolve someone's neck pain. Dr. Reiss testified that when claimant resumed treatment in June 2019, he was denying radicular symptoms after more than a year between his treatments.

27. Claimant testified at hearing that he continues to experienced symptoms in his neck that began after his slip and fall at work and has not resolved. The ALJ credits the testimony of claimant and the opinions expressed by PA Bjerstedt and Dr. Krauth and finds that claimant has demonstrated that it is more likely than not that the need for the cervical fusion surgery recommended by Dr. Krauth is reasonable medical treatment necessary to cure and relieve claimant from the effects of his work injury.

28. The ALJ has considered the contrary opinions expressed by Dr. Reiss and Dr. Janssen, but finds the opinions expressed by Dr. Krauth and PA Bjerstedt to be more credible and persuasive with regard to the issue of the relatedness of the surgical procedure.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2016. A party seeking to modify an issue decided by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

3. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

4. As found, claimant has proven by a preponderance of the evidence that the cervical discectomy and fusion surgery recommended by Dr. Krauth is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury. As found, the ALJ credits claimant's testimony at hearing along with the opinions expressed by Dr. Krauth and PA Bjerstedt as being credible and persuasive with regard to the issue of whether the medical treatment is reasonable and necessary to cure and relieve claimant from the effects of the work injury.

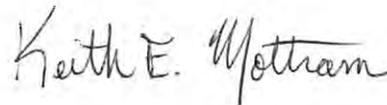
ORDER

It is therefore ordered that:

1. Respondents shall pay for the cervical discectomy and fusion surgery recommended by Dr. Krauth pursuant to the Colorado Medical Fee Schedule.
2. All matters not determined herein are reserved for future determination.

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

DATED: August 28, 2020



Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

Whether Respondents have established by a preponderance of the evidence that Claimant's future medical maintenance benefits, including opioid medications, are no longer reasonable, necessary or causally related to her July 21, 2011 admitted industrial injury.

FINDINGS OF FACT

1. Claimant is a 55-year old female who no longer works for Employer. She previously worked as a Merchant Manager but was laid off in approximately 2018. Claimant's job duties included unloading trucks in the back of the store and operating the front cash registers.

2. On July 21, 2011 Claimant suffered industrial injuries to her legs. She was restocking shelves in the back of Employer's store while standing on a pallet. Her left foot slid in between two of the pallet's wooden slats and boxes began falling on her. Claimant pulled back, twisted her left ankle or foot area and felt a pop. She did not fall to the ground.

3. As a result of Claimant's industrial injuries, she underwent two surgeries on her ankle and one surgery on her knee. The first ankle surgery occurred on November 21, 2011. Daniel L. Ocel, M.D. performed an ankle stabilization with repair of the peroneal tendons, repair of the peroneus longus and debridement of the brevis.

4. On April 10, 2013 Claimant underwent a second left ankle surgery with Dr. Ocel. Claimant initially had improvement in ankle function and mechanical symptoms. She testified that, following the second ankle surgery, she began taking Nucynta and other medications

5. In 2014 Claimant visited Dr. Mann for right knee pain and underwent an MRI. The MRI revealed degenerative tearing at the posterior horn in the medial meniscus with some extrusion as well as underlying medial femoral cartilage loss, underlying tibial insufficiency fracture and edema. Claimant received crutches and nonsteroidal anti-inflammatory medications. She underwent a repeat MRI of the right knee on July 14, 2014 that showed healing of the tibial plateau insufficiency fracture.

6. On November 11, 2014 Claimant underwent a 24-month Division Independent Medical Examination (DIME) with Gary Zuehlsdorff, D.O. He determined that Claimant had not reached Maximum Medical Improvement (MMI) and made multiple recommendations. He specifically suggested further therapeutic procedures for Claimant's left ankle including injections. Dr. Zuehlsdorff noted that "[o]therwise, manipulation of other medications would be appropriate under maintenance." In

addressing Claimant's right knee, Dr. Zuehlsdorff recommended surgery because of the medial meniscal tear.

7. Claimant was subsequently referred to L. Barton Goldman, M.D. Dr. Goldman recommended nutritional supplementation, weight loss and medications. He performed an EMG/Nerve Conduction Study of the left lower extremity on January 26, 2015 that showed mild left superficial peroneal neuritis.

8. Claimant underwent a repeat EMG/Nerve Conduction Study of the left lower extremity with Dr. Goldman on July 27, 2015. She exhibited mild left superficial peroneal nerve neuritis and new peroneal neuropathy, but no lumbar radiculopathy. Dr. Goldman recommended ongoing treatment with her primary care physician and weight loss.

9. On December 2, 2015 Claimant visited Dr. Mazola for treatment. Dr. Mazola performed hydrodissection of the nerve tracks with approximately three weeks of pain relief. He repeated the injections and Claimant obtained temporary improvement. On December 8, 2017 Dr. Mazola recommended sural nerve blocks and an ongoing series of hydrodissection as needed for maintenance care.

10. On January 29, 2018 Claimant visited Authorized Treating Physician (ATP) William H. Miller, III, M.D. Dr. Miller determined that Claimant had reached MMI on January 10, 2018. He assigned a 17% lower extremity rating for Claimant's left ankle and a 15% lower extremity rating for her right foot. His recommended maintenance care included ongoing pain management and medications. Dr. Miller specifically commented:

Maintenance care = ongoing pain management/medications (presently with Dr. Zimmerman), Chiropractic 20 visits per year (Dr. Graves), Orthotics (Dr.Channin), injections into the foot 3-4 sural nerve blocks or series of hydrodissection injections (Cornerstone), visits to Dr. Ocel (ortho foot and ankle), visits to PROS

11. Claimant underwent a follow-up DIME with Dr. Zuehlsdorff on January 30, 2018. Dr. Zuehlsdorff agreed with Dr. Miller's date of MMI. He assigned a 26% lower extremity rating for Claimant's left ankle, a 12% lower extremity rating for Claimant's right knee and a 1% psychiatric rating for acute on chronic pain. Dr. Zuehlsdorff assigned restrictions including no lifting, pushing, pulling, or carrying in excess of 25 pounds and no crawling, kneeling, or climbing ladders. He noted that Claimant required maintenance care including medication management and 3-4 hydrodissection injections with Dr. Mazzola over the following year.

12. On April 18, 2018 Claimant had her first visit with new ATP Roberta Anderson-Oeser, M.D. for post-MMI chronic pain management. Dr. Anderson-Oeser noted that Claimant reported ongoing left ankle and foot pain, bilateral knee pain and lower back pain. She recounted that Claimant had recently reached MMI with permanent impairment of the right knee, left ankle and left foot. Dr. Anderson-Oeser remarked that, "if i were to manage [Claimant's] chronic pain medications, she would

need to read and sign a Pain Contract at today's visit, agree to abide by the terms of the contract and submit a random urine sample. She was in agreement to reading and signing the contract, abiding by the terms of the contract and submitting a random urine sample." Dr. Anderson-Oeser "explain[ed] to [Claimant] that the goal would be to gradually reduce the amount of Nucynta ER that she is taking with the eventual goal of weaning her off the opioid medication in the foreseeable future." She instead recommended Lyrica for Claimant's neuropathic pain. Dr. Anderson-Oeser noted that Lyrica would be the most beneficial in controlling Claimant's neuropathic symptoms because opioid medications have minimal to no effect on neuropathic pain.

13. On May 7, 2018 Claimant returned to Dr. Anderson-Oeser for an evaluation. Claimant reported continued burning, pins and needles, and a numbing sensation in her left knee, left lower leg and left foot. Dr. Anderson-Oeser advised Claimant that the goal would be to reduce her Nucynta intake and increase Lyrica because opioids are not successful in managing neuropathic pain. Claimant noted she increased her Lyrica dosage, but the change caused depression and loss of focus at work. She thus reduced her dosage and continued with Nucynta. Claimant remarked that her medications, including Nucynta ER and Lyrica were "75-100% effective with controlling her symptoms and she is more active with the medicine." She also noted some fatigue, difficulty focusing, waking, depression and difficulty breathing with her medications. Dr. Anderson-Oeser reiterated the importance of reducing her dosage of Nucynta because the medication might have caused her hyperalgesia. However, Claimant was reluctant to reduce the medication. Dr. Anderson-Oeser hoped the combination of topical cream would help.

14. On May 12, 2018 Claimant underwent an independent medical examination with Kathleen D'Angelo, M.D. Dr. D'Angelo noted Claimant had undergone seven years of active treatment for a work-related injury that consisted of twisting her left foot and ankle. She expressed concern over Claimant's pre-existing and causally unrelated issues such as diffuse osteoarthritis of her bilateral knees, lumbar pain complaints and significant underlying psychiatric issues. Dr. D'Angelo also noted that Claimant's continued use of opioids was of significant concern. She mentioned that Dr. Anderson-Oeser had already attempted to decrease Claimant's opioid medications by increasing her dosage of Lyrica. Claimant expressed to Dr. D'Angelo that she has sensitivity to several medications including non-narcotic pain killers as well as higher therapeutic doses of Lyrica and Gabapentin. The only medication family for which Claimant did not note any persistent issues with opioids. Dr. D'Angelo strongly encouraged an opioid weaning program as recommended by Dr. Anderson-Oeser. She remarked that, for the vast amount of time Claimant was taking opioids, her functional gains had stalled.

15. Since May 2018 Claimant's medications have included the following: Baclofen 10 mg for muscle spasms; Diclofenac 1.5% transdermal solution, which she uses four times per day for pain and inflammation when not utilizing ibuprofen; lidocaine 5% topical ointment for non-narcotic relief of her neuropathic pain, which she utilizes three to four times per day; ibuprofen 600 mg for pain and inflammation; Lyrica, 100 mg; Nucynta 100 mg extended release and; Nucynta 15 mg.

16. On November 1, 2018 Claimant presented to Thomas Eichmann, M.D. for bilateral knee pain. Dr. Eichmann assessed chronic bilateral primary knee osteoarthritis with severe varus osteoarthritis in the bilateral knees, joint space narrowing and osteophyte formation. He noted in a previous report from an August 16, 2018 visit that Claimant had tried Lyrica, Nucynta, PT and injections to treat her knee pain. On December 5, 2018 Claimant received a left total knee arthroplasty and in January 2019 she underwent a right total knee arthroplasty. She acknowledged that the knee replacements were not related to her July 21, 2011 industrial injury.

17. On May 29, 2019 Dr. Anderson-Oeser again discussed with Claimant a reduction in her Nucynta ER. Claimant agreed to decrease immediate release pills from 100 mg to 75 mg. On June 20, 2019 Dr. Anderson-Oeser again mentioned reducing Claimant's Nucynta by an additional 25 mg.

18. On August 15, 2019 Claimant again visited Dr. Anderson-Oeser for an evaluation. Claimant reported increased pain in her lower back and left foot. She believed the increase was secondary to reducing Nucynta. Dr. Anderson-Oeser explained that the goal was to reduce Claimant's use of opioid medication over time to decrease problems with dependence and addiction. She remarked that the 50 mg Nucynta Claimant was taking at midday would be changed to the instant release formula. Dr. Anderson-Oeser expressed concern about Claimant's reluctance to further reduce her pain medications. She discussed with Claimant a referral to New Health Services for assistance in reducing her opioid medications.

19. At the hearing in this matter Claimant acknowledged on cross-examination that she did not follow through with the referral to New Health Services. Claimant asserted there were problems with the referral and thus did not proceed with treatment. However, she noted that she later spoke with a physician's assistant in Dr. Anderson-Oeser's office who said she was not required to continue with the referral to New Health Services. However, there is no evidence that Claimant's providers stated she should not visit New Health Services for assistance in reducing her opioid medications.

20. On December 20, 2019 Dr. Anderson-Oeser commented that Claimant had not followed through with her referral to New Health Services. Similarly, on January 21, 2020 Dr. Anderson-Oeser specifically stated that she had been discussing the referral to New Health Services for the past four to five months. Nevertheless, Claimant obtained refills of her medications including: Nucynta extended release 100 mg; Nucynta 15 mg; Baclofen for spasms in foot and back; ibuprofen for inflammatory pain; diclofenac gel for inflammatory pain; lidocaine ointment for neuropathic pain and; Lyrica 50 mg for neuropathic pain.

21. On February 2, 2020 Dr. D'Angelo issued an addendum to her May 2018 independent medical examination following a records review. Dr. D'Angelo repeated that Claimant's continued care was neither reasonable nor necessary for her July 21, 2011 injury. Dr. D'Angelo remarked that Claimant has been receiving treatment for her pre-existing and causally unrelated osteoarthritis issues. She noted that in her independent medical examination she expressed concerns about Claimant's diffuse

pain complaints and ongoing waxing and waning left lower extremity complaints that never resolved despite extensive interventions.

22. Dr. D'Angelo also expressed her continued concern that Claimant remained on opioid medications. She explained that the use of opioid medications such as Nucynta are inappropriate for treating chronic musculoskeletal pain. In fact, Claimant had not demonstrated any functional improvement. Specifically, Claimant's last day working for Employer occurred on August 12, 2018 and she remained unemployed. Dr. D'Angelo reasoned that Claimant's functional gains have stalled and her use of chronic opioid medications was not associated with any increased work or functional capacity. She recommended aggressive weaning from her chronic opioid use with the option of in-patient treatment. Moreover, Dr. D'Angelo explained that Claimant did not require continuation of her topical pain medication and any other ancillary treatment, including chiropractic care, nine years after her original work injury. However, she acknowledged that Claimant could continue Lyrica for up to a year, but should be switched to the generic version.

23. On February 13, 2020 Elena C. Antonelli, M.D. performed a peer review regarding the medical necessity of Claimant's ongoing medications. Dr. Antonelli determined the lidocaine cream, Nucynta Extended Release 100 mg, Nucynta 15 mg, Baclofen, Lyrica and Diclofenac gel were not medically necessary. The only medically necessary medication was ibuprofen. Because of the nature of the Lyrica and Nucynta, Dr. Antonelli recommended weaning.

24. On February 27, 2020 William M. Barreto, M.D. conducted a peer review. He considered the medical necessity of Claimant's Nucynta Extended Release 100 mg. and Nucynta 50 mg. He determined that neither medication was medically necessary. Dr. Barreto also recommended weaning.

25. On June 5, 2020 the parties conducted the pre-hearing evidentiary deposition of Dr. D'Angelo. Dr. D'Angelo remarked that Claimant's initial diagnosis after the July 21, 2011 incident included a tear of the peroneal longus tendon and a complex medical meniscus tear of the right knee. She maintained that Claimant's medical maintenance benefits were not reasonable, necessary or causally related to her work injuries. In fact, Dr. D'Angelo noted that she was uncertain about why Claimant was still receiving medications and treatment approximately nine years after her original industrial injuries. She specifically, remarked that the results of Claimant's EMG tests did not demonstrate any neuropathy that should be treated with opioid medications. Dr. D'Angelo emphasized that Claimant's failure to resume work activities reflected a lack of functional gains. Notably, the record reveals that Claimant's functional capacity decreased while continuing her maintenance medications. Dr. D'Angelo explained that Claimant's need for ongoing treatment is caused by the confounding of unrelated personal medical conditions with her work-related injuries. She specifically commented that "I absolutely believe that the confounding issue was that we took many of her personal medical issues, lower back pain, obesity, degenerative knee disease, bilaterally, and we treated it -- all of those, as if they were acute traumatic injury due to

her work injury, and they were not.” Accordingly, Dr. D’Angelo concluded that Claimant’s medical maintenance benefits should be terminated.

26. Claimant testified at the hearing in this matter. She explained that she cannot pursue her activities of daily living without her maintenance medications. Claimant also remarked that she would like to continue her chiropractic care and undergo additional hydrodissection injections as originally recommended by ATP Miller.

27. On June 18, 2020 Claimant returned to Ascent Medical Consultants and visited Kristin Seger, PA. Claimant reported that, without all of her medications, she would have difficulty performing her activities of daily living. However, PA Seger noted that Ascent Medical Consultants had received a weaning notice from Claimant’s insurance company specifying that, unless otherwise instructed, they would begin weaning following a refill of her medications.

28. Respondents have established that it is more probably true than not that Claimant’s future medical maintenance benefits, including opioid medications, are no longer reasonable, necessary or causally related to her July 21, 2011 admitted industrial injuries. Claimant’s initial injury involved twisting her left ankle and caused a peroneal tendon tear. Her subsequent left knee condition was also determined to be compensable. The record reveals that Claimant has experienced a number of intervening and overlapping non-work-related symptoms. Claimant has specifically suffered back pain, generalized joint pain in her hips, back, and knees, a total left knee arthroplasty, a total right knee arthroplasty, depression, osteoarthritis and obesity. Because the preceding symptoms have contributed to Claimant’s overall medical condition, medical maintenance benefits are no longer directly related to her July 21, 2011 industrial injuries. Specifically, Claimant had relatively minor injuries to her left foot and knee and underwent surgeries to correct her conditions. After the surgeries, the only significant ongoing problem was mild nerve pain in the foot as demonstrated by objective EMG testing.

29. Dr. D’Angelo persuasively explained that Claimant’s medical maintenance benefits are no longer reasonable, necessary or causally related to her work injuries. She remarked that Claimant’s initial diagnosis after the July 21, 2011 incident included a tear of the peroneal longus tendon and a complex medical meniscus tear of the right knee. Dr. D’Angelo noted that she was uncertain about why Claimant was still receiving medications and treatment approximately nine years after her original industrial injuries. She specifically remarked that the results of Claimant’s EMG tests did not demonstrate any neuropathy that should be treated with opioid medications. Dr. D’Angelo detailed that the use of opioid medications such as Nucynta are inappropriate for treating chronic musculoskeletal pain. In fact, Claimant had not demonstrated any functional improvement. Specifically, Claimant’s last day working for Employer occurred on August 12, 2018 and she remained unemployed. Dr. D’Angelo reasoned that Claimant’s functional gains have stalled and her use of chronic opioid medications was not associated with any increased work or functional capacity. She recommended aggressive weaning from her chronic opioid. Dr. D’Angelo also determined that Claimant did not require continuation of her topical pain medication and any other

ancillary treatment, including chiropractic care, nine years after her original work injury. However, she acknowledged that Claimant could continue Lyrica for up to one year.

30. Similarly, ATP Dr. Anderson-Oeser explained that Claimant's goal was to reduce the use of opioid medication over time to decrease problems with dependence and addiction. She specifically informed Claimant that opioid medications are not appropriate for her nerve pain. Dr. Anderson-Oeser repeatedly sought to decrease Claimant's reliance on Nucynta and referred her to New Health Services for assistance in reducing her opioid medications. However, the record reveals that Claimant failed to follow-up with the referral. Moreover, Dr. Antonelli conducted a peer review and determined the lidocaine cream, Nucynta Extended Release 100 mg, Nucynta 15 mg, Baclofen, Lyrica and Diclofenac gel were not medically necessary. The only medically necessary medication was ibuprofen. Because of the nature of the Lyrica and Nucynta, Dr. Antonelli recommended weaning. Finally, in another peer review Dr. Barreto considered the medical necessity of Claimant's Nucynta Extended Release 100 mg. and Nucynta 50 mg. He determined that neither medication was medically necessary. Dr. Barreto also recommended weaning.

31. In contrast, when Dr. Miller determined that Claimant reached MMI on January 10, 2018 he recommended maintenance care including ongoing pain management and medications. Furthermore, on January 30, 2018 DIME Dr. Zuehlsdorff agreed with Dr. Miller's date of MMI. He noted that Claimant required maintenance care including medication management and 3-4 hydrodissection injections with Dr. Mazzola over the following year. Finally, Claimant explained that she cannot pursue her activities of daily living without her maintenance medications. Claimant also remarked that she would like to continue her chiropractic care and undergo additional hydrodissection injections as originally recommended by ATP Miller.

32. Despite Claimant's testimony and the opinions of Drs. Miller and Zuehlsdorff, the record reflects that Claimant's medical maintenance treatment and medications are no longer reasonable, necessary or causally related to her July 21, 2011 admitted industrial injury. The record reveals that Claimant has had extensive treatment before and after she reached MMI. Claimant's medical maintenance treatment for her peroneal nerve injury and meniscal repair has provided little relief. Based on the persuasive medical opinions and the medical records, Claimant's continuing symptoms are likely related to her underlying health conditions instead of her July 21, 2011 admitted industrial injuries. Accordingly, Claimant's continued medical maintenance treatment and medications are no longer reasonable, necessary or causally related to her July 11, 2011 work injury. Claimant's medications and treatment shall thus be terminated. However, Claimant shall be weaned from her opioid medications as recommended by Dr. Anderson-Oeser and weaned from Lyrica over the course of one year as recommended by Dr. D'Angelo.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured

workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. See *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. To prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover v. Industrial Comm'n.*, 759 P.2d 705, 710-13 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609, 611 (Colo. App. 1995). Once a claimant establishes the probable need for future medical treatment he "is entitled to a general award of future medical benefits, subject to the employer's right to contest compensability, reasonableness, or necessity." *Hanna v. Print Expeditors, Inc.*, 77 P.3d 863, 866 (Colo. App. 2003); see *Karathanasis v. Chilis Grill & Bar*, W.C. No. 4-461-989 (ICAP, Aug. 8, 2003). Whether a claimant has presented substantial evidence justifying an award of *Grover* medical benefits is one of fact for determination by the Judge. *Holly Nursing Care Center v. Industrial Claim Appeals Office*, 919 P.2d 701, 704 (Colo. App. 1999).

5. Although Respondents filed a FAL acknowledging medical maintenance benefits, it is not precluded from contesting liability for future treatment. See *Azar v. Mervyn's*, W.C. No. 4-354-936 (ICAO, June 9, 2005). An admission for medical maintenance benefits is general in nature and subject to a respondents' subsequent right to challenge specific treatment. *Id.* When the respondents seek to terminate all medical maintenance benefits, they have the burden to prove that medical maintenance benefits are no longer reasonable, necessary or related to the industrial injury. *HLJ Management Group, Inc. v. Kim*, 804 P.2d 250 (Colo. App. 1990); see §8-43-201(1), C.R.S. (specifying that "a party seeking to modify an issue determined by a general or

final admission, a summary order, or a full order shall bear the burden of proof for any such modification”).

6. It is appropriate for an ALJ to consider the Colorado Division of Workers' Compensation *Medical Treatment Guidelines (Guidelines)* in determining whether a certain medical treatment is reasonable and necessary for a claimant's condition. *Deets v. Multimedia Audio Visual*, W.C. No. 4-327-591 (ICAO, Mar. 18, 2005); see *Eldi v. Montgomery Ward*, W.C. No. 3-757-021 (ICAO, Oct. 30, 1998) (noting that the *Guidelines* are a reasonable source for identifying the diagnostic criteria). The *Guidelines* are regarded as accepted professional standards for care under the Workers' Compensation Act. *Rook v. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005). Nevertheless, the *Guidelines* expressly acknowledge that deviation is permissible.

7. The *Guidelines* provide, in relevant part, that opioid “medications should be clearly linked to improvement of function, not just pain control.” WCRP 17, Exhibit 9 (I)(6). Furthermore, the *Guidelines*, specify that, “examples of routine functions include the ability to perform work tasks, drive safely, pay bills or perform math operations, remain alert and upright for 10 hours per day, or participate in normal family and social activities.” WCRP 17, Exhibit 9(I)(6).

8. As found, Respondents have established by a preponderance of the evidence that Claimant's future medical maintenance benefits, including opioid medications, are no longer reasonable, necessary or causally related to her July 21, 2011 admitted industrial injuries. Claimant's initial injury involved twisting her left ankle and caused a peroneal tendon tear. Her subsequent left knee condition was also determined to be compensable. The record reveals that Claimant has experienced a number of intervening and overlapping non-work-related symptoms. Claimant has specifically suffered back pain, generalized joint pain in her hips, back, and knees, a total left knee arthroplasty, a total right knee arthroplasty, depression, osteoarthritis and obesity. Because the preceding symptoms have contributed to Claimant's overall medical condition, medical maintenance benefits are no longer directly related to her July 21, 2011 industrial injuries. Specifically, Claimant had relatively minor injuries to her left foot and knee and underwent surgeries to correct her conditions. After the surgeries, the only significant ongoing problem was mild nerve pain in the foot as demonstrated by objective EMG testing.

9. As found, Dr. D'Angelo persuasively explained that Claimant's medical maintenance benefits are no longer reasonable, necessary or causally related to her work injuries. She remarked that Claimant's initial diagnosis after the July 21, 2011 incident included a tear of the peroneal longus tendon and a complex medical meniscus tear of the right knee. Dr. D'Angelo noted that she was uncertain about why Claimant was still receiving medications and treatment approximately nine years after her original industrial injuries. She specifically remarked that the results of Claimant's EMG tests did not demonstrate any neuropathy that should be treated with opioid medications. Dr. D'Angelo detailed that the use of opioid medications such as Nucynta are inappropriate for treating chronic musculoskeletal pain. In fact, Claimant had not demonstrated any

functional improvement. Specifically, Claimant's last day working for Employer occurred on August 12, 2018 and she remained unemployed. Dr. D'Angelo reasoned that Claimant's functional gains have stalled and her use of chronic opioid medications was not associated with any increased work or functional capacity. She recommended aggressive weaning from her chronic opioid. Dr. D'Angelo also determined that Claimant did not require continuation of her topical pain medication and any other ancillary treatment, including chiropractic care, nine years after her original work injury. However, she acknowledged that Claimant could continue Lyrica for up to one year.

10. As found, similarly, ATP Dr. Anderson-Oeser explained that Claimant's goal was to reduce the use of opioid medication over time to decrease problems with dependence and addiction. She specifically informed Claimant that opioid medications are not appropriate for her nerve pain. Dr. Anderson-Oeser repeatedly sought to decrease Claimant's reliance on Nucynta and referred her to New Health Services for assistance in reducing her opioid medications. However, the record reveals that Claimant failed to follow-up with the referral. Moreover, Dr. Antonelli conducted a peer review and determined the lidocaine cream, Nucynta Extended Release 100 mg, Nucynta 15 mg, Baclofen, Lyrica and Diclofenac gel were not medically necessary. The only medically necessary medication was ibuprofen. Because of the nature of the Lyrica and Nucynta, Dr. Antonelli recommended weaning. Finally, in another peer review Dr. Barreto considered the medical necessity of Claimant's Nucynta Extended Release 100 mg. and Nucynta 50 mg. He determined that neither medication was medically necessary. Dr. Barreto also recommended weaning.

11. As found, in contrast, when Dr. Miller determined that Claimant reached MMI on January 10, 2018 he recommended maintenance care including ongoing pain management and medications. Furthermore, on January 30, 2018 DIME Dr. Zuehlsdorff agreed with Dr. Miller's date of MMI. He noted that Claimant required maintenance care including medication management and 3-4 hydrodissection injections with Dr. Mazzola over the following year. Finally, Claimant explained that she cannot pursue her activities of daily living without her maintenance medications. Claimant also remarked that she would like to continue her chiropractic care and undergo additional hydrodissection injections as originally recommended by ATP Miller.

12. As found, despite Claimant's testimony and the opinions of Drs. Miller and Zuehlsdorff, the record reflects that Claimant's medical maintenance treatment and medications are no longer reasonable, necessary or causally related to her July 21, 2011 admitted industrial injury. The record reveals that Claimant has had extensive treatment before and after she reached MMI. Claimant's medical maintenance treatment for her peroneal nerve injury and meniscal repair has provided little relief. Based on the persuasive medical opinions and the medical records, Claimant's continuing symptoms are likely related to her underlying health conditions instead of her July 21, 2011 admitted industrial injuries. Accordingly, Claimant's continued medical maintenance treatment and medications are no longer reasonable, necessary or causally related to her July 11, 2011 work injury. Claimant's medications and treatment shall thus be terminated. However, Claimant shall be weaned from her opioid

medications as recommended by Dr. Anderson-Oeser and weaned from Lyrica over the course of one year as recommended by Dr. D'Angelo.

ORDER

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

1. Claimant's continued medical maintenance treatment and medications are no longer reasonable, necessary or causally related to her July 11, 2011 work injury. Claimant's medications and treatment shall thus be terminated. However, Claimant shall be weaned from her opioid medications as recommended by Dr. Anderson-Oeser and weaned from Lyrica over the course of one year as recommended by Dr. D'Angelo.

2. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at <http://www.colorado.gov/dpa/oac/forms-WC.htm>.*

DATED: September 1, 2020.

DIGITAL SIGNATURE:


Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- I. Has Claimant shown, by a preponderance of the evidence, that he suffered a compensable work injury on February 19, 2020?
- II. If so compensable, what medical bills are the responsibility of Employer?
- III. If so compensable, has Claimant shown, by a preponderance of the evidence, that the reverse shoulder replacement surgery, as recommended by Dr. Defee, is reasonable, necessary, and related to his work injury?
- IV. If so compensable, who is now Claimant's Authorized Treating Physician?
- V. Have Respondents shown, by a preponderance of the evidence, that Claimant was responsible for his own termination from his employment?
- VI. What is Claimant's average weekly wage?

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

Background

1. Claimant is 74-years-old. He worked for Employer initially as a potato laborer, then as a sorter. (Ex. G, p. 90).
2. Claimant was hired on October 24, 2019. *Id* at 89. He was hired as a baler. His job was to place either ten 5-pound bags of potatoes or five 10-pound bags in a 50-pound sacks and then stack the sacks 8' high on a pallet. Claimant was struggling with lifting the 50-pound sacks. In late 2019, Claimant requested his hours be reduced, and he was moved to a lighter duty job sorting potatoes, and with significantly diminished hours.
3. The larger potatoes which the Claimant had to sort (which needed to be tossed onto a second conveyor) weighed approximately 3-4 ounces; the B size potatoes weighed approximately 1-2 ounces.

4. On February 19, 2020, Claimant's job involved sorting potatoes on the "B" line, which were coming down a conveyer belt, running from Claimant's left towards his right. Claimant would stand to the side of this lower conveyer, which was approximately groin height. He was required to pick out the larger sized potatoes, then toss them in an underhanded motion to another conveyer, which was located directly in front of where Claimant stood.
5. This second conveyer was running in the opposite direction of the lower one, in an upward angle. The height of the second conveyer above the floor would vary but required a toss from approximately armpit level. Claimant would also sort the small and 'bad' potatoes into a chute, which was located directly across the lower conveyer from Claimant. At hearing, Claimant stated he would toss approximately 5 large potatoes per minute onto the second conveyer, i.e., one toss every 12 seconds. (see *also* Ex. H, I).

Demonstrative Video Evidence

6. The ALJ has viewed the videos (Ex. H, I), as demonstrative evidence, with Mr. T[Redacted] (who is 5'6", compared with Claimant, who is 5'9"), depicted in the role Claimant was assigned on the date of his alleged injury. Tossing the potatoes (using an underhand motion) onto the upper conveyer does not require the worker to lift his hand past his armpits, although the motion is repetitive. The potatoes must be tossed no more than a foot or two to safely land on the upper conveyer. Tossing the small rejects into the floor chute requires an underhanded toss - using more wrist than shoulder - of perhaps a foot or two, with the hand never having to go above the worker's waist. This motion is the rough equivalent of tossing a spoon into a sink. As noted, while not the least bit strenuous, the action is repetitive, and requires some focus.
7. According to Employer's job description, the sorter position involved constant grasping and fine manipulation with both hands, constant reaching below shoulder level but no reaching above shoulder level. It also involved constant lifting up to 10 pounds but no lifting over ten pounds. (Ex. F pp. 75-76). The ALJ finds the work depicted in the videos to be consistent with this written job description.

The Alleged Work Injury

8. Claimant alleges injury to his right shoulder arising out of the activity of tossing one of the larger potatoes to the second conveyer when he felt a pop and pain in his right shoulder on February 19, 2020. Claimant testified that he continued to work through the pain for a few minutes longer, then informed Employer.

9. Claimant told Josh, his supervisor, that his shoulder hurt. He was directed to see Steve T[Redacted], who is the Safety Manager for the Colorado Division, and Food Safety Compliance Specialist for the entire company.
10. Claimant told Mr. T[Redacted] that he had pain in his right shoulder. He said that his shoulder hurt like it had hurt him in the past. Mr. T[Redacted] asked whether he had fallen or hit his head. He had not. Claimant did not report anything in writing at the time.
11. Mr. T[Redacted] is trained as a first responder. He examined Claimant's shoulder, and upon cursory examination, did not perceive any obvious signs of injury. Mr. T[Redacted] did not understand at this time that Claimant was reporting his shoulder condition as a work-related injury, because he had recently requested to reduce his hours and had changed his job duties. Mr. T[Redacted] asked Claimant if he wanted to go to the doctor. Claimant declined, indicating he felt more comfortable just going home to ice his shoulder because it had bothered him before and that was what he did before.
12. At hearing, Mr. T[Redacted] testified that his understanding at the time was that Claimant's shoulder pain was due to a preexisting condition. He did not understand Claimant to have alleged a work-related injury. Claimant told Mr. T[Redacted] that he had experienced the same pain before and Claimant told him his shoulder had popped before. Mr. T[Redacted] sent Mr. Packer home to ice his shoulder and take ibuprofen. He directed Claimant to let him know if he was still in pain in the morning or if he wanted to go see a doctor.
13. At hearing, Claimant testified that, while examining his shoulder, Mr. T[Redacted] simply grabbed his shoulder, without asking permission, and caused excruciating pain during this examination.

Claimant seeks Treatment

14. The next day Claimant called Mr. T[Redacted] and requested that he be sent to a doctor. Mr. T[Redacted] obtained a doctor's appointment with Sheryl Belanger, MD for Claimant to be seen the next day. Mr. T[Redacted] called Claimant back and notified him of the appointment. Mr. T[Redacted] told Claimant to call him back following his doctor's appointment as soon as he found out what was wrong with his shoulder so they could determine if they needed to fill out paperwork.
15. At hearing, Claimant testified that he brought in paperwork to Mr. T[Redacted] (Ex. 2, p. 6), which is the *Physician's Report of Workers Compensation Injury*, form WC164. This was signed by Cheryl Belanger, MD, who noted 'alignment suspicious for rotator cuff injury', recommended

an MRI, and placed Claimant on TTD, with follow-up in two weeks. *Id.*

The Workers Compensation Claim

16. Claimant then completed a *Workers' Claim for Compensation*, form WC15, on February 28, 2020. (Ex. G p. 90).
17. In that document, Claimant listed his average weekly wage at \$456.98. He also checked the box indicating he received overtime pay.
18. Mr. T[Redacted] did not become aware that Claimant was alleging a work-related injury until the end of March 2020. An Employer's First Report of Injury was then completed on March 25, 2020, by Mr. T[Redacted]. (Ex. G, p. 89).

Preexisting Conditions

19. Three weeks before his alleged injury, Claimant was seen on January 30, 2020, by Jackie Bennett, FNP-BC to 'establish care and to refill medications'. (Ex. C, p. 65). At this visit, Claimant reported chronic hip, left shoulder, right knee pain, "bad arthritis". Claimant had been taking oxycodone (Percocet) to manage his arthritis pain for a long time. *Id.*
20. A number of maladies were listed under ***Active Diagnosis*** at that visit, including:
 - ****Complete tear of the right rotator cuff***
 - **Internal derangement of the right shoulder*
 - *Osteoarthritis multiple sites
 - *Other chronic pain
 - ****Other injury of the muscle, fascia and tendon of long head of biceps right arm sequela***
 - *Over exertion from repetitive movements,
 - ****Traumatic complete tear of the right rotator cuff***, subsequent encounter
 - ****Unspecified injury of right shoulder and upper arm***, subsequent encounter.

Surgical history included his right rotator cuff surgery in 1998 and back surgery in 1970. *Id.* (emphasis added). There is no information in the records regarding any follow-up visits to address of any of these issues.

21. At hearing, Claimant testified he had arthritis in his hands, but denied he had arthritis in his left shoulder, knee, or low back.
22. Claimant testified he had bursitis in his hip, denied chronic left shoulder pain, but agreed he had chronic knee pain. According to visit note [from an unidentified provider, but consistent with his 1/30/2020 visit] of March 2, 2020, Claimant was there to refill his chronic pain medications. "He has taken oxycodone 5 mg TID to manage for "a long time"; requests refill today." He reported chronic hip, left shoulder and right knee pain and 'bad arthritis'. His left shoulder had been more painful for the last 2 months; he was awaiting imaging for it. (Ex. C, p. 56).
23. At hearing, Claimant testified he injured the same (right) shoulder on or about September 1996 in an occupational injury while employed with the Rocky Mountain News in their newspaper distribution department. Claimant testified while lifting a bundle of newspapers, he felt and heard a pop in his right shoulder. He testified he underwent a right rotator cuff surgical repair, was restricted from work for five (5) months and returned to work until 1998. He testified he quit that job in 1998 when his wife became ill and later died. (see Ex. 7, p. 24). Claimant testified he was released without restrictions.
24. Claimant testified that WC claim closed when he was placed at MMI with a small PPD rating. In the ensuing decades, Claimant testified that his surgical repair was so complete that he worked as a construction laborer breaking concrete with a jackhammer for a period of years, and later for John Gonzales, Tree Man Service, as laborer using a chain saw to cut limbs, tree stumps and remove debris from May 2014-September 2017.

Treatment by Dr. Belanger

25. When Claimant was first seen by Dr. Belanger February 21, 2020, he reported that he was sorting potatoes off of a conveyor belt throwing them into bins; he reported joint aches, joint stiffness, muscle aches, weakness, pain in arms shoulder pain - not just his right upper extremity. Dr. Belanger restricted Claimant from repetitively lifting, carrying, pushing, pulling, or reaching away from the body. Examination of the right shoulder revealed no bruising, no redness, and no swelling. (Ex. C, p. 64). Under the intake note, Dr. Belanger made the following notation: "Of note is he had a *previous right rotator cuff* repair 20 years ago or more. *He had been doing well until this injury.*" (emphasis added).
26. X-rays of the right shoulder taken on February 21, 2020, reflected no fracture, but *chronic* arthritic and posttraumatic changes. (Ex. E, p. 73).
27. Claimant was prescribed a 30 day supply of cyclobenzaprine, and a 30 day

supply of ibuprofen 600 mg. He was also administered 60 mg of toradol in the right glute to treat inflammation.

28. February 26, 2020, review of the x-ray report by Dr. Belanger reflected no dislocation or fracture, but abnormal contour of the biceps shadow and humerus/glenoid alignment suspicious for rotator cuff injury. (Ex. C, p. 64).
29. MRI of the right shoulder taken on March 5, 2020, reflected degenerative osseous labral changes. Cartilaginous labrum was not well evaluated due to motion. There was bulky osteophyte formation noted in the glenohumeral joint. (Ex. E, p. 72).
30. Claimant saw Dr. Belanger on March 6, 2020. She then opined that the MRI showed full thickness tears of the right rotator cuff, supraspinatus and infraspinatus. Claimant was referred to orthopedist, Dr. Defee. It was further noted that Claimant's shoulder "now appears with bruising in various shades of colors." (Ex C pp. 52- 55).
31. On March 24, 2020, Claimant returned to Dr. Belanger. According to her report, by this point, Employer had light duty to offer, but they needed work restrictions outlined. They discussed his ability to return to work in a modified duty capacity using his left upper extremity if light duty was available. Claimant initially told Dr. Belanger that there was nothing he could do at work as *he could not move his arm at all*, but was observed by Dr. Belanger to be able to sign papers, hold papers, and supinate/pronate forearm without problems. Claimant was also noted to have full range of motion with his left arm. (Ex. C pp. 44, 45). Despite Claimant's stated inability to function, Dr. Belanger filed a WC164 on 3/24/20, returning him to modified light duty, using upper left extremity only. *Id* at 44.
32. Claimant was next seen by Dr. Belanger on April 21, 2020, reporting that his orthopedic appointment had been delayed due to Corona virus. He reported that he was not going to be able to take his medication during the day and drive. [Claimant had been taking Percocet for at least the previous 10 years on a regular basis]. When he worked for Tree Man Service for nearly 3 ½ years between 2014 and 2018, he took Percocet several times a day every day. The entire time he worked for the Respondent Employer he took Percocet several times a day. Yet, on April 21, 2020, he had a discussion with Dr. Belanger, resulting in her taking him completely off work, because he should not be around machinery when taking medication. (Ex. C, p. 33). There is nothing in the record indicating that Dr. Belanger had any awareness of Claimant's regular use of Percocet for years, apparently without incident.

Orthopedic Referral

33. Claimant saw Laticia Hollingsworth, PAC, with San Luis Valley Health Orthopedics on April 27, 2020. She noted that x-rays of his right shoulder showed narrowing of the glenohumeral joint with inferior osteophyte formation. There was significant translation of the humeral head with narrowing of the acromiohumeral interval. Under Claimant's medical history, she notes:

He states that prior to that [date of injury] *he was not having any pain or difficulty*. He did have an injury to his rotator cuff 23-24 years ago. He had a rotator cuff repair Rose Medical Center at the time. He states that really *he had been doing well up until his injury* in February. (Ex. 8, p. 40) (emphasis added).

34. On that same visit, it was noted that "Review of the MRI shows tearing of the supraspinatus and infraspinatus **with retraction and atrophy**. There is evidence of significant glenohumeral arthritis in addition to changes consistent with a previous rotator cuff repair. *Id* at 43. (emphasis added).
35. Claimant saw orthopedist Dr. Defee on June 12, 2020. Dr. Defee assessed osteoarthritis of the right glenohumeral joint and rotator cuff arthropathy of the right shoulder. He recommended a right reverse shoulder replacement. Dr. Defee did not provide a connection between Claimant's symptoms and his alleged work injury. (Ex. 8, p. 39).
36. Claimant had a prior work-related right rotator cuff tear approximately 23 - 24 years ago. He underwent surgery for that and was off work for approximately 5 months.

IME by Dr. Striplin

37. Dr. Michael Striplin, MD, performed an Independent Medical Examination on behalf of Respondents on May 27, 2020. He is board certified in Occupational Medicine. He also testified at hearing, consistent with his report. He opined that a pop and pain did not equate to an injury of the right shoulder. He opined that the MRI findings were most consistent with longstanding pathology, resulting in the recommended right shoulder surgery, but which was not caused by or substantially aggravated by sorting potatoes at work on February 19, 2020.
38. While the apparent rupture of the long head of the right biceps was of

undetermined age and etiology, the notation of injury of the muscle, fascia and tendon of long head of biceps right arm sequela was noted on the January 30, 2020, report from Jackie Bennett, FNP-BC. Thus, he opined, the rupture of the long head of the biceps has already occurred prior to February 19, 2020.

39. Dr. Striplin further opined that the non-strenuous mechanism of injury of tossing potatoes as depicted in the demonstrative videos of the potato sorting job would not have caused or substantially aggravated the underlying glenohumeral arthritis seen on the March 5, 2020, MRI report. Nor would it have caused the right rotator cuff tears. The advanced preexisting degenerative arthritis in the glenohumeral joint was the reason for the recommended reverse total shoulder replacement. Dr. Striplin opined that Claimant did not sustain a work-related injury to his right shoulder on February 19, 2020.
40. Dr. Striplin acknowledged that he did not take a complete employment history, and was unaware that Claimant had returned to other heavy duty labor for a number of years post-surgery without restrictions, until after he examined Claimant on May 27, 2020. However, he did not indicate that his changed his analysis.

Claimant's Wages

41. Consistent with Mr. T[Redacted]'s testimony (and pursuant to Claimant's own request to Employer, which was honored), the wage records show that Claimant's hourly wage remained constant at \$11.60 per hour. Beginning with his check period dated 11/1/2019, through the check period dated 12/13/2019, Claimant worked nearly 40 hours every week, sometimes more, resulting in overtime pay. (Ex. G, p. 75, Ex. 9, pp. 78-92)
42. Beginning with the check period dated 12/20/2019, and continuing through Claimant's tenure (not counting the final paycheck), Claimant's weekly hours ranged from a high of 31.82, to a low of 21.00. His weekly hours worked, once he went to the "B" line, averaged 25.72. *Id.* At no point after this change did Claimant come even close to qualifying for overtime. His average weekly wage is thus \$298.35.

Temporary Total / Partial Disability

43. The last day Claimant worked for the employer was February 19, 2020, the day he alleges he was injured. Claimant has had no further contact with his employer. After three 'no-call/no-shows', Employer's policy is to terminate the employment relationship. As a result of Claimant accruing three no-

call/no-shows, Claimant was terminated.

44. Mr. T[Redacted] acknowledged that no written termination letter was personally tendered or mailed to Claimant, and there is no evidence in the record that Respondent's Human Resources department had notified Claimant, in writing or otherwise, of his termination.
45. At hearing, Claimant testified that he hand delivered the WC164 to Mr. T[Redacted], and in the presence of other workers. He further indicated that he then called Mr. T[Redacted], and left several messages on his voicemail about his work injury. He never heard back.
46. Mr. T[Redacted] testified he did not meet with Claimant after 2/19/2020. He was not even at the office on the day Claimant alleged he submitted the WC164 to him; instead he was in an all-day meeting at a different location from 9:00 a.m. to 5:00 p.m. regarding an unrelated operation. Mr. T[Redacted] also denied that Claimant left any messages for him after the injury. Instead, Mr. T[Redacted] made several attempts to reach Claimant by phone, leaving voicemails. On the last attempt, he testified that the phone number of Claimant was no longer in service.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

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

arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

C. In deciding whether a party has met their burden of proof, the ALJ is empowered “to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence.” See *Bodensecki v. ICAO*, 183 P.3d 684 (Colo.App. 2008). In short, the ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo.App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo.App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo.App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness’s testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *CJI*, Civil 3:16 (2007). Although credibility will be outlined in somewhat detail in this Order, suffice it to say at this juncture that Claimant has not been shown to be a reliable medical historian.

Compensability, Generally

D. According to C.R.S. § 8-43-201, “a claimant in a workers’ compensation claim shall have the burden of proving entitlement to benefits by a preponderance of the evidence; the facts in a workers’ compensation case shall not be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer, and a workers’ compensation case shall be decided on its merits.” Also see *Qual-Med, Inc. v. Indus. Claim Appeals Off.*, 961 P.2d 590, 592 (Colo. App. 1998) (“The Claimant has the burden of proving an entitlement to benefits by a preponderance of the evidence.”); *Lerner v. Wal-Mart Stores, Inc.*, 865 P.2d 915, 918 (Colo. App. 1993) (“The burden is on the claimant to prove his entitlement to benefits by a preponderance of the evidence.”).

E. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). It is the claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between his employment and his injuries. An ALJ might reasonably conclude the evidence is so conflicting and unreliable that the claimant has failed to meet the burden of proof with respect to causation. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186, 191 (Colo. App. 2002) (weight to be accorded evidence on question of causation is issue of fact for ALJ). See also, *In the Matter of the Claim of Tammy Manzanares, Claimant*, W. C. Nos. 4-517-883 and 4-614-430, 2005 WL 1031384 (Colo. Ind. Cl. App. Off. Apr. 25, 2005).

F. For an injury to be compensable under the Workers’ Compensation Act, it must “arise out of” and “occur within the course and scope” of the employment. *Price v.*

Indus. Claim Appeals Off., 919 P.2d 207, 210, 210 (Colo. 1996); *Schepker v. Daewoo North*, W.C. No. 4-528-434 (ICAO April 22, 2003). An injury "arises out of" employment when the origins of the injury are sufficiently related to the conditions and circumstances under which the employee usually performs his or her job functions as part of the employee's services to the employer. See *Schepker, supra*. "In the course of" employment refers to the time, place, and circumstances of the injury. *Id.* There is no presumption that an injury arises out of employment merely because an unexplained injury occurs during the course of employment. *Finn v. Indus. Comm'n*, 165 Colo. 106, 108-09, 4437 P.2d 542 (1968).

G. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. § 8-41-301 (1)(c) C.R.S.; *Faulkner v. Indus. Claim Appeals Off.*, 12 P.3d 844, 846 (Colo. App. 2000). The question of causation is generally one of fact for the determination by the ALJ. *Faulkner*, 12 P.3d at 846.

H. Colorado's Workers' Compensation Act creates a distinction between the terms "accident" and "injury". The term "accident" refers to an "unexpected, unusual, or undesigned occurrence." See §8-40-201(1), C.R.S. In contrast, an "injury" refers to the physical trauma caused by the accident. In other words, an "accident" is the cause and an "injury" is the result. *City of Boulder v. Payne*, 426 P.2 194 (1967). No benefits flow to the victim of an industrial accident unless the accident results in a compensable "injury." A compensable injury is one which requires medical treatment or causes a disability.

Compensability, as Applied

I. In this case, the evidence is sufficient to show that Claimant at least suffered some compensable injury, albeit a very minor one. Although Claimant's reliability as a medical historian, and as a fact witness, is questionable, there is sufficient corroboration in the medical records of a minor strain of Claimant's right shoulder, sufficient to warrant seeking medical attention. Such finding is consistent with Dr. Striplin's opinions. Claimant was referred, however unwittingly, to Dr. Belanger by Mr. T[Redacted]. Claimant was treated with an anti-inflammatory, and prescribed pain medication and a muscle relaxant good for 30 days. Such treatment was adequate to fully treat Claimant's minor work injury, and the ALJ so finds.

Medical Benefits, Generally

J. A claimant is entitled to medical benefits that are reasonably necessary to cure or relieve the effects of the industrial injury. See § 8-42-101(1), C.R.S. 2003; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The question of whether the need for treatment is causally related to an industrial injury is one of fact. *Walmart Stores, Inc. v. Industrial Claims Office, supra*. Similarly, the question of whether medical treatment is reasonable and necessary to cure or relieve the effects of an industrial injury is one of fact. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). Where the relatedness, reasonableness, or necessity of

medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc.*, W.C. No. 4-117-758 (ICAO April 7, 2003).

Medical Benefits, Reasonably Necessary

K. No one, even Dr. Striplin, is disputing that Claimant might need a reverse shoulder replacement at this stage of his life. The medical evidence shows severe arthritis in the joint, torn supraspinatus and infraspinatus tendons, a biceps tendon that is likely absent, and misalignment of the glenohumeral joint. Claimant's symptoms are consistent therewith.

Medical Benefits, Related to Work Injury

L. The mere fact that a claimant suffers from a pre-existing condition does not disqualify a claim for compensation or medical benefits if the work-related activities aggravated, accelerated, or combined with the pre-existing condition to produce disability or a need for medical treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). Pain is a typical symptom from the aggravation of a pre-existing condition, and the claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment-related activities and not the underlying pre-existing condition. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949). The claimant must prove by a preponderance of the evidence that his symptoms were proximately caused by an industrial aggravation of a pre-existing condition rather than simply the natural progression of the condition. *Melendez v. Weld County School District #6*, W.C. No. 4-775-869 (ICAO, October 2, 2009).

M. In this case, Claimant's pain symptoms *related* to his actual work injury (a minor strain, and nothing more) would have abated within a few days with the treatment provided on the initial visit. The ALJ finds that this minor shoulder strain *did not* cause Claimant's severe, pre-existing shoulder symptoms to suddenly become symptomatic, and now to somehow necessitate a reverse shoulder replacement. Claimant was already symptomatic when he went in to establish care on January 30, 2020, and refill his longstanding prescription for Percocet. Claimant's shoulder was not "doing fine" before February 19, 2020, although he told his providers that. The MRI showed that his supraspinatus and infraspinatus tendons were already *retracted and atrophied*. They did not reach this condition as a result of tossing a 4-ounce potato on February 19. Those tendons, and the surgery to repair them, had failed at a time well prior, likely before Claimant even started work for Employer. While it remains *possible* that Claimant's bicep tendon was hanging by a thread, then snapped on the "B line" on 2/19/2020, the evidence is insufficient to show even this by a preponderance. The ALJ finds and concludes that the shoulder surgery being proposed is *not related* to Claimant's compensable, minor shoulder strain.

N. Therefore, the only medical treatment which was reasonable, necessary, *and related* to Claimant's work injury was the initial visit with Dr. Belanger on 2/21/2020.

There is, therefore, no need to determine at this point whether Claimant is entitled to a change of physician. Any medical needs of Claimant are now to be addressed outside the Workers Compensation system.

Temporary Total Disability

O. To establish entitlement to TTD and TPD benefits the Claimant maintains the burden to proof by a preponderance of the evidence that his wage loss has some connection to his industrial injury. *PDM Molding v. Stanberg*, 898 P.2d 542 (Colo. 1995). Once Claimant establishes entitlement to temporary disability benefits, it becomes incumbent upon the Respondent to prove, by a preponderance of the evidence, that the temporarily disabled employee is responsible for his termination of employment, and if proven, the resulting wage loss of the injured worker shall not be attributable to the on-the-job injury. C.R.S. sec. 8-42-105 (4), sec. 8-42-103 (1)(g), *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2004).

P. Claimant will be held responsible for his separation of employment from the insured if he performed some volitional act, or exercised some control over the circumstances of the termination. *Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1994) (opinion after remand, 908 P.2d 1185 (Colo. App. 1995)). The determination of the fault issue is ordinarily one of fact for resolution by the ALJ. *Id.*

Q. The ALJ finds that Respondents have met their burden here. Claimant insists he drove to work (apparently using only his left hand the whole drive, while on Percocet) to hand deliver the WC164 to Mr. T[Redacted] on 2/21/2020. Mr. T[Redacted] insists that did not occur; instead, he provided a credible account of his whereabouts when this allegedly occurred. Claimant posits that Mr. T[Redacted] has the greater motive to bend the truth – the ALJ finds that if anyone has such motive, it is Claimant. The ALJ also does not find Claimant’s version of events surrounding his cursory exam by Mr. T[Redacted] to be persuasive. Mr. T[Redacted] is trained as a first responder, and the ALJ finds that his cursory exam was reasonable, appropriate under the circumstances, and not excruciating. The ALJ finds Mr. T[Redacted] to be far more persuasive in his testimony.

R. Claimant effectively abandoned his position, once he failed to show for work, and did not respond to Mr. T[Redacted]’s phone inquiries. Any misunderstanding of what tasks Claimant might or might not be able to perform from that point could have been cleared up with some communication. Claimant could still be working there, if he desired to keep his job. The lack of a formal termination letter being delivered to Claimant (who would not pick up his phone) changes nothing. He was still let go, and for good cause. The ALJ is especially unpersuaded by Claimant’s rationalization that he could not drive in to work and use his left hand, because he was to continue his longstanding Percocet prescription. Claimant ‘played’ his physicians, who were attempting to treat him. The ALJ finds that Claimant was responsible for his own termination.

Average Weekly Wage

S. This is a moot point, despite Claimant's Average Weekly Wage having now been calculated. What is concerning is that Claimant even wished to claim he worked overtime on his WC15. Claimant knew full well that, upon his own request, he had only been working part-time since the Christmas holidays.

ORDER

It is therefore Ordered that:

1. Claimant suffered a minor compensable injury, in the form of a shoulder strain, on February 19, 2020.
2. Respondents shall pay for all reasonable, necessary, and related medical treatment; in this instance, the treatment Claimant received at his initial visit with Dr. Belanger.
3. Claimant's request for a change of physician is denied and dismissed.
4. Claimant's request for reverse shoulder surgery is denied and dismissed.
5. Claimant's requests for Temporary Total Disability payments is denied and dismissed.
6. Respondents shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.
7. All matters not determined herein are reserved for future determination.

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

petition to review form at: <http://www.colorado.gov/dpa/oac/forms-WC.htm>. In addition, it is recommended that you send a copy of your Petition to Review to the Colorado Springs OAC via email at oac-csp@state.co.us.

DATED: September 1, 2020

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-103-828-002**

ISSUES

Whether the claimant has demonstrated, by a preponderance of the evidence, that on February 15, 2019, she suffered an injury arising out of an in the course and scope of her employment with the employer.

If the claimant proves a compensable injury, whether the claimant has demonstrated, by a preponderance of the evidence, that medical treatment she has received is reasonable, necessary, and related to the work injury.

The parties have stipulated to an average weekly wage (AWW) of \$666.00.

The issues of temporary total disability (TTD) benefits and temporary partial disability (TPD) benefits were also endorsed for hearing. However, at hearing the parties agreed to reserve those issues for future determination.

FINDINGS OF FACT

1. The claimant began working for the employer in July 2018. She was hired to work in public safety. The claimant's job duties included patrolling the property and working at the gate house. The claimant testified that she worked 40 to 50 hours per week and was paid \$16.65 per hour.

2. On February 15, 2019, the claimant slipped on ice and fell while at work. The claimant testified that the fall occurred after she had finished washing her work truck when she stepped on black ice, slipped and fell. The claimant testified that as she slid she fell forward onto her knees and landed on her right side. The claimant also testified that after her fall, she had pain in her knees and her right shoulder.

3. The claimant immediately went to speak with Ms. M[Redacted] in Human Resources to notify her of her fall. When she arrived at Ms. M[Redacted]'s office, Ms. S[Redacted] and Mr. H[Redacted] were both present.

4. The claimant testified that Ms. M[Redacted] assisted her with basic first aid on her knees. At that time, Ms. M[Redacted] asked if the claimant wanted to seek medical treatment. The claimant testified that at that time she declined, because she wanted to wait and see.

5. The other individuals present in Ms. M[Redacted]'s office also testified at the hearing. Ronald H[Redacted], IT Administrator, testified that he was present in Ms. M[Redacted]'s office when the claimant reported that she had fallen. Mr. H[Redacted] also testified that the claimant arrived in the HR office and stated that she had fallen near the fuel pumps. The claimant stated to the group that she was "fine" and that she had

scraped her knee. Mr. H[Redacted] further testified that the claimant seemed to be lighthearted and was laughing. The claimant did not complain of shoulder pain in Mr. H[Redacted]'s presence.

6. Tracy S[Redacted], Office Manager, was also present when the claimant reported her February 15, 2019 fall. Ms. S[Redacted] testified that the claimant reported that she slipped and fell while fueling her work truck. Ms. S[Redacted] also testified that the claimant did not exhibit behavior indicative of shoulder pain.

7. Erin M[Redacted], worked at the employer's Human Resource Manager on February 15, 2019. Ms. M[Redacted] testified that the claimant was laughing when she reported her fall. The claimant reported to Ms. M[Redacted] that she fell onto her knees and then caught herself with her hands. The claimant did not report shoulder pain to Ms. M[Redacted] at that time.

8. On March 2, 2019, Ms. M[Redacted] received an email from the claimant requesting medical treatment related to her February 15, 2019 fall. As that date was a Saturday, Ms. M[Redacted] began the process of scheduling a medical appointment for the claimant on that Monday. Ms. M[Redacted] authored a summary of her February 15, 2019 interaction with the claimant and interactions thereafter. That written summary is consistent with Ms. M[Redacted]'s testimony at hearing.

9. Ms. X[Redacted] testified that on February 15, 2019, she was the claimant's supervisor. Ms. X[Redacted] was unable to recall the events of that date and an event described in a memorandum authored by Ms. M[Redacted].

10. The claimant testified that during the two week period after her fall, her knee pain improved, but her right shoulder pain became worse. As a result, on March 2, 2019, the claimant emailed Ms. M[Redacted] and requested medical treatment. Ms. M[Redacted] replied to the claimant's email and began the process to schedule a medical appointment for the claimant.

11. On March 5, 2019, Ms. M[Redacted] completed an Employer's First Report of Injury. In that report, the February 15, 2019 incident is described as "[s]lipped on ice, fell sideways onto her right side."

12. On March 13, 2019, the claimant was seen at Avon Occupational Health by Lucia London, CNP. The claimant reported to Ms. London that she tripped and fell "forward and slightly to the right side landing on her right upper arm and shoulder." The claimant also reported pain in her right shoulder. Ms. London diagnosed a right shoulder strain and ordered x-rays that were performed that same date. The x-rays of the claimant's right shoulder showed no fracture or dislocation. Ms. London noted that she was concerned the claimant could have a rotator cuff tear, and ordered a magnetic resonance image (MRI) of the claimant's right shoulder.

13. The claimant testified that she was placed on work restrictions that included no lifting, pushing, or pulling over one pound. The claimant further testified that even with these work restrictions, she continued to work full duty.

14. On March 16, 2019, an MRI of the claimant's right shoulder showed a full thickness tear of the posterior supraspinatus. In addition, the MRI showed a moderate partial thickness tear of the cranial subscapularis, mild infraspinatus tendinosis, and prominent lateral acromial downsloping with mild subacromial spurring.

15. On March 18, 2019, Ms. London referred the claimant to Vail Summit Orthopaedics and Neurosurgery.

16. On March 27, 2019, the claimant was seen at Vail Summit Orthopaedics and Neurosurgery by Dr. William Sterett. At that time, the claimant reported that she fell onto her right shoulder on February 15, 2019. Dr. Sterett diagnosed strain of the muscles and tendons of the right rotator cuff. He recommended surgical intervention that would include right shoulder arthroscopy, debridement, decompression of the subacromial space, rotator cuff repair, and a biceps release.

17. On April 1, 2019, Ms. London amended the claimant's work restrictions to include no driving.

18. Dr. Alisa Koval testified by deposition. Dr. Koval indicated that she has treated the claimant at Vail Health. In her testimony, Dr. Koval opined that the claimant's fall on February 15, 2019 was a consistent mechanism of injury to cause the claimant's right rotator cuff tear. In support of this opinion, Dr. Koval noted that a chronic finding would include muscle atrophy, and there was no atrophy to the muscle on the MRI. Dr. Koval also noted that prior to the fall at work, the claimant had normal function. Dr. Koval testified that she agrees with Dr. Sterett's surgical recommendation in treating the claimant's right shoulder. With regard to causation, Dr. Sterett opined that the claimant's shoulder pain was secondary to a fall at work. In addition, on the WC 164 form, Dr. Sterett indicated that the claimant's condition was consistent with an injury at work.

19. On May 16, 2019, the claimant attended an independent medical examination (IME) with Dr. Nicholas Olsen. In connection with the IME, Dr. Olsen reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. At the IME, the claimant described to Dr. Olsen the manner in which she fell. First, she indicated that she "slipped forward onto her right side". Then the claimant told Dr. Olsen that she caught herself with her hands, then landed on her knees, and ultimately fell to the right onto her right shoulder.

20. In his IME report, Dr. Olson opined that the condition of the claimant's right shoulder was not caused by her fall at work on February 15, 2019. In support of that opinion, Dr. Olsen noted that Ms. M[Redacted]'s written summary indicated that the claimant did not demonstrate pain behaviors immediately following the incident. However, Dr. Olsen also notes in his IME report that if one were to believe the claimant's version of events, then the MRI findings would correlate to the February 15, 2019 slip on the ice.

21. Dr. Olson's testimony was consistent with his written report. Dr. Olson testified that the claimant's description of her fall does not make sense to him. Dr. Olsen

further testified that if the claimant's right shoulder struck the ground last, then there would not be enough force to cause a rotator cuff tear.

22. The ALJ credits the claimant's testimony over the contrary testimony of the respondent witnesses regarding the events of February 15, 2019. The ALJ also credits the medical records and the opinions of Drs. Koval and Sterett over the contrary opinions of Dr. Olsen. The ALJ places weight on the absence of atrophy as noted by Dr. Koval, thereby indicating the likelihood of an acute rotator cuff tear. Therefore, the ALJ finds that the claimant has successfully demonstrated that it is more likely than not that on February 15, 2019, she suffered an injury to her right shoulder while at work. The claimant has also successfully demonstrated that it is more likely than not that the right rotator cuff tear and the need for surgical repair is causally related to the claimant's February 15, 2019 fall at work.

CONCLUSIONS OF LAW

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

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

4. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it

“aggravates accelerates or combines with a preexisting disease or infirmity to produce disability or need for treatment.” See *H & H Warehouse v. Vicory, supra*.

5. As found, the claimant has demonstrated by a preponderance of the evidence that on February 15, 2019 she suffered an injury to her right shoulder arising out of and in the course and scope of her employment with the employer. As found, the claimant’s testimony, the medical records and the opinions of Drs. Koval and Sterett are credible and persuasive.

6. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; see *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

7. As found, the claimant has demonstrated by a preponderance of the evidence that treatment of her right shoulder, including the right shoulder surgery recommended by Dr. Sterett is reasonable medical treatment, necessary to cure and relieve the claimant from the effects of the work injury. As found, the claimant’s testimony, the medical records and the opinions of Drs. Koval and Sterett are credible and persuasive.

ORDER

It is therefore ordered:

1. The claimant suffered a compensable injury on February 15, 2019.
2. The respondents are responsible for treatment of the claimant’s right shoulder, including the right shoulder surgery recommended by Dr. Sterett, pursuant to the Colorado Medical Fee Schedule.
3. The ALJ adopts the stipulation of the parties and orders that the claimant’s average weekly wage (AWW) is \$666.00
4. All matters not determined here, including TTD and TPD, are reserved for future determination.

Dated this 3rd day of September 2020.



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-088-752-001**

ISSUES

1. Whether Respondents established by clear and convincing evidence that the Division Independent Medical Examination (DIME) opinion of Caroline Gellrick, M.D., that Claimant is not at MMI is incorrect.
2. Assuming Respondents overcome the DIME, have Respondents established by clear and convincing evidence that Dr. Gellrick's provisional impairment rating is incorrect?
3. Whether Claimant established by a preponderance of the evidence that additional shoulder treatment is reasonably needed to cure and relieve and related to the effects of the March 12, 2018 admitted work injury.

FINDINGS OF FACT

1. Claimant is a 47-year-old male who sustained an admitted work-related injury to his right shoulder on or about March 12, 2018 while moving a slot machine in the course of his employment with Employer.
2. On March 15, 2018, Claimant was seen at Concentra for his right shoulder pain. Claimant reported anterior shoulder pain with radiation into the distal upper arm. Claimant reported a slot machine tipped while he was moving it, pulling his right shoulder downward, resulting in immediate sharp pain. Claimant reported pain with extension and cross-body movements and denied a history of prior shoulder injuries. Claimant was referred for physical therapy and advised to take ibuprofen. (Ex. 3 and E). (Claimant's treatment note from Concentra on March 15, 2018 is not included in the record).
3. After several weeks of conservative treatment and a lack of improvement, Claimant's authorized treating provider (ATP), Theodore Villavicencio, M.D., ordered an MRI of Claimant's right shoulder. The MRI was interpreted as showing mild degenerative changes, Type I acromion with slight down sloping anteriorly, mild infraspinatus and suprascapularis tendinosis with no rotator cuff tearing and a mild thickening of the axillary pouch with an intact biceps tendon labrum. Dr. Villavicencio then referred Claimant to orthopedic surgeon Michael Hewitt, M.D., for evaluation. (Dr. Villavicencio's reports and the MRI Report are not included in the record). (Ex. 3).
4. Claimant saw Dr. Hewitt on April 23, 2018. Claimant remained symptomatic for anterior/posterior shoulder pain. Dr. Hewitt found posterior instability of the right shoulder with moderate posterior impingement and posterior joint line tenderness. Dr. Hewitt ordered a repeat MRI of the right shoulder with contrast. The MRI was performed on May 8, 2018, and was interpreted as showing a partial thickness, non-detached SLAP tear in

the right shoulder from 1:00 to 11:00 with mild diffuse rotator cuff tendinosis with no tear, no evidence of atrophy, no osseous lesions. Dr. Hewitt recommended surgery for Type I vs Type III SLAP tear with probable biceps tenodesis recommended. (Ex. 3 and E). (Neither Dr. Hewitt's April 23, 2018 treatment note, nor the May 8, 2018 MRI Report is included in the record).

5. On May 21, 2018, Claimant saw Dr. Hewitt and reported increased symptoms with overhead use within his shoulder. Claimant was diagnosed with a right shoulder superior labral tear and surgery was recommended. (Ex. 3). (Dr. Hewitt's May 21, 2018 report is not included in the record).

6. On August 27, 2018, Claimant saw Dr. Hewitt and reported persistent shoulder symptoms without indicating the location of symptoms. Dr. Hewitt discussed with Claimant that surgery would involve the evaluation of the biceps labral attachment and if the superior labrum was compromised, he would recommend a biceps tenodesis. (Ex. 2).

7. On November 27, 2018, Dr. Hewitt performed surgery on Claimant's right shoulder. The pre-operative diagnoses were right shoulder superior labral tear and subacromial impingement. The procedures performed included right shoulder arthroscopic biceps tenodesis within the intertubercular groove, arthroscopic posterior superior labral repair with anchor, distal clavicle co-planing with resection of inferiorly directed distal clavicle exostosis. The post-operative diagnoses were right shoulder posterior superior labral tear, 10:30 and 12:00; subacromial impingement; and acromioclavicular arthropathy. (Dr. Hewitt's operative note is not included in the record). (Ex. 3 and Ex. E).

8. Following surgery, Claimant continued to follow up with Dr. Hewitt and Dr. Villavicencio's office. Claimant also underwent physical therapy following surgery. (No records between November 27, 2018 and February 15, 2019 are included in the record).

9. On February 15, 2019, Dr. Hewitt evaluated Claimant and noted moderate capsular tightness of the right shoulder and recommended continuing formal therapy and placed Claimant in a dynamic stretching brace. (Ex. 3). (Dr. Hewitt's note from February 15, 2019 is not included in the record).

10. On April 3, 2019, Claimant saw Dr. Villavicencio. Dr. Villavicencio noted that Claimant had seen Dr. Hewitt in March 2019, to discuss possible options of MUA (the ALJ infers that MUA means "manipulation under anesthesia") if the Claimant's range of motion did not improve. (Ex. 3). (Neither Dr. Villavicencio's note from April 3, 2019 nor Dr. Hewitt's treatment note from March 2019 is included in the record).

11. On April 8, 2019, Claimant saw Dr. Hewitt who documented moderate improvement in range of motion. Dr. Hewitt offered Claimant the option of a cortisone injection if his symptoms failed to improve further. Claimant opted for conservative treatment. (Ex. 3). (Dr. Hewitt's April 8, 2019 note is not included in the record).

12. On May 15, 2019, Claimant underwent a right shoulder MRI on referral from Dr. Hewitt. The MRI was interpreted by Frank Crnkovich, M.D. Dr. Crnkovich interpreted the

MRI as showing a type I acromion. The Dr. Crnkovich's findings of the acromion outlet states, in part: "[i]nterval hypertrophic degenerative changes in the acromioclavicular joint with capsular thickening and edema. Reactive edema in the clavicle and acromion. Findings much more prominent on the current exam than the prior. Coracoacromial ligament is thickened and edematous. Did the patient have surgery on the acromion in the interim?" (Ex. C).

13. On May 23, 2018, Claimant was seen by Dr. Hewitt who reviewed the MRI. Dr. Hewitt recommended an ultrasound guided intra-articular injection, and recommended Claimant continue working on range of motion and strengthening during physical therapy along with massage. (Ex. 3). (Dr. Hewitt's record from May 23, 2018 is not included in the record).

14. On June 3, 2019, Claimant received a corticosteroid injection in the glenohumeral joint. Although the record for this injection is not included in the record, the ALJ infers this injection was in the right shoulder. (Ex. 2).

15. On August 8, 2019, Claimant saw a physician assistant at Concentra and was noted to have continued aching pain in the right shoulder, with physical therapy aggravating the shoulders. The physician assistant recommended an independent home exercise program recommended release from care at MMI. Claimant was instructed to return to follow up with Dr. Villavicencio in two weeks. (Ex. 3). (The August 8, 2019 Concentra treatment note is not included in the record).

16. On August 22, 2019, Claimant saw Theodore Villavicencio, M.D., for an evaluation. Dr. Villavicencio's examination of Claimant's right shoulder showed no ecchymosis. Claimant had tenderness in the AC joint, in the anterior glenohumeral joint and in the anterior shoulder, but not in the bicipital groove and not in the posterior shoulder. Dr. Villavicencio noted that Claimant was at his function goal, but not at the end of healing. Dr. Villavicencio recorded Claimant's right shoulder active range of motion as: flexion 150° (with pain); extension 35°; abduction 140° (with pain), adduction 55°; internal rotation 30° and external rotation 60°. Dr. Villavicencio assessed that Claimant was at maximum medical improvement as of August 22, 2019 and recommended that Claimant have 12 months of maintenance orthopedic care, as needed. Dr. Villavicencio provided Claimant with an 8% scheduled impairment for right shoulder range of motion deficits. (Ex. B).

17. On October 1, 2019, Respondents filed a Final Admission of Liability ("FAL") in accordance with Dr. Villavicencio's August 22, 2019 report, admitting for 8% scheduled impairment and reasonable, necessary, and related maintenance benefits. (Ex. A). Claimant objected to the FAL and requested a DIME.

18. Caroline M. Gellrick, M.D., performed the DIME on March 5, 2020. Dr. Gellrick reviewed some of Claimant's medical records, including records from Dr. Villavicencio, Dr. Hewitt, and Concentra physical therapy. Dr. Gellrick noted that records were not available for the period of May 23, 2019 to August 8, 2019, and that no records were available for review after August 8, 2019. Claimant reported problems with shoulder and

neck pain causing him to have difficulty with dressing and other personal care issues. He also reported difficulty with other activities of daily living and hobbies due to the status of his right arm and shoulder. (Ex. 3).

19. Claimant reported restrictions with cervical ROM with pain radiating from the lower paraspinal muscles on the right side of the cervical spine to the proximal trapezius with a trigger point in that area. Dr. Gellrick found restricted range of motion of the right shoulder and 4/5 strength due to pain of the right shoulder, with supraspinatus tenderness. Dr. Gellrick noted a positive impingement test. Claimant indicated his pain was located at the acromioclavicular joint on the right side. Dr. Gellrick's found Claimant's right shoulder range of motion to be flexion 115°; extension 25°; abduction 60°, adduction 25°; internal rotation 35° and external rotation 30°. Dr. Gellrick was apparently not provided Dr. Villavicencio's August 22, 2019 report placing Claimant at MMI, but did review a report dated August 8, 2019 from a physician assistant indicating that Claimant was at MMI. (Ex. 3).

20. Dr. Gellrick noted that Claimant was continuing to receive cortisone injections at the time he was placed at MMI. Additionally, Claimant reported he was a candidate for surgery with Dr. Hewitt. Dr. Gellrick concluded Claimant was not at MMI. The ALJ inferred Dr. Gellrick was of the opinion that Claimant required additional treatment and this treatment is related to the work injury. Dr. Gellrick assigned Claimant a scheduled impairment rating of 19% for his right shoulder (converted to 11% whole person impairment), and a whole person impairment of 5% for his spine. Dr. Gellrick assigned a combined and unapportioned impairment rating of 15% whole person. (Ex. 3).

21. Dr. Gellrick noted that, with respect to future care "if the patient needs surgery with Dr. Hewitt, this should be authorized due to persistent capsular tightness, impingement scenario, subacromial bursitis. Once surgery is completed with Dr. Hewitt, the patient will have to go through physical therapy rehab with consideration ultimately at MMI." (Ex. 3).

22. On June 23, 2020, Adam Farber, M.D., performed an IME at the request of Respondents. Dr. Farber examined Claimant and reviewed some of Claimant's medical records. The medical records Dr. Farber reviewed, summarized, and characterized included the following:

- 22 records from Concentra dated March 15, 2018, March 19, 2018, March 26, 2018, April 3, 2018, April 11, 2018, April 23, 2018, April 25, 2018, May 9, 2018, May 21, 2018, August 27, 2018, December 17, 2018, January 7, 2019, January 28, 2019, February 11, 2019, February 25, 2019, March 18, 2019, April 3, 2019, April 8, 2019, May 1, 2019, May 23, 2019, August 8, 2019, and February 10, 2020;
- an April 9, 2018 non-contrast MRI report from Health Images Denver West;
- a May 8, 2018 MRI arthrogram report from Touchstone Imaging Lakewood;
- November 27, 2018 records from Surgery Center at Cherry Creek;

- Colorado Orthopedic Consultants records dated December 7, 2018, January 11, 2019, and February 15, 2019;
- a radiology report for a non-contrast MRI scan of the right shoulder from Health Images at Denver West dated May 15, 2019;
- Physical therapy records from Concentra Medical Center dated March 26, 2018 - April 8, 2019;
- Massage therapy records from Standley Lake Massage Therapy dated March 7, 2019;
- a June 3, 2019 report for a CT-guided glenohumeral joint corticosteroid injection performed at Health Images Diamond Hill; and
- Dr. Gellrick's DIME report dated March 5, 2020.

23. With the exception of an April 8, 2019 physical therapy record from Concentra (Ex. D); a May 15, 2019 right shoulder MRI report (Ex. C); May 21, 2018 and August 27, 2018 records from Dr. Hewitt (Ex. 2); and Dr. Gellrick's DIME report (Ex. 3), the records reviewed and characterized by Dr. Farber were not offered or admitted as part of the evidentiary record.

24. Dr. Farber's testimony was offered by pre-hearing deposition and through his report dated June 23, 2020. Dr. Farber testified that Claimant suffered a right shoulder superior labral tear as a result of his March 12, 2018 industrial injury. (Ex. F).

25. Dr. Farber opined that Claimant's "industrial injury did not cause any significant acromioclavicular joint pathology." Dr. Farber's report indicates that the Claimant's mild degenerative changes in his right shoulder and particularly the acromioclavicular joint are "chronic, degenerative, and pre-existing, but are not causally related to the effects of the March 12, 2018 industrial injury." (Ex. E).

26. Dr. Farber testified that Claimant reported he had "never had pain on the top of his shoulder prior to surgery." Dr. Farber agreed that Claimant has no record of shoulder or acromioclavicular joint treatment prior to Claimant's industrial injury. (Ex. F).

27. Dr. Farber further opined that the distal clavicle co-planing procedure was not indicated to address Claimant's industrial injury, but to address a chronic, degenerative, and pre-existing acromioclavicular joint arthritic condition. Dr. Farber opined that Claimant's current shoulder symptoms (i.e., "superior" shoulder pain), is a post-surgical sequela of the co-planing procedure, which Dr. Farber believes is unrelated to the Claimant's industrial injury, and therefore, any treatment related to the acromioclavicular joint is not related to the Claimant's May 12, 2018 industrial injury.

28. The record contains only two treatment notes from Dr. Hewitt, one dated May 21, 2018 and one dated August 27, 2018. The record does not include Dr. Hewitt's operative note or any other record from Dr. Hewitt explaining the purpose or rationale for the

surgical procedures performed on November 27, 2018. Similarly, the record contains no treatment notes from Dr. Villavicencio other than his August 22, 2019 evaluation.

29. The record does not contain information sufficient for the ALJ to determine or infer the type and nature of future treatment recommended by Dr. Hewitt, the purpose of such treatment, or whether Dr. Hewitt or Dr. Villavicencio has requested that any future treatment for Claimant's right shoulder be authorized.

30. Respondents failed to overcome Dr. Gellrick's opinion on MMI.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. See § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. See § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id.* at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence

contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

OVERCOMING DIME ON MMI

MMI exists at the point in time when “any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition.” Section 8-40-201(11.5), C.R.S. A DIME physician’s finding that a party has or has not reached MMI is binding on the parties unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(III), C.R.S.; *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000); *Kamakele v. Boulder Toyota-Scion*, W.C. No. 4-732-992 (ICAO, Apr. 26, 2010).

MMI is primarily a medical determination involving diagnosis of the claimant’s condition. *Berg v. Industrial Claim Appeals Office*, 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office*, 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant’s medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007); *Powell v. Aurora Public Schools* W.C. No. 4-974-718-03 (ICAO, Mar. 15, 2017). A finding that the claimant needs additional medical treatment (including surgery) to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office*, 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office*, 794 P.2d 1090 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.*, W.C. No. 4-320-606 (ICAO, Mar. 2, 2000). Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining the claimant’s condition or suggesting further treatment is inconsistent with a finding of MMI. *Abeyta v. WW Construction Management*, W.C. No. 4-356-512 (ICAO, May 20, 2004). Thus, a DIME physician’s findings concerning the diagnosis of a medical condition, the cause of that condition, and the need for specific treatments or diagnostic procedures to evaluate the condition are inherent elements of determining MMI

The party seeking to overcome the DIME physician’s finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, *supra*. “Clear and convincing evidence” is evidence that demonstrates that it is “highly probable” the DIME physician’s rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998); *Lafont v. WellBridge D/B/A Colorado Athletic Club* W.C. No. 4-914-378-02 (ICAO, June 25, 2015). In other words, to overcome a DIME physician’s opinion, “there must be evidence establishing that the DIME physician’s determination is incorrect, and this evidence must be unmistakable and free from serious or substantial doubt.” *Adams v. Sealy, Inc.*, W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appeals Office*, *supra*.

The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.*, W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); see *Shultz v. Anheuser Busch, Inc.*, W.C. No. 4-380-560 (ICAO, Nov. 17, 2000). Rather it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Oates v. Vortex Industries*, WC 4-712-812 (ICAO, Nov. 21, 2008); *Licata v. Wholly Cannoli Café* W.C. No. 4-863-323-04 (ICAP, July 26, 2016).

Respondents have failed to prove by clear and convincing evidence that Dr. Gellrick's DIME opinion on MMI is incorrect. DIME physician, Dr. Gellrick, concluded Claimant was not at MMI as of March 5, 2020, due to continued shoulder pain, restricted range of motion and the need for ongoing surgery and injections.

Respondents rely on Dr. Farber's opinion that Claimant had no symptoms prior to the November 27, 2018 for which the co-planing procedure was indicated. Dr. Farber opined the co-planing procedure addressed a pre-existing, asymptomatic, degenerative condition in the Claimant's acromioclavicular joint (i.e., a bone spur or osteophyte in the acromioclavicular joint). Dr. Farber has opined that Claimant's acromioclavicular joint pathology was neither caused nor aggravated by the industrial injury. Respondents contend Claimant's continuing symptoms are the result of the purportedly unrelated co-planing procedure, and that any further treatment for the acromioclavicular joint is therefore unrelated to his industrial injury.

Dr. Farber's conclusion that Claimant had no pre-surgical complaints regarding his acromioclavicular joint is based relies, in part, on the purported omission of complaints regarding Claimant's "superior shoulder" on pain diagrams from Concentra appointments. Although Dr. Farber characterizes pain diagrams from at least nine different Concentra visits, none of the referenced pain diagrams or associated Concentra treatment notes are included in the record. Given the subjective nature of patient-marked pain diagrams and the close anatomic proximity of Claimant's admitted right shoulder superior labral tear superior and the acromioclavicular joint, Dr. Farber's interpretation of Claimant's self-marked pain diagrams is not persuasive in the absence of the underlying documents. Similarly, because the record does not contain most of the medical records from Dr. Hewitt, Dr. Villavicencio, or Concentra, the ALJ cannot reliably determine whether Claimant complained of such symptoms prior to surgery.

Respondents have not offered evidence that is unmistakable and free from serious doubt that the co-planing procedure was not performed to address any industrial-injury-related condition. While Dr. Farber opined he was not aware of objective medical evidence indicating that Claimant's industrial injury aggravated the Claimant's pre-existing degenerative changes, Dr. Farber also testified that removal of a bone spur (i.e., the co-planing procedure) is not something that is normal to perform without specific symptoms at the acromioclavicular joint. The limited supporting records admitted into evidence do not indicate the reason Dr. Hewitt performed the co-planing procedure. The ALJ cannot infer from the available evidence that Dr. Hewitt performed the co-planing procedure without a medical basis. The evidence indicates that Claimant's shoulder was

asymptomatic prior to his injury on March 12, 2018. The ALJ infers that Dr. Hewitt performed the procedure either to address an symptomatic condition in the Claimant's acromioclavicular joint, or because Dr. Hewitt deemed it necessary to successfully address Claimant's SLAP lesion or biceps tenodesis. Respondents have not produced clear and convincing evidence that the co-planing procedure was unrelated to Claimant's industrial injury.

The evidence is also not unmistakable or free from serious doubt that Claimant's ongoing shoulder symptoms (even if emanating from Claimant's acromioclavicular joint) are unrelated to his industrial injury. When questioned whether Claimant's post-surgical acromioclavicular symptoms are due to the March 12, 2018 industrial injury, Dr. Farber testified that the Claimant did not have symptoms in the acromioclavicular joint prior to surgery, and "if he has new findings after the surgery, they're not necessarily attributed to the injury itself, but perhaps to the [co-planing] procedure which was done." (emphasis added). Dr. Farber's opinion in this regard is not unmistakable or free from serious doubt.

Similarly, because of the lack of medical records regarding the corticosteroid injections the Claimant received from Dr. Hewitt or the recommendation for future surgery, the ALJ cannot find it unmistakable and free from serious or substantial doubt, that further treatment is unrelated to the industrial injury, or that Claimant's condition is "stable and no further treatment is reasonably expected to improve the condition." §8-40-201(11.5), C.R.S. Implicit in Dr. Gellrick's opinion is that future treatment for Claimant's shoulder condition is reasonably expected to improve the condition. Dr. Farber's opinion to the contrary is a mere difference of medical opinion.

Overcoming Dime On Impairment Rating

The finding of a DIME physician concerning the claimant's medical impairment rating shall be overcome only by clear and convincing evidence. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995); *Lafont v. WellBridge D/B/A Colorado Athletic Club* W.C. No. 4-914-378-02 (ICAO, June 25, 2015).

As a matter of diagnosis, the assessment of permanent medical impairment inherently requires the DIME physician to identify and evaluate all losses that result from the injury. *Mosley v. Industrial Claim Appeals Office*, 78 P.3d 1150 (Colo. App. 2003); *Sharpton v. Prospect Airport Services* W.C. No. 4-941-721-03 (ICAO, Nov. 29, 2016). Consequently, a DIME physician's finding that a causal relationship does or does not exist between an injury and a particular impairment must be overcome by clear and convincing evidence. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998); *Watier-Yerkman v. Da Vita, Inc.* W.C. No. 4-882-517-02 (ICAO Jan. 12, 2015); Compare *In re Yeutter*, 2019 COA 53 ¶ 21 (determining that a DIME physician's opinion carries

presumptive weight only with respect to MMI and impairment). The rating physician's determination concerning the cause or causes of impairment should include an assessment of data collected during a clinical evaluation and the mere existence of impairment does not create a presumption of contribution by a factor with which the impairment is often associated. *Wackenhut Corp. v. Industrial Claim Appeals Office*, 17 P.3d 202 (Colo. App. 2000).

The questions of whether the DIME physician properly applied the *AMA Guides*, and ultimately whether the rating was overcome by clear and convincing evidence present questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office*, 17 P.3d 202 (Colo. App. 2000); *Paredes v. ABM Industries W.C.* No. 4-862-312-02 (ICAO, Apr. 14, 2014). A mere difference of opinion between physicians does not necessarily rise to the level of clear and convincing evidence. See *Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-36 (ICAO, Mar. 22, 2000); *Licata v. Wholly Cannoli Café W.C.* No. 4-863-323-04 (ICAO, July 26, 2016).

Because Respondents have not overcome the DIME's opinion on MMI, Dr. Gellrick's non-binding, provisional impairment rating is not subject to review.

Additional Medical Benefits

Respondents assert Claimant's current condition is not related to his admitted injuries and seek a denial of additional medical treatment. Respondents rely upon the opinion of Dr. Farber for the proposition that Claimant's current condition is due to a pre-existing degenerative condition and the co-planing procedure performed purportedly to address that condition. Because Claimant is entitled to medical benefits until reaching MMI, a denial of future medical treatment necessarily reflects a determination that Claimant reached MMI for the effects of his industrial injury. Because the DIME physician, determined Claimant is not at MMI, and Respondents have failed to overcome that opinion, Claimant proved he is entitled to medical benefits.

Moreover, although the record reflects that Claimant reported to Dr. Gellrick that Dr. Hewitt believes Claimant may be a surgical candidate in the future, the record does not reflect that either Dr. Hewitt or Dr. Villavicencio (Claimant's ATP), have actually recommended a specific surgery or future treatment. Thus, the record contains insufficient information for the ALJ to determine whether any additional treatment has been recommended, and whether such treatment would be reasonably needed to cure and relieve and related to the effects of the March 12, 2018 admitted work injury. The issue is not ripe for decision. The Claimant is entitled to receive continued medical care for his March 12, 2018 industrial injury until he is determined to be at MMI, which includes the right to return to his ATP for future treatment recommendations.

ORDER

It is therefore ordered that:

1. Respondents have failed to establish by clear and convincing evidence that Dr. Gellrick's DIME opinion that Claimant is not at MMI is incorrect.
2. All remaining issues are moot.
3. All matters not determined herein are reserved for future determination.

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

DATED: September 3, 2020



Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

- Did Claimant prove diagnostic lumbar epidural steroid injections recommended by Dr. Botolin and Dr. Leggett are reasonably necessary and causally related to his admitted industrial injury?
- Did Claimant prove a left shoulder arthroscopic surgery recommended by Dr. Walden is reasonably necessary and causally related to his admitted industrial injury?

FINDINGS OF FACT

1. Claimant works for Employer as a fuel truck driver. He suffered an admitted low back injury on July 28, 2020 while draining a 50-pound fuel hose after a delivery. He had draped the hose over his shoulder to facilitate draining the fuel. The hose slipped off his shoulder and he quickly turned to catch it. In the process, he twisted awkwardly and jerked his low back.

2. Claimant experienced immediate back pain after the accident. He called his dispatch supervisor, Michael Price, to report the injury. Claimant told Mr. Price he probably "pulled a muscle" in his back. Mr. Price advised Claimant to continue with his route for the day and hopefully the pain would subside. Instead, the pain intensified by the time he finished his shift.

3. Dr. Daniel Olson at CCOM has been Claimant's primary ATP for this injury. At his initial visit on July 30, 2018, Claimant described pain in his low back and buttocks radiating into his thighs. He also reported numbness, tingling, and a "cold" feeling in his feet. Physical examination showed muscle spasms in the right lower lumbar area. Claimant had difficulty standing in a neutral position, and reduced range of motion. Dr. Olson diagnosed a lumbar "sprain." He gave Claimant a Toradol injection and referred him to physical therapy. Dr. Olson also took Claimant off work.

4. Claimant improved after a couple weeks of physical therapy and tried to return to full-duty work. Unfortunately, his back pain flared significantly, so Dr. Olson took him off work again and ordered an MRI.

5. The lumbar MRI was completed on August 22, 2018. The radiologist interpreted it as showing a bulging disc at L2-3 which, combined with congenitally short pedicles, produced moderately severe spinal stenosis. There was also a bulging disc at L3-4 causing moderate stenosis, and less severe findings at L4-5.

6. On August 29, 2018, Dr. Olson noted Claimant was having pain in his low back and hips with diffuse numbness down his legs. Dr. Olson considered a surgical evaluation but wanted to try a short course of chiropractic treatment first.

7. On September 11, 2018, Dr. Olson stopped the chiropractic treatment because it aggravated Claimant's pain. Claimant was noted to favor his right leg while standing, and his gait was described as "unstable." Dr. Olson referred Claimant to Dr. Leggett or Dr. Sparr "to see if they have any other options."

8. On September 27, 2018, Dr. Olson documented, "[Claimant] has been trying to walk more but he has to use a cane as he fatigues." Claimant used the cane during the appointment to help him arise from a sitting position.

9. Claimant saw Dr. Leggett on October 10, 2018. He described ongoing low back pain, aggravated by activities including prolonged sitting. He reported numbness, tingling, and a "cold" sensation in his right foot, and numbness radiating into his right thigh. Claimant was using a cane because "he feels that sometimes his legs want to give out when he takes steps." On examination, Dr. Leggett observed multiple postural abnormalities related to back pain, significant myofascial tightness and tenderness around the lumbar and gluteal musculature, and significant pain with facet loading at L3-4, L4-5, and L5-S1. Despite the significant spinal stenosis shown on MRI, Dr. Leggett thought Claimant's symptoms were probably related to myofascial/soft-tissue dysfunction and facet arthropathy rather than a frank radiculopathy. He recommended bilateral L4-5 and L5-S1 facet joint injections.

10. Claimant had the facet injections on October 30, 2018. They produced temporary relief, which Dr. Leggett opined was a sufficient diagnostic response to warrant medial branch blocks. Claimant continued to exhibit objective clinical signs consistent with myofascial and soft tissue pain, including muscle spasm and multiple trigger points throughout the lumbosacral and upper gluteal musculature. Dr. Leggett recommended massage therapy and trigger point injections.

11. The medial branch blocks were performed on December 4, 2018. They produced temporary benefit, during which time Claimant noted "significant improvement in walking, lying down tolerance, sleep, and mood. Overall, he is quite pleased with the effect of the diagnostic test." Based on his positive diagnostic response, Dr. Leggett recommended radiofrequency ablation (rhizotomy).

12. On December 27, 2018, Claimant was walking at home when his right leg "locked up" and gave way, causing him to fall. He landed on his outstretched left arm, which caused significant pain in the left shoulder.

13. Claimant called CCOM the next morning to request treatment for injuries suffered in his fall. No one answered the phone, probably because the clinic was closed for the holiday, and he left a message. He called again the next morning (December 29) and again reached the clinic's voicemail. The message directed patients to the emergency room if they desired immediate assistance.

14. Claimant was seen at the St. Mary Corwin Hospital emergency room on December 29, 2018 with a chief complaint of "left shoulder pain." He explained he was being treated for low back problems "with known deficit of right leg weakness, walking

with a cane. He tripped and fell, twisting his right ankle, landing on his chest and left shoulder. Event happened 2 days ago.” The ER provider noted only “mild” tenderness in the anterior shoulder and biceps tendon, with “full” shoulder range of motion.¹ X-rays showed “no fracture or dislocation.” Claimant was diagnosed with “multiple contusions” and a right ankle sprain.

15. Claimant saw Brendon Madrid, NP at CCOM on January 2, 2019. He indicated he had fallen on December 27 “secondary to right leg numbness. The patient states that he fell forward, bracing [h]is fall with his left hand and arm and injuring his left shoulder.” He described stabbing, aching, and burning pain in his left shoulder and down his right leg. Claimant could “barely move his left arm due to [pain] in the left shoulder.” On examination of the left shoulder, Mr. Madrid documented, “The patient is unable to shrug his left shoulder due to discomfort. Patient is unable to abduct his left arm anteriorly or laterally past 15°. There was moderate to severe discomfort with internal and external rotation of his left shoulder. There is 2+ strength² in his left arm to internal and external rotation of the left shoulder.” Mr. Madrid diagnosed a rotator cuff “strain,” and ordered an MRI.

16. Claimant followed up with Dr. Olsen on January 10, 2019. Dr. Olson noted, “[Claimant] was seen by Brendon last time after he fell. He states he has fallen 4 times when his right leg gives out on him. This last time he fell forward onto his left upper extremity. Since then he has been having left shoulder pain. MRI scan was ordered but not authorized.” A rhizotomy was scheduled on January 22.

17. Claimant underwent the rhizotomy on January 22, 2019 and followed up with Dr. Leggett the next day. He reported “night and day change to his low back pain.” Claimant said, “last evening was the first time that he has gotten a full night’s sleep since his injury began. He is extremely pleased with this.” He was still having pain in his right leg, which was not affected by the rhizotomy. Claimant told Dr. Leggett, “He had a period of significant leg weakness on the right, resulting in a fall. He states that this resulted in a strain of his right ankle and left shoulder. He is in the process of seeing if workman’s comp will cover these issues. He is reporting high levels of numbness and tingling throughout the right lower extremity, as well as continued weakness. He utilizes a straight cane for balance and stability.” Dr. Leggett recommended an electrodiagnostic study of the right leg.

18. Dr. Sparr performed an EMG on February 7, 2019. Dr. Sparr opined, “the patient has an essentially normal study of the lower extremity. Given the findings of absent peroneal F-wave response there is certainly a chance that symptoms are stemming from peroneal nerve irritation within the central buttock (sciatic nerve).”

19. The left shoulder MRI was completed on February 13, 2019. It showed a Hill-Sachs lesion “consistent with recent dislocation and relocation,” an anterior bony contusion consistent with a reverse Hill-Sachs lesion, a large joint effusion, a probable

¹ This description of Claimant’s clinical presentation is suspect given the significant findings documented at CCOM a few days later, and significant shoulder pathology subsequently demonstrated on MRI.

² This is a significant strength deficit, because normal strength is generally described as “5/5.”

biceps tendon tear, and multiple rotator cuff tears. After receiving the MRI report, Dr. Olson referred Claimant to Dr. David Walden for a surgical evaluation.

20. Claimant had his initial visit with Dr. Walden on March 5, 2019. Claimant explained that his back problems “cause[] him intermittently to lose complete control of his lower extremities and fall. . . . [On 12/28/2018] the patient lost control of his legs, fell onto an outstretched left arm to prevent hitting his face. Reports immediate shoulder pain.” Physical examination showed significant pain with palpation around the shoulder, reduced range of motion, and evidence of instability. Claimant’s shoulder was “excruciatingly painful” and “he cannot utilize his left arm.” Dr. Walden reviewed operative versus non-operative options, and Claimant elected to proceed with surgery. Dr. Walden recommended a left shoulder arthroscopic anterior, inferior, posterior capsulorrhaphy with possible subscapularis repair. Respondents denied authorization for the left shoulder surgery.

21. Claimant was evaluated by Dr. Sergiu Botolin, a spine surgeon, on April 18, 2019. Consistent with his reports to other providers, Claimant described severe low back pain radiating into the right leg, and “weakness in his right lower extremity and buckling then losing control of it from time to time.” Dr. Botolin noted “[the] patient also has to use a cane to try to unload his right side.” Dr. Botolin reviewed the August 2018 lumbar MRI images, and saw the L2-3 disc bulge was impinging the L2 nerve. He also thought the bulging disc at L3-4 might be contacting the L3 nerve root. Dr. Botolin opined, “[Claimant’s] history, physical examination, and radiographic findings are compatible with low back pain with radiation into the right upper extremity together with the weakness consistent with lumbar radiculopathy, in the setting of a multilevel degenerative spondylosis of the lumbar spine with a far right lateral disc herniation at L2-3 and L3-4 with impingement on the L2 and possibly L3 nerve on the right.” He further stated, “he has a good match between his clinical presentation and imaging.” Dr. Botolin opined the majority of Claimant’s symptoms were coming from the L2-3 right-sided disc herniation, but wanted an updated MRI “to make sure his L3 nerve is not compressed between the facet joints and the far lateral disc herniation at the L3-4 level.”

22. The repeat lumbar MRI was completed on May 2, 2019. The radiologist noted the L2-3 bulge impinging on the right L2 nerve but referenced no L3 nerve root impingement.

23. Claimant returned to Dr. Botolin on May 17, 2019. After reviewing the MRI images himself, Dr. Botolin continued to believe the L3-4 disc bulge may be contacting the right L3 nerve root. He opined, “To try and differentiate between those two, I would like to recommend a right-sided transforaminal steroid injection, first at L2-3 and then on another date at L3-4. However, if the L2-3 transforaminal injection on the right provided the patient with 100% relief that will be confirmatory and there is no need for the L3-4 injection.”

24. Claimant followed up with Dr. Walden on May 21, 2019 and received a cortisone injection in the shoulder. The injection provided no sustained benefit.

25. Dr. Timothy O'Brien performed an IME on behalf of Respondents on April 26, 2019. Dr. O'Brien opined the work accident was trivial and Claimant's injury was limited to a "minor lumbosacral spine strain/sprain" that resolved in less than four weeks. He opined the lumbar MRI showed only chronic longstanding congenital and degenerative conditions, with no evidence of acute injury. He thought Claimant's clinical presentation and reported symptoms were "profoundly nonorganic," highly exaggerated, and cannot be explained by any objective medical findings. Instead, Claimant's reported symptoms are "present only as a means to continue adjudicating a Workers' Compensation claim based on that potential secondary gain that is inherent to that claim." Dr. O'Brien accused Claimant's providers, including Dr. Leggett and Dr. Walden, of "overtreating" Claimant because they did not perform the "due diligence" of a "meticulous review of the medical records." He recommended all treatment be terminated and Claimant immediately returned to unrestricted work. He opined the "completely normal" EMG "proves" Claimant's reported lower extremity symptoms are "nonphysiologic" and "not organically based." He estimated the likelihood that Claimant's leg gave out and caused him to fall on December 27, 2018 "is approximately 0 percent."

26. Claimant followed up with Dr. Leggett on June 18, 2019 to discuss Dr. Botolin's recommendations. Dr. Leggett again observed significant myofascial tightness, tenderness, and multiple trigger points throughout the lumbosacral region. He agreed with Dr. Botolin's recommendations regarding lumbar ESIs. He also disagreed with the opinions expressed in Dr. O'Brien's report.

27. Claimant saw Dr. Timothy Hall for an IME at his counsel's request on August 12, 2019. Dr. Hall noted pain behaviors such as grimacing and moaning when moving about the exam room. Examination of the low back showed straightening of the lumbar lordosis, considerable spasm and hypertonicity in the thoracolumbar paraspinal muscles, and active trigger points. Claimant walked with an antalgic gait. Claimant's left shoulder and biceps tendon were tender to palpation, with markedly limited shoulder range of motion. Dr. Hall's diagnoses included lumbar sprain with ongoing myofascial pain and potential discogenic pain, piriformis syndrome versus radiculopathy, potential foraminal stenosis with radiculopathy, rotator cuff tear, and potential instability/Hill-Sachs lesion and Bankart tear. Dr. Hall disagreed with Dr. O'Brien's conclusions in most respects. He opined Claimant's pre-existing degenerative changes and congenitally short pedicles "means that it would only take a minor incident to create symptomatology in this previously asymptomatic patient." He disagreed Claimant has been "overtreated" and opined, "a number of very good providers who have been in his community for many years and provide appropriate care have simply tried to help [Claimant] in this work-related injury." He further opined, "Does [Claimant] exhibit pain behaviors, some of them excessive? Yes. That does not mean his presentation is 'nonorganic.' It simply means this is his way of dealing with his situation. Some deal more effectively with pain than others. It does not make him a liar." Regarding the shoulder, Dr. Hall opined leg weakness is often associated with low back injuries and "there is nothing all that out of the ordinary about his fall." He thought Claimant's low back and shoulder issues were work-related and he should receive further treatment.

28. Dr. O'Brien issued several supplemental reports after his initial IME. None of the additional information he reviewed altered any of his opinions. He disagreed with Dr. Hall's analysis and opined physiatrists have insufficient training, experience, or expertise to accurately evaluate acute musculoskeletal pathology. His opinion in that regard is not specific to Dr. Hall but applies to the expertise of physiatrists in general.

29. Dr. Leggett authored a lengthy narrative report dated January 13, 2020 addressing Dr. O'Brien's opinions. He disagreed the described mechanism of injury was "minor," and believed the associated forces would be "quite substantial" and reasonably associated with an injury to Claimant's lumbar spine. He opined the low back problems for which Claimant is being treated are "more likely than not" related to the July 2018 work accident. He explained Dr. O'Brien's characterization of the electrodiagnostic study as "completely normal" is inaccurate. The EMG showed fibrillation potentials, which may correlate with the upper lumbar nerve root irritation later identified by Dr. Botolin. Moreover, the absent peroneal F-wave response may indicate sciatic nerve irritation. He also pointed out that purely sensory radiculopathies and subtotal nerve root impingements "are hard to detect" with EMG. He described many of Dr. O'Brien's other opinions as "extreme." Finally, he explained that physiatrists (such as himself and Dr. Hall) are considered experts in "polytrauma" with extensive training and experience treating a wide variety of pathologies in a multidisciplinary context, including spinal cord injuries, musculoskeletal traumas, and neurological conditions. He found Dr. O'Brien's assertion that physiatrists are inadequately trained to evaluate and treat musculoskeletal conditions "inaccurate and condescending."

30. Respondents obtained video surveillance of Claimant in June and September 2019, and January 2020. The video showed Claimant engaging in basic activities such as entering and exiting medical offices, standing and sitting on his front porch, and shopping with his wife. Claimant generally used a cane to assist with ambulation, consistent with medical records. He accompanied his wife to the grocery store but generally avoided lifting or carrying items. After leaving the store, Claimant's wife loaded groceries into the vehicle while he stood and watched. The ALJ paid close attention to the September 19, 2019 video, which Respondents argue shows Claimant acting normally until he spots the investigator, at which time he ostentatiously resumes a disability affectation. The video was not nearly as impressive as the description suggests. The initial portion of the September 19 video shows Claimant step down and back up while holding a railing. He then sits down. Although Claimant looks directly toward the camera while sitting and smoking a cigarette, there is no persuasive indication he actually saw the investigator, as opposed to merely coincidentally looking in his direction. In any event, the remainder of the video shows Claimant arise slowly and limp back into his home, consistent with his reported symptoms and limitations. On balance, the video supports Claimant's testimony and his reports to physicians.

31. The opinions of Claimant's treating physicians and Dr. Hall are more persuasive than the contrary opinions expressed by Dr. O'Brien. Although Dr. O'Brien does not explicitly use the term fraud, that is the upshot of his argument that Claimant is intentionally reporting fictitious complaints to obtain monetary compensation. Based on the evidence presented, the ALJ is not persuaded that is an accurate characterization of

Claimant's situation. Having thus rejected the primary assumptions underlying O'Brien's argument, the ALJ finds his opinions of limited utility in deciding this matter. The ALJ is more persuaded by the findings and opinions of Claimant's treating providers and Dr. Hall. Dr. Leggett's January 13, 2020 narrative report is particularly compelling and persuasive.

32. Claimant proved the lumbar ESIs recommended by Dr. Botolin and Dr. Leggett are reasonably necessary diagnostic procedures for his work-related injury.

33. Claimant proved the fall on or about December 27, 2018, and resulting left shoulder injury, are causally related to his work accident.

34. Claimant proved the surgery recommended by Dr. Walden is reasonably needed to cure and relieve the effects of his compensable injury.

CONCLUSIONS OF LAW

The respondents are liable for medical treatment which is reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P. 2d 362 (Colo. App. 1995). Even if the respondents admit liability, they retain the right to dispute the relatedness of any particular treatment, and the mere occurrence of a compensable injury does not compel the ALJ to find that all subsequent medical treatment was caused by the industrial injury. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997); *McIntyre v. KI, LLC*, W.C. No. 4-805-040 (ICAO, Jul. 2, 2010). Where the respondents dispute the claimant's entitlement to medical benefits, the claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The claimant must also prove that the requested treatment is reasonably necessary, if disputed. Section 8-42-101(1)(a). The claimant must prove entitlement to medical benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case are not interpreted liberally, for either claimant or respondents. Section 8-43-201.

As found, Claimant proved the lumbar ESIs recommended by Dr. Botolin and Dr. Leggett are reasonably necessary treatment for the July 2018 admitted injury. The ESIs were primarily recommended as diagnostic procedures to help identify the pain generators in Claimant's back. Diagnostic procedures are a compensable medical benefit if they have a reasonable prospect of diagnosing or defining the claimant's condition and suggesting a course of further treatment. *Soto v. Corrections Corp. of America*, W.C. No. 4-813-582 (October 27, 2011). The ALJ credits the opinions of Claimant's treating providers and Dr. Hall that Claimant's low back problems are causally related to the July 2018 work accident, as well as the underlying rationale for the injections.

Regarding the shoulder injury, the respondents are liable for the direct effects of an injury and indirect effects that flow naturally and proximately from the original injury. *Standard Metals v. Ball*, 474 P.2d 622 (Colo. 1970). Where a work injury leaves the body in a weakened condition and that weakened condition causes additional injury, the additional injury represents a compensable consequence of the original injury. *Employer's Fire Insurance Company v. Lumbermens Mutual Casualty Company*, 964 P.2d 591 (Colo. App. 1998); *Price Mine Service, Inc. v. Industrial Claim Appeals Office*, 64 P.3d 936 (Colo. App. 2003). The additional injuries are compensable because of their causal relationship to the original compensable injury.

As found, Claimant's fall on or about December 27, 2018 was a natural and proximate result of the original injury. The record contains multiple references to Claimant's antalgic gait and reliance on a cane to assist with ambulation, both before and after the fall. Claimant has consistently attributed the fall to leg weakness related to his back injury. Claimant's back pain and lower extremity symptoms were precipitated by the work accident and directly led to the fall. The ALJ credits Dr. Walden's opinion that surgical intervention is the best option for definitive treatment of Claimant's shoulder injury.

ORDER

It is therefore ordered that:

1. Insurer shall cover the lumbar ESIs recommended by Dr. Botolin and Dr. Leggett.
2. Claimant's left shoulder injury is a compensable consequence of his July 28, 2018 admitted injury. Insurer shall cover all medical treatment from authorized providers reasonably needed to cure and relieve the effects of Claimant's left shoulder injury, including but not limited to the left shoulder arthroscopic surgery recommended by Dr. Walden.
3. All issues not decided herein are reserved for future determination.

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

review form at: <http://www.colorado.gov/dpa/oac/forms-WC.htm>. In addition, please send a courtesy copy of your Petition to Review to the Colorado Springs OAC office via email at oac-csp@state.co.us

DATED: September 4, 2020

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

- I. Whether Claimant proved, by a preponderance of the credible evidence, that his condition has worsened to justify reopening his claim pursuant to C.R.S. § 8-43-303.

FINDINGS OF FACT

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

1. Claimant suffered an admitted work injury to his lumbar spine on October 26, 2017 (*RHE A*, p. 2; *RHE C*, p. 56).
2. Dr. Nicholas Olsen, the authorized treating physician, placed Claimant at maximum medical improvement (MMI) on September 6, 2018 (*RHE C*, p. 57). In his September 6, 2018, treatment record, Dr. Olsen noted Claimant “continues to notice pain 8-9/10”. At that time, Claimant reported he felt his symptoms were worsening. Dr. Olsen said the Claimant presented “in significant discomfort” (*RHE C*, p. 56). Dr. Olsen’s working diagnosis of the Claimant’s October 26, 2017, injuries included, lumbar sprain/strain and lumbar spondylosis with clinical signs of right L5-S1 radiculitis (*RHE C*, p. 56). Dr. Olson assigned Claimant 12 percent whole person impairment, 7 percent per Table 53(II)(C) and 5 percent for loss of lumbar motion. Despite placement at MMI, the Claimant remained interested in an epidural steroid injection, but was unable to successfully get authorization (*RHE C*, p. 59).
3. Respondents filed an October 3, 2018, Final Admission of Liability, admitting to Dr. Olsen’s opinions on MMI and impairment and denied post MMI - maintenance – medical treatment.
4. The claim closed based on the October 3, 2018, Final Admission of Liability as to the issues of MMI, impairment and medical treatment post-MMI.
5. On December 30, 2019, the Claimant filed an Application for Hearing endorsing the issues of Petition to Reopen and worsening of condition.
6. The Claimant testified at the May 21, 2020, hearing on his own behalf. Claimant credibly testified that he accurately reported his injury-related symptoms to all treating physicians. Claimant testified that he consistently reported back pain at a level 8 to 10 out of 10 to all his treating providers, and that his pain has been present, “24/7” since the October 26, 2017, work injury.
7. Claimant underwent an independent medical examination (IME) with Dr Brian Reiss on May 17, 2018, and a repeat IME with Dr. Reiss on November 13, 2019 (*RHE F*, pp. 84-100).
8. During the May 18, 2018, IME, the Claimant reported to Dr. Reiss that he was

experiencing low back pain at an “8-9/10” level, with constant pain radiating to the right low back area and sometimes to the left (*RHE F, p. 87*). Claimant also reported some cramping on and off in his legs bilaterally “perhaps 4-5 times per week”; a sharp, transient pain in “one of the other legs” in the mornings; and right anterior lateral thigh numbness perhaps burning on and off (*RHE F, p. 87*).

9. On May 18, 2018, Claimant reported to Dr. Reiss that his worst pain was “more than 10 out of 10”, even though Dr. Reiss described a level 10 out of 10 to Claimant as being the worst possible pain imaginable (*7/10/20 Dr. Reiss Depo. Tr. at 7*). Claimant described his pain level as never going below 6 or 7 (*7/10/20 Dr. Reiss Depo. Tr., p. 7*).
10. Before the May 18, 2018, IME with Dr. Reiss, Claimant completed a pain diagram in which he indicated that his level of pain was “7, 8, 9, 10.” (*RHE F, p. 91*).
11. In connection with his November 13, 2019, IME, the Claimant completed a pain diagram. On this pain diagram, the Claimant indicated his pain levels were “8 to 10, 24/7 for 25 months”. On November 13, 2019, Claimant also reported to Dr. Reiss lower back pain right more than left “between 8 and 10” (*RHE F, pp. 95-96*). Claimant reported that the pain may shoot up his back; sometimes to the anterior and posterior thighs; possibly to the lower legs; and he may get cramping (*RHE F, p. 96*).
12. Claimant has consistently rated his pain somewhere between an 8 out of 10 to over 10 out of 10 throughout his claim (*7/10/20 Dr. Reiss Depo. Tr., p. 8*).
13. Dr. Reiss testified, Claimant’s pain description on November 13, 2019, “is generally not compatible with reality”. Dr. Reiss credibly testified that a person with the pain levels that Claimant described on November 13, 2019, would be in the emergency room regularly and on “a huge amount” of drugs to try to get it under control (*7/10/20 Dr. Reiss Depo. Tr., p. 9*).
14. Claimant walked into his November 13, 2019, IME with Dr. Reiss and was otherwise functional (*7/10/20 Dr. Reiss Depo. Tr. at 9*). Claimant’s physical examination by Dr. Reiss on this date revealed that Claimant was not in any apparent distress (*RHE F, p. 96*).
15. Dr. Reiss credibly testified that an exercise and conditioning program is all that is needed to maintain Claimant at MMI (*7/10/20 Dr. Reiss Depo. Tr., p. 14*).
16. Dr. Reiss credibly testified that Claimant’s pain complaints remained the same in Dr. Reiss’ November 13, 2019, follow-up IME that they were in his pre-MMI IME of Claimant on May 18, 2018 (*7/10/20 Dr. Reiss Depo. Tr., pp. 14-15*).
17. Dr. Reiss credibly testified that the only difference he observed between his May 18, 2018, IME of Claimant and his November 13, 2019, follow-up IME was a great deal more pain behaviors that did not appear to be totally physiologic, but Claimant complained of the same level of pain he had previously (*7/10/20 Dr. Reiss Depo. Tr., p. 15*).
18. Dr. Reiss credibly testified that, from examining Claimant, and reviewing his medical records, there has been no worsening of Claimant’s condition since Dr. Olsen placed

Claimant at MMI on September 6, 2018 (7/10/20 Dr. Reiss Depo. Tr., p. 18).

19. Claimant presented to Dr. Eduardo Carrera on November 27, 2019, for treatment of low back pain. The report from this appointment notes that “[p]ain is currently 7/10,” and that Claimant denied any new weakness, numbness or tingling (*CHE Section 2, p. 17*).
20. Claimant started seeing Dr. Tushar Sharma around the beginning of 2020.
21. On February 28, 2020, Claimant was evaluated by Dr. Sharma. At this visit, Dr. Sharma’s assessment included sacroiliac dysfunction. Given his assessment, Dr. Sharma prescribed a sacroiliac joint injection as well as physical therapy (*CHE Section 1, pp. 4-12*).
22. On March 12, 2020, Claimant underwent a sacroiliac joint injection (*Section 1, p. 13*).
23. On April 16, 2020, after his sacroiliac joint injection, Claimant followed up with Dr. Sharma. The report from this appointment indicates Claimant had a “Pain Score” of 7/10 and reported low back pain radiating to his posterior thigh.

Dr. Sharma also indicated Claimant said the injection provided short term relief for “just a few hours.” Dr. Sharma said that based on Claimant’s stated response to the injection, he still had to:

[R]eassess his pain in the office to differentiate between LBP [low back pain]/left leg sciatica vs left SI [sacroiliac] joint pain.

(*CHE Section 1, pp. 15-17*)

As a result, Dr. Sharma was unable to determine an exact diagnosis. Despite not having a definitive diagnosis, Dr. Sharma concluded in his report that Claimant’s work injury has worsened. He specifically stated:

[Claimant] is being treated for a worsening of condition that is directly related to the original work injury of 2017/work trauma.

(*CHE Section 1, p. 17*)

24. Even though Dr. Sharma concluded in his April 16, 2020 report that Claimant’s work condition worsened, there is no indication he reviewed Claimant’s prior medical records to determine Claimant’s condition when Claimant was placed at MMI. Plus, it is not clear what information Dr. Sharma used to determine Claimant’s condition worsened since he had yet to determine whether he thought Claimant was suffering from low back pain or sacroiliac joint pain (*CHE Section 1, p. 17*).
25. In the end, all Dr. Sharma provided was a conclusory statement that Claimant’s condition has worsened. As a result, the ALJ does not find his opinion to be persuasive.
26. Claimant credibly testified that the doctors whom he saw through the VA after he was placed at MMI did not have all his work-related medical notes.

27. Claimant credibly testified that his “pain level has been the same” and “hasn’t gone up or down” since October 26, 2017.
28. The ALJ does not find Claimant’s allegation that his work-related condition has worsened to be supported by credible and persuasive evidence.
29. The ALJ finds Dr. Reiss’ opinions, as explained in his reports and deposition testimony, to be credible and persuasive. Dr. Reiss’ opinions fit with the Claimant’s statements to other medical providers that he has been in pain at a level 7-10/10 since his October 26, 2017, work injury.
30. The ALJ finds insufficient evidence to establish that it is more likely true than not that Claimant’s injury-related condition has worsened justifying reopening of the claim.

CONCLUSIONS OF LAW

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

General Provisions

- A. The purpose of the Workers’ Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers’ compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers’ compensation claim shall be decided on its merits. C.R.S. § 8-43-201.
- B. The ALJ’s factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng’g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).
- C. In deciding whether a party has met the burden of proof, the ALJ is empowered “to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence.” See *Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness’s testimony and actions, the reasonableness or unreasonableness

(probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Claimant proved, by a preponderance of the credible evidence, that his condition has worsened to justify reopening his claim pursuant to C.R.S. § 8-43-303.

- D. At any time within six years after the date of injury, the director or an administrative law judge may, after notice to all parties, review and reopen any award on the ground of fraud, an overpayment, an error, a mistake, or a change in condition. C.R.S. § 8-43-303(1).
- E. The party seeking to reopen an issue or claim shall bear the burden of proof on any issues sought to be reopened. C.R.S. § 8-43-303(4).
- F. To warrant the reopening of an award on the ground of a "change of condition," a claimant must prove a change in physical or mental condition. *Avalanche Industries v. Industrial Claim Appeals Office*, 166 P.3d 147, 152 (2007).
- G. A change in condition refers either to a change in the condition of the original compensable injury or to a change in a claimant's physical or mental condition which can be causally connected to the original compensable injury. *Heinicke v. Industrial Claim Appeals Office*, 197 P.3d 220, 222 (2008).
- H. Claimant's reported symptoms to examining and treating physicians have remained constant throughout the treatment for his October 26, 2017, work injury, both before, and after Claimant reached MMI.
- I. When Claimant was placed at MMI, he reported to his authorized treating physician experiencing pain at level 8-9/10. At an appointment with a physician on April 16, 2020, Claimant reported pain in his low back at a level 7/10.
- J. Claimant has reported pain at a level 7-10/10 to all physicians who have treated or examined him for symptoms relating to his October 26, 2017, work injury, both before and after MMI.
- K. Claimant also testified that his pain level has been the same and has not gone up or down since his date of injury.
- L. Moreover, although Dr. Sharma specified Claimant's condition has worsened, the ALJ did not find his opinion to be persuasive since there was no indication he reviewed Claimant's prior medical records and compared Claimant's condition when he was placed at MMI to when he was evaluating Claimant.
- M. As found, Claimant failed to prove, by a preponderance of the evidence, that his condition resulting from the October 26, 2017, work injury, has worsened, justifying reopening.

ORDER

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

1. Claimant failed to prove, by a preponderance of the evidence, that his work-related condition has changed since he was placed at MMI on September 6, 2018.
2. Claimant's Petition to Reopen is DENIED and DISMISSED.

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

DATED: September 8, 2020

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-106-898-003**

ISSUES

- I. Whether Claimant has overcome the Division IME as to maximum medical improvement ("MMI").
- II. If Claimant is not at MMI, is Claimant entitled to further medical treatment and diagnostic procedures that are reasonably necessary and related?
- III. If Claimant is at MMI as of May 24, 2019, is she entitled to a general award of maintenance medical benefits?

FINDINGS OF FACT

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

1. Claimant was a 78-year-old part-time substitute teacher on the date of injury. On March 7, 2019, Claimant slipped and fell on her bottom in a parking lot in the morning on her way into the building. Claimant continued to work that day, but she left early.
2. After leaving early, Claimant treated her pains with warm water and Epsom salts. Claimant had continued to utilize this treatment to address her pains, along with a heating pad. Claimant had taken no pain medications by the time she sought medical care. (Hrg. Ex. B, pg. 12).
3. Claimant did not seek medical treatment until March 18, 2019, eleven days after the fall. On March 18, 2019, Claimant presented to Dr. Matus with complaints of low back pain, neck pain, left shoulder pain and headaches. Claimant reported her pains were activity based, primarily in her low back. Claimant reported her pain at seven out of ten. She noted her left shoulder was sore when she woke up, but there was no numbness or tingling and she could not identify any motion that made her pain worse. Claimant denied any vision changes or hearing, but she was unsteady on her feet without disequilibrium or loss of balance. (Hrg. Ex. B, pg. 12).
4. Lumbar and cervical x-rays showed no acute findings. (Hrg. Ex. B, pg. 15). Dr. Matus concluded after Claimant's examination that there were no serious injuries, but Claimant continued to have discomfort. Claimant declined prescription medications. She was dispensed bio-freeze and instructed to take over the counter Tylenol for her pain. She was referred to physical therapy and chiropractic treatment to address limitations. Claimant was returned to work regular duty as a substitute teacher. (Hrg. Ex. B, pg. 15).
5. Claimant returned on April 1, 2019 and reported her low back and left shoulder were improving. (Hrg. Ex. B, pg. 16). But, Claimant reported persistent

headaches and a vertigo sensation associated with the headaches. With these reported complaints, Dr. Matus referred Claimant for a brain MRI. (Hrg. Ex. B, pg. 16). Claimant reported some continued pain in her left shoulder with clicking. Claimant's examination demonstrated full range of motion in her left shoulder with normal strength. (Hrg. Ex. B, pg. 17). Dr. Matus noted Claimant had progressed with her motion and pain but had developed balance and vision changes which warranted diagnostic testing. (Hrg. Ex. B, pg. 18).

6. Dr. Matus evaluated Claimant on April 10, 2019 and again, Claimant noted her condition was improving. Her primary pain was in her back and neck and her pain was a five. Claimant reported she had returned to a partial class of yoga. (Hrg. Ex. B, pg. 19). Dr. Matus noted Claimant had intermittent headaches, neck, and back stiffness. Claimant was to continue with physical therapy. (Hrg. Ex. B, pg. 20).
7. On April 16, 2019, a little over a month and a half after the fall, Claimant returned to Dr. Matus, and she reported minimal symptoms. (Hrg. Ex. B, pg. 22-23). She reported no radicular symptoms in her upper or lower extremities. She had no weakness in her upper extremities. Claimant reported her pain in her back and SI joints were significantly improved. Claimant reported that she was performing her exercises regularly. Claimant reported significant improvement in her left shoulder. Claimant reported her vertigo has almost completely resolved. Claimant informed Dr. Matus that she could do balance exercises and yoga. (Hrg. Ex. B, pg. 23). Claimant had also returned to work a couple of days. The brain MRI showed no acute findings. (Hrg. Ex. B, pg. 23). Claimant's left shoulder examination revealed normal range of motion without palpable crepitation. After claimant reported significant improvement in all her complaints, Dr. Matus continued conservative treatment to continue to resolve Claimant's symptoms. (Hrg. Ex. B, pg. 24).
8. On April 29, 2019, claimant presented to Dr. Matus and her improvement had plateaued. Claimant's primary complaint was in her low back. Claimant was still attending physical therapy, which she found beneficial. Claimant had returned to part-time work. (Hrg. Ex. B, pg. 26).
9. Claimant returned a month later on May 24, 2019. Claimant reported she was better. Claimant reported dull throbbing pain, but it improved with rest. Claimant had been working. (Hrg. Ex. B, pg. 29). Dr. Matus concluded Claimant had made steady progress with her therapies and exercises. Claimant had resumed her usual exercises with yoga and was tolerating regular work. Claimant reported only intermittent pain in her neck, arm and back. (Hrg. Ex. B, pg. 30). Dr. Matus found no other indications for escalation of care. Dr. Matus placed Claimant at maximum medical improvement ("MMI") as of May 24, 2019, with no impairment rating. Dr. Matus recommended a few more massage and physical therapy sessions for maintenance medical treatment to relieve Claimant from the effects of her work injury. (Hrg. Ex. B, pg. 31).
10. On June 28, 2019, after being placed at MMI, Claimant returned to physical therapy for maintenance medical treatment as prescribed by Dr. Matus. The

physical therapist documented Claimant had normal range of motion in her bilateral shoulders, but Claimant had pain in her left triceps region. (Hrg. Ex. C, pg. 41). Claimant also reported to the physical therapist during this visit that she was performing yoga on her own without issues. Claimant's treatment plan was to transition her to a home exercise program with the remaining maintenance medical treatment sessions. (Hrg. Ex. C, pg. 42).

11. As a result, upon being placed at MMI, Claimant needed maintenance medical treatment to relieve her from the effects of her work injury.
12. Dr. Burris evaluated claimant on October 8, 2019, nearly five months after being placed at MMI for a Division IME. Claimant reported seven out of ten pain in her left upper arm, not her shoulder. Claimant reported a constant ache in her arm which worsened with movements. Claimant denied neck pain or low back pain. Claimant denied radiating pain in her upper and lower extremities. Claimant had no numbness or weakness in any extremity. Claimant was continuing to work her normal schedule and was not taking any medications. (Hrg. Ex. A, pg. 4). Claimant's left upper extremity examination showed normal range of motion. Dr. Burris also documented performing a thorough shoulder examination. Dr. Burris noted Claimant had some mild tenderness at the distal insertion of the deltoid in the upper arm. Even so, he also noted the following examination findings:
 - Negative impingement test.
 - Negative speed's test.
 - Negative resistive Jobe's test.
 - Negative drop arm sign.
 - Full strength with resisted abduction.(Hrg. Ex. A, pg. 5).
13. Dr. Burris also assessed Claimant's neurological complaints. He noted that when Claimant slipped and fell, she did not strike her head. He further noted there was no loss of consciousness associated with the event. He also reviewed the MRI findings and indicated that the MRI of her head on April 13, 2019 was negative for acute/traumatic findings.
14. Dr. Burris assessed Claimant with a lumbar contusion/strain and a left upper arm strain. Dr. Burris concluded Claimant had appropriately been placed at MMI on May 24, 2019 after completing a reasonable course of conservative care and transitioning to a self-directed home exercise program. Dr. Burris assigned no impairment rating, like Dr. Matus, the authorized treating physician.
15. Dr. Sander Orent performed a records review with a telephonic interview with Claimant on June 10, 2020, fifteen months after the injury. (Hrg. Ex. 2, pg. 17). Claimant reported continued low back, neck, and left arm complaints. Claimant also informed Dr. Orent that she suffered vision changes after the incident, although this was not documented in the medical records. Claimant informed Dr. Orent that she had been extremely active until the accident and since that time

she had been unable to do any of her activities, including yoga. (Hrg. Ex. 2, pg. 18). Dr. Orent concluded Claimant was discharged prematurely with multiple unresolved body parts. Dr. Orent based this opinion on Claimant's "substantial mechanism of injury." (Hrg. Ex. 2, pg. 19, 21). Dr. Orent "completely disagreed" with the Division IME's opinion that claimant reached MMI with no impairment rating. (Hrg. Ex. 2, pg. 21).

16. Here, Dr. Matus physically examined Claimant and treated Claimant on numerous occasions. Moreover, Dr. Burris performed a DIME and physically examined Claimant. Dr. Orent, however, did not physically examine Claimant. As a result, Dr. Orent was unable support Claimant's verbalized complaints pursuant to a physical examination. Plus, Dr. Orent was unable to provide credible and persuasive evidence to contradict the normal shoulder examination documented by Dr. Burris and Dr. Burris' other findings on which he concluded Claimant was properly placed at MMI. Thus, the ALJ does not find Dr. Orent's opinions and conclusions to be persuasive.
17. Claimant also testified at hearing. She testified consistent with her statements about her ongoing complaints and symptoms as documented by Dr. Orent in his telephonic IME.

CONCLUSIONS OF LAW

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

General Provisions

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40101, C.R.S. 2007, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

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

C. Assessing the weight, credibility, and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *Univ. v. Indus. Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other

things, the consistency, or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). Moreover, the weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55, P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting all, part or none of the testimony of an expert witness. *Colorado Springs Motors, Ltd. v. Indus. Commission*, 441, P.2d 21 (Colo. 1968).

I. Whether Claimant has overcome the Division IME as to maximum medical improvement (“MMI”).

D. A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by “clear and convincing evidence.” §8-42-107(8)(b)(III), C.R.S.; *Peregoy v. Indus. Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). “Clear and convincing evidence” is evidence that demonstrates that it is “highly probable” the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998). In other words, to overcome a DIME physician's opinion, “there must be evidence establishing that the DIME physician's determination is incorrect, and this evidence must be unmistakable and free from serious or substantial doubt.” *Adams v. Sealy, Inc.*, W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.*, W.C. Nos. 4-532-166 & 4-523-097 (ICAP, July 19, 2004); see *Shultz v. Anheuser Busch, Inc.*, W.C. No. 4-380-560 (ICAP, Nov. 17, 2000).

E. Claimant failed to submit sufficient evidence to overcome Dr. Burris's opinion that Claimant reached MMI on May 24, 2019, by clear and convincing evidence. Claimant has failed to meet her burden of proof. *Resources One, LLC v. Indus. Cl. App. Off.*, 148 P.3d 387 (Colo. App. 2006).

F. Claimant obtained an IME from Dr. Orent regarding MMI. This ALJ finds Dr. Orent's opinion is less credible than Dr. Burris, the Division IME, and Claimant's treating physicians as to MMI. Dr. Matus – who physically examined Claimant on several occasions - opined Claimant did not sustain serious injuries when she fell. This opinion is supported because Claimant did not seek treatment for eleven days after she fell. Rather, Claimant treated her injuries with salt baths and a heating pad. Plus, Claimant did not take any medications for pain during this time. When she did seek treatment, Claimant treated conservatively with significant improvement in her complaints over a couple of months. Claimant's treating physicians documented Claimant's continued improvement in her pain complaints and function. When Claimant was released and placed at MMI, she had returned to her regular activities, including yoga and her part-time work as a substitute teacher.

G. Dr. Burris' evaluation and opinion on MMI and impairment rating concurred with Claimant's treating provider, Dr. Matus. Dr. Burris noted Claimant

reported left arm pain, not left shoulder pain, which was also documented by the physical therapist. Dr. Burris also noted Claimant had returned to work and was not taking any medications for her complaints. Dr. Burris also completed a thorough shoulder evaluation by performing various tests – each of which were negative. Lastly, he also considered Claimant’s neurological complaints and reviewed the MRI findings. As noted by Dr. Burris, the MRI of Claimant’s head/brain was negative for acute/traumatic findings.

H. Dr. Orent’s opinions are merely a difference of opinion than that of the Division IME and Claimant’s primary treating physician, Dr. Matus. Plus, as found, Dr. Orent’s opinions and conclusions are not supported by an actual physical examination. Thus, Claimant has failed to present clear and convincing evidence that Dr. Burris’ opinions and conclusions were incorrect or in error.

II. Whether Claimant is entitled to a general award of maintenance medical benefits?

The need for medical treatment may extend beyond the point of MMI where claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Indus. Commission*, 759 P.2d 705 (Colo. 1988); *Hanna v. Print Expeditors Inc.*, 77 P.3d 863, 865 (Colo. App. 2003); *Hobirk v. Colorado Springs School District #11*, W.C. No. 4-835-556-01 (ICAO, Nov. 15, 2012). An award for *Grover* medical benefits is neither contingent on a finding that a specific course of treatment has been recommended nor a finding that the claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1999); *Hastings v. Excel Electric*, W. C. No. 4-471-818 (ICAO, May 16, 2002). Claimant must prove entitlement to *Grover* medical benefits by a preponderance of the evidence. *Lerner v. Wal-Mart Stores, Inc.*, 865 P.2d 915 (Colo. App. 1993); *Mitchem v. Donut Haus*, W.C. No. 4-785-078-03 (ICAO, Dec. 28, 2015). An award of *Grover* medical benefits should be general in nature. *Hanna v. Print Expeditors Inc.*, 77 P.3d 863 (Colo. App. 2003); *Anderson v. SOS Staffing Services*, W. C. No. 4-543-730, (ICAO, July 14, 2006).

In this case, when Claimant was placed at MMI, her primary treating physician, Dr. Matus, specifically prescribed maintenance medical treatment in the form of four more visits of manual therapy or physical therapy to relieve Claimant from the effects of her injury. The ALJ credits Dr. Matus’ conclusion that maintenance medical treatment was reasonable and necessary to relieve Claimant from the effects of her work injury at the time she was placed at MMI. And, after Claimant was placed at MMI, she did undergo maintenance medical treatment in the form of physical therapy on June 28, 2020, to relieve her from the effects of her work injury. As a result, Claimant established by a preponderance of the evidence that she is entitled to a general award of maintenance medical treatment.

ORDER

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

1. Claimant failed to overcome the opinion of the Division IME physician, Dr. Burris.
2. Claimant reached MMI on May 24, 2019.
3. Claimant is entitled to maintenance medical treatment.
4. Issues not expressly decided herein are reserved to the parties for future determination.

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

DATED: September 9, 2020.

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

Whether the respondents have demonstrated, by a preponderance of the evidence, that the claimant engaged in an unsanitary or injurious practice, and pursuant to Section 8-43-404 (3), C.R.S., his temporary total disability (TTD) benefits should be suspended from May 26, 2020, up to the date of the (as yet unscheduled) recommended shoulder surgery.

Whether the respondents have demonstrated, by a preponderance of the evidence, that there was an overpayment of TTD benefits to the claimant.

The ALJ takes administrative notice that due to the COVID-19 pandemic, on March 25, 2020, Governor Jared Polis issued a statewide "Stay at Home" Order. That Order resulted in the suspension of elective medical procedures, including surgeries. On April 27, 2020, Mesa County was approved for a "variance" from the March 25, 2020 Order. This variance allowed elective surgeries to proceed.

FINDINGS OF FACT

1. The employer operates a coal mine. The claimant has worked for the employer since 2000. On January 17, 2020, the claimant suffered an injury to his right shoulder, while at work. The injury occurred when the claimant was hosing off mining equipment and slipped on ice. The slip resulted in the claimant falling on his right side, jarring his right shoulder. On January 29, 2020, the respondents filed a General Admission of Liability related to the claimant's January 17, 2020 work injury.

2. On January 27, 2020, a magnetic resonance image (MRI) was taken of the claimant's right shoulder. The MRI showed, *inter alia*, a complete tear of the supraspinatus tendon, and a complete tear of the infraspinatus insertion with tendon retraction.

3. Subsequently, the claimant was referred to Dr. Mark Luker for a surgical consultation. On February 25, 2020, the claimant was seen in Dr. Luker's practice by Daryl Haan, PA-C. On that date, Mr. Haan addressed the possible repair of the claimant's rotator cuff. Mr. Haan noted that it would be "imperative" that the claimant stop smoking for four weeks before the surgery and for three months after the surgery. In the medical record of that date, Mr. Haan noted that the claimant would begin physical therapy and pursue a smoking cessation program.

4. On March 3, 2020, the claimant was seen by Dr. Luker. At that time, Dr. Luker recommended a rotator cuff repair with debridement. In addition, Dr. Luker reiterated that it would be necessary for the claimant to stop smoking. Dr. Luker observed that the claimant "seems reluctant to quit smoking and says that he does not think he will

be able to do it". The claimant also informed Dr. Luker that he was considering finding a surgeon that would perform the operation, but allow the claimant to continue smoking. At the Tuesday, March 3, 2020 appointment with Dr. Luker, the claimant indicated that he was going to ask his primary care physician for assistance to quit smoking that Friday.

5. On May 8, 2020, the claimant attended an independent medical examination (IME) with Dr. Mark Failing. In connection with the IME, Dr. Failing reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In his IME report, Dr. Failing opined that if the claimant does not quit smoking, it is unlikely that the recommended surgery would be successful. In the IME report, Dr. Failing noted that the claimant refuses to quit smoking. Dr. Failing also noted that the claimant wanted to find a surgeon that would perform the surgery without requiring him to stop smoking.

6. On May 26, 2020, the respondents filed a Petition to Modify, Terminate, or Suspend Compensation. On June 15, 2020, the claimant timely filed his Objection to Petition to Modify, Terminate, or Suspend Compensation.

7. On June 30, 2020, the claimant was seen by Dr. Kelly Jensen in Price, Utah. Dr. Jensen diagnosed right rotator cuff arthropathy. Dr. Jensen opined that repair of the claimant's rotator cuff "would be a partial repair". The medical record of that date indicates that with regard to smoking the claimant was "[t]hinking about quitting."

8. The claimant testified that he has been a smoker for 35 years. The claimant also testified that when he learned that Dr. Luker would not perform the surgery until the claimant stopped smoking, the claimant disagreed. The claimant testified that he had prior surgeries while smoking and recovered from those surgeries. The claimant further testified that he did not think it was necessary for him to quit smoking before the surgery. However, he also testified that now he understands that he has to quit smoking to be able to undergo the surgery. The claimant began taking the prescription smoking cessation drug Chantix one week before the hearing.

9. The claimant's spouse also testified at hearing. Her testimony was consistent with the claimant's testimony. In addition, the claimant's spouse corroborated that the claimant began taking Chantix approximately one week before the hearing.

10. Dr. Failing's testimony by deposition was consistent with his written report. Dr. Failing testified that the claimant has limited range of motion and a loss of strength in his right shoulder. Dr. Failing further testified that the claimant's primary diagnosis is "a very large rotator cuff tear". Dr. Failing noted his opinion that the recommended surgery is reasonable treatment of the claimant's right shoulder condition. Dr. Failing also testified that he agrees with Dr. Luker's instruction to the claimant to quit smoking. Dr. Failing described in his testimony the claimant's repeated statements at the IME regarding his unwillingness to quit smoking and the claimant's belief that he does not need to quit smoking.

11. The ALJ credits the medical records, Dr. Failing's report, and statements made by the claimant to various medical providers. The ALJ finds that the respondents

have demonstrated that it is more likely than not that the claimant has repeatedly refused to quit smoking, despite the requirement that he do so prior to surgery. The ALJ finds that the claimant did not attempt to quit smoking, but fail. Rather, the claimant simply refused to quit smoking. The ALJ places weight on the statements he made to various medical providers that he was not willing to quit smoking. The ALJ also notes that it was only one week prior to the hearing that the claimant began taking steps to stop smoking, by taking Chantix.

12. The ALJ is further persuaded that the claimant's refusal to quit smoking rises to the level of an injurious practice. Specifically, the claimant's ongoing refusal to quit smoking delayed the recommended surgery, ultimately delaying his recovery. The ALJ recognizes that nicotine is addictive and it is not "easy" to quit smoking. However, it is clear from the evidence in this case that the claimant simply refused to stop smoking and sought out a surgeon willing to perform surgery while allowing the claimant to continue to smoke.

13. The ALJ notes the COVID-19 pandemic and related Stay at Home Order that impacted timely scheduling of the recommended surgery. However, that delay does not negate the fact that the claimant refused to quit smoking. Therefore, the ALJ finds that Governor's Stay at Home Order did not have any impact on the claimant's refusal to quit smoking.

CONCLUSIONS OF LAW

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

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the

reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

4. Section 8-43-404(4), C.R.S., provides, in pertinent part:

If any employee persists in any unsanitary or injurious practice which tends to imperil or retard recovery . . . , the director shall have the discretion to reduce or suspend the compensation of any such injured employee.

5. In determining whether a claimant's actions constitute an "unsanitary or injurious practice", the ALJ may consider whether the claimant's actions were reasonable. *MGM Supply Co. v ICAO*, 62 P.3d 1001 (Colo. App. 2002).

6. The process for requesting the suspension of disability benefits is addressed in WCRP 6. More specifically, WCRP 6-4 allows an insurer to file a Petition to Suspend, Modify or Terminate Compensation. If the claimant files a written objection to the petition, as was done in the current case, the matter is set for an expedited hearing before an ALJ.

7. WCRP 6-4(D) provides:

When a claimant files a timely objection to a petition, the insurer shall continue temporary disability benefits at the previously admitted rate until an application for hearing is filed with the Office of Administrative Courts, and the matter is resolved by order. The Director finds that good cause exists to expedite a hearing to be held within sixty (60) days from the date of the setting, **because overpayment of benefits may result if the suspension, modification or termination is granted.** (*emphasis added*).

8. As found, respondents have demonstrated, by a preponderance of the evidence, that the claimant's refusal to quit smoking as recommended by his surgeon, constitutes an injurious practice that tends to "imperil or retard" the claimant's recovery. Therefore, the claimant's temporary total disability (TTD) benefits shall be suspended beginning May 26, 2020 and until the date the recommended shoulder surgery is performed.

9. Pursuant to WCRP 6-4(D), the respondents have demonstrated, by a preponderance of the evidence, that an overpayment of TTD benefits has occurred from May 26, 2020 to the date of the hearing; (August 12, 2020).

ORDER

It is therefore ordered:

1. TTD benefits are suspended beginning May 26, 2020 and until the date the recommended shoulder surgery is performed.

2. TTD payments made to the claimant from May 26, 2020 to the date of hearing (August 12, 2020) are deemed an overpayment.

Dated this 11th day of September 2020.



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

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

ISSUES

- I. Has Claimant shown, by a preponderance of the evidence, that he suffered a compensable work injury on or about January 21, 2020?
- II. Has Claimant shown, by a preponderance of the evidence, that Employer is responsible for Claimant's medical treatment to date?
- III. Has Employer shown, by a preponderance of the evidence, that Claimant was responsible for his own termination from work for this Employer?
- IV. Is Employer obligated to post a bond for Claimant's Workers Compensation benefits, pursuant to C.R.S.8'43-408(2)?

STIPULATIONS

The parties stipulated that Claimant's Average Weekly Wage is \$598.77. The parties also agreed that the Employer in fact is [Employer Name Redacted]

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

The Work Injury

1. Claimant worked as a bud trimmer for Employer. He had been doing this job for approximately four months prior to January 21, 2020. On that date, Claimant testified that he was lifting a bud tray when a marijuana bud got caught in between the top and bottom tray and caused a splinter in his right small finger. (Exhibit C, p. 9). Claimant did not remove the splinter, and his condition deteriorated.

Medical Treatment

2. Claimant received emergent care at St. Mary Corwin Medical Center Emergency Department on January 31, 2020. Notes indicate that Claimant received this splinter "2 days ago." Claimant was placed on an antibiotic to stem the infection that had developed by this time. Claimant's diagnosis was cutaneous abscess of the right hand and cutaneous abscess of the right finger. Records indicate Claimant's pain secondary to the infection had worsened, prompting him to go to the emergency room. Claimant's infection is identified as swollen, warm and tender, with decreased range of motion in the right small finger on all planes. (Ex. E, pp. 44-59).
3. Orthopedist Kenneth Danylchuk became involved with Claimant's care through

the St. Mary Corwin Emergency Department. He first saw Claimant on 2/3/2020. The notes from that visit indicate: "*The finger does show most likely improved function*, he did state there is some pain in the elbow and forearm...today we will clean and redress it. I will see him tomorrow and at that time we will consider a digital block with more aggressive cleaning" (Ex. F, p. 71)(emphasis added).

4. Claimant returned to Dr. Danylchuk on 2/4/2020. A block around the finger was made, with necrotic skin removed. The wound was irrigated, and a gauze with antibiotic solution was applied. Claimant was to return in 48 hours. (Ex. F, p. 72).
5. Claimant returned on 2/6/2020, at which time it was noted: "Gavan is status post 2 days Right I&D of the 5th finger, *states he is doing ok*" (Ex. R. p. 73)(emphasis added). Antibiotics were continued. *Id.*
6. The next visit was 2/18/2020. Dr. Danylchuk noted: " Gavan is status 2 weeks right pinky I&D. *He states it is doing good....His wound looks excellent. Skin appears viable.*" (Ex. F, p. 74)(emphasis added). Follow-up in two weeks. *Id.*
7. Claimant returned on 3/5/2020. Dr. Danylchuk noted: "He states it is feeling better and looking better. The loss of skin over the palmar surface of the distal phalynx of the right fifth finger *is (sic) gone on to heal*. Range of motion is diminished particularly at the DIP joint." (Ex. F, p. 75)(emphasis added). Claimant was referred to physical therapy, and to return in one month. *Id.*
8. The final entry from Dr. Danylchuk is dated 4/2/2020. Claimant again stated he was 'doing well'. "Gavin returns, his finger has responded an extremely positive way. His function has returned, the infection is gone. Range of motion is near normal. *At this time is ready to return to work.* (Ex. F, p. 76)(emphasis added).

Claimant's Testimony

9. At hearing, Claimant testified that when this splinter initially occurred, he told his supervisor, Jeremy A[Redacted], within minutes. Mr. A[Redacted]'s response was something to the effect that 'it was Claimant's fault'. During this exchange, Claimant testified that Mr. A[Redacted] had alcohol on his breath. Claimant did not file a claim that day, since it 'did not seem like a big deal' at the time.
10. In the following days, Claimant made some attempts to remove the splinter on his own, but was unable to do so. He noted that the pain in his finger was increasing, along with a deteriorating appearance. He finally told someone with Employer that he was going in to the ER for treatment.
11. Claimant further testified that once he went to the ER for treatment, he was told to avoid moisture by the treating physician.
12. Claimant also acknowledged that once he reported this injury to Employer, that

he was asked to fill out paperwork to report his injury. He stated he knew how to report a work injury, but was not told by this Employer how to do so.

13. An *Employee's Report of Injury* form was filed. (Ex. 3, p. 37). Claimant insisted at hearing that he did not fill this form out, as the handwriting was not his. He later denied filling out an attachment thereto, after initially admitting he had filled it out. (Ex. 3, p. 39). He indicated that of the forms he did fill out, he did so in his left hand. Once he filled out the forms, he picked up his final paycheck.
14. Claimant acknowledged that he was able to complete his work tasks up until he sought treatment for this injury (on 1/31/2020), although it was more difficult to do so, due to the pain; however, he never told anyone at work of this pain.
15. Claimant testified that once he mentioned this issue to Jeremy [A[Redacted]], but was told "there was nothing [in the form of modified duty] to do."
16. Claimant further testified that for three to four months, post-surgery, he could not hold *anything* in his [right] hand.

Edward V[Redacted] Testimony

17. Edwards V[Redacted] testified at hearing. He is part-owner of [Employer Name Redacted], which manages several marijuana farms and pays its employees. He first knew of this issue when Jeremy informed him that Claimant had gone to the ER for treatment. He told Jeremy to have Claimant come in and fill out an incident report. The last thing he was aware of was that Claimant had come in to pick up his final paycheck. He knew that in the first week of February [2020], Claimant had missed some work. He never spoke in person with Claimant. He did leave at least one voicemail for Claimant to call him back. Claimant never did so.
18. Mr. V[Redacted] indicated that Employer would have been willing to offer modified duty to Claimant, and accommodate any work restrictions, including keeping Claimant away from excess moisture. He could also find things for Claimant to do without using his right hand; office work, cleaning, outdoor work, etc. At this point, Claimant is considered by Employer to have abandoned his position with Employer.
19. Mr. V[Redacted] acknowledged that his insurance broker had "dropped the ball" as of the previous December, and had allowed his Workers Compensation insurance to lapse. He only became aware of this lapse once this injury was reported. This was the only Workers Compensation claim that occurred during this lapsed period. He then reinstated this insurance at once, but was unable to make it retroactive to cover this claim. Employer's designated provider was the Button Family Practice, and he would have sent Claimant there, had this been reported in due course, despite the lapse in insurance. He knew full well that he

would have to accept any Workers Compensation claims, insurance or not, and knew it would be in his own best interest to offer modified duty when appropriate.

Jeremy A[Redacted] Testimony

20. Jeremy A[Redacted], Claimant's immediate supervisor, testified at hearing. He recalls Claimant texting him on 2/1/2020 that he could not make it in to work. At this time, Claimant did not tell him that he had suffered a work injury initially. He found out on Monday (2/3/2020) that Claimant was alleging a work injury. He was still not told that his injury had occurred on 1/21/2020. He called Claimant during that week to check up on him, regardless of whether this was a work or off-premise injury, but got no response. He did eventually receive the Incident Report from Claimant on 2/7/2020. He then never heard from Claimant after Claimant picking up his final paycheck during this time.
21. Mr. A[Redacted] further indicated Claimant asked him for contact information from "the owner", which he provided. He further denied drinking on the job when Claimant accused him of doing so. Once this became clear that Claimant was reporting this as a work injury, he then began to ask other co-workers about what they knew about it, and collected written statements. Upon examination, such statements do not indicate on their face that Claimant received this splinter from any location other than work.
22. During the time Claimant was working with the splinter still embedded, Mr. A[Redacted] noted that Claimant's production remained constant. Claimant was able to perform his work tasks at full productivity up until the day he left work. He also indicated that during his conversation with Claimant [on 2/7/2020] he told Claimant that Employer wanted to work with him on getting the problem solved.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

1. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40101, C.R.S. 2007, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.
2. In accordance with §8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every

item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. Assessing the weight, credibility and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). Moreover, the weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55, P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting all, part or none of the testimony of an expert witness. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

4. In this instance, while Claimant has shown sufficient evidence to prove compensability, as noted below, his credibility has been shown to be highly suspect. The ALJ finds, among other instances, that he has unconvincingly accused his supervisor of drinking on the job, unconvincingly denied signing at least two documents bearing his handwriting, and unconvincingly stated that he has been unable to use his right hand for any purpose for 3 to 4 months, despite medical records to the contrary.

5. In contrast, the ALJ finds that Edward V[Redacted] and Jeremy A[Redacted] testified credibly and persuasively. As such, there has been a direct conflict in the testimony – in this case, over the circumstances of Claimant's departure from work – which will be resolved in Respondent's favor.

Compensability, Generally

6. To qualify for recovery under the Workers' Compensation Act of Colorado, a claimant must be performing services arising out of and in the course of her employment at the time of her injury. See § 8-41-301(1)(b) C.R.S. 2007. For an injury to occur "in the course of" employment, the claimant must demonstrate that the injury occurred within the time and place limits of her employment and during an activity that had some connection with her work-related functions. See *Gregory v. Special Counsel, and Travelers Indemnity Co.*, W.C. 4-713-707 (2008); *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arise out of" requirement is narrower than the "in the course of" requirement. See *id.* For an injury to arise out of employment, the claimant must show a causal connection between the employment and injury such that the injury

has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. See *id.* at 64-1-42; *Industrial Comm'n v. Enyeart*, 81 Colo. 521, 524-25, 256 P. 314, 315 (1927) (denying recovery to claimant who was injured when his steering gave out while he was driving across a bridge on his employer's property on his way home from work). The claimant must prove these statutory requirements by a preponderance of the evidence. See *City of Boulder v. Streeb*, 706 P.2d 786, 789 (Colo.1985).

Compensability, as Applied

7. In this instance, once the apparent discrepancies regarding Claimant's statements about how he originally got the splinter were resolved, the ALJ finds, by a preponderance of the evidence, that Claimant received this splinter at work, while trimming buds for Employer. While the exact date and time of occurrence will remain unclear, suffice it to say Claimant received it on or about January 21, 2020. While the possibility remains that Claimant got the splinter elsewhere, no viable alternative theory has been offered by Respondents. Claimant has met his burden here.

Medical Benefits, Generally

8. Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. C.R.S. § 8-42-101. However, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. C.R.S. § 8-41-301(1)(c); *Faulkner v. Indus. Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.*, 124 Colo. 210, 236 P.2d 2993. A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co.*, 124 Colo. 210, 236 P.2d 293 (1951).

Medical Benefits, as Applied

9. While Claimant's decision to defer treatment for this splinter no doubt aggravated his condition unnecessarily, it cannot be concluded that he acted *willfully*, in some effort to bring about this result. It began benignly enough, and despite unsuccessful early attempts at removal, Claimant just soldiered on for a few days more. Had he mentioned it earlier, the ALJ finds that Respondents would have made reasonable efforts to accommodate treatment through Button Family Practice. Nonetheless, the situation progressively worsened. While an argument might be made that Claimant failed to mitigate his damages, the ALJ cannot identify a remedy to apply. The ALJ does not conclude that the ensuing infection was an intervening medical event; instead, it was a natural extension of the original, untreated injury. Further, the ALJ

does not conclude that Claimant's *negligence* in seeking earlier intervention constituted a willful *refusal* to engage in offered treatment.

10. The ALJ finds that all medical treatment rendered from the point of entering the ER through his release by Dr. Danylchuk was reasonable, necessary, and related to his compensable work injury. Claimant's treatment (by this time, on a weekend) at the ER was of an emergent nature, and the ALJ therefore finds that the ER, and their referral to Dr. Danylchuk, are Claimant's Authorized Treating Physicians. No further care is anticipated from any provider, however.

Claimant Responsible for Own Termination, Generally

11. If an injured worker is responsible for his termination from employment, the injured worker is not entitled to receive benefits compensating him for the wage loss after the date of termination. § 8-42-103(1)(g), C.R.S.; § 8-42-105(4), C.R.S. For an employee to be responsible for termination, the employee must perform a volitional act which leads to the termination. *Gutierrez v. Exempla Healthcare*, W.C. No. 4-495-227 (ICAO June 24, 2002). An employee commits a volitional act when he exercises some degree of control over the circumstances leading to the termination. *Colorado Springs Disposal v. Indus. Claim Appeals Office*, 58 P.3d 1061, 1062 (Colo. App. 2002). An employee is responsible for termination if the employee precipitated the employment termination by a volitional act that an employee would reasonably expect to result in the loss of employment. *Patchek v. Colo. Dept. of Public Safety*, W.C. No. 4-432-301 (ICAO, Sept. 27, 2001). Negligent or inadvertent acts qualify as volitional acts for the purposes of determining whether a claimant is responsible for termination. *Gleason v. Southland Corp.*, W.C. No. 4-149-631 (ICAO June 13, 1994).

12. Failing to return to or call in to work after an injury for a position that is within a Claimant's work restrictions are volitional acts which support a finding that a Claimant is responsible for termination. *Villa v. Wal-Mart Stores, Inc.*, W. C. No. 4-631-217 (ICAO Sept. 30, 2005); *Hoefner v. Russell Stover Candies*, W.C. No. 4-541-518 (ICAO Dec. 13, 2002).

13. Respondents have the burden to prove by a preponderance of the evidence that claimant was responsible for termination. *Gilmore v. Indus. Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008).

Claimant Responsible for his Own Termination, as Applied.

14. As noted, the ALJ finds Edward V[Redacted] and Jeremy A[Redacted] to be far more credible and persuasive than Claimant regarding their conversations, or lack thereof, with Claimant after he sought treatment. The ALJ finds that Claimant abandoned his job when failed to report for work when scheduled to return on February 3, 2020. Not only that, he never attempted to contact Employer to see how he could continue work, and declined to return their phone calls. At no point did Jeremy A[Redacted] tell Claimant that there was no modified duty available to explore. The ALJ finds and concludes that modified employment would have been offered, but Claimant

willfully chose not to pursue that as an option. There were no formal work restrictions in effect, because Claimant willfully thwarted Employer's ability to even obtain the needed information from Dr. Danylchuk. In addition, Claimant effectively thwarted Dr. Danylchuk from formally defining any work restrictions for Employer. He cannot now shift the blame to Employer for failing to formally offer modified employment.

15. In effect, Claimant unilaterally placed himself on Temporary Total Disability, but without going through the process. The ALJ finds no justification for this. Claimant was able to work at full productivity up through January 31, 2020, albeit with some level of pain. Once he was treated at the ER, his condition actually began to improve, but with a bandaged hand. Claimant could fill out WC forms, regardless of which hand he claims to have used. There was plenty he could have done, as testified by Mr. V[Redacted], even if Dr. Danylchuk had formally placed Claimant onto one-handed duty in a dry environment. At no point in this process could Claimant legitimately claim that he was temporarily, totally disabled. An injured worker's subjective beliefs about his ability to perform a modified job are legally irrelevant, and do not provide a basis to refuse to begin modified employment. *Burns v. Robinson Dairy*, 911 P.2d 661, 663 (Colo. App. 1995) (“[A]ny evidence concerning claimant’s self-evaluation of his ability to perform his job was irrelevant.”). The ALJ finds that Respondents have shown that Claimant was responsible for his own termination from employment.

Bond for Uninsured Employer

16. The ALJ accepts the testimony from Mr. V[Redacted] that Employer's broker “dropped the ball” and failed to timely renew Employer's Workers Compensation policy. It came as a genuine surprise and disappointment, and was rectified as soon as practicable. The ALJ finds that based upon the information presented, Employer had a good faith, albeit unsuccessful, belief that this claim was not compensable. Otherwise, they stand prepared to pay this claim as self-insured. Fortunately for all, the injury was not serious. Nonetheless, Employer was uninsured on the day this happened.

17. CRS 8-43-408(2) provides:

In all cases where compensation is awarded under the terms of this section, the director or an administrative law judge of the division shall compute and require the employer to pay to a trustee designated by the director or administrative law judge an amount equal to the present value of all unpaid compensation or benefits computed at the rate of four percent per annum; or, in lieu thereof, such employer, within ten days after the date of such order, shall file a bond with the director or administrative law judge signed by two or more responsible sureties to be approved by the director or by some surety company authorized to do business within the state of Colorado. The bond shall be in such form and amount as prescribed and fixed by the director and shall guarantee the payment of the compensation or benefits as awarded. The filing of

any appeal, including a petition for review, shall not relieve the employer of the obligation under this subsection (2) to pay the designated sum to a trustee or to file a bond with the director or administrative law judge.

18. There is no dispute in the evidence that the Respondent is uninsured, and as a result, the Respondent has to pay a bond, which should be sufficient to cover anticipated benefits in the case, as well as a fifty percent increase for temporary disability benefits. *Miller v. United Insurance Group*, W.C. Nos. 4-940-803-01 & 4-940-803-02 (December 2, 2016); § 8-43-408(2), C.R.S. (2020).

ORDER

It is therefore Ordered that:

1. Claimant suffered a compensable injury on or about 1/21/2020.
2. Respondents are liable for all reasonable, necessary, and related medical treatment rendered to date.
3. Claimant's claim for Temporary Total Disability is denied and dismissed.
4. Respondents shall post a bond for Claimant's medical treatment, in the matter prescribed by C.R.S. 8-43-408(2).
5. Respondents shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.
6. All matters not determined herein are reserved for future determination.

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

petition to review form at: <http://www.colorado.gov/dpa/oac/forms-WC.htm>. In addition, it is recommended that you send a copy of your Petition to Review to the Colorado Springs OAC via email at oac-csp@state.co.us.

DATED: September 11, 2020

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

- I. Has Claimant shown, by a preponderance of the evidence, that he is entitled to temporary total disability ("TTD") benefits beginning August 16, 2019 and ongoing?
- II. If Claimant has proven an entitlement to TTD benefits, have Respondents, by a preponderance of the evidence, shown that Claimant was responsible for his wage loss by voluntarily resigning, or, alternatively, by being terminated for cause?

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

1. Claimant was employed by Employer as a sign installer. On May 3, 2018, Claimant sustained admitted injuries to his back while installing a sign.

2. Claimant was placed on modified duty restrictions by his physician after his injury. These restrictions included 10 pounds lifting and repetitive lifting, no crawling, kneeling, or squatting, and limited climbing. (Ex. E, p. 43). Employer accommodated Claimant's restrictions by taking him from a sign installer position in the field and moving him to a light duty warehouse position, working 4 hours per day instead of 8.

3. At hearing, Claimant testified that he continued to work for the Employer in the warehouse after his injury, and was able to work modified duty within these restrictions until the end of his employment on August 15, 2019. Claimant and Mr. K[Redacted] both testified that he was able to paint, perform light welding, do light assembly, and clean and organize the warehouse.

4. The medical records also show that Claimant was working within his restrictions. The ATP, Dr. Rudderow noted multiple times in her records that Claimant was working per restrictions. (see Ex. E, pp. 30; 35, 44; 45). Additionally, the FCE report noted that Claimant was working part time on restrictions. (Ex. I, p. 83). No medical records show that Claimant was complaining to his physicians that his work duties were too strenuous or that his restrictions needed to be modified.

5. Claimant was placed at MMI by Dr. Rudderow on March 5, 2019, and those same work restrictions became permanent. (Ex. E, p. 43). After Claimant was placed at MMI with permanent restrictions, Employer continued to accommodate Claimant's restrictions and he was able to work modified duty within those restrictions. Dr. Rudderow also assigned a 21% whole person rating for Claimant's lumbar spine

based on the results of a formal FCE. *Id.*

6. Claimant sought a Division IME with Dr. Dwight Caughfield, which took place on January 7, 2020. Dr. Caughfield opined that Claimant was not at MMI, but he agreed with the restrictions put in place by Dr. Rudderow, the ATP. (Ex. J, p. 96). During the *History of Injury*, Claimant reported to Dr. Caughfield:

He [Claimant] is not currently working *since his employer doesn't have work for him within his restrictions* that were provided after he was placed at maximum medical improvement. *Id* at 93 (emphasis added).

7. The sole reason Dr. Caughfield found Claimant not to be at MMI was his belief that Claimant would benefit from psychological treatment for delayed recovery. Otherwise, Dr. Caughfield assigned a provisional 18% rating for the lumbar spine. *Id.* There were no additional physical impediments noted. Additionally, Dr. Caughfield noted that Claimant's complaints - and significant pain behaviors - did not correlate to any physical findings. He noted, for example:

There is *no palpable spasm* in the paraspinals either in static posture or with motion *despite significant pain reports*. *He has back pain to even light skin stroking* over the paraspinals bilaterally. *Id* at 94 (emphasis added).

8. At hearing, Claimant testified that his treating physician placed him on sitting, standing, and walking restrictions. This is not supported by the evidence. The medical records from the ATP, Dr. Rudderow, and the DIME, Dr. Caughfield, show that Claimant's work restrictions in evidence are "no lifting or repetitive lifting over 10 pounds, no crawling, no kneeling, no squatting, and limited climbing." (Ex. E, p. 43; Ex. J, p. 96). At the time of Claimant's separation from employment, he was not restricted by any physician for walking, standing, or sitting in any manner.

9. Respondents filed an application for hearing on February 12, 2020 to overcome the DIME's MMI determination. (Resp. Ex. A). During the interim time period, Claimant's employment with the Employer came to an end on August 15, 2019.

10. The parties subsequently agreed that Claimant was not at MMI. A stipulation and motion for approval was submitted and granted. (Ex. C). Respondents further agreed to pay temporary partial disability ("TPD") to Claimant for his ongoing work from the original date of MMI, March 5, 2019, through August 15, 2019. *Id.* at 7. Respondents filed a General Admission of Liability on May 12, 2020 consistent with these terms. (Resp. Ex. D).

11. Respondents' Exhibit L (surveillance video snippets of Claimant's workstation, taken on various days in July, 2019, cumulatively over one hour) was received at hearing. It includes footage of Claimant working over multiple days in the weeks leading up to his last day at work. Claimant is seen welding, painting, carrying

light equipment, using power tools, and organizing the shop. Claimant appears to be able to perform the job duties requested of him. Claimant also works unsupervised during much of the footage. Claimant is not seen exhibiting any pain behaviors, grimacing, or obvious difficulty with the tasks that were assigned to him.

12. Claimant testified that Mr. K[Redacted] would become upset if Claimant sat down at work. Mr. K[Redacted] testified that Claimant often worked unsupervised in the warehouse, because the other employees were installing signs in the field. Claimant testified he continued working for the Employer after MMI at reduced hours, and that he often had to violate his restrictions because his boss would get upset if he saw Claimant sitting down. Mr. K[Redacted] testified that Claimant would have been allowed to sit down and take a break if he needed, and that Claimant was never punished for sitting down or taking a break. Mr. K[Redacted] acknowledged that Claimant must work within his restrictions, and he testified that he had a conversation with Claimant wherein he told Claimant that he had to stay within the restrictions of the doctor's notes when working.

13. Mr. K[Redacted] testified that if the Claimant had not quit his employment on August 15, 2019, that Employer would have continued accommodating Claimant's modified duty restrictions in the warehouse just as Employer had for the fifteen months after his injury.

14. Claimant testified that he did not appear for work on August 14, 2019 because he had a doctor's appointment. Claimant admitted that his doctor's appointment was not related to his workers' compensation case, but was for a different [as yet undisclosed] condition. Claimant also agreed that he had not treated for his Workers' Compensation case since he was placed at MMI on March 5, 2019 by Dr. Rudderow. Claimant has never provided any documentation of this alleged doctors' appointment. To date, no medical records have been produced by Claimant showing excused absences for attendance at any doctors' appointments.

15. Claimant's attendance issues were already an issue with Mr. K[Redacted]. Claimant agreed at hearing that he was missing work or leaving early some days because he was feeling sick. Mr. K[Redacted] testified that Claimant had serious attendance problems. Mr. K[Redacted] testified that out of 17 payrolls, Claimant only worked a full 40-hour payroll twice. He also testified that Claimant was only working 20 hours per week, so the 40-hour payroll was for two weeks of work. Effectively, out of 34 weeks of work, Claimant only worked his full hours for 4 of the 34 weeks. Mr. K[Redacted] testified that Claimant was disappearing during his work hours, and that Claimant would leave early or be gone when the crew would come back from outside sign installs in the field.

16. Mr. K[Redacted] testified that he was Claimant's direct supervisor, and that employees are trained and required to request time off from their supervisor. This attendance policy is reiterated in the employee handbook (see Exhibit K, p. 102). However, when asked if they are given to every employee, he answered, "No." Mr.

K[Redacted] testified that he did not know of a time that Claimant ever requested time off from him to attend doctors' appointments after March of 2019. Mr. K[Redacted] testified that Claimant did not provide him with any appointment slips after he was placed at MMI on March 5, 2019.

17. Mr. K[Redacted] testified that although Claimant was a native Spanish speaker, he felt that he was able to communicate with Claimant without the need for a translator. Claimant had worked off and on for him for a number of years, and the ability to communicate effectively was important, since power tools are involved, among other things.

18. At hearing, Claimant testified that he was not allowed in to begin work on August 15, 2019. Claimant testified on direct examination that Mr. K[Redacted] told him he was not firing him, that Claimant refused to provide doctors' notes, and that Claimant turned around and left work on August 15, 2019. Mr. K[Redacted] testified that it was his intent for Claimant to continue working that day if he provided a doctor's note.

19. Mr. K[Redacted] testified that on August 15, 2019 he had a conversation with Claimant about his attendance issues. Mr. K[Redacted] asked Claimant why he left early on August 13, 2019, and why he did not show up for work on August 14, 2019. Claimant got very defensive and responded that he had doctors' appointments. After Mr. K[Redacted] asked Claimant for the doctors' notes, Claimant became very defensive and angry, and told Mr. K[Redacted] that he quit. Claimant then began walking away, but then turned around and told Mr. K[Redacted] that "that means you just fired me."

20. Mr. K[Redacted] testified that he did not terminate Claimant, that he never told Claimant he was fired, and that instead, Claimant said that he quit.

21. Claimant testified that he left the premises on August 15, 2019 under the assumption that he would return to work the next day like he always did. Claimant sent a text message to Mr. K[Redacted] asking if he was needed at work that day, and Mr. K[Redacted] replied, "No." When asked when he could return, Claimant was told by Mr. K[Redacted] that Claimant had quit.

22. On cross-examination, Mr. K[Redacted] testified consistently with a prior statement that he told to the adjuster, Zoraida Juarez, on August 28, 2019. Again, this testimony was that Claimant told Mr. K[Redacted] that he quit, and then turned around and said "you fired me."

23. Claimant's testimony at hearing was that he was terminated for failing to show up to work on August 14, 2019. However, Claimant has now also filed a civil rights complaint against Employer alleging that he was terminated, in part, because he is Hispanic. (Ex. O, p. 129).

24. Claimant testified that he was terminated because he did not show up for work on August 14, 2020. Claimant admitted that he missed work for a non-Workers' Compensation related medical appointment, and that he had not treated for Workers' Compensation injuries from the time he was placed at MMI with Dr. Rudderow on March 5, 2019 until his Division IME in January, 2020.

25. Mr. K[Redacted] testified that Claimant was trained to request time off from their supervisor if they need to take time off, and that he was Claimant's supervisor. Mr. K[Redacted] testified that Claimant never requested time off for any doctor's appointment after March of 2019.

26. Claimant testified that he has not applied for any other jobs. Claimant presented no evidence supporting his contention that his work-injury is impeding his ability to obtain new employment. Claimant does not know whether he could obtain other employment, because he has not applied. Claimant has not demonstrated that his work restrictions are the cause of his wage loss because he has not attempted to find work.

27. Claimant has not shown that he suffered any worsening of his condition. His restrictions prior to and after the separation from employment were the same. The only additional treatment that has been recommended on this claim is psychological treatment for delayed recovery. (Ex. J, p. 95). Claimant's physical condition now is the same now as it was at the time of the separation from his employment.

28. Claimant also exhibited inconsistent effort on functional capacity evaluations, and failed validity testing. (see Ex. I, pp. 64, 82). The DIME, Dr. Caughfield, also invalidated claimant's lumbar flexion because it was non-physiological. (Ex. J, p. 96). Claimant has a medical history of demonstrating self-limited effort during his medical evaluations, and being insincere in his presentation.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

a. The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to Employers, without the necessity of litigation.

b. A Claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all

of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the Employer, Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. *Id.*

c. In assessing credibility, the ALJ should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness of the testimony; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936). The ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to testimony, and draw plausible inferences from the evidence." See *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002).

d. In this instance, there is a conflict in the testimony which the ALJ must resolve. In summary, the ALJ finds Mr. K[Redacted] to be more credible, and therefore persuasive, than Claimant. Such conflicts are now resolved in Mr. K[Redacted]'s favor, as Claimant bears the appearance of someone looking for a free lunch wherever he can find it. He told the DIME physician in January, 2020 that Employer was unable/unwilling to accommodate his restrictions. One month prior, he averred before a State Agency that, among other things, he was not allowed to speak Spanish at work. His medical providers, including the DIME physician, noted what is tantamount to symptom magnification. He claims to be unable to perform even the modified duty he was placed on, when the video evidence suggests otherwise. His attendance record at work leading up to his termination is suggestive of taking advantage of lax supervision.

Temporary Total Disability, Generally

e. To receive temporary disability benefits, the claimant must prove the injury caused a disability. C.R.S. § 8-42-103(1); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). As stated in *PDM Molding*, the term "disability" refers to the claimant's physical inability to perform regular employment. See also *McKinley v. Bronco Billy's*, 903 P.2d 1239 (Colo. App. 1995). Once the claimant has established a "disability" and a resulting wage loss, the entitlement to temporary disability benefits continues until terminated in accordance with C.R.S. § 8-42-105(3)(a)-(d). Claimant is not required to prove that the industrial injury is the "sole" cause of his wage loss to recover temporary disability benefits. *Jorge Saenz Rico v. Yellow Transportation, Inc.* W.C. No. 4-547-185 (ICAO December 1, 2003), citing *Horton v. Industrial Claim Appeals Office*, 942 P.2d 1209 (Colo. App. 1996).

Termination of Temporary Disability Payments, Generally

f. Sections 8-42-105(4) and 8-42-103(1)(g), C.R.S., contain identical language that in cases "where it is determined that a temporarily disabled employee is responsible for termination of employment the resulting wage loss shall not be attributable to the on-the-job injury." In *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo. App. 2002), the court held that the term

“responsible” introduced into the Workers’ Compensation Act the concept of “fault” applicable prior to the decision in *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Hence, the concept of “fault” as it is used in the unemployment insurance context is instructive for purposes of the termination statutes. *Kaufman v. Noffsinger Manufacturing*, W.C. No. 4-608-836 (ICAO, April 18, 2005). In that context, “fault” requires that Claimant have performed some volitional act or exercised a degree of control over the circumstances resulting in the termination. See *Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1995) *opinion after remand* 908 P.2d 1185 (Colo. App. 1995). An employee is thus “responsible” if he precipitated the employment termination by a volitional act that he would reasonably expect to cause the loss of employment. *Patchek v. Dep’t of Public Safety*, W.C. No. 4-432-301 (ICAO, Sept. 27, 2001).

g. The termination statutes provide an affirmative defense to a claim for TTD and the respondents bear the burden of proof to establish their applicability. *Witherspoon v. Metropolitan Club* W. C. No. 4-509-612 (December 16, 2004). *White-Skunk v. QK, Inc.*, W.C. No. 4-500-149 (October 3, 2002). Generally, the question of whether the Claimant acted volitionally, and therefore is “responsible” for a termination from employment, is a question of fact to be decided by the ALJ, based on consideration of the totality of the circumstances. *Gonzales v. Industrial Commission; Jeppsen v. Huerfano Medical Center, supra. Windom v. Lawrence Construction Co.*, W.C. No. 4-487-966 (November 1, 2002).

h. To receive temporary disability benefits, a Claimant must establish a causal connection between the industrial injury and the loss of wages. § 8-42-103(1)(g), C.R.S. In *Gonzalez v. Nat’l King Coal, Inc.*, the court evaluated whether a Claimant has looked for work following his separation as a factor in establishing whether the wage loss was caused by the work injury. W.C. No. 3-114-636, 1995 WL 615299, at *3 (Sept. 26, 1995). Claimant must prove that his work restrictions impaired his ability to earn wages to some degree. Where there is no evidence that Claimant’s post-separation wage loss is attributable to the work-injury, then Claimant has failed to establish the causal connection. *Id.*

Termination of Temporary Disability Payments, as Applied

i. At the outset, the ALJ finds that Employer took all reasonable steps to accommodate Claimant’s work restrictions. Contrary to Claimant’s assertions, he was not required to sit, nor, however, did Employer forbid it. Claimant was mostly unsupervised while the other crew members were out in the field. Claimant’s own subjective belief about his ability to meet his work restrictions is not relevant. As shown in the video, Claimant was fully able to perform the modified duty prescribed. There was not a hint of struggle, even with tasks which appear to exceed his work restrictions, but for which no credible evidence exists that Claimant was somehow forced to perform. The ALJ also finds that Claimant was fully capable, within his restrictions, of performing similar work for a different employer, but has declined to seek work elsewhere. *Claimant is not temporarily and totally disabled, and the ALJ so finds.*

j. As noted by Respondents, it is not necessary for the ALJ to dissect whether Claimant quit or got fired on August 15, 2019. It is not a requirement under any case law that the ALJ can identify that a formal passage from a work manual need be cited. Even in the most informal of circumstances, Employers have the right to expect their employees to show up for work, on time, perform their assigned tasks, and not argue with their supervisor about it. In this instance, Mr. K[Redacted] had grounds to terminate Claimant for his attendance up to that point, without seeking a resignation. Nothing in the record suggests that Claimant even had a non-Workers Comp medical appointment the day prior – such a note would not have been difficult to obtain for hearing.

k. Claimant wants the ALJ to decide this case based upon whether he quit or got fired. For someone who is purportedly deficient in English, such semantic distinction was important in Claimant's mind, even in the heat of the moment. Either way, Claimant performed a volitional act [poor attendance, without documentation] which is an adequate reason for his wage loss. In any event, the ALJ finds that Claimant got mad and quit. That was also a volitional act on Claimant's part. The fact that he thought better of it overnight and wanted his job back does not mean he didn't quit when he did – or that his lack of accountability up to that point was somehow insufficient in and of itself to let him go. The ALJ finds that it was Claimant's actions which led to his wage loss, and not due to any retaliation by Employer for having a Workers Comp claim. The ALJ cannot conclude that Employer would suddenly stop accommodating claimant's restrictions after having accommodated them for over a year. Furthermore, the Employer intended to continue accommodating these restrictions if Claimant had continued to work satisfactorily. Nor was Claimant's wage loss due to his own inability to function within his work restrictions.

ORDER

It is therefore Ordered that:

1. Claimant has failed to show that he is temporarily and totally disabled, thus he is not entitled to any Temporary Total Disability benefits.
2. Claimant voluntarily resigned from his employment on August 15, 2019; thus he is not entitled to TTD benefits.
3. Additionally, Claimant was responsible for his own termination from employment, effective August 15, 2019; thus he is not entitled to TTD benefits.
4. All matters not determined herein are reserved for future determination.

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

DATED: September 14, 2020

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUE

Whether Respondents have proven by a preponderance of the evidence that Claimant was responsible for his termination from employment under §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. (collectively "termination statutes") and is thus precluded from receiving Temporary Total Disability (TTD) benefits effective April 7, 2020.

FINDINGS OF FACT

1. Claimant is 21-year-old male who worked for Employer as a C-50 Operator. He began working for Employer on March 31, 2019. Claimant's job duties specifically involved operating tea bagging machines. He worked the graveyard shift from 11:15 p.m. to 7:15 a.m.

2. On February 10, 2020 Claimant injured his lower back when he slipped and fell on ice in a parking lot at work. Claimant remarked that he had no physical restrictions prior to working for Employer and performed his job duties without limitations until his work-related lower back injury.

3. On March 3, 2020 Respondents filed a General Admission of Liability (GAL) acknowledging Claimant was entitled to receive Temporary Partial Disability (TPD) benefits from February 17, 2020 through February 25, 2020 at a variable rate. The GAL also recognized that Claimant was authorized to receive Temporary Total Disability (TTD) benefits beginning February 26, 2020 on an ongoing basis at the rate of \$471.59.

4. After Claimant's industrial injury on February 10, 2020 he received work restrictions from Authorized Treating Physician (ATP) Concentra Medical Centers. Specifically, on February 12, 2020 Claimant's work restrictions consisted of no lifting in excess of 10 pounds constantly, no squatting, kneeling, ladders and sitting 80% of time. By February 17, 2020 Claimant's lifting restriction was limited to five pounds. Claimant testified that Employer mostly accommodated his work restrictions, but later in the week he was lifting in excess of his limitations.

5. On February 20, 2020 Claimant was terminated from his position with Employer. Operations Manager Brett R[Redacted] made the decision to terminate Claimant. Employer sent the formal termination paperwork to Claimant on February 27, 2020 based on violations of Employer's attendance policy.

6. On April 7, 2020 Respondents' filed a Petition to Terminate Claimant's TTD benefits. On April 17, 2020 Claimant objected to the Petition. The Division of

Workers' Compensation did not approve the Petition and invited Respondents to apply for hearing if they wished to pursue the issue.

7. Employer's attendance policy is set forth in its Employee Handbook. The Handbook explains that when an employee is not at work, an added burden is placed on fellow employees. Moreover, employees are expected to work their scheduled time, report to work on time and complete their shift unless authorized by a supervisor.

8. Absenteeism is defined as "an unscheduled absence from work on any scheduled workday due to illness, injury, or an emergency situation." In contrast, absenteeism does not include days off that are covered by Employer's vacation and personal time off policies.

9. The Handbook specifies that more than six occurrences of absenteeism or tardiness within a rolling twelve-month period is excessive and will result in disciplinary action up to and including termination of employment. The Handbook explains that each period of unscheduled consecutive absences will be recorded as one occurrence regardless of the number of days' duration up to a maximum of three days. More than three consecutive days of absences will result in additional occurrences.

10. If an employee must be absent from work or leave early during a workday, the supervisor should be notified in advance so that the employee's job responsibilities can be covered with a minimum of inconvenience to Employer and coworkers. Employees are required to call in at least a half hour prior to a scheduled shift and explain the reason for their absence.

11. Based on the circumstances, Employer has discretion in counting an occurrence as an attendance violation. Mr. R[Redacted] explained that he worked with employees when possible because Employer's goal was to retain employees. In fact, Mr. R[Redacted] and Claimant agreed that Claimant had a number of occurrences that Employer did not charge as attendance violations. The provision of a doctor's excuse to Employer does not preclude an occurrence from counting as an attendance violation absent Employer's discretion. Specifically, Claimant had multiple occurrences that Employer did not count toward violations of the attendance policy when he was dealing with family, dental and medical issues.

12. By September 28, 2019 Claimant had been charged with six occurrences of absenteeism or tardiness within a rolling six-month period of his March 31, 2019 hire date. The number of occurrences was considered excessive and triggered disciplinary action.

13. Claimant received a verbal warning on December 13, 2019 documenting that he had received seven attendance policy violations. Mr. R[Redacted] counseled Claimant that he was in violation of Employer's attendance policy and was at risk of further disciplinary action. He warned Claimant that if there was no immediate and sustained improvement in performance or there were any other performance, behavior

or attendance problems he would be subject to further disciplinary action up to and including termination.

14. On January 8, 2020 Claimant again violated Employer's attendance policy. Employer prepared a formal written warning on the following day.

15. On January 15-16, 2020 Claimant had another occurrence for an unscheduled absence. Claimant received a formal warning on January 17, 2020 advising him of another attendance policy violation. Employer warned Claimant that if there was no immediate and sustained improvement in performance or if there were any other performance, behavior or attendance problems he would be subject to further disciplinary action up to and including termination.

16. Claimant provided Employer with an undated work release from Boulder County Smiles. The release specified: "[p]lease Excuse [Claimant] for any absences that may have occurred between 1/22/2020-1/24/2020, [Claimant] was seen today for an abscess/infected tooth and asked to avoid any activities that may inflame or stress the affected area. Thank you for your understanding, Dr. Gordon West D.D.S." However, Claimant testified consistently with the records from Boulder County Smiles that he did not visit the facility between January 8, 2020 and January 30, 2020.

17. Claimant also provided Employer with an undated work release from Boulder Community Health. The release provided: "[p]lease Excuse [Claimant] for any absences that may have occurred between 1/28/2020-1/30/2020, [Claimant] was seen today for heart palpitations resulting in him losing consciousness. Regards, Dr. Molly G. Ware M.D."

18. Claimant testified that he found the Boulder County Smiles and Boulder Community Health excuses on a table at his home one week apart. He remarked that he had no idea how they got there and neither he nor someone he knew drafted them.

19. Claimant missed work on January 8, 15-16, 22-24, 28-30 and February 3 and 5, 2020. The preceding dates amounted to six more violations of Employer's attendance policy after his verbal warning on December 13, 2019.

20. On February 18, 2020 Claimant received his final written warning. Employer again advised Claimant that if there was no immediate and sustained improvement in performance and if there were any other performance, behavior or attendance problems he would be subject to further disciplinary action up to and including termination.

21. Claimant's last day of work for Employer was February 20, 2020. The Employee Termination Form was also dated February 20, 2020. Although the Employee Termination Form was dated February 20, 2020, both Claimant and Mr. R[Redacted] confirmed Claimant was scheduled to work from February 22-25, 2020.

22. Claimant testified he called Employer's nurse on February 22, 2020 and was told not to return to work until he visited ATP Concentra. He was originally

scheduled to visit Concentra on February 23, 2020 but had to reschedule and went to the facility on February 25, 2020. Claimant gave the report to Employer on February 26, 2020 and was informed that he was suspended. Mr. R[Redacted] noted that the February 23-25, 2020 absences constituted “call outs” or “no call or show” at work and were also grounds for termination. Employer sent the formal termination paperwork to Claimant on February 27, 2020 based on numerous violations of Employer’s attendance policy.

23. As of February 25, 2020 Claimant’s work restrictions limited lifting to 10 pounds constantly and working no more than four hours per day. Claimant continued to treat with ATP Concentra and Spine West after termination of his employment. He received physical restrictions that limited his ability to work. On March 2, 2020 Claimant’s lifting restriction was limited to five pounds.

24. By June 29, 2020 Claimant’s work restrictions were relaxed. He was permitted to lift 20 pounds occasionally and push or pull up to 40 pounds occasionally. Claimant was authorized to bend occasionally up to three hours per day and work a complete eight-hour shift.

25. Claimant testified that he first felt some improvement of his condition after leaving work but his condition deteriorated after his physical therapy ceased in June, 2020. The Concentra report of June 29, 2020 confirmed physical therapy was suspended pending an MRI and physical medicine consultation. He also required additional diagnostic testing and physical therapy. Claimant remarked that since June his symptoms have steadily increased with bilateral lower back, hip and radiating pain into his lower extremities.

26. Respondents have proven that it is more probably true than not that Claimant was responsible for his termination from employment under the termination statutes and is thus precluded from receiving TTD benefits effective April 7, 2020. Initially, Claimant began working for Employer on March 31, 2019 and suffered an industrial injury to his lower back on February 10, 2020. Employer terminated his employment on February 20, 2020 because he frequently failed to show up or call in to work during his approximately 11 months of employment. The record reveals that Claimant willfully violated Employer’s attendance policy when he repeatedly failed to notify a supervisor that he would not be coming in or arrive late to work.

27. Employer’s Employee Handbook specifies that more than six occurrences of absenteeism or tardiness within a rolling twelve-month period is excessive and will result in disciplinary action up to and including termination of employment. The Handbook explains that each period of unscheduled consecutive absences will be recorded as one occurrence regardless of the number of days’ duration up to a maximum of three days. More than three consecutive days of absences will result in additional occurrences. By September 28, 2019 Claimant had been charged with six occurrences of absenteeism or tardiness within a rolling 6-month period of his March 31, 2019 hire date. The number of occurrences was considered excessive and triggered disciplinary action. Claimant received a verbal warning on December 13, 2019

documenting that he had received seven attendance policy violations. Mr. R[Redacted] counseled Claimant that he was in violation of Employer's attendance policy and was at risk of further disciplinary action. He warned Claimant that if there was no immediate and sustained improvement in performance or there were any other performance, behavior or attendance problems, he would be subject to further disciplinary action up to and including termination. Claimant subsequently missed work on January 8, 15-16, 22-24, 28-30 and February 3 and 5, 2020. The preceding dates amounted to six more violations of Employer's attendance policy after his verbal warning on December 13, 2019. Employer repeatedly warned Claimant that if there was no immediate and sustained improvement in performance or if there were any other performance, behavior or attendance problems he would be subject to further disciplinary action up to and including termination.

28. On February 18, 2020 Claimant received his final written warning. Employer again advised Claimant that if there was no immediate and sustained improvement in performance and if there were any other performance, behavior or attendance problems he would be subject to further disciplinary action up to and including termination. Claimant's last day of work for Employer was February 20, 2020. The Employee Termination Form was also dated February 20, 2020. Although the Employee Termination Form was dated February 20, 2020 both Claimant and Mr. R[Redacted] confirmed Claimant was scheduled to work from February 22-25, 2020. On February 26, 2020 Claimant was informed that he was suspended. Mr. R[Redacted] noted that Claimant's February 23-25, 2020 absences constituted "call outs" or "no call or show" at work and were also grounds for termination.

29. On February 27, 2020 Employer sent the formal termination paperwork to Claimant based on violations of Employer's attendance policy. Regardless of any confusion over Employer notices, the record reveals that Claimant had at least eight unscheduled, non-medical absences in his 11 months of his employment. Employer appropriately applied its attendance policy in terminating Claimant. The record reflects that Claimant was thus responsible for his termination. Through his repeated attendance violations Claimant exercised some control over the circumstances causing his termination. Claimant precipitated his employment termination by a volitional act that he would reasonably expect to cause the loss of employment. He is therefore precluded from receiving TTD benefits effective April 7, 2020.

30. Claimant contends that, even if he was responsible for his termination of employment with Employer, he is entitled to receive TTD benefits based on a worsening of condition. Despite Claimant's assertion, the record reveals that he did not suffer a worsening of condition subsequent to his termination from employment with Employer that caused a wage loss. A subsequent increase in work restrictions is not per se evidence of a worsening condition. After his termination from employment Claimant continued to treat with ATP Concentra and Spine West. He received physical restrictions that limited his ability to work. As of February 25, 2020 Claimant's work restrictions limited lifting to 10 pounds constantly and working no more than four hours per day. By March 2, 2020 Claimant's lifting restriction was limited to five pounds.

31. Claimant testified that he first felt some improvement of his symptoms after leaving work but his condition deteriorated after his physical therapy ceased in June, 2020. The Concentra report of June 29, 2020 confirmed physical therapy was suspended pending an MRI and physical medicine consultation. Claimant remarked that since June his symptoms have steadily increased with bilateral lower back, hip and radiating pain into his lower extremities. He also required additional diagnostic testing and physical therapy. However, on June 29, 2020 Claimant's work restrictions were relaxed. He was permitted to lift 20 pounds occasionally and push or pull up to 40 pounds occasionally. Claimant was authorized to bend occasionally up to three hours per day and work a complete eight-hour shift. Although Claimant required additional medical treatment after his June 29, 2020 Concentra visit, the totality of the evidence reveals that he has not demonstrated that his condition worsened after his termination of employment. His relaxed work restrictions on June 29, 2020 demonstrate that Claimant has not shown that any increase in symptoms prevented or diminished his ability to work. Accordingly, Claimant's request for TTD benefits based on a worsening of condition is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. To prove entitlement to TTD benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *See*

Sections 8-42-(1)(g), 8-42-105(4); *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office*, 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term “disability” connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (citing *Ricks v. Industrial Claim Appeals Office*, P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic*, 952 P.2d 831, 833 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

5. Under the termination statutes in §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. a claimant who is responsible for his or her termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and wage loss. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1131 (Colo. App. 2008). The termination statutes provide that, in cases where an employee is responsible for her termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, W.C. No. 4-631-681 (ICAO, Apr. 24, 2006). A claimant does not act “volitionally” or exercise control over the circumstances leading to her termination if the effects of the injury prevent her from performing her assigned duties and cause the termination. *In re of Eskridge*, W.C. No. 4-651-260 (ICAO, Apr. 21, 2006). Therefore, to establish that Claimant was responsible for her termination, respondents must demonstrate by a preponderance of the evidence that Claimant committed a volitional act, or exercised some control over her termination under the totality of the circumstances. See *Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994). An employee is thus “responsible” if she precipitated the employment termination by a volitional act that she would reasonably expect to cause the loss of employment. *Patchek v. Dep't of Public Safety*, W.C. No. 4-432-301 (ICAP, Sept. 27, 2001).

6. Section 8-42-105(4) does not bar TTD wage loss claims after a termination for which the employee was responsible when the worsening of a work-related injury incurred during that employment causes a subsequent wage loss. *Anderson v. Longmont Toyota, Inc.*, 102 P.3d 323, 326 (Colo. 2004). This is limited to cases in which the “claimant's condition worsens after the termination of employment and prevents or diminishes the claimant's ability to work,” rather than where the wage

loss is the result of the voluntary or for-cause termination of the regular or modified employment. *Id.* at 326; *Grisbaum v. Indus. Claim Appeals Office*, 109 P.3d 1054, 1056 (Colo. App. 2005). A subsequent increase in work restrictions is not per se evidence of a worsening condition, and whether a worsened condition caused the claimant's wage loss is a factual question for the ALJ. See *Apex Transportation, Inc. v. Industrial Claim Appeals Office*, 321 P.3d 630, 632 (Colo.App.2014); *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186, 191 (Colo.App.2002). An ALJ may consider several factors in determining that a worsened condition, and not an intervening termination of employment, caused the claimant's wage loss. *Apex Transportation, Inc.*, 321 P.3d at 633.

7. As found, Respondents have proven by a preponderance of the evidence that Claimant was responsible for his termination from employment under the termination statutes and is thus precluded from receiving TTD benefits effective April 7, 2020. Initially, Claimant began working for Employer on March 31, 2019 and suffered an industrial injury to his lower back on February 10, 2020. Employer terminated his employment on February 20, 2020 because he frequently failed to show up or call in to work during his approximately 11 months of employment. The record reveals that Claimant willfully violated Employer's attendance policy when he repeatedly failed to notify a supervisor that he would not be coming in or arrive late to work.

8. As found, Employer's Employee Handbook specifies that more than six occurrences of absenteeism or tardiness within a rolling twelve-month period is excessive and will result in disciplinary action up to and including termination of employment. The Handbook explains that each period of unscheduled consecutive absences will be recorded as one occurrence regardless of the number of days' duration up to a maximum of three days. More than three consecutive days of absences will result in additional occurrences. By September 28, 2019 Claimant had been charged with six occurrences of absenteeism or tardiness within a rolling 6-month period of his March 31, 2019 hire date. The number of occurrences was considered excessive and triggered disciplinary action. Claimant received a verbal warning on December 13, 2019 documenting that he had received seven attendance policy violations. Mr. R[Redacted] counseled Claimant that he was in violation of Employer's attendance policy and was at risk of further disciplinary action. He warned Claimant that if there was no immediate and sustained improvement in performance or there were any other performance, behavior or attendance problems, he would be subject to further disciplinary action up to and including termination. Claimant subsequently missed work on January 8, 15-16, 22-24, 28-30 and February 3 and 5, 2020. The preceding dates amounted to six more violations of Employer's attendance policy after his verbal warning on December 13, 2019. Employer repeatedly warned Claimant that if there was no immediate and sustained improvement in performance or if there were any other performance, behavior or attendance problems he would be subject to further disciplinary action up to and including termination.

9. As found, on February 18, 2020 Claimant received his final written warning. Employer again advised Claimant that if there was no immediate and sustained improvement in performance and if there were any other performance,

behavior or attendance problems he would be subject to further disciplinary action up to and including termination. Claimant's last day of work for Employer was February 20, 2020. The Employee Termination Form was also dated February 20, 2020. Although the Employee Termination Form was dated February 20, 2020 both Claimant and Mr. R[Redacted] confirmed Claimant was scheduled to work from February 22-25, 2020. On February 26, 2020 Claimant was informed that he was suspended. Mr. R[Redacted] noted that Claimant's February 23-25, 2020 absences constituted "call outs" or "no call or show" at work and were also grounds for termination.

10. As found, on February 27, 2020 Employer sent the formal termination paperwork to Claimant based on violations of Employer's attendance policy. Regardless of any confusion over Employer notices, the record reveals that Claimant had at least eight unscheduled, non-medical absences in his 11 months of his employment. Employer appropriately applied its attendance policy in terminating Claimant. The record reflects that Claimant was thus responsible for his termination. Through his repeated attendance violations Claimant exercised some control over the circumstances causing his termination. Claimant precipitated his employment termination by a volitional act that he would reasonably expect to cause the loss of employment. He is therefore precluded from receiving TTD benefits effective April 7, 2020.

11. As found, Claimant contends that, even if he was responsible for his termination of employment with Employer, he is entitled to receive TTD benefits based on a worsening of condition. Despite Claimant's assertion, the record reveals that he did not suffer a worsening of condition subsequent to his termination from employment with Employer that caused a wage loss. A subsequent increase in work restrictions is not per se evidence of a worsening condition. After his termination from employment Claimant continued to treat with ATP Concentra and Spine West. He received physical restrictions that limited his ability to work. As of February 25, 2020 Claimant's work restrictions limited lifting to 10 pounds constantly and working no more than four hours per day. By March 2, 2020 Claimant's lifting restriction was limited to five pounds.

12. As found, Claimant testified that he first felt some improvement of his symptoms after leaving work but his condition deteriorated after his physical therapy ceased in June, 2020. The Concentra report of June 29, 2020 confirmed physical therapy was suspended pending an MRI and physical medicine consultation. Claimant remarked that since June his symptoms have steadily increased with bilateral lower back, hip and radiating pain into his lower extremities. He also required additional diagnostic testing and physical therapy. However, on June 29, 2020 Claimant's work restrictions were relaxed. He was permitted to lift 20 pounds occasionally and push or pull up to 40 pounds occasionally. Claimant was authorized to bend occasionally up to three hours per day and work a complete eight-hour shift. Although Claimant required additional medical treatment after his June 29, 2020 Concentra visit, the totality of the evidence reveals that he has not demonstrated that his condition worsened after his termination of employment. His relaxed work restrictions on June 29, 2020 demonstrate that Claimant has not shown that any increase in symptoms prevented or diminished his ability to work. Accordingly, Claimant's request for TTD benefits based on a worsening of condition is denied and dismissed.

ORDER

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

1. Claimant is precluded from receiving TTD benefits effective April 7, 2020.
2. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at <http://www.colorado.gov/dpa/oac/forms-WC.htm>.*

DATED: September 15, 2020.

DIGITAL SIGNATURE:


Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-122-747-001**

ISSUE

1. Whether Claimant established by a preponderance of evidence that she suffered an injury in the course and scope of her employment on or about October 16, 2019.
2. Whether Claimant has established by a preponderance of the evidence that she is entitled to reasonable, necessary, and related medical benefits because of a work-related injury.
3. Whether Claimant has established by a preponderance of the evidence that the medical care and treatment she has received by Banner Urgent Care; Dr. Stacey Garber and Dr. Thomas Pazik is reasonable and necessary and related to her work injury.
4. Whether Claimant has established by a preponderance of the evidence that she is entitled to temporary total disability benefits because of a work-related injury from October 17, 2019 until terminated pursuant to statutes, rule, or further order?
5. Determination of Claimant's average weekly wage (AWW).
6. If Claimant proves a compensable injury, whether Claimant has demonstrated by a preponderance of the evidence that penalties should be imposed against Respondent under Section 8-43-408, C.R.S. for employer's alleged failure to obtain and maintain workers' compensation insurance.
7. Whether Claimant has demonstrated by a preponderance of the evidence that penalties should be imposed pursuant to Section 8-43-304, C.R.S., for Respondent's alleged failure to timely file an Employer's First Report of Injury. and for failing to timely file either a Notice of Contest or Admission of Liability.

FINDINGS OF FACT

1. Claimant is a 73-year-old female who was employed by Employer as a cashier at Employer's liquor store beginning on or about September 2, 2019.
2. Claimant's duties included cashiering, stocking, and cleaning. Claimant's job duties required her to stand and walk approximately 7.5 hours per day and lift up to 40 pounds.
3. On October 16, 2019, Claimant was working for Employer when she was sent to lunch. Claimant was walking through the store when she tripped on a box located between the washroom and the hallway. Her knee "snapped" and "popped." Claimant reported her injury to her manager, Manny S[Redacted], and then continued on to lunch. When Claimant returned from lunch, she again reported her injury to Mr. S[Redacted].

4. At the time of Claimant's injury, Employer did not have workers compensation insurance. Employer did not provide Claimant with a list of authorized treating providers. Employer did not provide Claimant with any instructions on what to do with respect to her injury.

5. Claimant credibly testified that she had no problems with her right knee prior to October 16, 2019.

6. On October 16, 2019, Claimant self-referred to Banner Urgent Care where she was seen by Renee Dutcher, NP. Claimant reported she tripped over a box on the floor at work when going to the bathroom resulting in an injury to her right knee. Ms. Dutcher diagnosed Claimant with a work-related right knee injury. Ms. Dutcher authorized Claimant to return to work on modified duty the following day, subject to restrictions including walking and standing less than 2 hours per day, no crawling, kneeling, squatting, or climbing. (Ex. 1). Ms. Dutcher provided Claimant with a copy of Exhibit 1, which set forth her work restriction. Claimant provided a copy of Ex. 1 to Employer the following day, October 17, 2019.

7. Due to the work restrictions, Claimant was not able to fully perform her duties for Employer. Employer did not offer Claimant modified duty or other opportunities to work for Employer following the October 16, 2019 injury.

8. On November 1, 2019, Claimant saw Stacey Garber, M.D., her primary care physician at Family Physicians of Greeley. Claimant reported that tripped over a box and experienced painful twisting of her knee when she caught herself. Claimant reported pain in her right knee with persistent effusion, pain with movement, and joint-line tenderness. Dr. Garber diagnosed Claimant with a right knee injury, recommended an MRI of the right knee, and referred Claimant to physical therapy. (Ex. 2)

9. On November 20, 2019, Claimant saw Thomas Pazik, M.D., for an orthopedic evaluation. Claimant reported experiencing no problems with her right knee prior to October 16, 2019 when she tripped over a box and felt a painful "pop." Dr. Pazik reviewed Claimant's MRI and performed a physical examination. Dr. Pazik diagnosed Claimant with an acute lateral meniscus tear of the right knee. Dr. Pazik recommended initially attempting non-operative measures to address Claimant's injury and performed a right knee injection. (Ex. 3)

10. Claimant returned to Dr. Pazik on December 3, 2019. Claimant reported no relief from the November 20, 2019 right knee injection performed by Dr. Pazik. Dr. Pazik diagnosed Claimant with tear of the lateral meniscus of the right knee and recommended a right knee arthroscopy with partial lateral meniscectomy for treatment of the meniscal tear. (Ex. 3)

11. On December 18, 2019, Dr. Pazik performed an arthroscopic partial lateral meniscectomy on Claimant's right knee. Following surgery, Claimant was referred to physical therapy once per week for six to eight weeks. (Ex. 3)

12. On December 31, 2019, Claimant saw Ryan Nettles, PA at Dr. Pazik's office for a follow up evaluation. Claimant reported some intermittent calf swelling and concern of a possible blood clot. A doppler ultrasound was performed which was negative. PA Nettles noted Claimant's symptoms were slowly improving. On examination, PA Nettles found mild diffuse swelling at Claimant's right knee. He also noted moderate tenderness at the mid distal thigh likely due to intra-operative tourniquet placement. PA Nettles noted that despite the Claimant's persistent swelling, her progress was satisfactory. (Ex. 3)

13. On January 28, 2020, Claimant saw Dr. Pazik. Claimant reported her knee was still very stiff and "buckles" on her constantly. Claimant reported she had not returned to work. On examination, Dr. Pazik, noted a mild right a mild right antalgic gait, but when observed walking down the hallway exiting the clinic, claimant walked slowly without asymmetry and with a non-antalgic gait. Due to Claimant's ongoing complaints, Dr. Pazik performed a right knee injection. Dr. Pazik did not recommend any specific work restrictions. (Ex. 3)

14. On April 21, 2020, Claimant saw Dr. Pazik. Claimant reported her knee was "popping and locking up" as well as giving out. Claimant reported progressive difficulty with activities of daily living (ADLs) due to right knee pain, marked antalgia, progressive valgus alignment and difficulty with weightbearing, and significant start up stiffness. X-rays demonstrated progressive narrowing of the lateral compartment with nearly bone-to-bone contact throughout the lateral compartment on 45-degree weightbearing. Dr. Pazik diagnosed Claimant with osteoarthritis of right knee. Dr. Pazik noted "rapidly progressive valgus arthrosis of the right knee after prior injury at work and subsequent arthropathy with partial lateral meniscectomy 12/18/2019." Dr. Pazik recommended use of two crutches for assisted ambulation weightbearing as tolerated and ordered an MRI of the right knee. Dr. Pazik opined that Claimant was likely to require TKA (total knee replacement). (Ex. 3)

15. On May 26, 2020, Claimant saw Dr. Pazik. Dr. Pazik reviewed Claimant's right knee MRI (performed on May 11, 2020). Dr. Pazik noted that the MRI showed significant progression of the lateral compartment chondrosis with full-thickness chondral degeneration, loss of the TP with sub-adjacent reactive subchondral edema, which was a new finding compared to the previous MRI. Dr. Pazik diagnosed Claimant with osteoarthritis of the right knee and recommended right total knee replacement. (Ex. 3)

16. On June 9, 2020, Claimant saw PA Nettles. Based on his examination, PA Nettles assessed that Claimant had failed non-operative measures and was experiencing increasing difficulty and inability to perform activities of daily living independently and comfortably. PA Nettles indicated Claimant's planned procedure was right total knee arthroplasty. PA Nettles prescribed a front-wheeled walker, high toilet seat and shower chair. (Ex. 3)

17. On June 15, 2020, Dr. Pazik performed a right total knee replacement on Claimant. (Ex. 3)

18. As of the date of hearing, Claimant was continuing to receive physical therapy twice per week. Claimant credibly testified that she continues to experience pain, tightness, and limited range of motion. Claimant uses a cane to assist with walking. Claimant also testified that she has not been placed at maximum medical improvement (MMI).

19. Claimant credibly testified that since her October 16, 2019 injury, she has not been offered work within her restrictions by Employer. Claimant has not worked elsewhere since October 16, 2019.

20. Manny S[Redacted], the Employer's store manager, testified at hearing. Mr. S[Redacted] testified that Claimant had complained of knee pain prior to her injury of October 16, 2019. Mr. S[Redacted] also testified that on October 17, 2019, Claimant provided him a copy of Exhibit 1, and that Claimant was unable to perform her job duties on that day due to her knee. Mr. S[Redacted] testified that he did not know whether Employer had workers' compensation insurance at the time of Claimant's injury.

21. Claimant testified her hourly wage at the time of her injury was \$12.50 per hour. Employer paid Claimant wages for work performed between September 2, 2019 and October 16, 2019 (a period of thirty workdays, or six 5-day weeks.). For the period of September 2, 2019 until October 16, 2019, Claimant received wages from employer in the amount of \$2,535.42. (Ex. 5) Claimant's wages of \$2,535.42 represents payment for 202.83 hours (i.e., $\$2,535.42 \div \$12.50 = 202.83$), or 33.8 hours per week ($202.83 \text{ hours} \div 6 \text{ weeks} = 33.8 \text{ hours/week}$). Claimant's average weekly wage (AWW) is \$422.57 per week ($33.8 \text{ hours/week} \times \$12.50 = \$422.57$).

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. See § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. See § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id.* at 641. When determining credibility,

the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Compensability & General Medical Benefits

To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S.; see *City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. C.R.S. § 8-41-301(1)(c). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.*, 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the ALJ. *Faulkner*, 12 P.3d at 846. A compensable injury is an injury which "arises out of" and "in the course of" employment. See C.R.S. § 8-41-301(1)(b); *Price v. Industrial Claim Appeals*, 919 P.2d 207 (Colo. 2012).

Under section 8-42-101(1)(a), C.R.S., respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of the industrial injury. See *Owens v. Industrial Claim Appeals Office*, 49 P.3d 1187, 1188 (Colo. App. 2002). All results flowing proximately and naturally from an industrial injury are compensable. *Id.*, citing *Standard Metals Corp. v. Ball*, 474 P.2d 622 (Colo. 1970). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.*, 236 P.2d 293 (Colo. 1951). A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission v. Royal Indemnity Co.*, 236 P.2d 293 (Colo. 1951). Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc.*, W.C. No. 4-117-758 (ICAO April 7, 2003). The question of whether a particular medical treatment is reasonably necessary to cure and relieve a claimant from the effects of the injury is a question of fact. *City & County of Denver v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984).

Claimant has established by a preponderance of the evidence that she sustained a work-related injury to her right knee on or about September 2, 2019. Claimant credibly testified that she tripped over a box at her place of employment and sustained an injury to her right knee while walking to the restroom at Employer's business. Claimant's testimony was not credibly rebutted by Respondents and is corroborated by Claimant's relevant, contemporaneous medical records, including records from Banner Urgent Care on the date of her injury. Mr. S[Redacted]'s testimony that Claimant came to work on October 16, 2019 with a painful knee is not credible. Claimant has met the burden to establish that her right knee injury is a compensable injury.

The ALJ finds the Claimant met her burden of proof of establishing that her right knee injury is related to or caused by her October 16, 2019 industrial injury and, therefore, treatment for her right knee is reasonably necessary to cure or relieve the effects of her October 16, 2019 injury or to prevent further deterioration of this work-related condition. Respondent is responsible for and shall pay general medical benefits that are reasonably necessary to relieve the effects of Claimant's October 16, 2019 injury.

Specific Medical Benefits

The question of whether medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). The ALJ's determinations in this regard must be upheld if supported by substantial evidence. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002). Section 8-43-301(8), C.R.S. The existence of evidence which, if credited, might permit a contrary result affords no basis for relief on appeal. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002).” *In the Matter of the Claim of Bud Forbes, Claimant*, No. W.C. No. 4-797-103, 2011 WL 5616888, at *3 (Colo. Ind. Cl. App. Off. Nov. 7, 2011).

Section 8-43-404(5)(a), C.R.S. permits an employer or insurer to select the treating physician in the first instance. *Yeck v. Indus. Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999). However, the Colorado Workers' Compensation Act requires that Employer most provide injured workers with a list of designated treatment providers. Section 8-43-404(5)(a)(1)(A), C.R.S. states that, if the employer or insurer fails to provide an injured work with a list of physicians or corporate medical providers, “the employee shall have the right to select a physician.” W.C.R.P. Rule 8-2 further clarifies that once an employer is on notice that an on-the-job injury has occurred, “the employer shall provide the injured worker with a written list of designated providers.” W.C.R.P. Rule 8-2 additionally provides that the remedy for failure to comply with the preceding requirement is that “the injured worker may select an authorized treating physician of the worker's choosing.” An employer is deemed notified of any injury when it has “some knowledge of the accompanying facts connecting the injury of illness with the employment and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim.” *Bunch v. Industrial Claim Appeals Office*, 148 P.3d 381, 383 (Colo. App. 2006).

Claimant has established by a preponderance of the evidence that Employer failed to provide a list of designated physicians. Thus, Claimant was permitted to select a treating physician. After Claimant reported her injury and sought medical care with Banner Urgent Care, she obtained treatment from her primary care physician, Stacey Garber, M.D. The ALJ finds that Dr. Garber is Claimant's ATP.

Authorized providers are those to whom the ATP refers the Claimant in the normal progression of authorized treatment. *Town of Ignacio v. Industrial Claim Appeals Office*, 70 P.3d 513, (Colo. App. 2002) Dr. Garber referred the Claimant to Dr. Pazik, an orthopedic surgeon. Dr. Garber and Dr. Pazik referred Claimant for MRIs and physical therapy. Claimant received authorized medical care through Banner Urgent Care, Stacey Garber, M.D., Thomas Pazik, M.D., and physical therapy. Claimant has established by a preponderance of the evidence that the care and treatment she received from Banner Urgent Care, Dr. Garber, and Dr. Pazik was reasonable and necessary to cure or relieve the effects of the October 16, 2019 work injury. Employer is financially responsible for Claimant's work injury treatment and shall pay to Claimant the reasonable value of medical treatment for treatment from Banner Health, Dr. Garber, Dr. Pazik and physical therapy for her work-related right knee injury. Claimant submitted no evidence as to the amount of medical expenses incurred to date. Consequently, the ALJ is unable to make an award of a specific amount of medical benefits incurred.

Average Weekly Wage

Section 8-42-102(2), C.R.S. requires the ALJ to determine a claimant's AWW based on her earnings at the time of injury. The Judge must calculate the money rate at which services are paid to the claimant under the contract of hire in force at the time of injury. *Pizza Hut v. ICAO*, 18 P.3d 867, 869 (Colo. App. 2001)

An AWW of \$422.57 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity based on Claimant's testimony that she earned \$12.50 per hour working and Claimant's 2019 W-2 from Employer. Claimant's AWW of \$422.57 results in TTD benefits in the amount of \$281.71 per week.

Entitlement to TTD Benefits

To prove entitlement to Temporary Total Disability (TTD) benefits, Claimant must prove her industrial injury caused a disability lasting more than three work shifts, she left work as a result of the disability, and the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office*, 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage-earning capacity as demonstrated by Claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999).

The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) TTD benefits ordinarily continue until terminated by the occurrence of one of the criteria listed in § 8-42-105 (3), C.R.S. The existence of disability is a question of fact for the ALJ. No requirement exists that a claimant produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic*, 952 P.2d 831, 833 (Colo. App. 1997).

Claimant sustained an injury to her right knee and was initially placed on work restrictions on October 16, 2019, including walking and standing less than 2 hours, and no crawling, kneeling, squatting, or climbing. Claimant credibly testified that her position as a cashier required her to stand approximately 7.5 hours per day, and that she was required to lift approximately 40 lbs. Claimant credibly testified that she has been unable to return to her position as a cashier due to the restrictions of her right knee. Medical records demonstrate that, since her injury, Claimant continually complained of pain in her right knee with standing, and ongoing stiffness and discomfort. The ALJ finds that Claimant's testimony and medical records, including records of a total knee replacement in June 2020, establishes by a preponderance of the evidence that Claimant is medically incapacitated with restrictions of bodily function that cause her to have work restrictions and impairment in her wage-earning capacity. Since October 16, 2020, Claimant has been unable to resume her prior work. Her wage-earning capacity is thus impaired due to her industrial injury and resulting disability. Claimant testified that she has not returned to work since October 16, 2020. Claimant has established by a preponderance of the evidence an entitlement to TTD benefits beginning on October 17, 2020 and continuing until terminated by law.

Employer shall pay to Claimant TTD benefits for the period of October 17, 2019 through September 16, 2020 in the amount of \$13,522.08 representing 48 weeks of TTD payments. Employer shall continue to pay Claimant TTD benefits in the amount of \$281.67 per week until terminated by law.

Penalties

Uninsured Employer

Claimant seeks penalties under § 8-43-408(1), C.R.S. Claimant's Position Statement argues for a penalty of fifty percent. Prior to July 1, 2017, Section 8-43-408(1), C.R.S., provided that in cases where the employer is subject to the provisions of the Colorado Workers' Compensation Act and has not complied with the insurance provisions required by the Act, the compensation or benefits payable to the claimant were to be increased fifty percent. Effective July 1, 2017, Section 8-43-408, C.R.S. was amended and the language regarding a fifty percent increase in claimant benefits was removed. The version of Section 8-43-408 C.R.S. in effect at the time of Claimant's October 16, 2019 work injury states that in cases where the employer is subject to the provisions of the Colorado Workers' Compensation Act and has not complied with the insurance provisions required by the Act, the employer is subject to a penalty and additional twenty-

five percent of the benefits ordered, which is payable to the Colorado uninsured employer fund.

Claimant has demonstrated by a preponderance of the evidence that the Employer did not have workers' compensation coverage at the time of Claimant's October 16, 2019 work injury. For its failure to obtain and maintain workers' compensation insurance, the Employer shall pay penalties of \$3,380.04 to the Colorado uninsured employer fund; (which is an amount equal to 25% of the total unpaid TTD benefits owed as of September 16, 2020). The record contains no evidence of the amount of medical bills owed. Consequently, the ALJ is unable to calculate any penalty to be assessed as a percentage of medical bills, and therefore assesses no penalty for unpaid medical benefits.

Failure to Timely File Employer's First Report of Injury and Notice of Contest or Admission of Liability:

Section 8-43-304 (a), C.R.S., governs when penalties may be imposed in a workers' compensation matter and provides, in relevant part, that any employer or insurer:

“who violates any provision of [the Workers' Compensation Act], or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or panel..., or fails, neglects, or refuses to obey any lawful order..., shall be subject to ... a fine of not more than one thousand dollars per day for each such offense.”

Section 8-43-304(1) identifies four categories of conduct and authorizes the imposition of penalties when an employer or insurer: (1) violates any provision of the Act; (2) does any act prohibited by the Act; (3) fails or refuses to perform any duty lawfully mandated within the time prescribed by the director or Panel; or (4) fails, neglects, or refuses to obey any lawful order of the director or Panel. *Pena v. Industrial Claim Appeals Office*, 117 P.3d 84 (Colo. App. 2005). The imposition of penalties under § 8-43-304(1), *supra*, requires a two-step analysis. The claimant must first prove by a preponderance of the evidence that the disputed conduct constituted a violation of statute, rule, or order¹ before a court can assess penalties against a respondent. *Allison v. Industrial Claim Appeals Office*, 916 P.2d 623 (Colo. App. 1995). If the ALJ finds a violation, the ALJ must determine whether the employer's actions which resulted in the violation were objectively reasonable. *See City Market, Inc. v. Industrial Claim Appeals Office*, 68 P.3d 601 (Colo. App. 2003). The reasonableness of the employer's action depends on whether it is

¹ Section 8-40-201(15) defines an “order” as “any decision, finding and award, direction, rule, regulation, or other determination arrived at by the director or an administrative law judge.” In *Rio Blanco County*, *supra*, the court of appeals affirmed the imposition of a penalty as a failure to obey an “order” within the meaning of §8-43-304(1), for failure to comply with then W.C.R.P. VIII which at the time provided workers' compensation adjudication rules. To summarize, violation of a Workers' Compensation Rule of Procedure is tantamount to violation of an order.

predicated in a rational argument based in law or fact. *Jiminez v. Industrial Claim Appeals Office*, 107 P.3d 965 (Colo. App. 2003). The standard is “an objective standard measured by reasonableness of the [respondent’s] action and does not require knowledge that the conduct was unreasonable.” *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office*, 907 P.2d 676 (Colo. App. 1995).

The fine shall be apportioned in whole or part at the discretion of the director or administrative law judge between the aggrieved party and the workers’ compensation cash fund created in Section 8-44-112, C.R.S. with the amount apportioned to the aggrieved party being a minimum of fifty percent of any penalty assessed. See § 8-43-304, C.R.S. In addition, § 8-43-305 C.R.S. provides that each day a party engages in the violation is construed as a separate offense.

Claimant asserts Employer failed to timely file an Employer’s First Report of Injury, pursuant to § 8-43-101 (1), C.R.S., which provides:

Within ten days after notice or knowledge that an employee has contracted such an occupational disease, or the occurrence of a permanently physically impairing injury, or lost-time injury to an employee, or immediately in the case of a fatality, the employer shall, upon forms prescribed by the division for that purpose, report said occupational disease, permanently physically impairing injury, lost-time injury, or fatality to the division.

Similarly, WCRP 5-2(B)(2), requires that a First Report of Injury be filed with the Division within ten days after notice or knowledge that an injury or occupations disease has resulted in lost time from work for the injured employee in excess of three shifts or calendar days.

The record before the ALJ contains no evidence regarding Employer’s filing or failure to file a First Report of Injury. Neither Claimant nor Employer offered testimony on this issue and neither party submitted documentary evidence to indicate whether a First Report of Injury was filed. As such, the ALJ cannot determine whether Employer did or did not comply with § 8-43-101 (1), C.R.S. or WCRP 5-2. The ALJ finds that Claimant failed to prove by a preponderance of the evidence that penalties should be imposed against Employer for violation of § 8-43-101 (1), C.R.S. or WCRP 5-2.

Claimant also asserts Employer failed to timely admit or deny liability and seeks penalties based on this allegation. Section 8-43-203(1)(a), C.R.S. provides:

The employer or, if insured, the employer’s insurance carrier shall notify in writing the division and the injured employee ... within twenty days after a report is, or should have been filed with the division pursuant to section 8-43-101, whether liability is admitted or contested; except that, for purpose of this

section, any knowledge on the part of the employer, if insured, is not knowledge on the part of the insurance carrier.

Similarly, WCRP 5-2(C) imposes the requirement to file either an admission or contest on the insurer within 20 day after the date the employer's First Report of Injury is filed with the Division.

Section 8-43-203(2)(a), C.R.S. provides that if such notice is not filed, "the employer, or if insured, the employer's insurance carrier, may become liable to the claimant, if successful on the claim for compensation, for up to one day's compensation for each failure to so notify." The claimant bears the burden of proof to establish the circumstances justifying the imposition of the penalty. See *Pioneer Hospital v. Industrial Claim Appeals Office*, 114 P.3d 97 (Colo. App. 2005).

The record before the ALJ contains no evidence regarding Employer's notification to the Division or Claimant as to whether liability was admitted or contested. Neither Claimant nor Respondent offered testimony on this issue and no documentary evidence was admitted into evidence to indicate when, or if, an admission or contest of liability was filed. The ALJ finds that Claimant failed to prove by a preponderance of the evidence that penalties should be imposed against Employer for violation of § 8-43-203 (1), C.R.S.

Claimant's Position Statement indicates that Employer filed its First Report of Injury on January 27, 2020 and filed a Notice of Contest on January 23, 2020. However, these representations are not supported by sworn testimony or admitted documentary evidence and are therefore not part of the record. However, assuming *arguendo*, these statements are correct, Respondent filed both a Notice of Contest and First Report of Injury within 20 days of Claimant's January 9, 2020 Application for Hearing, and therefore filed within the time period permitted to cure under § 8-43-304(4), C.R.S.

ORDER

It is therefore ordered that:

1. Claimant has established by a preponderance of evidence that she suffered an injury in the course and scope of her employment on or about October 16, 2019.
2. Claimant is entitled to a general award of reasonable and necessary medical benefits to treat her right knee injury.
3. Claimant has established by a preponderance of the evidence that the medical care and treatment she has received by Banner Urgent Care; Dr. Stacey Garber, Dr. Thomas Pazik, and physical therapy for her right knee injury is reasonable and necessary and related to her work injury.
4. Claimant's average weekly wage (AWW) is \$422.50 (resulting in TTD benefits in the amount of \$281.71 per week).

5. Claimant's claim for TTD benefits from October 17, 2019 through the date of this Order is granted. Employer shall pay to Claimant TTD benefits for the period of October 17, 2019 through September 14, 2020 in the amount of \$13,522.08 representing 48 weeks of TTD payments. Employer shall continue to pay Claimant TTD benefits in the amount of \$281.67 per week until terminated pursuant to statute, rule, or further order.
6. Respondent shall pay penalties pursuant to section 8-43-408 (5), C.R.S., in the amount of \$3,380.52 to the Colorado uninsured employer fund; (which is an amount equal to 25% of the total unpaid TTD benefits owed as of September 16, 2020).
7. Claimant failed to establish by a preponderance of the evidence that penalties should be imposed pursuant to § 8-43-304, C.R.S., for Respondent's alleged failure to timely file an Employer's First Report of Injury. and for failing to timely file either a Notice of Contest or Admission of Liability. Claimant's request for penalties pursuant to § 8-43-304 is denied and dismissed.
8. All matters not determined herein are reserved for future determination.

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



DATED: September 16, 2020.

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-098-497-004**

ISSUE

1. Whether Claimant established, by a preponderance of the evidence, that he sustained a compensable, work-related injury to spinal levels L2-L3, L3-L4, L4-L5 and L5-S1 on December 20, 2018.
2. Whether Claimant established, by a preponderance of the evidence, that he is entitled to reasonable, necessary and related medical benefits for his December 20, 2018 work-related injury.
3. Whether Claimant established, by a preponderance of the evidence, that his March 29, 2019 surgery on spinal levels L2-L3, L3-L4, L4-L5 and L5-S1 was reasonable and necessary to cure or relieve the effects of his December 20, 2018 the industrial injury.
4. If Claimant fails to establish any of the above, how financial responsibility for medical benefits should be allocated with respect to Claimant's March 29, 2019 surgery and subsequent treatment.

FINDINGS OF FACT

1. Claimant is a 56-year-old male employed by Employer as a rental manager and sales representative. Claimant sustained an admitted industrial injury to his back on December 20, 2018, while working for Employer. On December 20, 2018, Claimant was picking up a box weighing approximately 40 lbs., when he experienced pain in his left lower back. Claimant reported the incident to Employer on or about and was instructed to seek treatment on his own. Because Claimant's injury occurred just before the Christmas holiday, Claimant did not immediately seek medical attention.
2. Claimant initially sought treatment on December 28, 2018, at Rocky Mountain Urgent Care, where he was seen by Christopher Wright, P.A., for complaints of lower back pain. Claimant reported left-sided electric and tingling-like pain radiating from his low back to his left calf and foot. Claimant denied weakness in the affected area. Mr. Wright diagnosed Claimant with radiculopathy in the lumbar region and advised Claimant to consider physical therapy. Claimant was instructed to return to work at light duty. (Ex. E).
3. On January 8, 2019, Claimant saw Lawrence Coulehan, M.D. and reported his back was painful following a work injury. Claimant reported receiving some initial relief from prednisone, but the pain had returned. Claimant reported experiencing left sciatic radiation to foot and left foot weakness. Dr. Coulehan's record appears to indicate he made a "back referral" which the ALJ infers is a referral to a back specialist. (Ex. H).

4. On January 14, 2019, Claimant saw Okezie Aguwa, M.D, of Denver Spine Surgeons. Claimant reported a 4-week history of low back pain and left lower extremity pain. Claimant reported bilateral foot numbness left worse than right. Claimant reported some of his numbness was prior to the work accident, but he had significantly worsened. Claimant reported weakness in his left leg with the leg giving out. Claimant reported that his left buttock and leg pain were significantly worse than his back pain. On his patient information form, Claimant reported “sharp pain in lower lumbar that radiates down back of leg into feet.” Claimant reported his symptoms as “constant pain (stabbing in lower back & butt) that radiates into back of knee, then radiating into ankle & feet, feet are numb, issues with incontinence, no erections, trouble walking, bending, standing, leg cramps at night.” Claimant’s patient information form did not disclose prior imaging for his lumbar spine from 2011 or a prior injury to his lower back but did disclose a neck fusion surgery performed in 2011. (Ex. F. & 11)

5. On January 14, 2019, Dr. Aguwa diagnosed Claimant with low back pain after lifting a 40 lb. motor at work; intervertebral disc disorders with radiculopathy, lumbar region; other intervertebral disc degeneration, lumbar region; L3-L4 DDD (degenerative disc disease); lumbar radiculopathy; and left lower extremity weakness. Dr. Aguwa ordered an MRI of Claimant’s lumbar spine. (Ex. F & 11).

6. On January 26, 2019, Claimant had a lumbar MRI. The radiologist, Dr. Vincent Herlihy, M.D., interpreted the MRI as showing the following at the L2-L3 spinal level: “There is disc desiccation, mild loss of disc height, and a mild to moderate circumferential disc bulge with left-sided disc osteophyte complex formation. There is a small superimposed caudal left paracentral disc extrusion. There is mild to moderate left and mild right facet joint osteoarthritis with ligamentum flavum hypertrophy. There is mild central canal stenosis with a 9 mm AP thecal sac diameter. There is mild to moderate left and mild right lateral recess stenosis with contact of the descending left L3 nerve roots. There is also moderate to severe left and mild right neural foraminal stenosis with flattening of the exiting left L2 nerve roots. (Ex. 5).

7. Dr. Herlihy interpreted the MRI as showing L3-L4 disc desiccation, moderate to severe loss of disc height, and a moderate circumferential disc osteophyte complex. Dr. Herlihy noted mild bilateral facet joint osteoarthritis with ligamentum flavum hypertrophy; moderate central canal stenosis with an 8 mm AP thecal sac diameter and moderate bilateral neural foraminal stenosis with contact of the bilateral exiting L3 nerve roots. (Ex. 5).

8. Dr. Herlihy’s report of January 26, 2019 includes the following Impression: “Additional lumbar degenerative disc disease and facet arthropathy with moderate central canal stenosis at L3-L4. There is fairly diffuse neural foraminal stenosis which is most prominent on the left at L2-L3 where it is moderate to severe with flattening of the exiting L2 nerve roots. Additional stenoses are detailed above.” (Ex. 5).

9. On January 28, 2019, Claimant saw Dr. Aguwa for review of his lumbar MRI. Dr. Aguwa interpreted the MRI as showing multilevel disc degeneration throughout the lumbar spine. At L2-L3, the MRI showed a left paracentral disc extrusion causing lateral

recess and entry foraminal narrowing. At L3-L4, the MRI showed severe loss of disc height and moderate central stenosis, with moderate foraminal narrowing. At L4-L5, the MRI showed moderate central stenosis and severe left lateral recess stenosis due to an inferior disc extrusion. At L5-S1 there was a large left-sided paracentral disc extrusion with severe central and left recess stenosis. Dr. Aguwa's assessment included, among other things, Left paracentral disc herniations at L5-S1, L2-L3, L3-L4 and L4-L5. Dr. Aguwa recommended a left-sided decompression and microdiscectomy at all levels from L2-S1. (Ex. F). Dr. Aguwa's medical record did not opine as to the cause of Claimant's lumbar pathology.

10. On January 28, 2019, Dr. Aguwa completed an "Attending Physician's Report of Workability" which indicates that claimant's diagnosis was Left L2-L3, L3-L4, L4-L5, L5-S1 disc herniations. In response to the statement "Work Related," Dr. Aguwa checked the box labeled "Yes." Dr. Aguwa indicated Claimant was unable to work from January 28, 2019 to "to be determined." (Ex. 11).

11. On January 29, 2019, Dr. Aguwa's office submitted a request for authorization to Insurer seeking authorization to perform Left L2-S1 Posterior lumbar microdecompression and microdiscectomy. (Ex. 11).

12. On March 22, 2019, Claimant saw Gerard Bernales, M.D. for a preoperative history and physical. Claimant reported a history of chronic lower back pain with bilateral sciatica symptoms and occasional urinary symptoms. (Ex. G).

13. On March 27, 2019, Claimant saw Dr. Aguwa for a pre-operative visit. Dr. Aguwa noted that Claimant had tried and failed many non-operative treatment modalities including but not limited to activity modification, over the counter and/or prescription medication, physical therapy, and injections. Despite this, the patient continues to be clinically debilitated and has elected to undergo surgical management. Dr. Aguwa's surgical plan was left L2-L3 microdecompression and microdiscectomy. (Ex. 11)

14. On April 9, 2019, Claimant saw Dr. Aguwa for a post-operative visit. At that time, Claimant continued to have mild left lower extremity pain and some numbness and tingling in his left foot. (Ex. F).

15. On May 7, 2019, Claimant saw Dr. Aguwa for a four week follow up visit. Claimant reported some mild pain in the left buttock and the posterior aspect of the left thigh and some improvement in the numbness of his left foot.

16. On March 29, 2019, Dr. Aguwa performed surgery on Claimant, including posterior lumbar microdecompression at L2-L3, L3-L4 L4-5 and L5-S1; Left L5-S1 microdiscectomy; use of intraoperative microscope, use of intraoperative fluoroscopy, and use of intraoperative monitoring. Dr. Aguwa's relevant postoperative diagnosis was lumbar spinal stenosis at L2-S1; left paracentral disc herniation at L5-S1; left paracentral disc protrusion at L2-L3, L3-L4; left lateral recess stenosis at L4-L5 and left lower extremity radiculopathy. Dr. Aguwa's operative report indicates that the MRI

demonstrated multi-level degenerative disc disease, large left paracentral disc herniation at L5-S1, and spinal stenosis from L2-S1. (Ex. G; Ex. 8).

17. Dr. Aguwa's operative report from March 29, 2019 describes the surgical procedure performed in detail. As part of the procedure, Claimant was administered preoperative antibiotics. Dr. Aguwa used a single incision and dissection to access Claimant's L2-S1 spinal lamina. Dr. Aguwa performed the decompression at the L5-S1 level first, and then performed an L5-S1 microdiscectomy. He then performed decompressions at the L2-L3, L3-L4, or L4-L5 levels. Dr. Aguwa did not perform microdiscectomies at the L2-L3, L3-L4, or L4-L5 levels. A hemovac drain was placed and the wound was closed. The patient was then transferred to the post-anesthesia care unit (PACU). Dr. Aguwa was assisted by Scott Como and an anesthesiologist, Dr. Alt, was also present in the operative suite. In addition, intraoperative neurophysiology was also provided during the surgery by IONM Technologist Tae Gugate, CNIM. The Intraoperative Neurophysiology report indicates the total professional time for the ION was 3 hours and 5 minutes. The Intraoperative Neurophysiology report was prepared by Badreldin Ibrahim, M.D. Dr. Ibrahim's "Technical; Report" indicates Claimant was in the operating room for 3 hours and 45 minutes. (Ex. G).

18. Following surgery, Claimant received physical therapy at Panorama Physical Therapy, from April 23, 2019 through May 23, 2019.

19. On July 30, 2019, Claimant saw Gary Ghiselli, M.D., of Denver Spine Surgeons. Claimant reported that he continued to have weakness in his left leg, that he felt may be getting worse. He also reported that his ED had gotten worse. Dr. Ghiselli ordered an MRI with contrast of Claimant's lumbar spine to assess the decompression, and an EMG/nerve conduction study of claimant's left leg to assess the neural elements.

20. On August 12, 2019, Claimant underwent an MRI of the lumbar spine. The radiologist, Samuel Scrutchfield, M.D. interpreted the MRI as showing the following at the L2-L3 level: "Posterior disc osteophyte complex formation with small central T2 hyperintense zone/annular tear. Facet arthropathy. Minimal spinal canal stenosis, improved. Mild left subarticular zone narrowing, improved. Mild to moderate right subarticular zone narrowing, stable. Severe left foraminal narrowing. Mild right neural foraminal narrowing. (Ex. 6).

21. Dr. Scrutchfield interpreted the August 12, 2019 MRI as showing the following at the L3-L4 level: "Posterior osteophytic ridging with slightly more focal right subarticular zone involvement. Facet arthropathy. Moderate to severe spinal canal stenosis which appears slightly worse. Moderate to severe subarticular zone narrowing slightly asymmetric to the right side which also appears progressive. Moderate to severe right neural foraminal narrowing. Moderate left neural foraminal narrowing. (Ex. 6).

22. On November 1, 2019, Respondent filed a General Admission of Liability admitting for medical benefits, temporary total disability, and temporary partial disability.

2011 Injury and Sequelae

23. In the summer of 2011, Claimant sustained an injury to his cervical and lumbar spine unrelated to his employment. As the result of that injury, Claimant had acute lower back and upper buttock pain and pain going down his left posterior leg that did not improve.

24. On September 12, 2011, Claimant saw Ahmed Stowers, M.D., at the Porter Adventist Hospital emergency department for evaluation of his back pain. Claimant reported a one-month history of worsening back pain with weakness in his lower extremities and numbness which extended to his groin area. Claimant was diagnosed with multiple level degenerative changes in the lumbar spine without evidence of significant canal stenosis and multiple-level foraminal narrowing at multiple levels. Dr. Stowers recommended that Claimant consult with a spine team. (Ex. G).

25. On September 12, 2011, Claimant had an MRI of his lumbar spine. The radiologist interpreted the MRI as showing degenerative disc disease, moderate disc bulge resulting in moderate left neural foraminal stenosis and mild modic endplate changes at the L2-L3 level. At the L3-L4 level, the radiologist interpreted the MRI as showing modic endplate changes, severe loss of disc height, a central disc bulge creating bilateral foraminal stenosis and bilateral facet arthropathy. (Ex. 4).

26. On September 16, 2011, Claimant saw Lawrence Coulehan, M.D. Dr. Coulehan's handwritten records are, in many aspects, illegible. Claimant reported that he had painful legs and back that started after lifting a relatively [illegible] object approximately one month earlier. Claimant reported developing progressively more severe back pain with radiation and weakness in the left leg. He reported no urine or fecal incontinence. Claimant reported being seen in the ER and seeing an orthopedist, and that Percocet helped. (Ex. H).

27. On October 10, 2011, Claimant saw Timothy Kulko, M.D. and Kathryn Dorweiler, PA-C, of Colorado Comprehensive Spine Institute. Claimant reported a history of intermittent back pain but not severe. Claimant reported acute left lower/upper buttock pain starting "a few months ago" after lifting a heavy box. At the time of the visit with Dr. Kulko, Claimant reported he had received chiropractic care in early August and had increased left leg pain and numbness and tingling ("n/t") below his waist in general. Claimant reported diffuse decreased sensation in his testicles and groin region. Claimant reported receiving a "recent" L3-5 tfESI (transforaminal epidural steroid injection) with a Dr. Fillmore, which provided good relief of his left leg pain. On examination, Claimant had pain with lumbar flexion and extension, and minimal tenderness along the spine. Dr. Kulko reviewed Claimant's September 12, 2011 lumbar MRI and the radiologist report and agreed with the radiologist's report. (Ex. D).

28. Claimant credibly testified that Dr. Kulko recommended Claimant undergo cervical surgery to address his cervical injury, and that no surgery on the lumbar spine be performed at that time. Claimant testified that Dr. Kulko indicated that Claimant may need lumbar surgery at some point in the future.

29. On or about October 13, 2011, Claimant underwent cervical spine surgery, performed by Dr. Kulko.
30. The record contains minimal documentation of Claimant's medical treatment and symptoms between October 13, 2011 and his injury on December 20, 2018.
31. On October 31, 2011, Claimant saw Dr. Coulehan. At that time, Claimant reported continuing to experience numbness in his left foot and ED (erectile dysfunction). On gait examination, Dr. Coulehan noted that Claimant had decreased left leg strength.
32. On May 30, 2014, Claimant saw Dr. Coulehan. Claimant reported numbness in his toes was [illegible] better, and that his activities of daily living (ADLs) were normal. Claimant reported that his exercise tolerance was able to walk four miles. Claimant also reported left calf cramps and back issues.
33. On August 4, 2016, Claimant saw Dr. Coulehan. At that time, Claimant reported that his exercise tolerance was such that he could hike up to ten miles. Claimant also reported chronic low back pain and that he was continuing to experience some left leg weakness. Dr. Coulehan found claimant had decreased range of motion in the cervical and lumbar spine, mild degenerative joint disease in his knees (R>L) and decreased left quad strength. (Ex. H).
34. On August 6, 2019, at Claimant's request, John Hughes, M.D. performed an independent medical examination (IME) of Claimant. Dr. Hughes interviewed Claimant and reviewed some of Claimant's medical records. Dr. Hughes relevant assessment was that Claimant had a past medical history of lumbar spine disc protrusion with documentation of left leg weakness through August 4, 2016, a lumbar spine sprain/strain with a frank disc extrusion, meriting surgical decompression done on March 29, 2019. Dr. Hughes concluded that while Claimant had a preexisting disc protrusion prior to December, 20, 2018, he also sustained injuries leading to a "frank disk extrusion," and therefore, Claimant's need for medical evaluation and treatment subsequent to December 20, 2018 was reasonable, necessary and related to his work-related injury on December 20, 2018. Dr. Hughes opined that this included surgical treatment of Claimant's lumbar spine. Dr. Hughes' August 6, 2019 report did not address whether any specific level of Claimant's lumbar spine was injured on December 20, 2018, or whether any portion of Claimant's March 29, 2019 surgery was work-related.
35. Subsequently, on February 25, 2020, Dr. Hugues conducted a case review at the request of Claimant to respond to the opinions of Dr. Castro, and specifically whether claimant sustained work-related injuries to his L2-L3 and L3-L4 spinal levels. Based on his review and comparison of MRI findings, Dr. Hughes concluded that Claimant sustained a lumbar disc extrusion at L2-L3 as a result of his work-related injury on December 20, 2018.
36. Dr. Hughes compared Claimant's L3-L4 MRI findings from 2011 and 2019, and opined that the 2019 MRI outlined similar pathologic findings and made no mention of a disc protrusion that he would consider to be substantially changed from the 2011 findings

of a central disc bulge. Dr. Hughes did not opine that Claimant sustained an injury at L3-L4 as the result of his work-related injury. Dr. Hughes did opine that because Claimant sustained injuries to the levels both above and below L3-L4, he believed L3-L4 also needed to be treated as part of the overall decompressive surgical procedure.

37. On August 21, 2019, Claimant saw Andrew Castro, M.D. for an IME at the request of Respondents. Dr. Castro reviewed Claimant's medical records and examined Claimant. Dr. Castro opined that Claimant experienced a new herniation at the L5-S1 and L4-L5 levels with new symptoms related to these injuries. Dr. Castro opined Claimant's MRI records showed that the L2-L3 and L3-L4 demonstrated non-severe, chronic degenerative changes, and no new disc herniations at these levels. Dr. Castro opined that surgery at L4-L5 and L5-S1 was reasonable and related to Claimant's work injury. He also opined that surgical intervention at the L2-L3 and L3-L4 levels were not related to Claimant's work injury.

38. Dr. Castro testified many of the medical expenses associated with surgery, including medications, surgical supplies, oxygen, self-administered drugs, recovery room (i.e., PACU), and observation room would be the same for a four-level vs. two-level surgery. Similarly, Dr. Castro testified that anesthesia charges would only be different to the extent additional time was needed to perform two additional levels of surgery. Dr. Castro testified he was not aware of whether anesthesiology charged by the hour. Dr. Castro testified that with the exception of the time spent performing two additional levels of surgery, the remaining charges associated with Claimant's surgery would not have been materially different. The ALJ infers from this testimony that Claimant would have incurred substantially similar medical expenses had Dr. Aguwa not performed microdecompression at L2-L3 and L3-L4 during March 29, 2019 surgery, and that the only increased expenses would have been associated with the additional time spent performing those procedures. The ALJ also infers that no additional personnel, supplies, or equipment was needed to perform the microdecompression at L2-L3 and L3-L4.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. See § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. See § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge.

University Park Care Center v. Industrial Claim Appeals Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id.* at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Compensability

To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S.; see *City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. C.R.S. § 8-41-301(1)(c). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.*, 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the ALJ. *Faulkner*, 12 P.3d at 846. A compensable injury is an injury which "arises out of" and "in the course of" employment. See C.R.S. § 8-41-301(1)(b); *Price v. Industrial Claim Appeals*, 919 P.2d 207 (Colo. 2012).

"A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury." *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999, (2004); *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo.App.1990).

Respondents do not dispute that Claimant sustained an injury to the L4-5 and L5-S1 spinal levels as the result of his December 20, 2018 work injury. Claimant has

established by a preponderance of the evidence that he sustained an injury to the L4-L5 and L5-S1 spinal levels in the course and arising out of his employment on December 20, 2018. It is also undisputed that Claimant had pathology at the L2-L3 and L3-L4 levels of his spine prior to December 20, 2018, dating to at least 2011.

The issue before the ALJ is whether Claimant's work-injury on December 20, 2018 caused additional injury, aggravated, or accelerated his pre-existing L2-L3 and/or L3-L4 spinal condition causing a need for treatment. Dr. Castro credibly testified that Claimant's 2019 MRI demonstrated that Claimant's disc bulge at L2-L3 was slightly larger than shown on the 2011 MRI. Dr. Castro's interpretation is consistent with that of Dr. Hughes. Dr. Castro also opined that the changes reflected at L2-L3 were likely degenerative changes, rather than acute, traumatic changes. While Dr. Hughes attributed the "disk extrusion" to Claimant's work-related injury. The ALJ finds the testimony of Dr. Castro to be persuasive on this issue.

Dr. Hughes and Dr. Castro agree Claimant's MRI studies do not demonstrate a new injury to L3-L4. Although, Dr. Hughes opined that surgery on L3-L4 was necessary because of injuries both above and below that spinal level. Because the ALJ finds that Claimant's work injury did not result in a new injury or aggravate his pre-existing condition at L2-L3, Dr. Hughes' opinion that surgery on L3-L4 was necessary is not persuasive on this issue.

The evidence establishes Claimant sustained significant disc injuries at the L4-L5, L5-S1 levels on December 20, 2018. The symptoms Claimant experienced following December 20, 2018 were consistent with injuries at these spinal levels, including pain in the back of the thigh, pain in the buttocks to the calf, which are consistent with an L4-L5, L5-S1 radiculopathy. Although Claimant reported a worsening of his pre-December 20, 2018 symptoms, the evidence is insufficient to conclude that the worsening of symptoms was attributable to a new injury to L2-L3 or L3-L4, or that his work injury aggravated those pre-existing conditions, as opposed to symptoms directly related to the large herniation at L5-S1 and injury to L4-L5. Dr. Aguwa's completion of the "Attending Physician's Report of Workability," indicating that his diagnosis was "work related" is not persuasive. Dr. Aguwa's medical records do not indicate that Claimant informed Dr. Aguwa of his 2011 injury, his 2011 lumbar MRI, or Dr. Kulko's indication that Claimant may require future surgery.

Claimant has met his burden of proof of establishing by a preponderance of the evidence that he sustained a work-related injury to the L4-L5 and L5-S1 spinal levels. Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable, work-related injury to L2-L3 or L3-L4, or that Claimant's December 20, 2018 work injury aggravated or accelerated Claimant's pre-existing condition at L2-L3 or L3-L4.

Medical Benefits

Under section 8-42-101(1)(a), C.R.S., respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of the

industrial injury. See *Owens v. Industrial Claim Appeals Office*, 49 P.3d 1187, 1188 (Colo. App. 2002). All results flowing proximately and naturally from an industrial injury are compensable. *Id.*, citing *Standard Metals Corp. v. Ball*, 474 P.2d 622 (Colo. 1970). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.*, 236 P.2d 293 (Colo. 1951). A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission v. Royal Indemnity Co.*, 236 P.2d 293 (Colo. 1951).

Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc.*, W.C. No. 4-117-758 (ICAO April 7, 2003). The question of whether a particular medical treatment is reasonably necessary to cure and relieve a claimant from the effects of the injury is a question of fact. *City & County of Denver v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984).

Although § 8-42-104(3), C.R.S. provides that “An employee’s ... medical benefits shall not be reduced based on a previous injury,” the Workers Compensation Act does not obligate respondents to pay medical benefits for the treatment of unrelated conditions. Rather, treatment is only compensable “where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment.” *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990).

Because Claimant has not established by a preponderance of the evidence that he sustained compensable injuries to the L2-L3 or L3-L4 levels, or that his work injury aggravated, accelerated or combined with his preexisting condition to produce the need for treatment, the ALJ concludes that Claimant has not met his burden of establishing that surgery on these levels was reasonable and necessary to cure or relieve the effects of his work injury.

Claimant has established by a preponderance of the evidence that he sustained compensable injuries to the L4-L5 and L5-S1 spinal levels, and that surgery performed by Dr. Aguwa on March 29, 2019, and post-operative care, including physical therapy, was reasonable and necessary to cure or relieve the effects of his work injury. Respondents are financially responsible for the treatment reasonable and necessary to cure or relieve the effects of his work injury.

Allocation of Responsibility for Medical Expenses

Claimant’s March 29, 2019 surgery addressed both compensable and non-compensable conditions. Because respondents are liable for medical treatment that is reasonable and necessary to cure or relieve the effects of the related industrial injury, Respondents are responsible for that portion of the March 29, 2019 surgery and subsequent treatment that was reasonable and necessary to cure or relieve the effects

of the injuries sustained at L4-L5 and L5-S1. See *Owens v. Industrial Claim Appeals Office*, 49 P.3d 1187, 1188 (Colo. App. 2002).

Respondents contend that they are responsible for 50% of the medical expenses from the March 29, 2019 surgery. However, a 50% allocation of the costs of surgery and post-surgical therapy is not supported by the evidence. The testimony of Dr. Castro indicates the costs of surgery were only marginally increased by the addition of the unrelated decompression procedures at the L2-L3 and L3-L4 levels. The compensable portion of the surgery required Dr. Aguwa's services, as well as the services of assistant surgeon Dr. Como, anesthesiologist Dr. Alt, IONM Technologist Fugate, and Dr. Ibrahim. Additionally, if the surgery had only addressed the L5-S1 and L4-L5 levels, the surgery would still require an operative suite, administration of preoperative antibiotics, anesthesia, oxygen, surgical supplies, medications, self-administered drugs, and intraoperative use of a microscope, fluoroscopy and neuromonitoring. Dr. Aguwa performed a single opening incision and single dissection through which all procedures were performed. Additionally, the procedures performed at L5-S1 were more involved than those at L2-L3 and L3-L4 and included a microdiscectomy at L5-S1 and decompressions at L4-L5 and L5-S1. Post-surgery, Claimant would have required PACU care, a recovery room, an observation room, and post-surgical care (including physical therapy) regardless of whether the L2-L3 and L3-L4 procedures were performed. In essence, these were "fixed costs" of surgery that would be incurred had only the compensable procedures been performed. The additional costs associated with the L2-L3 and L3-L4 procedures were limited to the time spent addressing Claimant's L2-L3 and L3-L4 pathology, such that anesthesia and surgical time may have been longer.

Respondents shall pay for the full cost of the March 29, 2019 surgery, less the incremental increase in the cost of surgery directly attributable to performance of the non-compensable microdecompression performed at L2-L3 and L3-L4. The evidence at hearing is insufficient for the ALJ to determine the amount of those costs or to make a specific allocation of costs. Counsel for the parties shall confer on this issue. Should the parties be unable to resolve the matter, either party may file an application for hearing to adjudicate this issue.

ORDER

It is therefore ordered that:

1. Claimant has proven by a preponderance of the evidence that he sustained a compensable injury to the L4-L5 and L5-S1 levels of his spine in the course and arising out of his employment with Employer on December 20, 2018.
2. Claimant has not proven by a preponderance of the evidence that he sustained a compensable injury to the L2-L3 and L3-L4 levels of his spine in the course and arising out of his employment with Employer.

3. Respondents shall pay the costs for all authorized, causally related and reasonably necessary medical care and treatment for Claimant's compensable injury to the L4-L5 and L5-S1 levels of his spine, including the costs associated with Claimant's March 29, 2019 surgery and post-surgical physical therapy, less the incremental increase in the cost of surgery directly attributable to performance of the non-compensable microdecompression performed at L2-L3 and L3-L4.
4. Counsel for the parties shall confer regarding the issue of allocation of costs attributable to the compensable vs. non-compensable portions of Claimant's March 29, 2019 surgery. Should the parties be unable to resolve the issue, either party may file an application for hearing on this issue.
5. All matters not determined herein are reserved for future determination.

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

DATED: September 18, 2020.



Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-108-431-001**

ISSUES

- Did Claimant prove he suffered a compensable injury arising out of and in the course and scope of his employment?
- Did Claimant prove medical care and treatment provided by UCHealth was reasonably necessary and authorized?
- Did Claimant prove he is entitled to TTD benefits from May 23, 2019 through July 31, 2019?

STIPULATIONS

The parties stipulated to an average weekly wage (AWW) of \$662.95, with a corresponding TTD rate of \$441.97.

FINDINGS OF FACT

1. Claimant works for Employer as an inspector and outside salesperson. Claimant travels to potential customers homes, performs inspections, and tries to sell Employer's pest eradication services.

2. Claimant's job requires extensive travel, and he was assigned a company vehicle for business purposes. As part of his "compensation package," Claimant can use the vehicle for limited personal purposes outside of work hours, such as running errands. Claimant is not allowed to have other passengers in the vehicle when using it for personal purposes. Claimant was permitted, but not required, to take his assigned vehicle home so he could drive directly to or from his first or last work site each day without stopping at the branch office to pick up and drop off his personal vehicle. Most employees in Claimant's position take their company car home each night, but some do not.

3. After he was hired, Claimant received training on Employer's policies regarding use of the company vehicle. Employer's "Vehicle Programs Policy" states that the assignment of a Company vehicle "is a privilege extended to certain positions based on the amount of business miles that the employee is expected to drive within a year. As one of the tools necessary to perform the job, the perquisite ("perk") is provided for certain business functions." Employer's policy also states, "time spent traveling in the morning from an employee's home to the branch to check-in or attend a meeting, is not work time."

4. Claimant was responsible to ensure his company vehicle was clean and professionally presentable. Employer paid for maintenance on the vehicle, but Claimant would take it to the service appointments. Claimant was given a company gas card to pay for fuel.

5. Employer conducts a mandatory meeting at 7:00 AM each morning at the branch office in southwest Colorado Springs. Claimant was required to attend the daily meetings unless he had an appointment with a distant customer that required him to be traveling at that time. Such morning appointments were relatively uncommon, and Claimant attended the meeting most days.

6. Claimant is a salaried employee, so he does not formally “clock in” or “clock out.” Mr. S[Redacted] persuasively explained the workday for all employees is generally considered to start when they arrive at the branch office for the meeting, even those on salary:

The branch is essentially our starting point, and that’s when we officially become on the clock. It is the same procedure for everybody at the branch, not just certain people. I’m held to the same standards, and I drive 60 miles one way to work every day, and I’m still not on [Employer’s] time until I reach the branch

7. On May 22, 2019 at approximately 6:55 AM, Claimant was involved in a rear-end motor vehicle accident on the I-25 exit ramp at Circle Drive. At the time of the accident, Claimant was commuting in his assigned company vehicle to attend the 7:00 AM meeting. Claimant had performed no work-related task that morning before the accident.

8. Claimant reported to Employer he developed back pain because of the accident. Employer referred Claimant to Concentra Medical Centers, where he was diagnosed with a thoracic strain and referred for therapy. Respondents paid for the initial treatment with Concentra but then denied the claim and further care. Claimant was subsequently diagnosed with a low back strain.

9. Claimant failed to prove the May 22, 2019 accident occurred while performing services arising out of and in the course of his employment. Claimant was merely commuting to work at the time of the accident and not performing or furthering any specific work tasks. The fact Claimant has a company car does not mean all travel is considered part of his service for Employer. Claimant is allowed but not required to take the company car home at night, primarily as a convenience and “perk” for him. Claimant’s job could be performed as effectively if he left the car at the branch office each evening. Employer derives no benefit from Claimant commuting to and from the branch office in the company vehicle. Claimant established no “special circumstances” that would justify an exception to the usual rule that injuries sustained while commuting to work are not compensable.

CONCLUSIONS OF LAW

To establish a compensable claim, a claimant must prove he suffered an injury arising out of and in the course of employment. Section 8-41-301(1)(b); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). The “course of employment” requirement is satisfied if the injury occurred within the time and place limits of the employment relationship and

during an activity that had some connection with the employee's job-related functions." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991). The term "arising out of" is narrower and requires an injury "has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered a part of the employee's employment contract." *Horodysyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001).

Under the "going and coming rule," injuries sustained while commuting to and from work are not compensable unless "special circumstances" create a sufficient nexus to the employment beyond the mere fact of the employee's arrival at work. *Madden v. Mountain West Fabricators*, 977 P.2d 861 (Colo. 1999). *Madden* established an analytical framework centered on four "variables" to determine whether the requisite "special circumstances" exist. Those variables are: (1) whether the travel occurred during working hours, (2) whether the travel occurred on or off the employer's premises, (3) whether the travel was contemplated by the employment contract, and (4) whether the obligations or conditions of employment created a "zone of special danger" out of which the injury arose. *Id.* at 864. If the claimant establishes only one of the four variables, "recovery depends on whether the evidence supporting the variable demonstrates a causal connection between the employment and the injury such that the travel to and from work arises out of and in the course of employment." *Id.* at 865.

Claimant's accident did not occur during working hours or on Employer's premises. Nor did the conditions of employment create any "zone of special danger" around commuting to work. Accordingly, the primary question is whether the travel was contemplated by the employment contract. *Madden* cited examples of situations that satisfy this factor, such as (a) when a particular journey is assigned or directed by the employer, (b) when the employee's travel is at the employer's express or implied request or when such travel confers a benefit on the employer beyond the sole fact of the employee's arrival at work, and (c) when travel was singled out for special treatment as an inducement to employment. The court emphasized those examples were "not an exhaustive list" of situations where travel can be considered part of the employment contract.

Travel is a substantial component of Claimant's job, and the car was provided in part to mitigate the expense to Claimant of using his own vehicle. The parties expected Claimant would routinely use the vehicle during the workday to accomplish his duties. But the question is not simply whether the employment contract contemplates *some* travel on the employee's part. Rather, the dispositive issue is whether the contract contemplated the travel in which the employee was engaged at the time of the accident. The fact that Claimant travels as part of his job does not mean he is within the course and scope of employment every time he operates the company-provided vehicle. Certainly, an accident that occurred while Claimant was driving between customer properties would be covered. But here the accident occurred before the workday started, while he was merely commuting to work to attend the daily morning meeting.

Employer's explicit policy regarding travel provides that "time spent traveling in the morning from an employee's home to the branch to check and/or attend the meeting, is not work time." This policy was conveyed to Claimant in writing during his training. While

language in an employee manual is not necessarily dispositive, Employer's express directive is persuasive evidence that commuting to work was not contemplated as part of Claimant's employment contract or his service to Employer.

Access to the company car is a convenience and a "perk" for Claimant, but his use of the vehicle for commuting provides no substantial benefit to Employer. There is no requirement Claimant take the company vehicle home in the evening and he could perform his job just as effectively if he left the vehicle at the branch office overnight and commuted in his personal vehicle. Any benefit Employer may have derived from Claimant's access to the company car during working hours was not implicated at the time of his accident. Claimant was merely commuting to work and not engaged in any specific employment-related task. Claimant failed to prove the existence of "special circumstances" to warrant an exception to the general rule that injuries suffered while commuting to work are not compensable. Thus, Claimant failed to prove he suffered a compensable injury arising out of and in the course of his employment.

ORDER

It is therefore ordered that:

1. Claimant's claim for workers' compensation benefits in WC 5-108-431 is denied and dismissed.

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

DATED: September 19, 2020

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

Whether the claimant has demonstrated, by a preponderance of the evidence, that on December 13, 2019 he suffered an injury arising out of and in the course and scope of his employment with the employer.

Whether the claimant has demonstrated, by a preponderance of the evidence, that on January 10, 2020 he suffered an injury arising out of and in the course and scope of his employment with the employer.

If the claimant proves a compensable injury on December 13, 2019 or January 10, 2020, whether the claimant has demonstrated, by a preponderance of the evidence, that injuries he sustained as the result of a motor vehicle accident (MVA) on January 16, 2020 are compensable under the quasi-course of employment doctrine.

If the claimant proves a compensable injury for any of the dates identified above, whether the claimant has demonstrated, by a preponderance of the evidence, that he is entitled to reasonable and necessary medical treatment related to that compensable injury.

If the claimant proves a compensable injury for any of the dates identified above, whether the claimant has demonstrated, by a preponderance of the evidence, that he is entitled to temporary total disability (TTD) benefits.

The issue of the claimant's average weekly wage (AWW) has been reserved for future determination.

FINDINGS OF FACT

1. The employer operates a tree trimming and removal company. The claimant began working for the employer as an arborist assistant in August 2019. The claimant's job duties included trimming trees and hauling away all related debris.

2. The claimant has a history of low back pain that began in 2002 when he fell off an oil rig. Much of the treatment for the claimant's low back has been provided by the Veterans' Administration (VA).

3. On February 8, 2016, the claimant was seen at the VA Medical Center by Tammy Keel, RN. The claimant reported a history of pain in his right knee, low back, and neck. On that date, the claimant requested a referral to Rocky Mountain Orthopaedic Associates. Ms. Keel noted that the claimant would first need to be seen by a doctor with the VA before such a referral could be made.

4. On March 7, 2016, the claimant was seen at the VA Medical Center by Dr. Randall Coffey. The claimant reported low back pain that radiated into his right hip and thigh, as well as neck pain. Dr. Coffey referred the claimant to Rocky Mountain Orthopaedic Associates, recommended physical therapy, and prescribed Tramadol.

5. On April 28, 2016, the claimant was seen at Rocky Mountain Orthopaedic Associates by Jason Bell, PA-C and Dr. James Gebhard. The claimant reported right sided low lumbar pain that radiated into his buttock. Dr. Gebhard diagnosed low back pain with right lower extremity radiculopathy. At that time, Dr. Gebhard referred the claimant to physical therapy.

6. The claimant continued to complain of low back pain and on September 1, 2016, a magnetic resonance image (MRI) of the claimant's lumbar spine was performed. The MRI showed degenerative disc disease at the L3-L4 and L4-L5 levels and right foraminal narrowing at the L3-L4 level.

7. The claimant continued to seek treatment of his low back in 2018 and into 2019. On July 11, 2019, the claimant was seen at the VA Medical Center by Andrea Briner, Nurse Practitioner. At that time, the claimant reported chronic back pain. However, he also noted that his back pain did not slow him down and he was able to work in a physically demanding job in the oil and gas industry.

8. The claimant testified that he has undergone chiropractic treatment for several years with Brady Chiropractic. The medical records entered into evidence indicate that on July 2, 2019, the claimant was seen at that practice by Dr. Sean Lynch. On that date, the claimant reported a headache, sharp pains down his right leg, a stiff neck, numbness in his right foot, pain in his cervical spine, lumbar spine, and thoracic spine.

9. On November 19, 2019, the claimant was seen at the VA Medical Center by Dr. Dean Scow. At that time, the claimant reported chronic right knee pain and chronic back pain. The claimant also reported mid and low back pain with shooting pain into both legs. Dr. Scow noted that the claimant had a known history of degenerative disk disease and ordered an MRI of the claimant's lumbar spine.

10. On December 16, 2019, the MRI of the claimant's lumbar spine showed a right disc extrusion at the L4-L5 level, a left paracentral disc extrusion at the L5-S1 level, and foraminal stenosis at those same levels.

11. On January 10, 2020, the claimant was working for the employer at the home of the owner's father¹. On that date, the crew was trimming a number of trees and removing the debris. The claimant testified that during that job, he placed the cut limbs and branches in a trailer. The claimant also testified that he noticed that his back pain was greater than normal.

¹ The claimant initially testified that this work was performed on December 13, 2019. However, based upon the testimony of the respondents' witnesses and the medical records, the ALJ finds that the work was performed on January 10, 2020.

12. On Sunday, January 12, 2020, the claimant sent a text message to his supervisor, Mr. R[Redacted], asking what time work would begin on January 13, 2020. The claimant did not report any back issues to Mr. R[Redacted] at that time.

13. The claimant testified that on Monday, January 13, 2020, he had back pain that was radiating into his legs that was so great that he was unable to get out of bed. The claimant notified Mr. R[Redacted] that he was not feeling well. In addition, the claimant asked to see a doctor. Mr. R[Redacted] provided the claimant with a list of medical providers. From that list, the claimant selected Dr. Theodore Sofish as his authorized treating provider (ATP). An appointment was scheduled with Dr. Sofish for January 16, 2020.

14. Mr. R[Redacted] is the owner/operator of the employer's company. He testified that he learned that the claimant was alleging a work injury when he received a text message from the claimant on January 13, 2020. That text message indicated that the claimant had hurt his back on Friday, January 10, 2020. Mr. R[Redacted] understood that the claimant was going to seek medical treatment at the emergency room on January 13, 2010. On that same date, Mr. R[Redacted] contacted the insurer regarding the proper steps to initiate a workers' compensation claim.

15. On January 16, 2020, the claimant's spouse drove him to his appointment with Dr. Sofish. While en route to the appointment, they were involved in a motor vehicle accident (MVA). The MVA occurred when another driver struck the passenger side of the claimant's vehicle.

16. At the time of the MVA, the claimant did not seek emergency medical treatment. The claimant testified that after the MVA he developed other symptoms. These new symptoms included headaches, numbness and tingling down both arms and down both legs, and right shoulder pain.

17. Despite the MVA, the claimant attended his January 16, 2020 appointment with Dr. Sofish, as scheduled. At that time, the claimant reported that due to lifting heavy logs on January 10, 2020, he began to have pain in his right lower back that radiated into his right leg. The claimant described the pain as stabbing and burning. Dr. Sofish recommended the use of ibuprofen and Tylenol and placed the claimant on restricted work duty of no lifting over five pounds. Dr. Sofish also noted that he would need to review the prior MRI results. In that same medical record, Dr. Sofish noted that the claimant arrived utilizing a cane. The claimant testified that he sometimes uses a cane because of balance issues. The claimant further testified that at the January 16, 2020 appointment, Dr. Sofish pushed the claimant's legs in such a way that it caused the claimant pain.

18. The claimant returned to Dr. Sofish on January 21, 2020. On that date, Dr. Sofish addressed the claimant's prior lumbar disc diagnosis. Dr. Sofish described the claimant as becoming "somewhat verbally hostile". In addition, at that time, the claimant informed Dr. Sofish he felt he "was not receiving good care". The claimant and Dr. Sofish agreed that the claimant would seek care with another provider. The WC 164 form of that date indicates that Dr. Sofish discharged the claimant from his care because the claimant

was “hostile”. The claimant did not return to Dr. Sofish after January 21, 2020. No other ATP was authorized by the respondents.

19. The claimant testified that since he reported the January 10, 2020 incident to the employer, the claimant’s medical treatment has included physical therapy, chiropractic treatment, and treatment with a pain specialist.

20. On January 21, 2020, Mr. R[Redacted] completed the First Report of Injury or Illness that identified a date of injury as January 13, 2020.

21. Following a referral from his VA physician, Dr. Scow, on February 25, 2020, the claimant was seen by Jeffrey Johnson, DC-FNP with Colorado Injury and Pain Specialists. The claimant reported to Mr. Johnson that he had right sided cervical pain, right sided lumbar pain, right sided thoracic pain, pain in his right leg, right arm, and right hand. Mr. Johnson noted there was restricted range of motion of both the claimant’s cervical spine and lumbar spine. Mr. Johnson diagnosed, *inter alia*, intervertebral disc displacement in the lumbosacral region and lumbosacral disc disorders with radiculopathy. He recommended physical therapy and a possible transforaminal epidural injection. Mr. Johnson also referenced a Vertiflex procedure. The claimant testified that he understands this procedure would involve placing a “bridge” in his back.

22. The claimant returned to Mr. Johnson on March 24, 2020. At that time, he reported that his pain had decreased. In addition, the claimant wished to further discuss the Vertiflex procedure. Mr. Johnson made a referral to Dr. Kirk Clifford for a surgical consultation.

23. On March 25, 2020, the claimant was seen by Dr. Christine Welsh at Primary Care Partners. At that time, the claimant reported ongoing pain in his “whole spine”. Dr. Walsh administered osteopathic manipulative treatment (OMT).

24. On July 7, 2020, the claimant attended an independent medical examination (IME) with Dr. Brian Reiss. In connection with the IME, Dr. Reiss reviewed the claimant’s medical records, obtained a history from the claimant, and performed a physical examination. In his IME report, Dr. Reiss opined that the claimant was not injured at work. He further opined that the claimant’s current symptoms are due to a combination of the claimant’s preexisting chronic pain and the January 16, 2020 MVA. Dr. Reiss’s testimony was consistent with his written report.

25. Dr. Reiss testified that the claimant has a significant prior history of back pain. Dr. Reiss reiterated his opinion that the claimant did not suffer a new injury while working for the employer. In support of this opinion, Dr. Reiss stated that chronic soreness with pain does not constitute an injury.

26. The claimant testified that he was injured on December 13, 2019 and reported that injury to his supervisor on December 16, 2019. The ALJ has considered all evidence and testimony presented at the hearing and finds that the incident that resulted in the claimant’s request for medical treatment and subsequent trip to see Dr. Sofish, occurred on January 10, 2020. The ALJ finds that there was no incident or injury in December 2019.

27. The claimant asserts that he is entitled to temporary total disability (TTD) benefits beginning December 14, 2019, and ongoing until terminated by law; (with the excluded dates of December 20, 2019; December 23, 2019; and January 10, 2019). The excluded dates are based upon the claimant's belief that he was injured on December 13, 2019 and worked for the employer on those dates.

28. With regard to the January 10, 2020, alleged injury, the ALJ credits the medical records, the testimony of Mr. R[Redacted], and the text message exchanges. Particularly, the ALJ notes that in his text message on January 12, 2020, the claimant did not mention concerns with his back. In addition, the ALJ credits the opinions of Dr. Reiss. Furthermore, the ALJ does not find the claimant's testimony to be credible or persuasive. The ALJ finds that the claimant has failed to demonstrate that it is more likely than not that he suffered a compensable injury on January 10, 2020. In addition, the ALJ notes that the claimant has a long history of low back symptoms. The ALJ is not persuaded that the claimant's work activities on January 10, 2020 aggravated, accelerated, or combined with the claimant's preexisting low back condition to necessitate medical treatment.

29. With regard to the January 16, 2020, MVA and related injuries, the ALJ finds that the claimant has failed to demonstrate that it is more likely than not that he was in the quasi-course of employment at the time of the MVA. First, as noted above the claimant has failed to demonstrate that he suffered a compensable injury on either December 13, 2019 or January 10, 2020. Although the claimant was en route to his appointment with Dr. Sofish on January 16, 2010, the ALJ finds that there must first be a compensable injury before applying the quasi-course of employment doctrine to a subsequent injury.

CONCLUSIONS OF LAW

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

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

4. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. See *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); see also *Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with a preexisting disease or infirmity to produce disability or need for treatment." See *H & H Warehouse v. Vicory*, *supra*.

5. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that he suffered an injury on December 13, 2019. As found, there was no incident that occurred on December 13, 2019. As found, the medical records, the testimony of Mr. R[Redacted], the text message exchanges, and the opinions of Dr. Reiss are credible and persuasive.

6. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that he suffered an injury on January 10, 2020. As found, the claimant's work activities did not aggravate, accelerate, or combine with his preexisting low back condition. As found, the medical records, the testimony of Mr. R[Redacted], the text message exchanges, and the opinions of Dr. Reiss are credible and persuasive.

7. Under the quasi-course of employment doctrine injuries sustained while undergoing or traveling to and from authorized medical treatment are compensable, even though they occur outside the ordinary time and place limitations of normal employment. *Excel Corp. v. Industrial Claim Appeals Office*, 860 P.2d 1393 (Colo. App. 1998); *Schreiber v. Brown & Root, Inc.*, 888 P.2d 274 (Colo. App. 1993).

8. Colorado courts recognize the quasi-course of employment doctrine. This legal construct provides that injuries sustained while traveling to and from appointments for authorized medical treatment are compensable. *Excel Corp. v. Industrial Claim Appeals Office*, 860 P.2d 1393 (Colo.App. 1993). The doctrine is restricted to injuries arising out of "authorized" treatment. *Schrieber v. Brown & Root, Inc.*, 888 P.2d 274, 278 (Colo.App. 1993). The rationale for this principle is that, because an employer is required to provide medical treatment, and because the claimant is required to submit to treatment in order to receive benefits, travel to receive authorized treatment is an "implied part of the employment contract." *Turner v. Industrial Claim Appeals Office*, 111 P.3d 534 (Colo. App. 2004); *Excel Corp. v. Industrial Claim Appeals Office*, 860 P.2d 1393 (Colo. App. 1993); *Bopp v. Garden Square Assisted Living W.C. No. 4-893-767* (ICAO, Feb. 6, 2014). The quasi-course of employment doctrine provides "the requisite connection between the employment and an injury that would not otherwise be considered to have arisen out of

and in the course of employment.” *Price Mine Service, Inc. v. Industrial Claim Appeals Office*, 64 P.3d 936 (Colo. App. 2003).

9. However, the doctrine is not limited to injuries sustained while actually engaged in a particular medical treatment explicitly "prescribed" by the authorized treatment physician. To the contrary, the quasi-course of employment doctrine applies to post-injury activities undertaken by the employee which, although they take place outside the time and space limits of the employment, and would not be considered employment activities for usual purposes, are nevertheless related to the employment in the sense that they are necessary or reasonable activities that would not have been undertaken but for the compensable injury. *Excel Corp. v. Industrial Claim Appeals Office*, supra; *Travelers Insurance Co. v. Savio*, 706 P.2d 1258 (Colo. 1985); *In re Martin*, W.C. No. 4-924-715-03 (ICAO, Oct. 11, 2018).

10. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that he suffered a compensable injury pursuant to the quasi-course of employment doctrine. The ALJ notes that the line of cases addressing the quasi-course of employment doctrine recognizes a compensable injury from which the subsequent quasi-course injury arises. Therefore, the ALJ concludes that for the January 16, 2020 MVA to be considered a compensable injury under the quasi-course of employment doctrine, there must have first been a compensable injury. As the ALJ has concluded that the claimant did not suffer a compensable injury on January 10, 2020, there is no injury from which a quasi-course of employment injury may flow.

ORDER

It is therefore ordered that the claimant's claim for benefits is denied and dismissed.

Dated this 21st day of September 2020.



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

- I. Whether Claimant established by a preponderance of the evidence that he is entitled to temporary total disability (TTD) benefits from December 13, 2019 to July 5, 2020.
- II. Whether Claimant's issue for TTD benefits was ripe and, if not, whether Respondents are entitled to attorney fees and costs pursuant to §8-43-211(3), C.R.S.

FINDINGS OF FACT

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

1. Claimant was employed by Employer and had an admitted work-related injury on March 7, 2019, injuring his left arm, shoulder, and neck.
2. Claimant came under the care of Dr. John Sacha and Dr. Theodore Villavicencio.
3. Dr. Sacha and Dr. Villavicencio are authorized providers who took care of Claimant and treated his work injury. As a result, Dr. Sacha and Dr. Villavicencio each became an attending physician.
4. On August 13, 2019, Claimant was initially given work restrictions by Dr. Villavicencio of no lifting over 10 pounds and no push/pull over 20 pounds. (Claimant's Exhibit 15).
5. Claimant continued to work at the modified job until the Employer closed on April 24, 2019 and he stopped working. Respondents began paying TTD on April 25, 2019. (See Respondents' Exhibit A, FAL at page A-1).
6. On August 8, 2019, Dr. Sacha stated that Claimant was ready for a full duty release trial. (Claimant's Exhibit 16). Dr. Sacha also stated that Claimant had a full duty release on November 8, 2019, December 5, 2019, and December 12, 2019. (*Id.*)
7. Claimant testified that Dr. Villavicencio told him on December 12, 2019 and December 13, 2019, that he still had lifting restrictions. The ALJ finds this testimony not credible as Dr. Villavicencio's medical records show that, even though the December 12, 2019 note states that Claimant has a 20-pound lift restriction, the note states that Claimant was not seen on that date and the December 13, 2019 note and the WC164 reflects that Dr. Villavicencio gave him a full duty release on that date. (Exhibit 15 and Exhibit B at B-18).
8. The ALJ finds that Dr. Villavicencio gave Claimant a full duty release on December 13, 2019. (*Id.*)

9. Marchelle R[Redacted], [Insurer Redacted] claim professional, testified credibly that she filed the Final Admission of Liability (FAL) on January 13, 2020, based on Dr. Villavicencio's maximum medical improvement (MMI) note dated December 13, 2019 and Dr. Sacha's rating. (See Exhibit A).
10. Claimant underwent a DIME and the DIME doctor found he was not at MMI. But the DIME doctor also stated that Claimant was "capable of full duty but should limit working above the shoulder level if [sic] possible." (Exhibit B at B-11).
11. After the DIME was completed and the DIME doctor found Claimant was not at MMI, Ms. R{Redacted} filed the General Admission of Liability (GAL) on May 1, 2020. She did not restart TTD benefits because the ATP had given Claimant a full duty release. (Exhibit B).
12. On May 15, 2020, Claimant filed an Application for Hearing and endorsed the issue of TTD as of December 13, 2019. Respondents responded to Claimant's Application.
13. Shortly thereafter Respondents set a prehearing. The prehearing was set to address Respondents' motion to strike Claimant's application for hearing. Respondents asserted that the issue of TTD was not ripe because Claimant was not entitled to TTD pursuant to *Burns v. Robinson Dairy, Inc.*, 911 P.2d 661 (Colo. App. 1995) because Claimant was released to full duty. Prehearing ALJ Gallivan concluded the issue of TTD was ripe and denied Respondents' motion. (Exhibit F).
14. On July 6, 2020, Dr. Villavicencio gave Claimant new work restrictions which included no reaching above shoulders with affected extremity. He also retracted his full duty release by placing Claimant on modified duty. (Exhibit D).
15. On July 16, 2020, Ms. R{Redacted} filed a new GAL and restarted TTD benefits as of July 6, 2020. (Exhibit C).
16. Ms. R[Redacted] testified that she retained counsel because Claimant filed the instant Application for TTD benefits and that the attorney charges of \$2,206.50 were related to the defense of the Application. (Exhibit E).
17. When Claimant filed his Application for Hearing and endorsed the issue of TTD, there was no legal impediment that prevented Claimant from pursuing a claim for TTD benefits at a hearing. Nothing about the issue of TTD was uncertain or contingent upon a future matter that had to be addressed. The mere fact that Respondents had a defense to Claimant's claim for TTD benefits — Claimant had been released to full duty by an attending physician — made the issue a factual dispute and subject to resolution by an ALJ. As a result, the issue of TTD was ripe for adjudication.

CONCLUSIONS OF LAW

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

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Claimant established by a preponderance of the evidence that he is entitled to temporary total disability (TTD) benefits from December 13, 2019 to July 5, 2020.

Section 8-42-105(3)(c), C.R.S., provides that TTD benefits shall continue until the attending physician gives the employee a written release to return to regular employment. The termination of TTD benefits under any of the enumerated statutory

conditions is mandatory. *Burns v. Robinson Dairy, Inc.*, 911 P.2d 661 (Colo. App. 1995).

If the attending physician issues conflicting or ambiguous opinions concerning release, or there are conflicting opinions between multiple attending physicians, the ALJ may resolve the issue as a matter of fact. See *Burns v. Robinson Dairy, Inc.*, *supra*. The determination of whether the attending physician has issued a release to return to work is a question of fact for resolution by the ALJ. *Id.*

As found, both Dr. Sacha and Dr. Villavicencio are each an authorized provider who took care of Claimant and treated his work injury. As a result, each was found to be an attending physician. As further found, both Dr. Sacha and Dr. Villavicencio released Claimant to full duty as of December 13, 2019. As a result, the ALJ finds and concludes Respondents established by a preponderance of the evidence that Claimant was released to full duty on December 13, 2019, and his right to temporary disability benefits terminated until his full duty release was retracted as of July 6, 2020, when Dr. Villavicencio limited Claimant to performing modified duty. Therefore, Claimant is not entitled to TTD from December 13, 2019 through July 5, 2020.

II. Whether the issue of TTD benefits was ripe and, if not, whether Respondents are entitled to attorney fees and costs pursuant to §8-43-211(3), C.R.S.

Section 8-43-211(3), C.R.S. provides that:

If an attorney requests a hearing or files a notice to set a hearing on an issue that is not ripe for adjudication at the time the request or filing is made, the attorney may be assessed the reasonable attorney fees and costs of the opposing party in preparing for the hearing or setting.” such request or filing is made, such person shall be assessed the reasonable attorney fees and costs of the opposing party in preparing for such hearing or setting.

The term “ripe for adjudication” is not defined by the statute. That said, in *Olivas-Soto v. Industrial Claim Appeals Office*, 143 P.3d 1178 (Colo. App. 2006) the court noted that generally ripeness tests whether an issue is real, immediate, and fit for adjudication. Under that doctrine, adjudication should be withheld for uncertain or contingent future matters that suppose a speculative injury, which may never occur.

Here, Respondents asserted that Claimant’s right to TTD ceased upon being released to full duty on December 13, 2019 pursuant to Section 8-42-105(3)(c), C.R.S. The successful application of the statute terminating Claimant’s right to TTD required Respondents to establish that an attending physician released Claimant to full duty or if there were multiple attending physicians whether each attending physician released Claimant to full duty. These were the factual showings Respondents had to establish to terminate Claimant’s TTD as of December 13, 2019. The Claimant did not have to determine the likelihood of Respondents succeeding on their defense to Claimant’s

claim to TTD benefits. The likelihood of a party's success is relevant to the question of merit, but not to the question of ripeness. As a result, Respondents failed to establish by a preponderance of the evidence that Claimant's claim for TTD was not ripe and that Respondents are entitled to attorney fees and costs.

ORDER

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

1. Claimant's claim for TTD benefits from December 13, 2019 through July 5, 2020, is denied and dismissed.
2. Respondents claim for attorney fees and costs is denied and dismissed.
3. Issues not expressly decided herein are reserved to the parties for future determination.

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

DATED: September 21, 2020

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Respondents have produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of Bryan D. Counts, M.D. that Claimant has not reached Maximum Medical Improvement (MMI) for her admitted October 4, 2013 right knee injury.

2. Whether Claimant has demonstrated by a preponderance of the evidence that the right total knee arthroplasty with a custom implant requested by Authorized Treating Physician (ATP) Mark Tuttle, M.D. is reasonable, necessary and causally related to her admitted October 4, 2013 right knee injury.

FINDINGS OF FACT

1. On October 4, 2013 Claimant suffered an admitted right knee injury during the course and scope of her employment with Employer. Claimant subsequently underwent extensive conservative treatment for her right knee condition. She ultimately required two right knee surgeries. Specifically, on November 1, 2016 Claimant underwent a partial knee replacement with Jeremy R. Kinder, M.D. On December 13, 2016 Dr. Kinder performed a debridement and manipulation procedure on Claimant's right knee.

2. Claimant continued to experience right knee pain. Authorized Treating Physician (ATP) Brian Williams, M.D. referred Claimant to surgeon Rajesh Bazaz, M.D. for an examination. Dr. Bazaz determined that Claimant's patellofemoral replacement had gone well and there was no infection. Nevertheless, Claimant experienced soft tissue discomfort. Dr. Bazaz did not recommend additional surgery and noted that 'conversion to a knee replacement' would not "help the situation."

3. On June 1, 2018 Dr. Williams referred Claimant to National Jewish Health for allergy testing because of her continuing right knee symptoms. On August 16, 2018 Claimant visited Annyce Mayer, M.D., M.S.P.H. for patch allergy tests involving various metals used in orthopedic hardware. Dr. Mayer determined that Claimant reacted to the metals of chromium and manganese as well as components of bone cement. Nevertheless, Dr. Mayer determined "[Claimant's] localized pain and swelling laterally has a dysesthetic quality is not typical for sensitization and raises concern for possible neurogenic contributor as well." Claimant also underwent a lymphocyte proliferation test to assess possible allergies to nickel and cobalt. She had a negative result.

4. On August 22, 2018 Claimant returned to Dr. Kinder for an examination. Dr. Kinder recommended Neurontin and a visit to a pain doctor for treatment options prior to a total knee replacement.

5. On July 12, 2018 Respondents requested a 24-Month Division Independent Medical Examination (DIME). Bryan Counts, M.D. was confirmed as the DIME physician and conducted his initial DIME on October 17, 2018. He concluded that Claimant had not reached Maximum Medical Improvement (MMI). On physical examination Dr. Counts documented active range of motion from 0-120 degrees, no erythema, small effusion, mild diffuse swelling, no increase warmth and negative Lachman's and McMurray's tests. Nevertheless, Dr. Counts explained that Claimant's "right knee symptoms are still very significant 23 months after patellofemoral arthroplasty, undoubtedly from the allergy to two or more components of the knee hardware and bone cement. The definite next step in treatment would be a total knee arthroplasty and that is my recommendation."

6. Based on Dr. Williams' referral, Claimant visited orthopedic surgeon Craig Loucks, M.D. for an evaluation. Dr. Loucks considered Claimant's allergy tests and the conversion of her partial knee replacement to a total knee arthroplasty. Dr. Loucks performed x-rays of Claimant's right knee. The x-rays revealed a "patellofemoral arthroplasty components to be well sized and position with no sign of failure or loosening noted. Medial and lateral compartments revealed reasonable preservation of the joint space with no acute findings noted." Dr. Loucks remarked that "[u]nfortunately, [Claimant] has been led down this path of thinking that her patellofemoral replacement is the source of pain because a physician at National Jewish tested her for metal and cement allergy. She tested positive for cement allergy on the skin patch test and for some reason they continue to connect the dots and somehow are trying to tell her that she needs a revision because of the skin patch test. This is completely ludicrous in our opinion."

7. Respondents sent inquiries to Dr. Kinder regarding his recommendations for Claimant's medical treatment. On January 24, 2019 Dr. Kinder determined that Claimant likely reached MMI, but did not provide a specific date. Dr. Kinder explained that he would not recommend a total knee arthroplasty based on Claimant's allergy tests. He suggested additional testing because the allergy tests were invalidated. Dr. Kinder specifically remarked that he was uncertain if "patch test was the best way to determine this." At a subsequent visit he reiterated "I think we are still in the infancy of understanding what really is going on with these allergies and doing a revision on her to a total knee I think would be unpredictable." Dr. Kinder recommended further allergy testing through Orthopedic Analysis from Chicago. He commented that the only other option for further allergy assessment would be T lymphocyte testing.

8. On April 4, 2019 Dr. Kinder testified through a pre-hearing evidentiary deposition in this matter. He explained that patch testing for allergies is not a validated procedure. Dr. Kinder testified that, if Claimant's T lymphocyte test from Orthopedic Analysis came back positive, it would give a stronger case for revision. However, he remarked that performing a revision surgery with a custom implant is "very unpredictable, and I think the outcomes of having a successful surgery isn't as predictable as having a plethora of other implants available." On April 19, 2019 Claimant proceeded with the T lymphocyte allergy testing recommended by Dr. Kinder.

9. On August 28, 2019 Karen S. Pacheco, M.D. M.S.P.H. from National Jewish health issued a report summarizing Claimant's metal and cement allergies. She explained that Claimant is "sensitized to manganese, cobalt and chromium as well as to bone cement." She commented that, if revision surgery is considered, a "press-fit titanium coated cobalt/chromium implant" is the best choice.

10. On September 18, 2019 Dr. Kinder reviewed the T lymphocyte testing performed by Orthopedic Analysis. In response to interrogatories from Respondents, Dr. Kinder did not recommend a total knee replacement based on the results of the T lymphocyte allergy test. He reiterated that Claimant had reached MMI for her October 4, 2013 injury.

11. On September 13, 2019 Claimant visited Mark S. Tuttle, M.D. for an evaluation of a possible right knee arthroplasty. Dr. Tuttle stated that Claimant was suffering right knee pain with a history of a right knee replacement. He noted that Claimant had a difficult situation with regard to the cement, manganese and chromium allergies. Dr. Tuttle commented that Claimant was severely debilitated by her pain. He recommended a total right knee replacement. Dr. Tuttle specifically determined that Claimant required a custom titanium press fit knee revision without manganese. He noted that he would fabricate a custom pressed-fit titanium knee.

12. On November 7, 2019 Claimant underwent a follow-up DIME with Dr. Counts. Dr. Counts maintained that Claimant had not reached MMI and recommended the right knee arthroplasty suggested by Dr. Tuttle. He explained that revision surgery was critical for Claimant's well-being due to her continued loss of function and pain. Dr. Counts remarked that Claimant suffers intermittent swelling of her knee and great difficulty on stairs. Her right knee also feels unstable at times and she can walk only about 15-25 minutes at a time. Dr. Counts summarized that Claimant's right knee continued to be problematic and it was very likely due to "allergy to the components of the knee hardware and/or bone cement." He relied on Dr. Pacheco's opinion endorsing revision surgery due to Claimant's magnesium and chromium allergies.

13. Dr. Counts recognized that Claimant's recent imaging did not reveal any loosening of her current prosthesis. He also documented the Orthopedics Analysis negative T lymphocyte and bone cement testing, with the exception of a mild reaction to nickel. Dr. Counts noted that Claimant underwent a genicular nerve block that did not relieve her symptoms. He acknowledged that orthopedic surgeons Drs. Loucks and Bazaz did not support revision surgery. Dr. Counts noted that "the smallness of the effusion and her fairly good range of motion does give me pause as to the likelihood that her ongoing post-op pain is from the allergy." However, Dr. Counts remarked that the surgery recommended by Dr. Tuttle would likely be 60-80% successful. Despite the lack of loosening or laxity in the right knee instrumentation, Dr. Counts determined that Claimant required surgery to improve both her function and quality of life. He ultimately concluded that, despite surgical risks, Claimant could benefit greatly from surgery. Dr. Counts acknowledged that Claimant would be at MMI if the revision surgery was not authorized.

14. On February 11, 2020 the parties conducted the pre-hearing evidentiary deposition of Dr. Counts. He also testified at the hearing in this matter. Dr. Counts maintained that Claimant should proceed with the proposed total right knee arthroplasty. He explained that he based his opinion on the literature and allergist Dr. Pacheco's report. Dr. Counts noted that Claimant met the criteria for joint failure after her initial surgery. He remarked that the proposed right knee arthroplasty had about a 60-80% likelihood of resolving Claimant's symptoms. Nevertheless, Dr. Counts acknowledged that the results of a total knee replacement are unpredictable and he did not know whether Claimant's pain was actually caused by a hypersensitivity to metal or bone cement. He also recognized that a total knee replacement could worsen Claimant's condition. Although Dr. Counts acknowledged the risks of a total knee replacement, he commented that the procedure was warranted because of Claimant's persistent pain and functional limitations.

15. Kathleen D'Angelo, M.D. testified at the hearing in this matter. Dr. D'Angelo conducted an independent medical examination of Claimant on March 28, 2018. On April 24, 2018 she performed a Rule 16 review regarding the proposed total knee arthroplasty. On April 4, 2019 Dr. D'Angelo conducted a second independent medical examination. She concluded that Dr. Counts erroneously determined Claimant has not reached MMI. Dr. D'Angelo also concluded that the proposed revision surgery requested by Dr. Tuttle was not reasonable, necessary or causally related to Claimant's October 4, 2013 admitted industrial injury.

16. Dr. D'Angelo testified that at her March 28, 2018 independent medical examination Claimant had good range of motion, no erythema, no effusion, no popliteal swelling and minimal tenderness to the right knee. She also noted that Claimant did not exhibit right knee laxity or pain behaviors and there were no documented complications regarding the device used for Claimant's partial knee arthroplasty. She remarked that, at her subsequent independent medical examination on April 4, 2019, Claimant's objective symptoms were not very different from her prior examination. Dr. D'Angelo specified that Claimant had excellent functional range of motion and updated records did not document complications with her partial knee prosthesis.

17. Dr. D'Angelo reviewed the DIME reports of Dr. Counts. She remarked that it was unclear why Dr. Counts recommended a total knee replacement when there were no physiological indications for the procedure. Dr. D'Angelo testified that the medical literature cited by Dr. Counts in his DIME reports failed to support his recommendation for a total right knee replacement. She noted that the article cited by Dr. Counts "presents an argument regarding some systemic signs: general pruritis, metal taste. Again, this article does not indicate the patient's sole subjective complaint of pain." Dr. D'Angelo emphasized that a positive allergy test does not reflect prosthesis failure. She commented that "[t]o date, there has been no allergy study for components of implants that has been validated." Dr. D'Angelo explained that the allergy tests in the present case validly reflect hypersensitivity. However, she specified "[t]hat there has been no validity proven in any of the literature, be it the allergy immunology or the orthopedic or sports medicine literature, that shows the presence of hypersensitivity denotes a predictive value for prosthesis failure. They are two separate results."

18. Dr. D'Angelo further testified that "the way you make a determination as to whether or not a partial or total prosthesis has to be replaced is that there's prosthesis failure. We are talking...about loosening, we are talking about infection, we are talking laxity. Those would be indications for revising a prosthesis." However, Claimant did not exhibit any of the preceding symptoms. Dr. D'Angelo noted that Dr. Counts credited Claimant's subjective symptoms over objective findings to support the total knee replacement. She remarked that Claimant would not likely benefit from the proposed total knee replacement based on her past lack of success with treatment. Dr. D'Angelo specified that Claimant failed to respond to conservative measures including injection therapy, genicular injections, manipulation under anesthesia and open debridement after prosthesis placement. She summarized that Claimant reached MMI one week after genicular injections on March 25, 2019. Dr. D'Angelo concluded that Claimant does not require maintenance medical care and assigned a 20% scheduled permanent impairment rating for the right lower extremity.

19. Respondents have failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Counts that Claimant has not reached MMI as a result of her admitted October 4, 2013 right knee injury. After Claimant's admitted injury she underwent two right knee surgeries but continued to experience right knee pain. Dr. Mayer performed patch allergy tests for various metals used in orthopedic hardware. She determined that Claimant reacted to the metals of chromium and manganese as well as components of bone cement.

20. On October 17, 2018 DIME Dr. Counts concluded that Claimant had not reached MMI. He explained that Claimant's "right knee symptoms are still very significant 23 months after patellofemoral arthroplasty, undoubtedly from the allergy to two or more components of the knee hardware and bone cement." He suggested that the next step in treatment was to perform a total right knee arthroplasty. He commented that Claimant was severely debilitated by her pain. On November 7, 2019 Claimant underwent a follow-up DIME with Dr. Counts. Dr. Counts maintained that Claimant was not at MMI and recommended the right knee arthroplasty suggested by Dr. Tuttle. He reasoned that Claimant's right knee disability arose from an allergic reaction to magnesium and chromium as explained by Dr. Pacheco. Dr. Counts explained that revision surgery was critical for Claimant's well-being due to her continued loss of function and pain.

21. In contrast, Dr. D'Angelo remarked that it was unclear why Dr. Counts recommended a total knee replacement when there were no physiological indications for the procedure. Dr. D'Angelo testified that the medical literature cited by Dr. Counts in his DIME reports failed to support his recommendation for a total knee replacement. She noted that Dr. Counts credited Claimant's subjective symptoms over objective findings to support the total knee replacement. She remarked that Claimant would not likely benefit from the proposed total knee replacement based on her past lack of success with treatment. Dr. D'Angelo specified that Claimant failed to respond to conservative measures including injection therapy, genicular injections, manipulation under anesthesia and open debridement after prosthesis placement. She summarized that Claimant reached MMI one week after genicular injections on March 25, 2019.

22. Despite Dr. D'Angelo's analysis, Respondents have failed to demonstrate that Dr. Counts improperly applied the *AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised)* (*AMA Guides*) or otherwise erred in concluding that Claimant has not reached MMI. Dr. D'Angelo's disagreement about whether Claimant has reached MMI or requires additional treatment is insufficient to demonstrate that Dr. Counts' conclusion was clearly erroneous. Notably, Dr. D'Angelo remarked that, because Dr. Counts improperly credited Claimant's subjective symptoms over objective findings and Claimant has failed to respond to conservative treatment, she reached MMI in late March 2019. Furthermore, although multiple surgeons disagree with Dr. Counts about whether the proposed total knee arthroplasty is reasonable, necessary and causally related to Claimant's October 4, 2013 industrial injury, disagreements about future medical treatment do not constitute clear and convincing evidence. Accordingly, Respondents have failed to produce unmistakable evidence free from serious or substantial doubt that Dr. Counts' MMI determination was incorrect.

23. Claimant has failed to demonstrate that it is more probably true than not that the total knee arthroplasty with a custom implant requested by Dr. Tuttle is reasonable, necessary and causally related to her admitted October 4, 2013 right knee injury. On September 13, 2019 Dr. Tuttle stated that Claimant was suffering right knee pain with a history of a right knee replacement. He noted that Claimant had a difficult situation with regard to the cement, manganese and chromium allergies. Dr. Tuttle commented that Claimant was severely debilitated by her pain. He recommended a total right knee replacement. Dr. Tuttle specifically determined that Claimant required a custom titanium press fit knee revision without manganese. Similarly, Dr. Counts recommended the right knee arthroplasty suggested by Dr. Tuttle. He explained that revision surgery was critical for Claimant's well-being due to her continued loss of function and pain. Dr. Counts summarized that Claimant's right knee continued to be problematic and it was very likely due to "allergy to the components of the knee hardware and/or bone cement." He relied on the opinion of Dr. Pacheco endorsing revision surgery due to Claimant's magnesium and chromium allergies.

24. Despite Dr. Tuttle's recommendation and the supporting opinions of Drs. Counts and Pacheco, the bulk of the evidence reflects that the proposed right total knee arthroplasty is not reasonable, necessary or causally related to Claimant's October 4, 2013 right knee injury. Orthopedic surgeon Dr. Loucks considered Claimant's allergy tests and the conversion of her partial knee replacement to a total knee replacement. He noted that x-rays revealed the patellofemoral arthroplasty components were well-positioned with no sign of failure or loosening. Dr. Loucks remarked that, unfortunately Claimant had been led to believe "that her patellofemoral replacement is the source of pain She tested positive for cement allergy on the skin patch test and for some reason they continue to connect the dots and somehow are trying to tell her that she needs a revision because of the skin patch test. This is completely ludicrous in our opinion." Moreover, Dr. Kinder explained that he would not recommend a total knee arthroplasty based on Claimant's allergy tests. He suggested additional testing because the allergy tests were invalidated. Dr. Kinder subsequently did not recommend a total right knee replacement based on negative T lymphocyte allergy testing. Furthermore, Dr. Bazaz determined that Claimant's patellofemoral replacement had gone well and

there was no infection. He did not recommend additional surgery and noted that “conversion to a knee replacement” would not “help the situation.” Finally, Dr. D’Angelo explained that “the way you make a determination as to whether or not a partial or total prosthesis has to be replaced is that there’s prosthesis failure” such as loosening, infection and laxity. However, Claimant did not exhibit any of the preceding symptoms. Dr. D’Angelo summarized that Claimant would not likely benefit from the proposed total knee replacement based on her past lack of success with treatment.

25. In addition to the persuasive opinions of Drs. Loucks, Kinder, Bazaz and D’Angelo, Dr. Counts acknowledged that the results of a total knee replacement are unpredictable and he did not know whether Claimant’s pain was actually caused by a hypersensitivity to metal or bone cement. The persuasive medical opinions suggest that the allergy tests performed at National Jewish Health do not conclusively establish prosthesis failure, the need for a total knee replacement or ongoing treatment as a result of the October 4, 2013 industrial incident. Moreover, Claimant’s medical records do not document prosthesis failure and establish the need for a total knee replacement. Accordingly, the proposed right knee arthroplasty is not reasonable, necessary or causally related to Claimant’s admitted October 4, 2013 right knee injury. Claimant’s request for a right knee total arthroplasty is thus denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the “Workers’ Compensation Act of Colorado” (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers’ Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers’ Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers’ Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge’s factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. See *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness’s testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Compensability

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson*, W.C. No. 4-589-645 (ICAO, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.*, 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner*, 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). *Soto-Carrion v. C & T Plumbing, Inc.*, W.C. No. 4-650-711 (ICAO, Feb. 15, 2007); *David Mailand v. PSC Industrial Outsourcing LP*, W.C. No. 4-898-391-01, (ICAO, Aug. 25, 2014).

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. See *Cotts v. Exempla, Inc.*, W.C. No. 4-606-563 (ICAO, Aug. 18, 2005). Rather, the symptoms could represent the “logical and recurrent consequence” of the pre-existing condition. See *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAO, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs*, W.C. No. 4-745-712 (ICAO, Oct. 27, 2008), simply because a claimant’s symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that “correlation is not causation,” and merely because a coincidental correlation exists between the claimant’s work and his symptoms does not mean there is a causal connection between the claimant’s injury and work activities.

7. The provision of medical care based on a claimant’s report of symptoms does not establish an injury but only demonstrates that the claimant claimed an injury. *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020). Moreover, a referral for medical care may be made so that the respondent would not forfeit its right to select the medical providers if the claim is later deemed compensable. *Id.* Because a physician provides diagnostic testing, treatment, and work restrictions based on a claimant’s reported symptoms does not mandate that the claimant suffered a compensable injury. *Fay v. East Penn manufacturing Co., Inc.*, W.C. No. 5-108-430-001 (ICAO, Apr. 24, 2020); cf. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337, 1339 (Colo. App. 1997) (“right to workers’ compensation benefits, including medical payments, arises only when an injured employee initially establishes, by a preponderance of the evidence, that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment”). While scientific

evidence is not dispositive of compensability, the ALJ may consider and rely on medical opinions regarding the lack of a scientific theory supporting compensability when making a determination. *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983); *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020).

8. As found, Claimant has failed to demonstrate by a preponderance of the evidence that she suffered a compensable left shoulder injury during the course and scope of her employment with Employer on May 22, 2019. Initially, Claimant explained that she injured her left shoulder while cleaning up after a patient in the shower room. Claimant detailed that on May 22, 2019 she was in a squatting position, cleaning the floor underneath the patient's chair with her right hand while holding onto the top of the chair with her left hand. While standing up, Claimant felt immediate pain in her left lateral biceps area. The records reveal that there is a dispute regarding the specific mechanism of Claimant's injury. The discrepancy involves the amount of force and position of Claimant's left arm when she lifted herself from the squatted position. The initial history suggests that Claimant placed all her weight on her left arm/shoulder to help herself up. Additionally, Claimant testified that her hand was located well above her head while standing up. Nevertheless, Claimant's testimony regarding the position of her arm in relation to the chair was inconsistent with the medical records and directly conflicts with what she represented and demonstrated to Dr. Cebrian during the independent medical examination. Because of the inconsistencies and the lack of a causal analysis by Drs. Hughes and Lugliani, the persuasive opinion of Dr. Cebrian reflects that Claimant's work activities on May 22, 2019 did not aggravate, accelerate or combine with a pre-existing condition to produce a need for medical treatment.

9. As found, Claimant's June 10, 2019 left shoulder MRI reflected a moderate partial interstitial tear of the midportion of the supraspinatous insertion. Dr. Cebrian credibly testified that there was insufficient force to cause an acute injury to the rotator cuff based on Claimant's position and use of her arm while standing from a squatting position. The mechanism was minimal and the MRI showed no acute tear of the tendon. Rather, the MRI reflected a degenerative interstitial tear that Dr. Cebrian characterized as incidental and the result of the natural aging process. Dr. Cebrian persuasively noted that Claimant's interstitial tear began inside the tendon and did not extend to the outer edge. An interstitial tear is in the intrasubstance of the tendon and is typically degenerative in nature. In contrast, most traumatic tears begin at the outer edge and then extend into the tendon. Dr. Cebrian specified that no external event was necessary for the MRI findings and they could be explained by the aging process.

10. As found, in contrast, Dr. Hughes diagnosed Claimant with a left shoulder strain/sprain with rotator cuff tear secondary to work activities on May 22, 2019. Dr. Hughes specifically disagreed with Dr. Cebrian and determined the forces and mechanism of injury were consistent with a rotator cuff tear. Similarly, Dr. Lugliani repeatedly noted on the M164 form that objective findings were consistent with Claimant's history and/or mechanism of injury. However, Drs. Hughes and Lugliani specifically failed to consider that the MRI findings suggested a degenerative interstitial tear that began inside the tendon and did not extend to the outer edge. Notably, an

interstitial tear is in the intrasubstance of the tendon and is typically degenerative in nature.

11. As found, although physicians provided Claimant with diagnostic testing, treatment and work restrictions based on her reported symptoms, the conclusion that Claimant suffered a compensable injury is not warranted. The lack of a scientific theory and causation analysis reveal that Claimant did not likely suffer a left shoulder injury while performing her job duties for Employer on May 22, 2019. Claimant's work activities on May 22, 2019 did not aggravate, accelerate or combine with her pre-existing condition to produce a need for medical treatment. Accordingly, Claimant's request for Workers' Compensation benefits is denied and dismissed.

Proposed Surgery

13. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). The claimant bears the burden of demonstrating a causal connection between his industrial injuries and the need for additional medical treatment. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier*, W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

14. As found, Claimant has failed to demonstrate by a preponderance of the evidence that the total knee arthroplasty with a custom implant requested by Dr. Tuttle is reasonable, necessary and causally related to her admitted October 4, 2013 right knee injury. On September 13, 2019 Dr. Tuttle stated that Claimant was suffering right knee pain with a history of a right knee replacement. He noted that Claimant had a difficult situation with regard to the cement, manganese and chromium allergies. Dr. Tuttle commented that Claimant was severely debilitated by her pain. He recommended a total right knee replacement. Dr. Tuttle specifically determined that Claimant required a custom titanium press fit knee revision without manganese. Similarly, Dr. Counts recommended the right knee arthroplasty suggested by Dr. Tuttle. He explained that revision surgery was critical for Claimant's well-being due to her continued loss of function and pain. Dr. Counts summarized that Claimant's right knee continued to be problematic and it was very likely due to "allergy to the components of the knee hardware and/or bone cement." He relied on the opinion of Dr. Pacheco endorsing revision surgery due to Claimant's magnesium and chromium allergies.

15. As found, despite Dr. Tuttle's recommendation and the supporting opinions of Drs. Counts and Pacheco, the bulk of the evidence reflects that the proposed right total knee arthroplasty is not reasonable, necessary or causally related to

Claimant's October 4, 2013 right knee injury. Orthopedic surgeon Dr. Loucks considered Claimant's allergy tests and the conversion of her partial knee replacement to a total knee replacement. He noted that x-rays revealed the patellofemoral arthroplasty components were well- positioned with no sign of failure or loosening. Dr. Loucks remarked that, unfortunately Claimant had been led to believe "that her patellofemoral replacement is the source of pain She tested positive for cement allergy on the skin patch test and for some reason they continue to connect the dots and somehow are trying to tell her that she needs a revision because of the skin patch test. This is completely ludicrous in our opinion." Moreover, Dr. Kinder explained that he would not recommend a total knee arthroplasty based on Claimant's allergy tests. He suggested additional testing because the allergy tests were invalidated. Dr. Kinder subsequently did not recommend a total right knee replacement based on negative T lymphocyte allergy testing. Furthermore, Dr. Bazaz determined that Claimant's patellofemoral replacement had gone well and there was no infection. He did not recommend additional surgery and noted that "conversion to a knee replacement" would not "help the situation." Finally, Dr. D'Angelo explained that "the way you make a determination as to whether or not a partial or total prosthesis has to be replaced is that there's prosthesis failure" such as loosening, infection and laxity. However, Claimant did not exhibit any of the preceding symptoms. Dr. D'Angelo summarized that Claimant would not likely benefit from the proposed total knee replacement based on her past lack of success with treatment.

16. As found, in addition to the persuasive opinions of Drs. Loucks, Kinder, Bazaz and D'Angelo, Dr. Counts acknowledged that the results of a total knee replacement are unpredictable and he did not know whether Claimant's pain was actually caused by a hypersensitivity to metal or bone cement. The persuasive medical opinions suggest that the allergy tests performed at National Jewish Health do not conclusively establish prosthesis failure, the need for a total knee replacement or ongoing treatment as a result of the October 4, 2013 industrial incident. Moreover, Claimant's medical records do not document prosthesis failure and establish the need for a total knee replacement. Accordingly, the proposed right knee arthroplasty is not reasonable, necessary or causally related to Claimant's admitted October 4, 2013 right knee injury. Claimant's request for a right knee total arthroplasty is thus denied and dismissed.

ORDER

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

1. Respondents have failed to overcome Dr. Counts' DIME opinion that Claimant has not reached MMI for her admitted October 4, 2013 right knee injury.
2. Claimant's request for a right knee total arthroplasty is denied and dismissed.
3. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at <http://www.colorado.gov/dpa/oac/forms-WC.htm>.*

DATED: September 9, 2020.

DIGITAL SIGNATURE:


Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- I. Has Claimant, by clear and convincing evidence, overcome the DIME's thoracic spine impairment rating?
- II. Has Claimant, by clear and convincing evidence, overcome the DIME's cervical spine impairment rating?
- III. What is Claimant's Average Weekly Wage?

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

The Work Accident

1. This is an admitted claim for an auto accident. Claimant suffered injuries to both shoulders, but the shoulder injuries are not in dispute herein. Claimant was a 33 year old driver, who was involved a motor vehicle accident ("MVA") on March 12, 2019. Claimant was driving a Ford F350, and was stopped at a traffic light. A minivan was approaching straight towards him, so he reported that he backed up, to minimize impact. The minivan struck the passenger side front light. The airbags did not deploy. Claimant did not hit his head, or lose consciousness. (Ex. D, p. 28).

Claimant's Preexisting Conditions

2. Claimant had a well-documented pre-existing cervical spine condition. A cervical spine MRI from December 2014 showed what appeared to be a fusion of the facet joints at C2-3, C3-4, and C4-5 on both sides and possibly C5-6 on the left. (Ex. E, p. 115).

3. Claimant was diagnosed with arthropathy of the cervical spine facet joints. As of January 2018, he was informed he needed to complete a medical history release form, so that all documentation could be sent to his primary care providers to move forward with a possible disability claim. (Ex. H, p. 122).

4. Claimant went January 17, 2018 for a physical. (Ex. 8, pp. 122-23). It was documented that Claimant's neck lateral rotation was "about 20 degrees bilaterally." *Id. at 123*. There are no other range of motion measurements of the neck mentioned, nor

is it stated that the 20 degrees of lateral rotation was measured consistently with the AMA Guides.

Treatment for the Work Injury

5. Claimant was taken to the emergency room with complaints of pain in his left clavicle and chest. Claimant had some mild paraspinal tenderness in his neck and back, but denied severe pain. His examination showed tenderness in the thoracic and lumbar area. He informed the physician that he had cervical facet syndrome with congenital cervical fusion. (Ex. I, pp. 128-129). It was noted that he had 'normal limited range of motion' (?) of his neck due to his congenital cervical spine fusion. (Resp. Ex, I, pg. 131). "He [Claimant] has some thoracic and lumbar paraspinal tenderness which is extremely mild, but no midline tenderness." No x-rays or CT scans were performed, as the emergency room physician did not deem them necessary. *Id.*

6. Claimant returned to care on April 2, 2019. His ATP was Dr. Cynthia Shafer at UCHealth. Dr. Schafer assessed Claimant with cervical strain and thoracic sprain. She documented that Claimant had pre-existing cervical facet syndrome. (Ex, D, p. 28). Dr. Schafer noted that Claimant subsequently developed neck and upper back tightness, but Claimant had already scheduled an appointment with his primary care physician. *Id.* at 29. Claimant reported to her that "he feels like his back just needs to be popped." *Id.*

7. Dr. Schafer noted that Claimant's increased neck pain which was new, but he had chronic neck stiffness. *Id.* Dr. Schafer noted the following under her examination:

Cervical back: He exhibits decreased range of motion (chronic per ptmost decr L lat flex & L rot)(sic). Tenderness (mild) and deformity (straightened). He exhibits no bony tenderness, no swelling and no spasm.

Thoracic back: He exhibits tenderness (rhomboids and L trap) and bony tenderness (mild mid thoracic processes) He exhibits no swelling, no deformity, and no spasm. (Ex. D, p. 30).

8. On April 9, 2019, Claimant reported new symptoms to his right shoulder, starting when he woke up on April 6, 2019. Claimant reported new weakness and pain. (Ex. D, p. 33).

9. Beginning on April 16, 2019, Claimant began undergoing manual therapy to both his cervical and thoracic spine. (Ex. 7, p. 77). It documents they were working on Claimant's cervical spine and his thoracic spine, particularly from T2 to T8, for joint mobilization. *Id.* Both a hot pack and electrical stimulation were used on Claimant's "cervical and thoracic regions to reduce pain and [minimize] tension." *Id.*

10. Dr. Schafer later noted that Claimant reported new anterior neck/throat and jaw pain on April 30, 2019. Dr. Schafer suggested trigger point injections, which

Claimant had had in the past. Claimant also reported increasing pain in his thoracic spine from mid to lower thoracic spine. Dr. Schafer discussed muscle relaxers, but Claimant reported he had used both suggested medications in the past with no benefit. (Ex. D, p. 41).

11. Claimant was subsequently referred to Dr. Michael Sparr with Accelerated Recovery Specialists for treatment. (Ex. 8). Claimant was referred to him due to only having “some” relief, but nothing significant. *Id.* at 83. Claimant indicated to Dr. Sparr that on a scale of 1 to 10, his pain ranges from a 7 to a 10. He also stated that prior to the accident, his pain was “mostly achy” and around a 4 or 5 out of 10. *Id.* at 84. “He reports that his cervical range of motion has diminished substantially following the accident.” *Id.*

12. Claimant told Dr. Sparr on July 19, 2019, that he still has pain throughout his neck and mid back. *Id.* at 95. Under the objective examination, Dr. Sparr documented that thoracic range of motion was painful in rotation and lateral bending both directions. *Id.* at 96. “The patient has persistent profound cervical and thoracic myofascitis with underlying thoracic facet and costovertebral joint dysfunction and arthralgias.” *Id.*

13. On June 18, 2019, Claimant reported little change in his symptoms to his back and right shoulder. (Ex. D, p. 43). At this time, Claimant reported concerns about his mood and not getting enough sleep. He reported stress and the impact on his relationships and indicated a desire to talk to a counselor. (Ex. D, p. 45). Claimant’s wife had recently had a baby, which may have contributed to Claimant’s fatigue.

14. Claimant had a left shoulder MRI, which showed an acute to subacute mild compression fracture of the posterior superior lateral aspect of the humeral head with bone marrow edema. (Ex. D, p. 48). Dr. Schafer noted that the findings of the MRI could be related, if his arms flew up over his head and back with the impact of the MVA. (Ex. D, p. 50). However, Claimant maintained at the beginning of his treatment that his hands were firmly clenched on the steering wheel at the time of the work MVA.

15. On July 15, 2019, Claimant returned due to shoulder pain. He also noted some left wrist pain. (Ex. D, p. 54). Claimant had reported prior left wrist pain on 6/16/2016, and received treatment from a prior MVA, which Claimant did not mention to his treating providers. (see Ex. H, p. 117). Dr. Schafer examined Claimant and noted that he had an extremely stiff neck, and he cannot rotate side to side and had minimal flexion and extension. Claimant informed Dr. Schafer that he had been seen previously and told that his neck and upper back was almost fused, and his chiropractor ‘questioned’ ankylosing spondylitis. (Ex. D, p. 55).

16. At this same visit with Dr. Schafer on 7/15/2019, under *family history*, her notes show: “reports that he has *never* smoked. He has *never* used smokeless tobacco. He reports that he drank alcohol.” *Id.* at 55. (emphasis added). However, during Claimant’s 6/16/2016 visit with Dr. Balju, the notes under *Assessment* show:

5. Smoker – smoker edu[cation] given
F17.200 Nicotine dependence, unspecified, uncomplicated (see Ex.
H, p. 117).

17. Claimant underwent a psychological consultation with Sean Kelly, Psy.D. (Ex. 10). Dr. Kelly documented in his July 22, 2019 note that Claimant reported having about 20% to 30% range of motion in his neck prior to the accident, and now he has only around 5% to 8% range of motion, per his estimate. *Id.* Claimant testified at hearing that he continues to agree with those estimates.

18. Dr. Sparr documented ongoing reported neck and thoracic symptoms in his September 12, 2019 note. (Ex. 8, p. 100). Dr. Sparr noted ongoing midthoracic paraspinal tenderness from T5-T9. *Id. at 101.*

19. After continued treatment for Claimant's complaints, Dr. Schafer placed him at MMI on October 18, 2019. (Ex. D, p. 72). At her impairment rating appointment on November 27, 2019, Dr. Schafer assigned Claimant a 6% whole person under Table 53, (II)(C) for his cervical spine, noting "persistent soft issue pain, unoperated, with moderate structural changes" *Id at 74.* Dr. Schafer noted Claimant had "profound" decreased cervical range of motion loss, and Claimant had reported he was back to his baseline. Dr. Schafer concluded no range of motion loss applied to the impairment rating. *Id.* Dr. Schafer then assessed Claimant a 2% whole person for soft tissue pain of the thoracic region under Table 53(II)(B), but assessed 9% for range of motion loss. *Id.*

Dr. Polanco IME

20. Dr. Frank Polanco evaluated Claimant for an Independent Medical Evaluation on October 9, 2019. Claimant reported headaches, jaw pain, neck pain, bilateral shoulder pain, mid and upper back pain and low back pain. (Ex. B, pp. 12-13). Claimant demonstrated markedly limited range of motion in his neck. Dr. Polanco noted that Claimant sustained a cervical strain which had resolved. He noted that Claimant had congenital cervical spine fusion and cervical facet syndrome that was pre-existing, and he opined had not been aggravated. (Ex. B, p. 16). Dr. Polanco opined that it was unlikely that Claimant sustained shoulder dislocations during the MVA, as Claimant did not report shoulder pain at the time of his initial evaluation in the emergency room; in fact he did not report shoulder pain until two and a half months later. Further, Dr. Polanco opined that Claimant may have suffered a mild cervical/thoracic strain, and treatment for six weeks would be appropriate. However, further treatment would be attributed to his pre-existing conditions. (Ex. B, p. 17).

Dr. Bissell DIME

21. Claimant attended a Division IME with Dr. Bissell on February 26, 2020. Claimant reported that after the MVA, he had immediate pain in his neck and both shoulders with stiffness in his shoulders, arms and neck. (Ex. A, p. 1). Claimant reported to Dr. Bissell that after an MVA (when Claimant was 16 years old), he

developed cervical facet syndrome which resulted in a fusion in his neck to T1. Claimant admitted to Dr. Bissell that he had essentially no range of motion in his neck. Claimant reported to Dr. Bissell that he had chronic aching and stabbing pains in his bilateral shoulders.

22. Dr. Bissell noted that Claimant did not have a prior impairment rating for his neck, but he noted that Claimant had no cervical range of motion both before and after the accident. Therefore, Dr. Bissell did not assign a rating for range of motion loss for the cervical spine. (Ex. A, p. 5). He noted, under *Apportionment*:

The patient's accident occurred after July 1, 2008 (on March 12, 2019). Based on today's evaluation and record review, I am aware of no prior impairment [rating] of the patient's cervical spine but *he did have complete bony ankylosis of the spine with no range of motion* both pre-and post-motor vehicle accident. Therefore, I did not give an impairment rating for his limited cervical range of motion (because the motor vehicle accident *caused no change* in his cervical range of motion and his cervical range of motion was at baseline at his date of maximum medical improvement on October 18, 2019). *Id at 5, 6.* (emphasis added).

23. Dr. Bissell assigned a 4% whole person from Table 53(II)(B) for his cervical spine, finding, (in contrast to Dr. Shafer), that Claimant's cervical region has suffered "*none-to-minimal* degenerative changes on structural tests." Dr. Bissell noted that at the Division IME evaluation, Claimant did not have complaints about his thoracic spine. Dr. Bissell therefore concluded that Claimant did not sustain any ratable injury to the thoracic spine. (Ex, A, p. 5). Under *Rationale for your Decision*: Dr. Bissell noted;

I rated the Claimant for his neck condition. I did not rate him for his thoracic condition since he had no complaints referable to his thoracic spine on today's evaluation *and sustained no ratable injury to his thoracic spine as a result of the March 12, 2019 MVA.* *Id at 6.* (emphasis added).

24. Dr. Bissell ultimately provided Claimant with a 12% right upper extremity rating, a 5% left upper extremity rating, and a 4% whole person rating for the cervical spine. *Id.* at 128, 132. He concurred with the ATP's MMI date of October 18, 2019. The Division accepted Dr. Bissell's DIME report, and Respondents filed a Final Admission of Liability consistent therewith.

Dr. Polanco Addendum and Testimony

25. On June 20, 2020, in an addendum to his initial report, Dr. Polanco addressed Claimant's assigned cervical rating. Dr. Polanco noted that Claimant had a history of chronic cervical pain and degenerative changes when he was involved in an earlier MVA. Dr. Polanco noted that Claimant was not moving his neck at that time. (Ex. C, p. 26). Dr. Polanco noted that Claimant did not sustain any structural injury to his cervical spine and thus, no impairment rating should apply. Similarly, Dr. Polanco

opined that Claimant's thoracic rating was based on pain complaints which was not consistent with the Guidelines. (Ex. B, p. 27).

26. At hearing, Dr. Polanco testified that neither Dr. Schafer, nor Dr. Bissell, assigned an impairment rating for cervical range of motion loss. At hearing, he testified that Claimant's prior fusion was not part of or related to the motor vehicle accident.

27. Dr. Polanco further testified it was not error for Dr. Bissell to decline to assign a rating for Claimant's cervical spine range of motion loss, since claimant had a well-documented condition that caused a clear loss of range of motion, and such loss existed prior to the work injury.

28. Dr. Polanco agreed that Dr. Bissell appropriately declined to assign an impairment rating for the thoracic spine, since at the time Dr. Bissell performed the Division IME, there was no findings of objective pathology to rate under Table 53.

29. Dr. Polanco testified that it is within the physician's discretion when providing a rating, because there are a variety of factors which impact conditions and findings, as well as the need for objective evidence to meet the criteria of the guidelines.

Claimant's Hearing Testimony

30. At hearing, Claimant estimated that he had approximately 20 to 30 percent of his range of motion in his neck before the motor vehicle accident. He explained that he would have some painful days, but it was mostly a manageable ache. "It didn't really interfere with my daily activities frequently, it was pretty sporadic, you know, a couple times a year. But it was – it was manageable and – and I was able to function more completely." (Transcript. 14:19 – 15:4). He elaborated that the loss of the additional range of motion made driving even more difficult, it has impaired his sleep, and his ability to get dressed in the morning. (Transcript. 15:5-12). Presently, Claimant experiences "very sharp pains" in his neck that occur frequently, cause headaches, and can become unbearable. (Transcript. 16:1-5).

Average Weekly Wage

31. Claimant testified that when he began working for the employer, there was training involved and he had to receive certifications from the Employer before he could start working with clients. (Tr. 20:10-15). He acknowledged that he continued to work for Employer after this MVA, and did not suffer any wage loss as a result of his work injury.

32. Claimant and Respondents have supplied identical documentation regarding Claimant's Average Weekly Wage. While neither party supplied any interpretation of Employer's data, the pertinent data is summarized (and calculated) below:

| Period End | Hours | Salary | Draw | Comm | Taxable | in 2018 | in 2019 | x4 | /52= AWW |
|------------|--------|--------|------|---------|---------|---------|---------|-----------|----------|
| 10/30/2018 | 77.88 | 1000 | | | 1000 | 1000 | | | |
| 11/15/2018 | 100.35 | 1500 | | | 1500 | 1500 | | | |
| 11/30/2018 | 93.25 | 1000 | 500 | | 1500 | 1500 | | | |
| 12/14/2018 | 78.5 | 1000 | | | 1000 | 1000 | | | |
| 12/28/2018 | 100.02 | 1000 | 500 | | 1500 | 1500 | | | |
| 1/15/2019 | 75.35 | | | 1794.63 | 1794.62 | | 1794.62 | | |
| 1/30/2019 | 83.25 | 1000 | | | 1000 | | 1000 | | |
| 2/15/2019 | 104.02 | | | 1920.67 | 1920.67 | | 1920.67 | | |
| 2/28/2019 | 89.85 | 1000 | | | 1000 | | 1000 | | |
| 3/15/2019 | 68.38 | | | 1468.17 | 1468.17 | | 1468.17 | | |
| 3/29/2019 | 72.48 | 1000 | | | 1000 | | 1000 | | |
| | | | | | | 6500 | n/a | n/a | n/a |
| | | | | | | | 8183.46 | 32,733.84 | 629.5 |

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

1. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

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

3. Assessing the weight, credibility and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder

should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). Moreover, the weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55, P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting all, part or none of the testimony of an expert witness. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

4. In this instance, the only lay witness who testified at hearing is Claimant. While Claimant's circumstances leading up to this incident were unfortunate indeed, the ALJ cannot accept everything at face value, given some of Claimant's occasional inconsistencies as a medical historian, depending upon the context. He was, however, forthright with medical providers and examiners regarding his preexisting cervical issues. The ALJ finds Dr. Polanco's testimony to be consistent with his written report, and sincerely delivered, but not pivotal in assisting the ALJ in deciding this case.

Overcoming the DIME Opinion, Generally

5. A DIME physician's findings of causation, MMI and impairment are binding on the parties unless overcome by "clear and convincing evidence." Section 8-42-107(8)(b)(III), C.R.S.; *Qual-Med v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998); *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion is incorrect and that said opinion is "free from substantial doubt." *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995) The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appeals Office*, *supra*. A mere difference of medical opinions is insufficient. *Medina-Weber v. Denver Public Schools* W.C. No. 4-782-625 (ICAO, May 24, 2010).

Overcoming the DIME Opinion, Thoracic

6. At the time of the DIME examination on 2/26/2020, Claimant did not complain to Dr. Bissell of thoracic symptoms. From reading the DIME report, the ALJ does not find evidence that any corners were cut in taking a medical history from Claimant. By all accounts, by this time (and not contested by Claimant), Claimant had been at MMI for over four months. Were his thoracic region still an issue over four months after treatment had ended, certainly it was worth a mention to the DIME examiner. Dr. Bissell was fully aware of Dr. Schafer's reasoning in providing the 11% thoracic rating; he chose to opine differently from her. More to the point, Dr. Bissell specifically found on the issue of causation, that Claimant *sustained no ratable injury* to

his thoracic spine as a result of the 3/12/19 MVA. Dr. Polanco concurred with Dr. Bissell's analysis on this issue. In summary, the ALJ cannot conclude that Dr. Bissell's thoracic impairment rating was highly probably incorrect. The DIME opinion on thoracic impairment has not been overcome.

Overcoming the DIME Opinion, Cervical

7. Dr. Schaefer found that Claimant had experienced *moderate* structural changes to his cervical region (along with the other requisite criteria) sufficient to warrant a 6% impairment rating under Table 53(II)(C). In contrast, Dr. Bissell found the structural changes to Claimant's cervical region (along with the other requisite criteria) to have been *none-to-minimal*, thus warranting a 4% impairment rating under Table 53(II)(B). Dr. Polanco went further, and found no cervical impairment attributable to the work MVA at all. The ALJ finds and concludes that such contrasting findings are mere differences in medical opinion; there is insufficient evidence to conclude that the DIME's assignment to Table 53(II)(B) was highly probably incorrect. Such an assignment falls within the DIME's medical discretion, and is supported by substantial evidence.

8. There is no medical opinion from any source which assigns an impairment rating for loss of cervical range of motion. They all list his loss of range of motion at zero, due to Claimant's unfortunate preexisting condition. Nonetheless, Claimant argues that Dr. Bissell did not follow the Impairment Rating Tips under Desk Aid 11; thus, the DIME is effectively precluded from apportioning Claimant's loss of range of motion due to incomplete data. The AMA guides are never likely to be pertinent, and therefore documented, in treating a non-work-related injury, no matter how serious. Claimant herein would use that to his own advantage. The ALJ is not prepared to concur with Claimant's reasoning. In fact, according to the DIME's own narrative and apportionment analysis, Claimant's prior, well-documented cervical range-of-motion deficiencies were *identified, treated, and noted to be independently disabling*. The ALJ finds that there is ample record support for the DIME to have reached this conclusion. The ALJ further finds that the DIME's apportionment analysis was adequately addressed head-on, and concludes that it is not highly probably incorrect. The DIME opinion on cervical impairment has not been overcome.

Average Weekly Wage, Generally

9. An ALJ has broad, statutorily granted discretion to calculate AWW in such a manner and by such a method as will, in the opinion of the director based upon the facts presented, fairly determine such employee's [AWW]." Section 8-42-102(3), C.R.S.; see also *Pizza Hut v. Industrial Claim Appeals Office*, 18 P.3d 867, 869 (Colo. App. 2001). The overall objective when calculating AWW is to arrive at "a fair approximation of the claimant's wage loss and diminished earning capacity." *Campbell v. IBM Corp.*, 867 P.2d 77, 82 (Colo. App. 1993).

Average Weekly Wage, as Applied

10. Other than Claimant's brief testimony (for which the ALJ finds some record support) that he made more money after his training period, there is little assistance in interpreting the payroll records. Nonetheless, certain observations are noted.

- Claimant was paid twice a month, but always on a weekday. If he worked more than approximately 90 hours in a particular pay period, he was paid an additional \$500 in the form of a draw or additional base salary. (89.85 hours did not qualify; 93.25 did qualify).
- Beginning (conveniently enough for calculation purposes) in 2019, Claimant was paid a Commission check on the 15th of each month, alternating with a \$1000 base salary - only - on the final payment of each month. Assuming Claimant would still have qualified for the extra \$500 for hitting 90 hours once he went on commission, he never hit that mark in 2019.
- While Claimant was injured on 3/12/2019, he testified that he missed no work as a result. Thus, the ALJ concludes that this work injury did not thwart Claimant's ability to exceed the 90 hour threshold in qualifying for the extra \$500 - assuming Claimant were still eligible to so qualify at all, once he went on commission.
- Once Claimant went on commission, there is no identifiable correlation between the hours he worked, and the commission earned. There is no discernable upward trend in commission earnings.

11. Respondents argue that there is no discernable pattern to Claimant's earnings, and that therefore all his earnings should be averaged from each pay period, even the partial period at the beginning of his employment. Claimant argues that he showed an increase in his wages (with record support, to a point) but that the final pay period (with the \$1000 salary only) should be totally disregarded, since Claimant was injured partway through this month. Claimant also argues (without record support) that he was paid every other week. (In fact, Claimant was paid twice monthly, but always on a weekday).

12. The ALJ will divide the baby thusly: Claimant's earnings did increase as a result of his promotion to commission status. Therefore, (and conveniently enough) his earnings beginning in 2019 best represent his earning capacity at the time of the work MVA. For reasons best explained by the 90-hour rule, Claimant earned only \$1000 on his second paycheck of each month, and was not paid on commission. Therefore, the ALJ finds that all six pay periods – exactly one-quarter year - in 2019 best represent Claimant's earning capacity at the time of the work injury. The math from the spreadsheet should be self-explanatory; Claimant's Average Weekly Wage is \$629.50.

ORDER

It is therefore Ordered that:

1. The DIME opinion of Dr. Bissell has not been overcome.
2. Claimant's Average Weekly Wage is \$629.50.
3. All matters not determined herein are reserved for future determination.

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

DATED: September 22, 2020

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

Whether the claimant has overcome, by clear and convincing evidence, the opinion of the Division-sponsored independent medical examination (DIME) physician that the claimant has no permanent impairment related to her lumbar spine.

FINDINGS OF FACT

1. The claimant suffered an injury at work on June 28, 2017. The respondent has admitted liability for the claimant's injury. The claimant's authorized treating provider (ATP) for this claim has been Dr. Emilly Burns. While treating the claimant, Dr. Burns did not diagnose the claimant with a back injury or refer the claimant for any low back treatment.

2. On September 6, 2018, Dr. Douglas Lucas performed surgery on the claimant's right ankle. During subsequent postoperative visits in Dr. Lucas's office on September 12, 2018, September 26, 2018, October 30, 2018, and December 11, 2018, the claimant did not report complaints of back pain. During her last follow-up on February 13, 2019, the claimant specifically denied any back pain. Dr. Lucas did not diagnose the claimant with a back injury.

3. On July 30, 2019, Dr. Burns placed the claimant at maximum medical improvement (MMI). In addition, Dr. Burns assessed "a total 18 [percent] lower extremity impairment" for the claimant's right ankle. At that time, the claimant did not report any low back pain. Dr. Burns did not diagnose the claimant with a lumbar spine injury or provide her with an impairment rating for her lumbar spine.

4. Although not included in the hearing exhibits, the ALJ infers that a Final Admission of Liability (FAL) was filed by the respondent based upon Dr. Burns's opinions and permanent impairment assessment. Subsequently, the claimant requested a Division-sponsored independent medical examination (DIME).

5. On December 12, 2019, the claimant presented for a DIME with Dr. Thomas Moore. In connection with the DIME, Dr. Moore reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In his DIME report, Dr. Moore identified the body parts to be assessed as the claimant's right foot, lumbar spine, left shoulder, left wrist, and left hip¹. Dr. Moore assigned 14 percent permanent impairment for the claimant's left lower extremity, and 9 percent for the claimant's right lower extremity. During the DIME, the claimant reported to Dr. Moore that

¹ The claimant does not dispute Dr. Moore's opinions regarding her right foot, left shoulder, left wrist, and left hip. Therefore, in this order the ALJ only addresses Dr. Moore's opinions related to the claimant's lumbar spine.

her low back pain was not present at the time of the injury but rather arose sometime shortly before her surgery in September 2018.

6. When listing the claimant's various diagnoses, Dr. Moore included "lumbar spine sprain/strain". Dr. Moore did not assign a permanent impairment rating for the claimant's lumbar spine. In the DIME report, Dr. Moore noted "[t]here is no Table 53 diagnoses [sic] for her lumbar spine, and therefore no impairment was provided for her lumbar spine".

7. On March 12, 2020, the respondent filed a Final Admission of Liability based upon Dr. Moore's DIME opinions.

8. Dr. Stephen Gray testified that he reviewed Dr. Moore's DIME report. Dr. Gray disagreed with Dr. Moore's decision to assign no impairment for the claimant's lumbar spine. It is Dr. Gray's opinion that Dr. Moore should have assigned an impairment rating based upon Table 53 of the AMA Guides², specifically Section II. B.

9. Section II of Table 53 addresses intervertebral disc or other soft-tissue lesions. Section II. B. provides that a condition that is "[u]noperated, with medically documented injury and a minimum of six months of medically documented pain and rigidity with or without muscle spasm, associated with *none-to-minimal* degenerative changes on structural tests" (emphasis in the original). Application of this section to the lumbar spine would result in an impairment rating of five percent.

10. Table 53 II. A. provides that a condition that is "[u]noperated, with no residual signs or symptoms" would result in an impairment rating of zero.

11. The ALJ credits the medical records and the opinions of Dr. Moore over the contrary opinions of Dr. Gray. The ALJ finds that Dr. Moore correctly applied the AMA Guides to the claimant's lumbar spine condition. Although Dr. Moore listed a diagnosis of a lumbar sprain or strain, the ALJ finds that that diagnosis is based solely on the claimant's subjective pain complaints. In addition, there was no imaging of the claimant's lumbar spine. Therefore, Dr. Moore's determination that no impairment rating for the claimant's lumbar spine was appropriate. The ALJ finds that the claimant has failed to overcome the DIME physician's opinion by clear and convincing evidence.

CONCLUSIONS OF LAW

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

² *American Medical Association Guides to the Evaluation of Permanent Impairment*, Third Edition (Revised) in effect as of July 1, 1991.

liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

4. Section 8-42-107(8)(b)(III) and (c), C.R.S. provides that the DIME physician's finding of MMI and permanent medical impairment is binding unless overcome by clear and convincing evidence. Clear and convincing evidence is highly probable and free from substantial doubt. The party challenging the DIME physician's finding must produce evidence showing it is highly probable that the DIME physician is incorrect. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). A mere difference of opinion between physicians fails to constitute error. See *Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-356 (March 22, 2000). The ALJ may consider a variety of factors in determining whether a DIME physician erred in his opinions including whether the DIME appropriately utilized the Medical Treatment Guidelines and the AMA Guides in his opinions.

5. In ascertaining a DIME physician's opinion, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office*, 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician's determination regarding MMI and permanent impairment consists of his initial report and any subsequent opinions. *In re Dazzio*, W.C. No. 4-660-149 (ICAO, June 30, 2008); see *Andrade v. Industrial Claim Appeals Office*, 121 P.3d 328 (Colo. App. 2005).

6. A DIME physician is required to rate a claimant's impairment in accordance with the *AMA Guides*. Section 8-42-107(8)(c), C.R.S.; *Wilson v. Industrial Claim Appeals Office*, 81 P.3d 1117, 1118 (Colo. App. 2003). However, deviations from the *AMA Guides* do not mandate that the DIME physician's impairment rating was incorrect. *In re Gurrola*, W.C. No. 4-631-447 (ICAO, Nov. 13, 2006). Instead, the ALJ may consider a technical deviation from the *AMA Guides* in determining the weight to be accorded the DIME physician's findings. *Id.* Whether the DIME physician properly applied the *AMA Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In Re Goffinett*, W.C. No. 4-677-750 (ICAO, Apr. 16, 2008).

7. As found, the claimant has failed to prove by clear and convincing evidence that Dr. Moore's opinions regarding zero impairment for the claimant's lumbar spine were incorrect. The claimant has failed to establish anything other than a difference of opinion between Drs. Moore and Gray. As found, the medical records and the opinions of Dr. Moore are credible and persuasive.

ORDER

It is therefore ordered that the claimant has failed to overcome the DIME physician's opinion by clear and convincing evidence.

Dated this 23rd day of September 2020.



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

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

ISSUES

- Whether claimant has proven by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course of his employment?
- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that the medical treatment from Aspen Family Medical Care and physical therapy are reasonable medical treatment necessary to cure and relieve the claimant from the effects of the industrial injury?

FINDINGS OF FACT

1. Claimant was employed with employer in their snowmaking operation on December 30, 2018. Claimant testified that he would begin snowmaking at Aspen Mountain at the beginning of the year, and then shift his work to snowmaking on Buttermilk Mountain later in the year. Claimant testified that on December 30, 2018, he was working at Buttermilk Mountain during the night shift making snow.

2. Claimant testified that snowmaking is a rough job as it is often cold and dark and he is exposed to difficult elements, including avalanches, water pressure issues and air pressure issues. Claimant testified that the employees making the snow during the night are often the only employees on the mountain.

3. Claimant testified that snowmaking involves a lot of physical work and minor injuries are common. Claimant testified that snowmaking employees are trained as to snowmobile operations and use the snowmobiles to access different parts of the mountain where the snowmaking operations take place. Claimant testified that in operating the snowmobiles at night, the employees must deal with varying terrain and often times maneuver around chunks of snow that are commonly found on the paths used by the snowmobiles.

4. Claimant testified that on December 30, 2018, he was working for employer making snow. Claimant testified he was in the control room and then needed to go out and check the snowmaking guns. Claimant testified that the snowmaking guns draw water from a creek and it becomes necessary to check the filters on the guns. Claimant testified that he came upon a snowmaking gun that was buried in the snow and blowing the snow back on itself. Claimant testified that when this happens, you need to dig out the snowmaking gun with a shovel. Claimant provided pictures of the type of snowmaking gun that was buried to demonstrate the size of the snowmaking gun. Claimant testified that in digging out the snowmaking gun, he had to pick up a lever to rotate the upper portion of the gun to aim the gun in the proper direction. Claimant testified that after doing these tasks he got back on the snowmobile and felt something in his shoulder.

5. Claimant testified he drove the snowmobile to the next snowmaking gun that was located on a tower. Claimant testified he climbed the ladder on the tower, reached out on to the gun to pull the lever to maneuver where the gun was aimed, and felt an acute pain in his right arm. Claimant testified he then changed to use his left arm to adjust the lever.

6. Claimant testified he reported his injury to his supervisor, Mr. D[Redacted]. The Employer's First Report of Accident filled out by Mr. D[Redacted] indicates that claimant was "feeling slight pain in his right shoulder diving snowmobiles and while performing other like tasks". The First Report of Accident also indicated that claimant was unsure of what caused the injury and he had not seen a doctor, as claimant was waiting to see if the pain subsides.

7. Claimant was eventually evaluated by Physicians' Assistant ("PA") Kiehnbaum on January 11, 2019. PA Kiehnbaum noted an accident history of claimant noticing symptoms while performing his snowmaking job on December 30, 2018. PA Kiehnbaum reported no specific activity or trigger that caused his pain, but noted that claimant's job is very active. Claimant reported his pain was aggravated with turning snow guns or pushing/pulling levers. Claimant was diagnosed with a right rotator cuff strain with possible labral pathology. PA Kiehnbaum recommended six sessions of physical therapy ("PT") and non-steroidal anti-inflammatories (NSAID's) or ice as needed. Claimant was provided with work restrictions of no pushing or pulling greater than 25, pounds.

8. Claimant returned to PA Kiehnbaum on January 24, 2019 and reported he had started PT and that his physical therapist believed that claimant's symptoms were related to the biceps head. PA Kiehnbaum noted that there was not a clear work trigger to the pain, although the pain began while claimant was at work riding a snowmobile downhill. PA Kiehnbaum further noted that claimant is very active at work and performs frequent pushing and pulling movements.

9. PA Kiehnbaum noted in her January 24, 2019 report that shoulder injuries are often multifactorial given the anatomy and complexity of the joint. PA Kiehnbaum also noted that there was no clear triggering event for the right shoulder pain and opined that it cannot be assumed that the work incident on December 30, 2018 was the sole cause of claimant's shoulder condition. PA Kiehnbaum noted that claimant had a history of a prior right shoulder SLAP tear repair in 2002, and that while this is not directly known to cause glenohumeral osteoarthritis, it could contribute to other symptoms in the shoulder such as a biceps tendinopathy, which claimant appeared to have. PA Kiehnbaum further noted that claimant performed a lot of repetitive movements and heavy lifting at work which over time could cause shoulder pathology.

10. Claimant was again examined by PA Kiehnbaum on February 12, 2019. Claimant reported his shoulder felt about the same and he still had pain along the biceps tendon head. PA Kiehnbaum recommended claimant continue with PT and noted she would consider a referral to an orthopedic specialist if there was no improvement.

11. Claimant was examined by Dr. Scheuer on March 1, 2019. Dr. Scheuer noted that while this visit and prior visits were covered by workers' compensation, future visits would not be covered, nor would future PT appointments. Dr. Scheuer released claimant to return to work without restrictions.

12. Respondents presented the testimony of Mr. J[Redacted], the workers' compensation manager for Employer. Mr. J[Redacted] testified that following claimant's injury, claimant returned to work for one day on January 17, 2019 driving a snow cat. Mr. J[Redacted] testified that claimant returned to work later in March at one of the restaurants and in a ski shop, before returning to work in the snowmaking department on May 13, 2019. Claimant disputed Mr. J[Redacted]'s testimony regarding the work he performed for Employer in March of 2019 and the date of his return to the snowmaking department.

13. With regard to the issue of compensability, claimant was at work when he first noticed pain in his shoulder. Claimant testified he noticed the pain while operating the snowmobile. Claimant testified he felt pain in his shoulder while at work in an area he had not felt pain before.

14. Unfortunately, the development of pain while on the job does not necessarily lead to a compensable workers' compensation claim. Claimant must establish that an injury occurred arising out of and in the course of his employment with employer. While the onset of pain while at work may establish that an injury occurred "in the course of" his employment with employer, claimant must also establish that the injury "arose out of" his employment with employer.

15. In this case, claimant has failed to establish how his work activities resulted in an injury to his right shoulder. As noted by PA Kiehnbaum, claimant has a prior history of a right shoulder injury resulting in a SLAP tear repair. PA Kiehnbaum further noted that this prior history could contribute to a biceps tendinopathy, which claimant appeared to have.

16. The ALJ notes that if claimant's work injury aggravates a pre-existing condition, the workers' compensation claim is compensable. However, in this case, there is a lack of credible evidence as to the development of any pain being related to work activities associated with claimant's employment. Claimant testified at hearing that he noticed the pain while operating a snowmobile, but did not establish that the use of the snowmobile resulted in an injury to the claimant's shoulder. Nor did claimant explain how operating the snowmobile and maneuvering the snowmobile would result in an injury to his right shoulder. Claimant's testimony that he later felt pain while attempting to move the lever on the snowmaking gun likewise does not establish that claimant sustained an injury to his right shoulder arising out of his employment. Pursuant to claimant's testimony, he had already noticed the pain in his right shoulder while operating the snowmobile, and again noticed the pain while trying to pull the lever on the snowmaking gun. While claimant began experiencing pain in his right shoulder while at work on December 30, 2018, the facts in this case fail to establish that the cause of that pain was related to claimant's work for employer.

17. Due to the fact that claimant has failed to establish that his right shoulder injury arose out of and in the course of his employment with employer, his claim for compensation must be dismissed.

CONCLUSIONS OF LAW

1. The purpose of the “Workers’ Compensation Act of Colorado” is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers’ Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers’ Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2018.

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

3. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it “aggravates accelerates or combines with “a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra*.

4. A compensable injury is one which arises out of and in the course of employment. Section 8-41-301(1)(b), C.R.S. (2017). The “arising out of” test is one of causation. It requires that the injury have its origin in an employee’s work-related functions, and be sufficiently related thereto so as to be considered part of the employee’s service to the employer. In this regard, there is no presumption that injuries which occur in the course of a worker’s employment arise out of the employment. *Finn v. Industrial Commission*, 165 Colo. 106, 437 P.2d 542 (1968); Rather, it is the claimant’s burden to prove by a preponderance of the evidence that there is a direct

causal relationship between the employment and the injuries. Section 8-43-201, C.R.S. 2002; *Ramsdell v, Horn*, 781 P.2d 150 (Colo. App. 1989).

5. As found, claimant has failed to establish by a preponderance of the evidence that he sustained an injury arising out of and in the course of his employment with employer. As found, the mere fact that claimant began to experience pain in his right shoulder while operating a snowmobile is insufficient under the facts of this case to establish that he sustained an injury arising out of and in the course of his employment with employer. As found, claimant has failed to establish that his injury had its origin in claimant's work related functions. Instead, the facts establish only that claimant began experiencing pain in his right shoulder while at work on December 30, 2018, but failed to establish that the cause of that pain was related to claimant's work for employer.

6. The ALJ recognizes that claimant argued at hearing that the purpose of the Workers' Compensation Act indicates that facts should be construed liberally in favor of the injured workers to ensure that they receive the benefits they are entitled to under the Act. However, this recitation of the law is incorrect. Facts involving the compensability of a claim cannot be interpreted liberally in favor of an injured worker or the employer.

7. Due to the fact that claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course of his employment with employer, claimant's claim for benefits must be denied.

ORDER

It is therefore ordered that:

1. Claimant's claim for benefits is denied and dismissed.

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

You may access a petition to review form at: <http://www.colorado.gov/dpa/oac/forms-WC.htm>. . In addition, it is recommended that you send a copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.

DATED: September 24, 2020



Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

- Did Claimant prove a sternoclavicular joint injection, an acromioclavicular joint injection, trigger point injections, and physical therapy ordered by Dr. Michael Sparr are reasonably needed to cure and relieve the effects of her industrial injury?
- What is the appropriate AWW?

FINDINGS OF FACT

1. Claimant works for Employer as a bank teller. She suffered admitted injuries on November 12, 2019 when she was assaulted by a homeless man after arriving at work. The man approached her and asked for money while she was walking in from the parking area. Claimant indicated she does not carry cash and continued walking into the bank. Without warning, the man grabbed her from behind and threw her face-first into a tree. Claimant primarily struck her face, but also impacted her left chest and shoulder area. She then fell to the ground and landed on her left side.

2. Employer referred Claimant to Emergicare for authorized treatment. She was initially seen by Dr. Erik Ritch on November 14, 2019. Her primary complaints were headache and nausea. There was no mention of any problem relating to the left chest or left shoulder. Physical examination revealed mild tenderness over the right forehead with bruising below the right eye. Dr. Ritch diagnosed a concussion and released Claimant to modified duty.

3. Claimant saw Dr. Dallenbach at Emergicare on November 18, 2019, who has been the primary ATP since then. Although the report states Claimant denied neck or shoulder pain, the physical examination documented significant muscle spasm in the paracervical musculature bilaterally. Dr. Dallenbach ordered cervical x-rays, which showed no bony abnormalities other than hardware from a C5-7 fusion Claimant underwent in 2013. He referred Claimant for a cervical MRI and took her off work.

4. Claimant underwent the cervical MRI on November 25, 2019. It showed post-surgical changes at C5-7 from a two-level fusion performed in approximately 2013, and minimal spondylosis at C3-4 with no evidence of nerve root impingement or cord compression. No other significant pathology was identified.

5. Medical records document continued neck pain and muscle spasms over the next two months. On December 11, 2019, Claimant told Dr. Dallenbach her neck pain started in the back of the neck on the left side and worked its way up over the top of her head as the day progressed. Dr. Dallenbach diagnosed a cervical "strain."

6. Claimant underwent left C2-C5 medial branch blocks on December 19, 2019. The blocks alleviated her neck pain for approximately three days.

7. Claimant had been receiving treatment from the Colorado Pain Specialists clinic before the work accident, primarily for pain related to polycystic kidney disease. She also received periodic treatment residual neck pain from the 2013 fusion surgery. Records dating to June 2018 show no significant interventions directed to Claimant's neck before the work accident. On October 22, 2019, a provider at the pain clinic described Claimant's neck pain as "intermittent and aching," and noted she was able to perform ADLs and desired no treatment or diagnostics at that time. Confusingly, that same day, a physical therapist documented "increasing" neck and back pain, and Claimant completed a Neck Disability Index Questionnaire indicating difficulty with certain ADLs.

8. Respondents filed a General Admission of Liability (GAL) on January 15, 2020. The GAL admitted to TTD benefits from November 15 through December 23, 2019 (5 4/7 weeks) based on an AWW of \$348.60. The GAL admitted for TPD benefits from December 24, 2019 ongoing at the rate of "varies."

9. Claimant followed up with Dr. Dallenbach's office on January 28, 2020 and reported significant and worsening pain in her neck, left shoulder, and arm. Claimant stated, "woke up today with pain around L clavicle radiating to L shoulder and upper back. Cannot move her L arm without severe pain." On examination, she was very tender to palpation of the left paracervical, parascapular, upper trapezius muscles, and the left clavicle. Claimant was referred to Dr. Michael Sparr a physical medicine evaluation.

10. Dr. Sparr evaluated Claimant on February 13, 2020. Claimant described the accident and explained she struck the tree with her face and left shoulder and fell to the ground. She reported pain in the superior and posterior shoulder radiating to the left lateral arm, medial forearm, and fourth and fifth digits. She was having numbness in the fingers of her left hand. Her neck was "achy," although "much improved from what she had initially." She also reported pain in the sternoclavicular and acromioclavicular joints. Physical examination showed asymmetric myofascial tightness and tenderness in the left-sided cervical and parascapular musculature. There was also moderate myofascial tightness with corresponding tenderness over the left-sided trapezius, levator scapula, posterior scalenes, rhomboids, the sternocleidomastoid and anterior scalenes, and the pectoral muscles. She was exquisitely tender to palpation over the left sternoclavicular and acromioclavicular joints and over the brachial plexus. Compression over the clavicle caused a substantial increase in pain and some radiating pain to the upper extremity. Deep compression over Erb's point and palpation of the pectoralis minor caused radiating pain through the upper extremity. Adson's maneuver produced numbness in the left upper extremity. Acromioclavicular joint loading was markedly positive.

11. Dr. Sparr opined sternoclavicular and acromioclavicular joint arthralgias and instability were causing myofascial irritation around the brachial plexus. He thought the upper extremity symptoms were related to brachioplexopathy. He ruled out cervical radiculopathy in light of the minimally abnormal cervical MRI and Claimant's clinical presentation. Dr. Sparr referred Claimant for a short course of manual physical therapy to improve myofascial tightness within the cervical, parascapular, and pectoral musculature. He also prescribed trigger point injections for the neck, acromioclavicular

and sternoclavicular joint injections, and an electrodiagnostic study of the left upper extremity.

12. Dr. Elena Antonelli performed a Rule 16 review of Dr. Sparr's recommendations on February 25, 2020. Dr. Antonelli opined none of Dr. Sparr's recommendations were medically necessary. Respondents denied the treatment based on Dr. Antonelli's report.

13. Claimant followed up with Dr. Sparr on February 27, 2020. Dr. Sparr was "quite concerned" because Dr. Antonelli had denied the requested treatment without speaking to him first. His office received a call from Dr. Antonelli on February 26 requesting a peer-to-peer review. Dr. Sparr was in a different office that day and unavailable. When he arrived at his main office on February 27, he received a "blanket denial of every treatment that was requested. This was without even discussing the case." Claimant's physical examination was largely the same as it had been on February 13. Dr. Sparr opined,

I stand by my initial history and physical examination as well as assessment of the patient. The patient's insurance company is obviously not willing to cover any further treatment so my hands are tied. I suggest that they are acting in bad faith. The patient does not seem litigious but has been forced to obtain the services of an attorney. Since nothing that I have recommended has been authorized I will not schedule further follow-up until further treatment is allowed. In the meantime, the patient continues to suffer rather severe pain and has no treatment options thanks to the carefully crafted denial of her insurance company.

14. Respondents eventually authorized the EMG, which Dr. Sparr performed on March 17, 2020. He interpreted the results as "mildly abnormal," with slowing of both median and ulnar motor nerves across the brachial plexus consistent with thoracic outlet syndrome (TOS). There was no evidence of cervical radiculopathy, generalized peripheral neuropathy, or left median or ulnar neuropathy. There was mild slowing of the ulnar sensory and motor nerves across the elbow, which was "suggestive of a mild cubital tunnel syndrome but not diagnostic." Dr. Sparr opined the electrodiagnostic findings were consistent with his previous physical examination findings. He opined Claimant is "likely experiencing [myogenic] compression of the brachial plexus which is causing a great deal of her symptoms. I have previously proposed appropriate treatment that would likely help greatly. All of the patient's treatment has been denied for unknown reasons despite appropriate supporting evidence that the patient was injured as a result of an assault and requires a substantial treatment."

15. Dr. Lawrence Lesnak performed an IME at Respondents' request on June 1, 2020. Dr. Lesnak emphasized Claimant's long history of neck pain, which he described as "chronic" and "clearly symptomatic" before the work accident. He opined there was "absolutely no medical evidence" to suggest Claimant injured her cervical spine, left shoulder, left clavicle, AC joint, or any surrounding structures. He opined Claimant had undergone numerous diagnostic tests, "none of which reported any evidence of

abnormalities that would in any way be related to the occupational incident of 11/12/2019.” He further opined, “a possible mild left cubital tunnel syndrome or ‘myogenic’ thoracic outlet syndrome would be completely unrelated to striking one’s face against the tree.” Dr. Lesnak thought Claimant’s progress was being hampered by “psychological factors.” He opined her subjective complaints “do not correlate with any reproducible objective findings whatsoever,” and saw “absolutely no evidence that she has any specific symptomatic pathology involving her left sternoclavicular joint or any of the surrounding soft tissues of her left upper chest, neck, and suprascapular region as it would pertain to the reported occupational incident.” He opined any mild facial trauma and mild closed head injury Claimant “may” have sustained had “clearly resolved.” He concluded Claimant was at MMI with no permanent functional impairment and no need for further treatment.

16. Dr. Sparr testified via deposition on July 16, 2020. He acknowledged Claimant’s preinjury history of neck problems including a two-level fusion, but opined the treatment he recommended is directed to the effects of the November 2019 injury and not any pre-existing condition. He explained the acromioclavicular and sternoclavicular joints are not part of the neck and not related to the prior cervical fusion. He opined Claimant probably suffered a cervical strain from the accident but most of her symptoms were coming from the anterior shoulder and brachial plexus rather than the cervical spine. He opined Claimant’s neurological findings, including abnormal sensation in the left upper extremity and all fingers, suggest a problem below the neck, consistent with brachial plexus irritation. He also noted the lack of any nerve root compression or other significant structural pathology shown on the cervical MRI. Dr. Sparr explained his recommended treatment plan is first focused on decreasing the muscle tightness within Claimant’s neck, parascapular region, shoulder blade, and pectoral region. He requested manual physical therapy to address those issues. The trigger point injections are intended to give Claimant a better chance to benefit from therapy. He thinks sternoclavicular and acromioclavicular joint injections will calm down those irritated joints he believes are further perpetuating muscle tightness and numbness in the upper extremity.

17. Dr. Sparr opined Claimant’s symptoms are directly related to the assault at work. He noted Claimant struck the front of her body and her shoulder when she was thrown into the tree. She was never treated for similar problems before the accident and he knew of nothing else that could have caused the condition. He opined Claimant’s described mechanism of injury — being thrown face-first into a tree, impacting the front of her body and falling onto her left shoulder — was sufficient to cause thoracic outlet syndrome, brachial plexopathy, sternoclavicular joint pain, and acromioclavicular joint pain. Regarding the two-month delay in developing symptoms, Dr. Sparr opined, “it can be seen with trauma to the clavicle that the joint becomes irritable at a later date.”

18. Dr. Lesnak testified at hearing to elaborate on the opinions expressed in his IME report. He disagreed with the diagnosis of myogenic TOS because his exam showed no findings to support it. He disagreed with Dr. Sparr’s interpretation of the EMG, and opined it was normal. He opined it is “anatomically impossible” to develop TOS from striking one’s face, shoulder, or chest on a tree because the thoracic outlet is “very protected” and “deep inside” the body. He emphasized that the acromioclavicular and sternoclavicular joint issues started two months after the accident, which he believes rules

out a causal connection. He also opined the proposed acromioclavicular and sternoclavicular joint injections, trigger point injections and physical therapy are not reasonably necessary, regardless of causation. He indicated Claimant no longer has neck symptoms are headaches, and all effects of her minor injuries have resolved.

19. Dr. Sparr's opinions are credible and more persuasive than the contrary opinions offered by Dr. Lesnak.

20. At hearing, Claimant credibly described striking her face and left shoulder on the tree and falling to the ground on her left side. She felt no immediate neck or left shoulder pain, but noticed some neck pain the next day. The headaches were her biggest concern early on. Claimant credibly testified she had a good result from the cervical fusion but had episodic neck issues before the November 19 work accident. The neck pain she experienced after the work accident differed from her previous neck problems. She did not mention striking the left side of her body and left shoulder early on because she was not having significant symptoms and was most focused on her headaches and neck pain.

21. Claimant proved the sternoclavicular joint injection, acromioclavicular joint injection, trigger point injections, and physical therapy ordered by Dr. Michael Sparr are reasonably needed to cure and relieve the effects of her industrial injury.

22. Claimant started working for Employer on or about August 19, 2019. She worked limited hours during the first two-week pay period because she was in training and was typically sent home after four or five hours each day. The first pay period is not representative of her typical earnings on the date of injury. Claimant earned \$4,122.86 in the five pay periods (10 weeks) from September 1, 2019 through November 8, 2019. This equates to an AWW of \$412.29, with a corresponding TTD rate of \$274.86.

CONCLUSIONS OF LAW

A. The requested medical benefits are reasonably necessary and causally related to the November 2019 work accident.

The respondents are liable for medical treatment reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P. 2d 362 (Colo. App. 1995). Even if the respondents admit liability, they retain the right to dispute the relatedness of any particular treatment, and the mere occurrence of a compensable injury does not compel the ALJ to find that all subsequent medical treatment was caused by the industrial injury. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997); *McIntyre v. KI, LLC*, W.C. No. 4-805-040 (ICAO, Jul. 2, 2010). Where the respondents dispute the claimant's entitlement to medical benefits, the claimant must prove an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The claimant must also prove the requested treatment is reasonably

necessary, if disputed. Section 8-42-101(1)(a). The claimant must prove entitlement to medical benefits by a preponderance of the evidence.

As found, Claimant proved the sternoclavicular joint injection, acromioclavicular joint injection, trigger point injections, and physical therapy ordered by Dr. Sparr are reasonably needed to cure and relieve the effects of her industrial injury. Dr. Sparr's opinions are credible and more persuasive than contrary opinions offered by Dr. Lesnak. Being thrown face-first into a tree is a plausible mechanism for neck, chest, clavicular and brachial plexus injuries. Claimant's testimony that she impacted the left side of her body and landed on her left shoulder is credible. She probably did not immediately draw attention to the clavicular area, chest, or left shoulder because she had no symptoms, and those details about the accident would not have affected the treatment she desired or received. Although a two-month delay in developing symptoms is not necessarily typical, Dr. Sparr persuasively explained, "It can be seen with trauma to the clavicle that the joint becomes irritable at a later date." Such a scenario probably occurred here. There is no persuasive evidence of any alternative explanation for the development of Claimant's symptoms aside from the assault at work. Although Respondents do not have to prove a nonwork-related cause, the absence of a persuasive alternate explanation in this case a significant factor in determining the accident more-likely-than-not caused the condition. Dr. Sparr's interpretation of the electrodiagnostic testing he personally administered is more persuasive than Dr. Lesnak's interpretation. The interventions Dr. Sparr has proposed are reasonably necessary for the injury-related pathology he identified.

B. Claimant's AWW is \$412.29.

Section 8-42-102(2) provides that compensation shall be based on the employee's average weekly earnings "at the time of the injury." The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. But § 8-42-102(3) gives the ALJ wide discretion to "fairly" calculate the employee's AWW in any manner that seems most appropriate under the circumstances. The entire objective of AWW calculation is to arrive at a "fair approximation" of the claimant's actual wage loss and diminished earning capacity because of the industrial injury. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993).

As found, Claimant's AWW is \$412.29 based on gross wages of \$4,122.86 from September 1, 2019 through November 8, 2019. The first pay period has been excluded because it does not accurately reflect Claimant's typical earnings immediately before her accident. The corresponding TTD rate is \$274.86.

ORDER

It is therefore ordered that:

1. Insurer shall cover the sternoclavicular joint injection, acromioclavicular joint injection, trigger point injections, and physical therapy recommended by Dr. Sparr.
2. Claimant's average weekly wage is \$412.29.

3. Insurer shall pay Claimant \$1,531.36 in TTD benefits from November 15, 2019 through December 23, 2019 (5 4/7 weeks x \$274.86 = \$1,531.36). Insurer may take credit for TTD already paid for those dates.

4. Insurer shall recalculate and pay Claimant TPD benefits based on an AWW of \$412.29 commencing December 20, 2019 and continuing until terminated by law. Insurer may take credit for TPD already paid for those dates.

5. Insurer shall pay Claimant statutory interest of eight percent (8%) per annum on all benefits not paid when due.

6. All issues not decided herein are reserved for future determination.

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

DATED: September 25, 2020

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-127-137-002**

ISSUE

- I. Whether Respondents established by a preponderance of the evidence that Claimant is responsible for the termination of her employment and not entitled to TTD benefits.

FINDINGS OF FACT

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

1. Claimant speaks Spanish and testified through an interpreter at the hearing.
2. Employer operates in multiple states, including Colorado.
3. Claimant worked for Employer in Colorado as a room attendant cleaning hotel rooms.
4. Claimant worked for Employer during two separate time periods. The first period was from 2014 to March 2018. The second period was from about September 2018 through her termination in May or June 2020.
5. Each time Claimant applied for employment with Employer, she dealt with Ms. Mercedes A[Redacted], who was in management.
6. When Claimant first started working for Employer in 2014, she provided Employer, through Ms. A[Redacted], her alleged social security number.
7. During her first period of employment, Claimant suffered an industrial injury and filed a claim for workers' compensation benefits. Under this first claim, Claimant used the first social security number she provided Employer.
8. Claimant stopped working for Employer in March 2018.
9. Around September 2018, Employer rehired Claimant. When Claimant was rehired, she again dealt with Ms. A[Redacted]. For her second period of employment, Claimant presented two social security numbers to Ms. A[Redacted]. Regardless of Claimant presenting two different social security numbers to Ms. A[Redacted], Claimant was hired, and a second social security number was linked to Claimant and used by Employer. As a result, when Claimant was hired again, Employer knew or reasonably should have known Claimant did not have a valid social security number.
10. On December 11, 2019, Claimant suffered another compensable work injury.
11. Ms. Claudia P[Redacted] testified on behalf of Employer. Ms. P[Redacted] is the Human Resources Director for Employer. Ms. P[Redacted] works in the corporate office in Atlanta Georgia. Her job duties include processing workers' compensation claims.

12. Ms. P[Redacted] testified that when she started processing Claimant's December 11, 2019 workers' compensation claim, she had to enter Claimant's name into their computer system's workers' compensation "module." Ms. P[Redacted] stated that upon entering Claimant's name into the workers' compensation module, it showed another Martha Sanchez with the same date of birth, but a different social security number.
13. Effective February 21, 2020, and despite Claimant using two social security numbers, Respondents started paying Claimant temporary total disability benefits.
14. Ms. P[Redacted] also testified that after she discovered the discrepancy regarding Claimant's social security numbers, she followed company policy and requested Claimant to provide proper documentation regarding her social security number.
15. On April 22, 2020, Ms. P[Redacted] wrote the following letter to Claimant:

Dear Ms. [Claimant name redacted],

We recently received information that the data and or documents you presented at the time of hiring may be coming close to expiration, have errors, or may not be accurate. Based on such, the documents might not satisfy the Form I-9 employment eligibility verification requirements of the Immigration and Nationality Act. As a result, the documents need to be reviewed or updated.

If you have proper identity and eligibility to work documentation and believe that this information is erroneous, or you have new documents that will supersede your previous expiring items, please provide us with proper documentation no later than 05/01/2020.

If you are working towards the effort of clearing this up, then on 05/01/2020, please provide us with adequate supporting documentation showing you are in active pursue of clearing this matter up.

Unless identification and employment eligibility acceptable documentation is presented, your employment with [Employer] will need to be terminated indefinitely immediately. This is a very serious matter that requires your immediate attention.
16. On May 12, 2020, Employer sent the same letter to Claimant, except it extended the deadline to respond to May 25, 2020. This second letter was sent to Claimant's new address – of which Respondents were recently apprised.
17. On May 26, 2020, Respondents filed a Petition to Modify, Terminate, or Suspend Compensation. In their petition, Respondents asserted Claimant's temporary total disability benefits should be terminated because Claimant was terminated for her failure to "clear up what appeared to be a social security number problem." (Respondents' Exhibit B.)

18. On May 29, 2020, Employer sent the same letter a third time, except this letter extended Claimant's deadline to respond to June 12, 2020.
19. Each letter was sent to Claimant in English and Spanish.
20. Claimant received at least the last two letters. Claimant, however, did not respond because she could not provide a valid social security number.
21. Ms. P[Redacted] stated that based on Claimant's failure to provide the appropriate documentation — a valid social security number — Respondents terminated Claimant's employment.
22. When Claimant was terminated, she was already receiving temporary total disability benefits. As a result, the termination did not cause any additional wage loss.
23. The ALJ, does not find Ms. P[Redacted]'s testimony regarding the basis for Claimant's termination to be credible or persuasive for many reasons. First, the timing of events is suspect. Ms. P[Redacted] testified that she discovered the discrepancy about Claimant's social security number when she first processed Claimant's claim. Claimant was injured on December 11, 2019. Ms. P[Redacted] did not send a letter to Claimant about the discrepancy until April 22, 2020 when Claimant was receiving temporary total disability benefits. Absent from Ms. P[Redacted]'s testimony was any explanation as to why it took over four months for Employer to decide to advise Claimant there was a problem with her employment documentation — social security number.
24. Second, their computer system, which helps manage the hiring and rehiring of employees, is set up in a manner that allows employees to use multiple social security numbers. Ms. P[Redacted] testified that their general computer system allows them to enter two employees with the same name, date of birth, but different social security number. As a result, Employer's computer system allows employees like Claimant to use multiple social security numbers. On the other hand, Ms. P[Redacted] testified that they have set up their workers' compensation system differently. Ms. P[Redacted] testified that their worker's compensation system has a "module" that prevents an employee with the same name and date of birth from having multiple worker's compensation claims under different social security numbers. As a result, Employer chooses to make social security number variances an issue when adjusting workers' compensation claims but not when rehiring and staffing.
25. Third, Employer does not use E-Verify in every state in which they do business to confirm each of their employees is using a valid social security number. Ms. P[Redacted] was asked whether Employer uses E-Verify to confirm each employee is using a valid social security number and eligible to work in the United States. Ms. P[Redacted] said they only use E-Verify in those states that mandate its use and that she was not sure whether Colorado required employers to use it. In other words, Employer will not use E-Verify to confirm an employee is eligible to work in the United States unless the state in which they are doing business mandates it use. As a result, there is no indication in the record that Colorado required Employer to use E-Verify when hiring or rehiring Claimant. There is also a lack of credible and

persuasive evidence in the record indicating Employer used E-Verify at any time during Claimant's preemployment screening or employment. Thus, Employer chose to hire and employ Claimant without verifying she had a valid social security number.

26. Fourth, assuming Employer just learned Claimant might be using two different social security numbers while processing Claimant's December 11, 2019, workers' compensation claim, there is no indication they used E-Verify at that time see whether either social security number was valid and assigned to Claimant. Had they done so and confirmed one of the social security numbers was valid, that might have negated the need to send out the letters. By not using E-Verify at that time, Respondents acted as if they already knew Claimant had not provided a valid social security number at any time. As a result, the ALJ finds Employer did not use E-Verify to confirm Claimant was using a valid social security number when she was hired the first time, the second time, or at any other time, because they did not want to know. Thus, they agreed, or tacitly agreed, to hire and employ Claimant without a valid social security number.
27. Fifth, Ms. P[Redacted] stated it was Employer's policy to follow up on any discrepancies regarding an employee's I-9 Form documents, such as a discrepancy regarding an employee's social security number. That said, Ms. P[Redacted] did not provide any details about their policy and how they administer and enforce the policy in Colorado and in states that do not mandate the use of E-Verify. As a result, the ALJ finds Employer failed to establish they enacted, implemented, and consistently enforced a policy that required employees to have a valid social security number.
28. In the end, the ALJ does not find Ms. P[Redacted]'s testimony to be credible and persuasive regarding when Employer learned about Claimant using two, invalid, social security numbers and the basis for terminating Claimant.
29. Employer did not submit any evidence to establish that but for Claimant's termination or undocumented status, Employer had available, and would have offered, modified employment to Claimant.
30. The ALJ finds Claimant's testimony to be credible and persuasive. Her testimony fits with the timing and sequence of events regarding Employer rehiring Claimant knowing she did not have a valid social security number and allowing her to work without a valid social security number up until Claimant started receiving temporary total disability benefits. It is also consistent with her contention that the Employer's proffered reason for her termination – an invalid social security number - is pretextual.
31. Based on the totality of the evidence, Employer failed to establish they implemented a policy requiring each worker to have a valid social security number, that they followed that policy when they hired and employed Claimant on two occasions, and that they actively enforced that policy. As a result, Employer failed to establish they required Claimant to provide a valid social security number to be hired and remain employed.
32. Based on the totality of the evidence, the ALJ finds Employer knowingly, or tacitly, allowed Claimant to work without a valid social security number.

33. The ALJ finds that it was only after Claimant filed a workers' compensation claim and Respondents started paying disability benefits that Respondents sought to require Claimant to have a valid social security number. Had Claimant not been receiving temporary disability benefits, it does not appear Respondents would have terminated Claimant for using an invalid social security number or for not being able to provide a valid social security number.
34. Based on the inconsistencies, contradictions, and sequence of events regarding how and when Employer terminated Claimant, the ALJ finds Respondents' proffered reason for terminating Claimant is pretextual. As a result, Claimant is not at-fault for her termination.

CONCLUSIONS OF LAW

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

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential*

Insurance Co. v. Cline, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Respondents established by a preponderance of the evidence that Claimant is responsible for the termination of her employment and not entitled to TTD benefits.

Section 8-42-103(1)(g), C.R.S., and § 8-42-105(4)(a), C.R.S., provide that if a temporarily disabled employee "is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury." Because these statutes provide a defense to an otherwise valid claim for TTD benefits, the respondents shoulder the burden of proof by a preponderance of the evidence to establish each element of the defense. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129 (Colo. App. 2008); *Brinsfield v. Excel Corp.*, W.C. No. 4-551-844 (I.C.A.O. July 18, 2003). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

In *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo. App. 2002), the court held the term "responsible" as used in the termination statutes reintroduces the concept of fault as it was understood before the Supreme Court's decision in *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Thus, the concept of fault used in the unemployment insurance context is instructive. Fault requires a volitional act or the exercise of some control in light of the totality of the circumstances. *Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1994), *opinion after remand*, 908 P.2d 1185 (Colo. App. 1995); *Brinsfield v. Excel Corp.*, *supra*.

Violation of an employer's policy does not necessarily establish the claimant acted volitionally with respect to a discharge from employment. *Gonzales v. Industrial Commission*, 740 P.2d 999 (Colo. 1987). That said, a claimant may act volitionally if he is aware of what the employer requires and deliberately fails to perform accordingly. *Gilmore v. Industrial Claim Appeals Office*, *supra*. This is true even if the claimant is not specifically warned that failure to comply with the employer's expectations may result in termination. See *Pabst v. Industrial Claim Appeals Office*, 833 P.2d 64 (Colo. App. 1992). Ultimately, whether the claimant was responsible for the termination is one of fact for determination by the ALJ. *Gilmore v. Industrial Claim Appeals Office*, *supra*.

As found, Claimant worked for Employer during two separate time periods. The first period was from 2014 to March 2018. The second period was from about September 2018 through her termination in May or June 2020. Each time Claimant applied for employment with Employer, she dealt with Ms. A[Redacted], who was in management.

When Claimant first started working for Employer in 2014, she provided Employer, through Ms. A[Redacted], her alleged social security number. During her first period of employment, Claimant suffered an industrial injury and filed a claim for workers' compensation benefits. Under this first claim, Claimant used the first social

security number she provided Employer. Claimant stopped working for Employer in March 2018.

Around September 2018, Employer rehired Claimant. When Claimant was rehired, she again dealt with Ms. A[Redacted]. For her second period of employment, Claimant presented two social security numbers to Ms. A[Redacted]. Regardless of Claimant presenting two different social security numbers to Ms. A[Redacted], Claimant was hired, and a second social security number was linked to Claimant and used by Employer. As a result, when Claimant was hired again, Employer knew or reasonably should have known Claimant did not have a valid social security number. As a result, Employer did not require Claimant to provide a valid social security number to be hired and remain employed.

On December 11, 2019, Claimant suffered another compensable work injury. Ms. P[Redacted], the Human Resources Director for Employer, testified on behalf of Employer. She testified that when she started processing Claimant's December 11, 2019 workers' compensation claim, she had to enter Claimant's name into their workers' compensation "module." Ms. P[Redacted] stated that upon entering Claimant's name into the workers' compensation module, it showed another Martha Sanchez with the same date of birth, but a different social security number. Ms. P[Redacted] also testified that after she discovered the discrepancy regarding Claimant's social security numbers, she followed company policy and requested Claimant to provide proper documentation regarding her social security number. Ms. P[Redacted] stated that based on Claimant's failure to provide the appropriate documentation — a valid social security number — Respondents terminated Claimant's employment.

This ALJ did not find Ms. P[Redacted]'s testimony to be credible or persuasive about the stated reason for terminating Claimant. This ALJ did not find her testimony to be credible or persuasive for the following reasons. First, Ms. P[Redacted] testified that she discovered the discrepancy about Claimant's social security number when she first processed Claimant's claim. Claimant was injured on December 11, 2019. Ms. P[Redacted], however, did not send a letter to Claimant about the discrepancy until April 22, 2020. Absent from Ms. P[Redacted]'s testimony was any explanation as to why it took over four months for Employer to decide to advise Claimant there was a problem with her employment documentation — social security number. As a result, the timing and sequence of events – combined with the lack of any explanation for 4 month delay to raise the issue - makes the proffered reason for terminating Claimant to not be credible or persuasive.

Second, Ms. P[Redacted] testified that their general computer system allows them to enter two employees with the same name, date of birth, but different social security number. As a result, Employer's computer system allows employees like Claimant to use multiple social security numbers. On the other hand, Ms. P[Redacted] testified that they have set up their workers' compensation system differently. Ms. P[Redacted] testified that their worker's compensation system has a "module" that prevents an employee with the same name and date of birth from having multiple worker's compensation claims under different social security numbers. Thus, it appeared to this ALJ that Employer chooses to make social security number variances an issue when adjusting workers' compensation claims but not in rehiring and staffing.

Third, during cross examination, Ms. P[Redacted] was asked whether Employer uses E-Verify to confirm each employee is using a valid social security number and eligible to work in the United States. Ms. P[Redacted] said they only use E-Verify in those states that mandate its use and that she was not sure whether Colorado required employers to use it. In other words, Employer will not use E-Verify to confirm an employee is eligible to work in the United States unless the state in which they are doing business mandates it use. This ALJ found that there was no indication in the record that Colorado required Employer to use E-Verify when hiring or rehiring Claimant. This ALJ also found there was a lack of credible and persuasive evidence in the record indicating Employer used E-Verify at any time during Claimant's preemployment screening or employment. Thus, this ALJ found Employer chose to hire and employ Claimant without verifying she had a valid social security number.

Fourth, assuming Employer just learned Claimant might be using two different social security numbers while processing Claimant's December 11, 2019, workers' compensation claim, there is no indication they used E-Verify at that time see whether either social security number was valid and assigned to Claimant. This ALJ found and concluded that by not using E-Verify at that time, Respondents acted as if they already knew Claimant had not provided a valid social security number at any time. As a result, this ALJ found Employer did not use E-Verify to confirm Claimant was using a valid social security number when she was hired the first time, the second time, or at any other time, because they either knew or did not want to know. Thus, Employer agreed, or tacitly agreed, to hire and employ Claimant without a valid social security number.

Fifth, Ms. P[Redacted] stated it was Employer's policy to follow up on any discrepancies regarding an employee's I-9 Form documents, such as a discrepancy about an employee's social security number. That said, Ms. P[Redacted] did not provide any details about their policy and how they administer and enforce the policy in Colorado and in states that do not mandate the use of E-Verify. As a result, this ALJ found Employer failed to establish they enacted, implemented, and consistently enforced a policy that required employees to have a valid social security number.

This ALJ did find Claimant's testimony to be credible and persuasive. Her testimony fit with the timing and sequence of events about Employer rehiring Claimant knowing she did not have a valid social security number and allowing her to work without a valid social security number up until Claimant started receiving temporary total disability benefits. It also aligns with Employer terminating Claimant's employment to terminate her TTD and not because she provided, or was unable to provide, a valid social security number.

Based on the totality of the evidence, Employer failed to establish they had a policy in place to not hire and employ workers without a valid social security number, that they followed that policy when they hired Claimant on two occasions, and that they actively enforced that policy.

Based on the totality of the evidence, the ALJ finds and concludes Employer knowingly, or tacitly, allowed Claimant to work without a valid social security number. The ALJ finds that it was only after Claimant filed a workers' compensation claim and

Respondents started paying disability benefits that Respondents sought to terminate Claimant.

The conduct on which an employer bases its decision to terminate an employee cannot be wielded in an inconsistent manner. It cannot allow the conduct when it suits its interests at one time and then disallow the same conduct when its interests change at a different time.

This ALJ finds and concludes Respondents failed to establish Claimant is at-fault for her termination. Based on the inconsistencies, contradictions, and sequence of events regarding how and when Employer terminated Claimant, the ALJ finds and concludes Respondents' proffered reason for terminating Claimant to be pretextual. As a result, Claimant is not at-fault for her termination.

ORDER

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

1. Respondents request to terminate Claimant's temporary total disability benefits based on their termination of Claimant is denied and dismissed.
2. Issues not expressly decided herein are reserved to the parties for future determination.

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

DATED: September 28, 2020.

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUE

1. Whether Claimant has established by a preponderance of the evidence that his scheduled impairment rating for his left shoulder injury should be converted to a whole person impairment rating.

FINDINGS OF FACT

1. Claimant is a 63-year-old, left-handed man who sustained an admitted work-related injury to his left shoulder on February 26, 2017 when he was moving a 20 lb. box of cat litter in his capacity as a freight verifier at Employer's Loveland, Colorado distribution center.
2. Claimant initially saw Dr. David Farstad at UC Health on February 26, 2017 and reported sudden left shoulder pain, radiation to the lateral neck muscles and down the arm. Claimant reported no history of left shoulder or cervical pathology. Dr. Farstad prescribed Norco and placed Claimant in a sling. (Ex. 3).
3. On February 27, 2017, Claimant saw Robert Dupper, M.D. at WorkWell. Dr. Dupper diagnosed claimant with an injury to the left rotator cuff and pain in the left shoulder. Dr. Dupper placed claimant on work restrictions and ordered an MRI of the left shoulder. (Ex. 4).
4. On March 7, 2017, Claimant had an MRI of his left shoulder. The MRI was interpreted as showing a full thickness tear involving the entire width of both the supraspinatus and infraspinatus tendons. The MRI showed retraction of the torn fibers and mild to moderate fatty atrophy of both muscle bellies. The subscapularis tendon showed a moderate to high grade partial tearing of the most inferior fibers of the tendon adjacent to the insertion, but no evidence of a full thickness tear. There was also extensive tearing of both the superior and inferior aspects of the labrum. The MRI also demonstrated an abnormal intrasubstance signal within the biceps tendon at the anchoring at the labrum and a labral SLAP lesion. (Ex. F & G).
5. On April 28, 2017, Claimant underwent surgery performed by Steven J. Seiler, M.D. Dr. Seiler performed an arthroscopic biceps tenolysis, subacromial decompression with acromioplasty and arthroscopic biceps repair to Claimant's left shoulder. (Ex. F & G).
6. On August 29, 2018, Claimant had an MRI of his cervical spine, ordered by Dr. Dupper. The MRI was interpreted as showing a circumferential disc bulge with facet and uncovertebral degenerative changes at C2-3, with moderate to severe left-sided neural foraminal narrowing with mild canal stenosis. There was mild canal stenosis and bilateral neural foraminal narrowing at C4-5. There was a CS-6 posterior broad-based disc

protrusion with posteriorly directed osteophytes and hypertrophic changes of the facet joints, as well as a superimposed left neural foraminal disc extrusion and severe left-sided neural foraminal narrowing and moderate right-sided neural foraminal narrowing. There was also a broad-based disc protrusion at C6-7. (Ex. F).

7. On September 13, 2017, Claimant saw Dr. Seiler for a follow up visit. Dr. Seiler opined that Claimant had no specific restrictions, could increase his activities as tolerated, and would be placed at maximum medical improvement. Dr. Seiler found Claimant was still having a "slight clicking" in the lateral aspect and anterolateral aspect of his shoulder. (Ex. 5).

8. On September 20, 2017, Claimant saw physiatrist Eric Shoemaker, D.O., on referral from Dr. Dupper due to complaints of neck and left upper extremity pain. Dr. Shoemaker opined that Claimant's symptoms were due to pathology of the left shoulder and a left C6 radiculitis due to severe left C5-6 foraminal stenosis related to "disc osteophyte complex." (Ex. F).

9. On June 11, 2018, Claimant was examined by Carlos Cebrian, M.D., at the request of Respondents. Dr. Cebrian agreed Claimant sustained a compensable injury to his left shoulder on or about February 26, 2017. Dr. Cebrian agreed Claimant qualifies for an impairment rating for his left shoulder. Although Dr. Cebrian's range of motion measurements and impairment rating differ from Dr. Tyler's, Dr. Cebrian agreed Claimant sustained permanent impairment to his left shoulder. Dr. Cebrian opined that Claimant's impairment was a scheduled, rather than whole-person, impairment because the functional impairment is limited to Claimant's left upper extremity and there was no functional impairment extending beyond the left glenohumeral joint. Dr. Cebrian opined Claimant could lift up to 20 pounds with his left arm but should not lift over his shoulder level on the left. (Ex. C).

10. On June 26, 2018, Claimant saw Dr. Dupper. Dr. Dupper placed Claimant at MMI for his left shoulder effective June 26, 2018. Dr. Dupper also recommended permanent work restrictions "Limited to the left upper extremity: Limit lifting from floor to shoulder height to 20 pounds. No overhead work. No reaching and lifting. No repetitive lifting. Pushing or pulling no more than 20 pounds." (Ex. D).

11. On August 21, 2018, Claimant saw Dr. Dupper for an impairment rating. Dr. Dupper noted Claimant had some improvement with surgery but continued to have left arm pain and shoulder pain. Dr. Dupper also noted Claimant had significant functional deficits in strength and range of motion. Dr. Dupper opined that Claimant had been at MMI for his left shoulder since June 26, 2018. Dr. Dupper assigned a scheduled impairment rating of 20% for range of motion deficits and weakness in the left shoulder, which converts to a 12% whole person impairment. Dr. Dupper also noted work restrictions "Limited to the left upper extremity: Limit lifting from floor to shoulder height to 10 pounds. Pushing or pulling no more than 10 pounds. No overhead lifting. No overhead work." (Ex. 3).

12. On February 20, 2019, Claimant underwent a Division Independent Medical Examination (DIME) performed by John M. Tyler, Jr., M.D. Claimant reported he was working as a “freight verifier” and was lifting a 20 lb. bag of cat litter when his right hand slipped off the bag and the bag pulled his left arm. Claimant reported the immediate onset of left shoulder pain and pain radiating into the lateral aspect of the cervical spine and superomedial parascapular region. Claimant reported he had no prior problems with his left shoulder, superomedial parascapular region or cervical spine. Claimant reported his primary problem was residual ongoing chronic neck pain. Claimant described the location of his pain as the middle to upper portion of the left posterolateral cervical spine into the superomedial parascapular region over to the level of his AC joint. Claimant reported that rotation of his spine to the left increased his pain, and that he could not maintain a static position of his head without the sensation worsening. Claimant reported his second area of concern was symptoms deep within his left shoulder with motion causing an “icepick” sensation within the shoulder joint itself. Claimant also reported difficulty sleeping due to pain in his cervical spine and shoulder. (Ex. 4).

13. Dr. Tyler’s impression was status post left rotator cuff repair of both the supraspinatus and infraspinatus and subacromial decompression; cervical myofascial pain syndrome with restriction of mobility at the CS-6 and C2-3 facet levels on the left side; diffuse myofascial pain syndrome throughout the left parascapular and superomedial parascapular regions. (Ex. 4).

14. Dr. Tyler concluded Claimant was at maximum medical improvement (MMI) as of June 26, 2018. Dr. Tyler provided a scheduled impairment rating of 15% for Claimant’s left upper extremity related to loss of motion, including 5% for impairment of the upper extremity for loss of shoulder flexion, 1% for loss of extension, 1% for loss of adduction, 3% for loss of abduction, 4% for loss of internal rotation and 1% for loss of external rotation. Dr. Tyler indicated no further impairment for shoulder pathology was given as there was no clavicle resection or shoulder replacement required. Claimant’s 15% upper extremity impairment converts to a 9% whole person impairment. Dr. Tyler agreed with the work restrictions recommended by Dr. Dupper. (Ex. 4).

15. Dr. Tyler also provided a whole person impairment for Claimant’s cervical spine impairment related to the pain in Claimant’s cervical spine. In addition, Dr. Tyler assigned a 13% impairment for loss of cervical range of motion. Dr. Tyler assigned a combined 16% permanent partial impairment rating for Claimant’s cervical spine. (Ex. 4)

16. Claimant credibly testified he had no prior injuries to his left shoulder or cervical spine. Claimant testified that as a result of his injury, he had pain down his left arm. Claimant testified he could not separate the impairment he attributes to his shoulder injury from the impairment attributable to his cervical injury.

17. On May 17, 2019, Respondents filed an Amended Final Admission of Liability (FAL) consistent with Dr. Tyler’s impairment rating and admitted for a 15% scheduled impairment of Claimant’s left shoulder and 16% whole person impairment related to Claimant’s cervical spine.

18. Respondents submitted footage of video surveillance of Claimant. The videos, taken on August 2, 3, 4 and 5, 2019, generally show an individual (presumed to be Claimant) entering and exiting an automobile and carrying various items in both his left and right arm. Nothing in the videos demonstrate Claimant performing any task inconsistent with his work restrictions. The videos neither demonstrate nor disprove any functional restrictions Claimant may experience. (Exhibit I).

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. See § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. See § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id.* at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Conversion of Scheduled Impairment to Whole Person Impairment

Section 8-42-107(1)(a), C.R.S. limits medical impairment benefits to those provided in §8-42-107(2), C.R.S. when a claimant's injury is one enumerated in the schedule of impairments. The schedule includes the loss of the "arm at the shoulder."

See §8-42-107(2)(a), C.R.S. However, the “shoulder” is not listed in the schedule of impairments. See *Bolin v. Wacholtz*, W.C. No. 4-240-315 (ICAO, June 11, 1998).

When an injury results in a permanent medical impairment not set forth on a schedule of impairments, an employee is entitled to medical impairment benefits paid as a whole person. See §8-42-107(8)(c), C.R.S.

Because §8-42-107(2)(a), C.R.S. does not define a “shoulder” injury, the dispositive issue is whether a claimant has sustained a functional impairment to a portion of the body listed on the schedule of impairments. See *Strauch v. PSL Swedish Healthcare*, 917 P.2d 366, 368 (Colo. App. 1996). Whether a claimant has suffered the loss of an arm at the shoulder under §8-42-107(2)(a), C.R.S., or a whole person medical impairment compensable under §8-42-107(8)(c), C.R.S., is determined on a case-by-case basis. See *DeLaney v. Industrial Claim Appeals Office*, 30 P.3d 691, 693 (Colo. App. 2000).

The ALJ must thus determine the situs of a claimant’s “functional impairment.” *Velasquez v. UPS*, W.C. No. 4-573-459 (ICAO Apr. 13, 2006). The situs of the functional impairment is not necessarily the site of the injury. See *In re Hamrick*, W.C. No. 4-868-996-01 (ICAO, Feb. 1, 2016); *In re Zimdars*, W.C. No. 4-922-066-04 (ICAO, Feb. 4, 2015). Pain and discomfort that limit a claimant’s ability to use a portion of the body is considered functional impairment for purposes of determining whether an injury is off the schedule of impairments. *In re Johnson –Wood*, W.C. No. 4-536-198 (ICAO, June 20, 2005); *Vargas v. Excel Corp.*, W.C. 4-551-161 (ICAO, Apr. 21, 2005). However, the mere presence of pain in a portion of the body beyond the schedule does not require a finding that the pain represents a functional impairment. *Lovett v. Big Lots*, WC 4-657-285 (ICAO, Nov. 16, 2007); *O’Connell v. Don’s Masonry*, W.C. 4-609-719 (ICAO, Dec. 28, 2006).

Claimant bears the burden of proof by a preponderance of the evidence to establish functional impairment beyond the arm at the shoulder and the consequent right to PPD benefits awarded under § 8-42-107(8)(c), C.R.S. Whether Claimant met the burden of proof presents an issue of fact for determination by the ALJ. *Delaney v. Industrial Claim Appeals Office*, 30 P.3d 691 (Colo. App. 2001); *Johnson-Wood v. City of Colorado Springs*, W.C. No. 4-536-198 (ICAO June 20, 2005). *In re Claim of Barnes*, 042420 COWC, 5-063-493 (ICAO, April 24, 2020).

Claimant has failed to establish by a preponderance of the evidence that his scheduled impairment rating for loss of use of the arm below the shoulder should be converted to a whole person impairment. Claimant did not testify as to the nature or location of any impairment related to his shoulder injury and testified, he could not distinguish between functional impairment he attributed to his cervical spine and his shoulder. The medical providers did not find any impairment beyond the shoulder, with the exception of that related to Claimant’s cervical spine, for which he received an impairment rating. Neither Dr. Dupper, Dr. Cebrian nor Dr. Tyler noted functional impairment beyond the Claimant’s shoulder, with the exception of those restrictions related directly to his cervical spine. The restrictions placed upon Claimant by Dr. Dupper (and agreed by Dr. Tyler) principally affect Claimant’s arm movements (i.e., pushing,

pulling, lifting, and working overhead with the left arm). Dr. Dupper specifically noted Claimant's permanent restrictions are "limited to the left upper extremity." Claimant reported to Dr. Tyler he experienced pain "deep within his left shoulder" with movement, and the Claimant's records do not document functional impairment extending beyond his left arm.

Claimant does have impairment as the result of his cervical spine injury, this has been separately rated as a whole person impairment. Where the accident has caused measurable impairment to more than one part of the body, the claimant may have more than one "injury" for purposes of § 8-42-107(7)(b)(II), C.R.S. *Warthen v. Industrial Claim Appeals Office*, 100 P.3d 581 (Colo. App. 2004). Section 8-42-107(8)(b)(II), C.R.S., "precludes conversion of a scheduled disability to a whole person impairment rating for the purposes of combining a scheduled disability with a whole person impairment where the claimant sustains both scheduled both scheduled and nonscheduled injuries." *Guzman v. KBP Coil Coaters*, (WC No. 4-444-246 (January 10, 2003); see also *Jesmer v. Portercare Hospital*, W.C. No. 4-442-706 (March 27, 2002). Although the ALJ makes no factual findings regarding the causation or relatedness of Claimant's cervical spine condition, the DIME physician did assign a whole person impairment rating for Claimant's cervical spine based on his finding that the Claimant sustained a related cervical injury.

Claimant has not established by a preponderance of the evidence that he sustained any functional impairment related to his shoulder injury that extends beyond the shoulder. As such, Claimant has not established that the 15% scheduled impairment assigned by the DIME for loss of use of arm below the shoulder should be converted to a whole person impairment.

ORDER

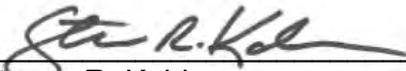
It is therefore ordered that:

1. Claimant's request to convert the 15% scheduled impairment rating for loss of use of the left arm below the shoulder to a whole person impairment rating is denied.
2. All matters not determined herein are reserved for future determination.

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

when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: <http://www.colorado.gov/dpa/oac/forms-WC.htm>.

DATED: September 28, 2020.



Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

- I. Has Claimant shown, by a preponderance of the evidence, that she suffered a compensable injury to her right shoulder on February 8, 2019?
- II. If compensable, has Claimant shown, by a preponderance of the evidence, that she is entitled to all reasonable, necessary, and related medical benefits, including treatment from UCHealth and Colorado Springs Orthopedic Group?
- III. If compensable, has Claimant shown, by a preponderance of the evidence, that the medical benefits she received before she reported this claim to Respondents are authorized?

STIPULATIONS

- I. Claimant's Average Weekly Wage is \$1,131.73
- II. Should Medical Benefits be awarded, the Division of Workers Compensation Fee Schedule would apply.

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

Claimant's Hearing Testimony about the Work Incident

1. Claimant worked as a full time fundraiser for Employer[Redacted]. At hearing, Claimant testified that she was pulling a wheeled case inside the Reno, Nevada airport to reach the airline's check-in counter and check those wheeled cases in as luggage for her flight. The case had a handle and was tilted forward so it rolled on two wheels built in to the case. Claimant explained she was grasping the handle with her right hand while walking forward. She was facing forward, with her arm extended down behind her to grasp the handle of the cases to pull the cases forward. Claimant said she was pulling the case as one typically does with wheeled luggage. She was not using any new or changed grip to pull the case. She was pulling the case on a smooth concrete floor, and there were no impediments, cracks, uneven places, an incline, a decline, or defects on the floor.

2. Claimant testified that nothing occurred while she was pulling the cases. They did not wobble, fall, stop suddenly, shift, bump, jump, shake, or do anything other than roll forward. No one added or subtracted weight from the case she was pulling. Claimant said at hearing that she felt her right shoulder "hyperextend" while pulling the

case. The pain began after she had been pulling the case for a time in the airport, and not when she was setting the case in motion, or when stopping it. Claimant testified that she experienced a deep sharp pain on the right shoulder down to her right elbow and that this pain was constant. Claimant testified that she told her co-worker Kevin N[Redacted] that she had extreme soreness in her right shoulder on February 8, 2019 and that she was not sure why.

3. Claimant testified that she had approximately four work trips in 2017 and seven work trips in 2018. These work-related trips typically lasted for three days during which Claimant was physically active for a minimum of three up to a maximum of ten hours a day. In performing her duties on these trips, Claimant was required to pack pallets weighing up to 600 pounds, set up booths with firearms and displays, and transport luggage weighing up to 80 pounds. During these trips, Claimant had assistance from one other employee. Claimant testified that although she had some soreness after these work trips, she did not have any difficulty performing her job duties prior to February 8, 2019.

4. Claimant testified that, although she continued to work after her February 8, 2019 injury, she required assistance from her travel partner Kevin N[Redacted]. Mr. N[Redacted] assisted Claimant with carrying her laptop in his backpack and lifting and pulling additional equipment to limit her physical activity. Claimant testified that she never required this type of assistance in performing her job duties prior to February 8, 2019. Claimant testified that she had four subsequent work trips after her February 8, 2019 injury. However, Claimant testified that she was not able to do the same amount of physical activity during these trips as she could before. Ultimately, Claimant was unable to go on her planned June 19 to June 24, 2019 work trip due to her injury. Claimant testified that the symptoms she experienced in her right shoulder after her February 8, 2019 injury were distinct from the soreness she previously experienced after her work trips in 2017 and 2018. Claimant described her symptoms from February 8, 2019 as very deep and intense in the right shoulder with chronic aching. Claimant described her previous soreness as “all body” and that it would resolve on its own with time. Claimant testified that she felt pain in her right shoulder then, and has felt a constant ache ever since.

Claimant Initially Treats through Primary Care

5. Claimant initially reported at Carlson Chiropractic and Acupuncture (Ex. D). Claimant, at her first appointment at Carlson Chiropractic on April 18, 2019, completed a pain diagram endorsing dull aches in her right and left arms and shoulders. (Ex. D, p. 107). This pain diagram endorses fewer symptoms and fewer affected body parts than her later pain diagrams, with a pain level of six on a 10- point pain scale. Claimant did not mention that she was injured on February 8, 2019, when she saw Dr. Carlson on April 18, 2019. Instead, he wrote, “This started following a lot of travel which began in December. There was a lot of lifting, pushing and pulling of heavy backpacks, etc. for work.” When asked about her arm pain, Dr. Carlson recorded, “The *patient is unsure when these symptoms started*. The symptoms appear on both sides.” *Id* at 109.

Claimant was similarly unsure when her neck, and mid back, pains began.

6. Dr. Carlson took detailed range of motion notes. He measured both arms for Flexion, Extension, Abduction, Adduction, Internal rotation, and External Rotation. In every measurement, the reported *ROM findings for both left and right arms were identical*. Additionally, the pain that Claimant reported for each ROM movement was *identical between the left and right sides*, but ranging from 3 to 6, depending on the specific movement. *Id at 109, 110*.

7. Claimant continued to treat with Dr. Carlson. Dr. Carlson never mentions any traumatic or specific injury occurring on February 8, 2019, in his reports from those visits. He never discusses any specific injury to Claimant's right shoulder. Instead, his chiropractic treatments focused on Claimant's cervical spine region. (Ex. D, p. 111-112). On May 10, 2019, Claimant said she had worsening arm pain wither severe symptoms that worsened with physical exertion. When asked about her bilateral shoulder and arm pain, [Claimant] "[I]s unsure when this condition started." *Id at 113*.

8. On May 16, 2019, Claimant told Dr. Carlson that her symptoms were better and, "[I]s now flared up again." Dr. Carlson said the flare up had occurred, "[F]or unknown reasons." She still reported bilateral shoulder and arm symptoms, with neck and mid back symptoms. Under *Shoulder Pain*, he writes "The symptoms are *bilateral*." (Ex. D, p. 115-116). On June 10 and 12, 2019, Claimant still reported bilateral shoulder symptoms, and was still unsure when that condition started. *Id at 117, 120*. In none of his reports from his treatment of Claimant over almost two months, does Dr. Carlson mention any injury occurring on February 8, 2019, or any injury to the right shoulder or any other body part.

Claimant Reports this as a Work Injury

9. Claimant completed the "Workers' Compensation – First Report of Injury or Illness" on June 21, 2019. Therein, she stated: "Started feeling pain in the neck and shoulder thought I was sore continued to feel sore after time I decided to go to chiropractor and he said I had pinched nerves." (Ex. P) Claimant alleges she informed Employer[Redacted] of her alleged injury on June 21, 2019 (*Id.*). After receiving a copy of the November 7, 2019, Worker's Claim for Compensation from the DOWC (Ex. Q), Insurer issued a Notice of Contest.

10. Claimant then went to UCHHealth on June 21, 2019. Claimant reported she had neck, bilateral arm, and low back pain, "[D]ue to pushing, pulling, moving lots of gear, works long hours and travels a lot as well. DOI sometime around 2/8/19." (Ex. C, p. 23). Claimant did not state or mention to Dr. Shafer at this visit that she sustained a specific injury to her right shoulder on February 8, 2019, while pulling wheeled luggage as she alleged at hearing. Claimant reported diffuse symptoms in her neck, back, right arm, and left arm, and reported her symptoms were emanating from her neck. Claimant was uncertain of the date when her symptoms began, stating they started after one of her work trips around February 8, 2019 (Ex. C, p. 24). She did not discuss or disclose her involvement in a 2013 motor vehicle accident (Ex. T, U) and the treatment and

symptoms she had due to that accident. Claimant said her previous chiropractic treatment (at Carlson Chiropractic and Acupuncture, Ex. D) had resolved her lower back symptoms, and her lumbar spine was normal to exam.

11. Claimant said that when she flexed and rotated her neck, her pain and symptoms in her arms increased. Luis A. Santiago, P.A.-C., diagnosed Claimant with cervical radiculopathy in the C5-C7 distribution, prescribed a steroid burst and Robaxin, and gave her work restrictions. PA Santiago did not diagnose Claimant with any right shoulder injury or pathology. Claimant's physical exam on June 21, 2019, did not mention any problems, issues, or symptoms in her right shoulder. (Ex. C, pp. 23-30). Claimant did not report a specific injury to her right shoulder at this appointment, and did not have any signs, symptoms, or diagnosis of right shoulder pathology at this appointment.

12. Claimant returned to UCHealth on June 27, 2019, and saw Dr. Cynthia Shafer for the first time. She said she was better. Claimant disclosed that she had worked for Employer[Redacted] for two and one-half years, and she had been, "[H]aving gradually increased symptoms since starting." Claimant did not state that her symptoms began suddenly or acutely when she was pulling luggage behind her in airport. Instead, Dr. Schafer's history from Claimant states:

Ms. Woods works for USA shooting, the Olympic shooting team doing a lot of fundraising which means a lot of shows. They are heavy as season of the year as January and February. Around 2/8/2019 coming home from 1 of her trips she noticed increased neck pain radiating into the right greater than left arm and some right arm weakness (this is her dominant hand). She also had diffuse back pain. She went to the chiropractor a few times which resolved her low back, but the upper back continued. Her coworkers kept urging her to get seen because this was work-related, so she finally came in and saw 1 of my colleagues last week on 6/21/2019. He gave her a steroid burst as well as Robaxin 750 mg put her on fairly tight restrictions and brought her back to see me today.

(Ex. C, pg. 34)

13. Claimant's shoulders had full, normal range of motion on Dr. Schafer's exam. She had diffusely tender in her paraspinous trapezius, and bilateral rhomboids. Her right deltoid muscle was also diffusely tender (Ex. C, g. 35). Cervical x-rays did not reveal any injury or degenerative changes. Dr. Schafer thought it unlikely that claimant had a cervical disc pathology. She concluded, "I actually believe all this is simply soft tissue, fascial as well as muscular from the cumulative effect of overloading her body." (Ex. C, pp.34-37) Dr. Schafer stated that Claimant had no work restrictions, and could regulate her activities herself. Claimant last worked for Employer[Redacted] on June 28, 2019, when she was laid off.

Prior Injury in 2013

14. Claimant did disclose to Dr. Schafer on June 27 that she had a significant injury in a motor vehicle accident in Texas in 2013. "She went to physical therapy and chiropractor for 2 years to resolve this." (Ex. C, p. 35). Records confirm that she required treatment and evaluation in the emergency room for neck, back, bilateral arm, and hand soreness. Claimant also sought care at Manitou Wellness Center for pain that interfered with her work (Ex. T). Claimant was found to have "Compression in Spine. External rotation of R[ight] hip. L[eft] and R[ight] scapula imbolized [sic]. She

was given treatment to increase mobility for her shoulder and shoulder girdle, including “Rotator cuff opening stretch.” She was to continue treatment for eight to 10 weeks *Id.*

15. At Claimant’s second appointment with Manitou Wellness Center, her scapula was, “[S]till immobilized [sic].” She was told to perform, “Deepened stretch for rotator cuff” Both shoulders were reported to be symptomatic at that appointment. On her fourth visit on July 3, 2013, Claimant still reported symptoms in her shoulders, and was still getting rotator cuff opening exercises. On July 17, 2013, Claimant still reported right scapula symptoms. Claimant’s pain was “high” when she returned for her sixth visit on August 14, 2013, and her right shoulder was, “[P]ulled forward.” Claimant’s physical therapist believed therapy should continue every other week. {Note: these medical records were obtained in mid-July, 2020; the hearing occurred June 30, 2020}.

16. At hearing, the following exchange took place:

Q What about that 2013 accident; what type of treatment did you receive for that?

A I didn’t need any treatment.

Q Did you have any treatment?

A I’m sorry. I went to get a – I went to the urgent care, and they sent me to get X rays.

Q *Did you have any follow-up after that?*

A *No.*

Q When was the last time you received medical treatment for that?

A That would be during the accident in 2013.

Q Did that issue resolve?

A Yes (Hearing transcript, pp. 30, 31)(emphasis added).

Claimant Referred for Chiropractic Care

17. Claimant was referred by Dr. Shafer to see Dr. Doyle for her first chiropractic appointment on July 15, 2019 (Ex. E). Dr. Doyle acquired a more detailed history from Claimant. Claimant, he wrote, was working 17-hour shifts and traveling, “[D]uring which she had to transport luggage and stack pallets past the point of fatigue. She reports that she developed neck upper back and shoulder pain *gradually* and that it significantly *worsened* in February of 2019.” (Ex. E, p. 128)(emphasis added). Claimant said that her complaints were of right greater than left neck, upper back, shoulder and arm pain. *Id.*

18. Claimant did not tell Dr. Doyle that she sustained a specific traumatic injury while pulling wheeled luggage in the airport on February 8, 2019, or any specific injury on any date. Her symptoms, she said, arose gradually, and not from a specific incident. Claimant said she was off work for the summer and thus now able to pursue medical treatment. She said her right shoulder and right side of her neck were most painful. She completed a pain diagram for Dr. Doyle, showing no specific right shoulder injury;

but diffuse symptoms covering her entire back, neck, head, and both upper extremities to the elbows. (Ex. E, p. 121). She wrote in her questionnaire for Dr. Doyle that her symptoms began in “February 2019” and in response to a question asking how her symptoms began, claimant wrote, “Worsening on the road.” (Ex. E, p. 122)

19. Dr. Doyle recorded Claimant, “Felt very sore,” in January and February 2019, and that her symptoms worsened February 8, 2019 (Ex. E, p. 127). Claimant wrote that her symptoms began in her neck and went from her neck down her arms to the elbow *Id.* Dr. Doyle’s physical exam revealed myofascial findings, “[C]onsistent with rotator cuff injury as well as impingement and subdeltoid bursitis on her right.” He also thought Claimant was symptomatic in her cervical and thoracic spine regions. He recommended she continue to receive chiropractic care three times weekly for two weeks, *Id at 128-129* Dr. Doyle added trigger point dry needling at Claimant’s next appointment on July 17, 2019, and continued manual therapy. *Id at 130.*

20. However, on July 18, 2019, Dr. Shafer found Claimant had right shoulder flexion and abduction of only 90 degrees, but normal rotator cuff strength (Ex. C, p. 46). Dr. Doyle had contacted Dr. Schafer to say he was concerned Claimant had a right shoulder rotator cuff injury along with her, “[S]evere muscle and myofascial findings.” Dr. Doyle wanted to add massage therapy to Claimant’s treatment plan. Claimant’s right shoulder range of motion was significantly restricted at this visit, but her muscle spasms had lessened. Claimant mentioned pulling wheeled luggage behind her for work at this visit but said she felt, “[A] lot in her *elbow* around the reported date of injury, so perhaps she did damage something.” Claimant does not say she injured her shoulder in this activity (Ex. C, p. 45).

21. Claimant continued chiropractic treatment with dry needling, manual therapy, and electrical stimulation. On July 22, 2019, Claimant said her symptoms began, “[G]radually, and that it significantly worsened in February of 2019.” (Ex. E, p. 132). She does not mention any specific injury on February 8, 2019. Claimant told Dr. Doyle she was, “[D]oing much better with treatment . . .” on July 24, 2019 *Id at 133.* On July 26, 2019, Claimant told Dr. Doyle that she was steadily improving and was very positive about her progress. She still makes no mention of any injury on February 8, 2019.

22. However, at Claimant’s sixth visit with Dr. Doyle on July 29, 2019, she said her symptoms in her right shoulder were now much worse. Her neck and upper back pain had not increased. Claimant said her range of motion in her right shoulder and ability to use her right arm were very limited. Claimant did not provide, and Dr. Doyle does not mention, any cause for this sudden increase in her symptoms. Dr. Doyle wrote that Claimant had, “Refractory right shoulder pain which seems due to a combination of rotator cuff impingement subdeltoid bursitis and bicipital tendonitis.” Dr. Doyle contacted Dr. Schafer to say he thought a right shoulder MRI would be needed (Ex. E, pp. 137-138). Claimant began massage therapy on July 30, 2019; then on July 31, 2019, told Dr. Doyle that her right shoulder symptoms were improved. *Id at 139-140.* Claimant continued to report that she was pleased with her treatment and positive about

her recovery, and continued with chiropractic and massage therapy appointments.

Care Focuses on Right Shoulder

23. Dr. Schafer saw Claimant again on August 8, 2019 (Ex. C, p. 57). Dr. Shafer said Claimant's neck and trapezius symptoms had resolved, but that Claimant's continued right shoulder symptoms made her concerned about internal derangement in that shoulder. She referred Claimant to Dr. John Redfern at Colorado Springs Orthopedic Group for an evaluation and to an MRI. That MRI, done August 22, 2019, was interpreted to show findings:

1. Thickening and edematous change inferior capsular margin with synovitis changes of the rotator interval. Findings *highly suggestive of adhesive capsulitis*.
2. Articular surface compromise of the supraspinatus tendon as above. Mid and bursal 50% remains intact. *Complete tear is not identified*.
3. Overall, given the *constellation* of findings, *consider* orthopedic surgery evaluation. (Ex. H, pp. 175-176)(emphasis added).

24. Dr. Redfern saw Claimant in the morning on September 5, 2019. Claimant told him her right shoulder pain started when traveling for her job with employer and having to carry heavy backpack and luggage, and set up display tables. Dr. Redfern wrote, "She believes that the shoulder was [injured] during her travels for work which requires her to carry heavy backpack and luggage. She also set up tendon [sic] tables. She began experiencing increased pain around the shoulder and upper arm and [sic] January/February 2019." Dr. Redfern diagnosed, "Incomplete rotator cuff tear or rupture of right shoulder, *not specified as traumatic*." (emphasis added). Dr. Redfern stated she should continue her therapy, and not have surgery at this time. An injection was deferred. Claimant agreed with that plan, stating she wanted to avoid surgery (Ex. G, pp. 169-171).

25. Claimant then saw Dr. Shafer that same afternoon on September 5, 2019, and told her that she was, "[A]mazed with the improvement that she has had working with the massage therapist." At this visit with Dr. Schafer, Claimant had 90 degrees of right shoulder flexion (Ex. C, pp. 68-69). However, earlier that day when Claimant saw Dr. Redfern, Claimant, Dr. Redfern found, had 160 degrees of flexion (Ex. G, p. 170).

26. Claimant presented to Orthopedic Rehabilitation Associates for physical therapy from September 18, 2019 to October 15, 2019. The physical therapy records reveal chronic right sided shoulder and neck pain, with intermittent less intense left shoulder pain. Claimant reported pain began while moving and handling a lot of heavy equipment during her work with Employer[Redacted] on February 8, 2019. Claimant reported that her pain progressed leading to difficulty with movement of the right shoulder and neck, difficulty sleeping, and difficulty performing activities of daily living and recreational activities. Physical examination revealed tenderness on the rhomboids, right rotator cuff, traps, pec major/minor and deltoid, with moderate guarding. Claimant

also had decreased right scapular mobility. Assessment included “WC due to overuse working for Employer[Redacted] February 2019.” On her last physical therapy session, the physical therapist noted “due to lack of significant functional progress, patient may be a surgical candidate at this time per her discussions with Dr. Redfern,” and that, although she responds well to treatment with improved motion and decreased pain, results are temporary and function is declining overall. (Ex. 7)

27. On December 12, 2019, Claimant told Dr. Schafer, “She has never had issues with the shoulder before including no frozen shoulder. The only thing with her joints has been a nonspecific ‘autoimmune disorder’ with no further delineation that she has had for many years.” Dr. Schafer opined: “her underlying autoimmune disorder may make her more likely to develop adhesive capsulitis, but the original injury I believe is work-related and therefore this adhesive capsulitis is secondary thus part of the same injury in my opinion.” (Ex. 2, pp. 74-80).

28. When Claimant returned to Dr. Redfern on October 10, 2019, she told him her symptoms had not improved with physical therapy and conservative care. Claimant now wanted to have a right rotator cuff repair (Ex. G, pp. 172-174). Dr. Redfern’s office then submitted a surgery authorization request to insurer.

Proposed Surgery is Denied

29. Jon Erickson, M.D. reviewed Dr. Redfern’s surgery authorization request as a Pinnacle physician advisor on November 26, 2019. Dr. Erickson reviewed Claimant’s medical records. He opined there was no specific injury, and that Claimant’s symptoms arose over time with activities. He stated claimant’s MRI was, “[M]ore consistent with progressive degenerative changes and not a work injury.” He recommended the surgery be denied (Ex. B, pp. 21-22).

Dr. Ciccone IME

30. William Ciccone, II, M.D. saw Claimant on February 26, 2020, for an IME at Respondents’ request. During this IME, Claimant did not tell Dr. Ciccone that her right shoulder symptoms began when pulling wheeled luggage behind her in an airport on February 8, 2019. Instead, she told him she noticed her shoulder was sore in January 2019 after doing three shows for employer. Claimant also said that she noticed increased pain *at night* after working on February 8, 2019. Dr. Ciccone wrote, “She notes she had to pull 80 pounds in January and felt a shift in her shoulder while pulling.”

31. Claimant also admitted to Dr. Ciccone that she did not report this as a work injury until June 2019. Claimant denied “[A]ny previous history of shoulder injury.” After reviewing Claimant’s medical records, taking her history, and performing a physical examination, Dr. Ciccone addressed the relatedness of Claimant’s right shoulder complaints to February 8, 2019. He opined, “I do not believe that the Claimant suffered a work-related injury to the right shoulder. While the Claimant may have been active at work there is no recollection of a specific injury that required a medical

evaluation or limited work duties.” (Ex. A, p. 10). He expanded on his reasoning:

In my experience, most patients who suffer an acute rotator cuff injury present for medical evaluation due to pain. In this case, the claimant relates some increased work with the shoulder but did not present for medical evaluation for months. From the records provided she did see a chiropractor on 4/18/2019, still months after the reported injury event, and in this note she was unsure when the symptoms started. Further, the claimant’s examinations have not been consistent with a shoulder injury that purportedly occurred around February 2019. In her examination on 7/6/2019 [sic], the claimant was noted to have a normal range of motion of the right shoulder then on 7/18/2019 she had flexion of only 90 degrees, but with normal rotator cuff strength. One would expect the claimant to have a consistent examination as she is now months after the work event. More concerning on 9/5/2019, the claimant had two examinations from two different providers. The occupational medicine physician documented right shoulder flexion of 90 degrees the orthopedic surgeon documented flexion at 160 degrees. These changes in range of motion are not consistent with an anatomic injury. Further, my own examination was limited by patient pain with even light touch about the shoulder with flexion limited to 40 degrees. None of these findings are consistent with rotator cuff tearing. (Ex. A, pp. 10-11)

32 Dr. Ciccone did not find Claimant had any work-related injury to her right shoulder’s rotator cuff, or any diagnosis of frozen shoulder/adhesive capsulitis in her right shoulder. He wrote that shoulder capsulitis, “[M]ost commonly just begins with no preceding event.” He noted Claimant had normal shoulder range of motion five months after the alleged work-related injury as documented by Dr. Shafer on June 27, 2019, and also nearly full range of motion when she saw Dr. Redfern on September 5, 2019. This, he noted, is inconsistent with adhesive capsulitis. “Patients with capsulitis do not have loss of motion intermittently.” He also stated claimant’s MRI findings, “[A]re chronic and unrelated to a work injury.” He concluded, “The claimant suffered no event that would be related to an acute rotator cuff injury. The findings of potential adhesive capsulitis are unrelated to a work event. *Id at 11.*

Dr. Ciccone Deposition

33. Dr. Ciccone also testified in a deposition on August 4, 2020. He explained Claimant told him, “[T]hat her pain began in January of 2019 when they had multiple shows that she was performing for Employer[Redacted]. And in February, she had increased pain at night She told me that she was pulling 80 pounds in January and felt a shift in her shoulder while pulling” (Ciccone, depo, p. 9, 11-12) Claimant did not tell Dr. Ciccone that she injured her right shoulder in a specific incident on

February 8, 2019, while pulling wheeled luggage behind her (Ciccone depo, p. 10). Claimant told him her pain began the night of February 8, 2019, and not during that day. If Claimant had said her right shoulder pain began during the day, Dr. Ciccone stated he would have recorded that statement as the timeline of the injury is important (Ciccone depo, pp. 10, 11).

34. Dr. Ciccone explained that the alleged mechanism of injury of simply pulling this wheeled luggage while walking on a level surface in an airport, without any events such as the luggage falling or shifting, would not put stress on the shoulder joint sufficient to cause a rotator cuff injury (Ciccone depo, pp. 12,13). He testified that had Claimant sustained an injury to her shoulder on February 8, 2019, she would have had pain from the injury *on that date*. Instead, Claimant's medical records show she told her providers that she had pain in her right shoulder in December 2018; there was no mention of any injurious event on February 8, 2019 in her initial chiropractic visit on April 18, 2019. He also explained that Claimant had neck pain, bilateral arm pain, and was not sure when those symptoms started (Ciccone depo, pp. 14-15, 19, 20). Dr. Ciccone acknowledged that while it may not happen commonly, that he does have patients who delay seeking treatment for injuries similar to Claimant. Dr. Ciccone further testified that if someone can perform their work duties one day, but requires assistance the next, that this change can be indicative of an acute injury.

35. Dr. Ciccone testified that Claimant's right shoulder rotator cuff partial-thickness tear is, "[C]hronic and preexisting." (Ciccone depo, pp. 16, 21) "I do not believe that the claimant suffered a rotator cuff injury as a result of a work injury because her physical examination never really correlated with a rotator cuff injury. She had normal range of motion and normal strength through most of her exams." *Id at pp. 10, 25.*

36. Dr. Ciccone opined that the most common presentation of adhesive capsulitis is spontaneously, without any known cause or trauma (Ciccone depo, p. 18). He did not believe Claimant's adhesive capsulitis, if that diagnosis were to exist, is not due to any work injury on February 8, 2019. He explained, "Mostly because if someone is developing adhesive capsulitis, they should have loss of motion on their examinations. Looking at her history and her medical records, she had pretty good range of motion of her shoulder. In fact, in July, five months after the injury, she had normal range of motion of the shoulders. She was actually released back to full work duties at that time. So developing -- the diagnosis of adhesive 3 capsulitis is based upon loss of motion. And she didn't have any loss of motion at that point, even five months after the injury." (Ciccone depo, p. 19).

Dr. Redfern Deposition

37. Dr. John Redfern's was deposed on June 24, 2020. He is not Level II accredited. He testified Claimant told him she experienced pain around her right shoulder around January or February 2019 (Redfern depo, p. 7). He explained that, "there's really very little correlation with activity level. . . ." when looking at rotator cuff

degeneration and pain progression (Redfern depo, p. 25), and that there is no orthopedic literature supporting an increased change of shoulder pain with degeneration (Redfern depo, p. 30). Heavy lifting is not a recognized risk factor for shoulder pain (Redfern depo, p. 31). Dr. Redfern was asked whether claimant's work activity of pulling, pushing, and lifting crates weighing 80 pounds was a major contributing cause of her right shoulder becoming symptomatic. He was unable to testify that this activity would be a causative factor (Redfern depo, p. 35). He also could not testify that claimant's job caused her shoulder to hurt (Redfern depo, pp. 36-37). Around 35% of asymptomatic rotator cuff tears will increase in size and become painful over a two-to five-year time frame (Redfern depo, p. 38).

38. When Dr. Redfern saw Claimant, he was just treating her symptoms, not looking for or analyzing a cause of those symptoms (Redfern depo, pp. 43; 53-54). When Claimant did not seek medical care until April 18, 2019, Dr. Redfern testified, "[I]t is very common for *degenerative tears to see me after months of pain*, while *acute traumatic tears* typically see me *very quickly* because of the change in their shoulder function." (Redfern depo, p. 46)(emphasis added).

39. Dr. Redfern explained that if Claimant had adhesive capsulitis in her right shoulder her range of motion would not change very much at all (Redfern pp. 49, 51). He explained that it is difficult to disagree whether something *could or can cause something* as, "[I]n medicine, almost anything is possible, so to ask if something can contribute or can cause is hard to disagree with that." He agreed that asking if something could cause a result is basically irrelevant to medical determinations (Redfern depo, pp. 52-53).

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

B. In accordance with *Section 8-43-215, C.R.S.*, this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ

has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

C. In deciding whether a party has met their burden of proof, the ALJ is empowered “to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence.” See *Bodensecki v. ICAO*, 183 P.3d 684 (Colo.App. 2008). In short, the ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo.App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo.App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo.App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness’s testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). In this instance, the ALJ finds that Claimant has been an inconsistent medical historian with her providers. Further, the ALJ notes that Claimant’s claim at hearing that she received no treatment for her 2013 auto accident is not consistent with medical records subsequently obtained.

Compensability, Generally

D. According to C.R.S. § 8-43-201, “a claimant in a workers’ compensation claim shall have the burden of proving entitlement to benefits by a preponderance of the evidence; the facts in a workers’ compensation case shall not be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer, and a workers’ compensation case shall be decided on its merits.” Also see *Qual-Med, Inc. v. Indus. Claim Appeals Off.*, 961 P.2d 590, 592 (Colo. App. 1998) (“The Claimant has the burden of proving an entitlement to benefits by a preponderance of the evidence.”); *Lerner v. Wal-Mart Stores, Inc.*, 865 P.2d 915, 918 (Colo. App. 1993) (“The burden is on the claimant to prove his entitlement to benefits by a preponderance of the evidence.”).

E. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). It is the claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between his employment and his injuries. An ALJ might reasonably conclude the evidence is so conflicting and unreliable that the claimant has failed to meet the burden of proof with respect to causation. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186, 191 (Colo. App. 2002) (weight to be

accorded evidence on question of causation is issue of fact for ALJ). See also, *In the Matter of the Claim of Tammy Manzanares, Claimant*, W. C. Nos. 4-517-883 and 4-614-430, 2005 WL 1031384 (Colo. Ind. Cl. App. Off. Apr. 25, 2005).

F. For an injury to be compensable under the Workers' Compensation Act, it must "arise out of" and "occur within the course and scope" of the employment. *Price v. Indus. Claim Appeals Off.*, 919 P.2d 207, 210, 210 (Colo. 1996); *Schepker v. Daewoo North*, W.C. No. 4-528-434 (ICAO April 22, 2003). An injury "arises out of" employment when the origins of the injury are sufficiently related to the conditions and circumstances under which the employee usually performs his or her job functions as part of the employee's services to the employer. See *Schepker, supra*. "In the course of" employment refers to the time, place, and circumstances of the injury. *Id.* There is no presumption that an injury arises out of employment merely because an unexplained injury occurs during the course of employment. *Finn v. Indus. Comm'n*, 165 Colo. 106, 108-09, 4437 P.2d 542 (1968).

G. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. § 8-41-301 (1)(c) C.R.S.; *Faulkner v. Indus. Claim Appeals Off.*, 12 P.3d 844, 846 (Colo. App. 2000). The question of causation is generally one of fact for the determination by the ALJ. *Faulkner*, 12 P.3d at 846.

H. The mere fact that a claimant suffers from a pre-existing condition does not disqualify a claim for compensation or medical benefits if the work-related activities aggravated, accelerated, or combined with the pre-existing condition to produce disability or a need for medical treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). Pain is a typical symptom from the aggravation of a pre-existing condition, and the claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment-related activities and not the underlying pre-existing condition. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949). The claimant must prove by a preponderance of the evidence that his symptoms were proximately caused by an industrial aggravation of a pre-existing condition rather than simply the natural progression of the condition. *Melendez v. Weld County School District #6*, W.C. No. 4-775-869 (ICAO, October 2, 2009).

Compensability, as Applied

I. Claimant has a partial tear in her right rotator cuff. The MRI also suggests adhesive capsulitis, but the origin of that condition is undermined, and her range of motion measurements along the way suggest it might not be present at all. There is no objective evidence of when or how the rotator cuff condition might have occurred. Had Claimant reported this case promptly on February 8, 2019 - which she now alleges as her injury date - there would have been a far greater chance of determining if such tear was traumatic or degenerative. The paper trail in this case suggests that Claimant herself did not believe this was a traumatic event until months later. Even then, the history she supplied along the way was a moving target. Her shoulder complaints to Dr. Carlson were *bilateral*. In fact, every one of six range of motion measurement for each

shoulder was *identical*, over two months after the date of alleged injury. Claimant herself did not purport to know when this allegedly occurred for months, until the medical attention began to focus on her left shoulder.

J. In this case, the ALJ finds Dr. Ciccone's reasoning to be persuasive. While on occasion an individual might delay in seeking treatment after a traumatic event as alleged here, such is not the norm. Dr. Redfern himself concurred. The pain would be more prominent, and would cause more than a request for help carrying items by a coworker. Claimant could not even tell Dr. Ciccone the 'right' injury date at the IME exam. The varying ranges of motion were not consistent with a traumatic injury of the rotator cuff – nor with adhesive capsulitis. Dr. Ciccone opined that adhesive capsulitis most commonly begins with "no preceding event", and no other medical expert here has opined differently. He further opined that the MRI was suggestive of a chronic condition, instead of a traumatic event. Dr. Ciccone further opined that the described mechanism of injury was not likely to cause a tear such as Claimant has. And Claimant got no dissent from that opinion from her own expert, Dr. Redfern. In fact, Claimant has no medical opinions on causation in her favor, even though surgery *might* still be in her best interest.

K. While it remains *medically possible* that Claimant suffered an injury to her rotator cuff sometime in February of 2019, the ALJ finds that Claimant has not met her burden here. Nor can the ALJ conclude that Claimant suffered a permanent aggravation of a preexisting shoulder condition, which then led Claimant to be in need of medical treatment. In fact, given the timelines and symptoms as outlined, the ALJ cannot find that Claimant suffered even a *temporary* aggravation of her shoulder on February 8, 2019, which required any medical treatment.

ORDER

It is therefore Ordered that:

1. Claimant's claim for Workers Compensation Benefits, including medical treatment, is denied and dismissed.
2. All matters not determined herein are reserved for future determination.

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

petition to review form at: <http://www.colorado.gov/dpa/oac/forms-WC.htm>. In addition, it is recommended that you send a copy of your Petition to Review to the Colorado Springs OAC via email at oac-csp@state.co.us.

DATED: September 28, 2020

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

- I. Whether Claimant's ongoing medical treatment is related to his admitted injury.
- II. Whether further rhizotomies performed by Dr. Kawasaki are reasonable, necessary, and related to the admitted injury.
- III. Whether Therma Care Patches and muscle relaxants are reasonable, necessary, or related to the admitted injury.
- IV. Whether Respondents established Claimant is not entitled to ongoing maintenance medical treatment.

FINDINGS OF FACT

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

1. Claimant is a 73-year-old male. Claimant sustained a significant injury to his back before his employment with Employer in around 2000. As a result, the 2000 injury appears to have caused Claimant to be permanently and totally disabled for about ten (10) years before the subject date of injury with the Respondent Employer on March 24, 2010.
2. In 2000, Claimant sustained an injury while working at the United States Mint in Denver. The injury caused significant chronic low back pain, left leg numbness, and throbbing in his thighs. The injury also caused significant long-term disability.
3. In 2004, Claimant was also involved in a motor vehicle accident. His vehicle was rear-ended which resulted in whiplash. Claimant was treated for cervical spine pain for the next few years. (Ex. A.)
4. Claimant has continued treating for years because of his 2000 back injury – without improvement.
5. According to Dr. Ryan, in 2007, Claimant still had significant limitations which included significant range of motion deficits and significant functional tolerances. As result, Dr. Ryan stated Claimant's symptoms prevented him from performing even sedentary work. (Ex A.)
6. While Claimant was treating with Dr. Ryan, Claimant's wife read about radiofrequency rhizotomy treatment. As a result, Claimant and his wife discussed the possibility of rhizotomy treatment for Claimant with Dr. Ryan. Dr. Ryan, however, did not think it was a good idea. Thus, Claimant did not undergo rhizotomy treatment with Dr. Ryan.

7. Claimant's 2000 claim ultimately closed. But, shortly after his case closed, Claimant began working on getting his case reopened so he could obtain rhizotomy treatment through another physician who would support such treatment.
8. In January 2008, Claimant started treating with Dr. Robert Kawasaki. As noted by Dr. Kawasaki in his January 9, 2008 report from his initial evaluation, Claimant was hopeful to reopen his 2000 workers' compensation claim and have Dr. Kawasaki assume his care. (Ex. B, p. 25.)
9. At his first appointment with Dr. Kawasaki in January 2008 Claimant completed a "Pain Self-Evaluation." Claimant noted that after 8 years, he still had unrelenting back pain. In describing his pain, he marked the next items that defined the duration and extent of his back pain: He noted that:
 - He had pain 12-24 hours per day.
 - His pain was bad all the time. When asked to identify whether his pain was worse, in the morning, afternoon, evening, or nighttime, he did not just check one or two time periods. Claimant checked off each time period that was listed. As a result, he stated that his pain was at its worst all of the time, i.e., morning, afternoon, evening, and nighttime. Basically, 24 hours per day.
 - He could not sit, stand, drive, or walk for more than 20 minutes.
 - He also noted that he had not worked for the last 8 years.
10. In March 2008, Claimant returned to see Dr. Kawasaki. At this visit, Dr. Kawasaki noted Claimant continued to have "significant pain complaints of low back pain with pain radiating down the left lower extremity." Dr. Kawasaki said Claimant's condition was unchanged from his prior visit, but that he was using a cane to walk. Claimant advised Dr. Kawasaki that he had a hearing within the next couple weeks to hopefully get his case reopened. (Ex. B, p. 34-35.)
11. Dr. Kawasaki noted that as of March 2008:
 - Claimant was continuing having pain in his low back – since 2000.
 - Claimant had weakness in his left lower extremity - with his leg giving out on him at times.
 - Claimant's MRI in October 2007 showed degenerative disc changes at L2-3, L3-4, L4-5, and L5-S1, and demonstrated that his maximum area of stenosis was at the L4-5 level with some lateralization towards the left. As a result, he concluded Claimant's Examination was compatible with L4 and L5 radiculopathy.
 - Claimant had undergone EMG (electrodiagnostic examination) in March 2008 which was normal for his left lower extremity.
 - Claimant was using Therma Care patches.
 - Claimant had been prescribed one or another muscle relaxers on an ongoing basis.

12. Claimant did not succeed in reopening his 2000 Claim. Despite his inability to reopen his claim, Claimant's chronic pain continued. According to Claimant and his wife, during 2008 and 2009 his average pain remained around 6-7.5/10 and would increase to 8-9/10 with minimal activity.
13. Around the beginning of 2010, Claimant returned to work and began working for the Respondent Employer in a part-time, light-duty position with significant permanent restrictions as an auto parts delivery driver. Claimant had only worked for two - three months before the admitted injury. Claimant was on Social Security Disability at the time of his DOI on March 24, 2010 and had been for several years. (Ex. A.)
14. Claimant remained symptomatic from his 2000 injury up to, and through, the March 24, 2010 admitted injury.
15. On March 24, 2010, Claimant was working for Employer as an auto parts delivery driver. Claimant was asked to help move an item at work. At times, it has been described as a bookcase. Claimant alleges that while moving the bookcase with a co-worker, he injured his back.
16. On March 27, 2010, Claimant sought medical treatment. At the first appointment, Claimant told the nurse that he was helping move a shelf and while moving the shelf he felt a pull in his lower back when he let go of it and developed lower back pain. There is no indication Claimant told the nurse at this appointment that he had a prior back injury. Nor is there any indication Claimant said he, or anyone else, heard a "pop" at the time of the alleged incident. Plus, there is no indication Claimant complained of symptoms radiating into his legs.
17. On March 29, 2010, five days after the alleged accident, Claimant presented to Dr. Gellrick. During his appointment, Claimant described how he was injured. According to Dr. Gellrick, Claimant stated that he was:
 - Helping a coworker move some things.
 - The item he was carrying, when he injured himself, was heavier than he thought.
 - The item weighed around 30 pounds.(Ex. C, p. 52.)
18. Claimant did tell Dr. Gellrick that he had a prior back injury about ten years earlier. But, instead of telling Dr. Gellrick the truth about his chronic and longstanding back problems that kept him out of work for approximately 10 years, Claimant told Dr. Gellrick that he fully recovered from his prior back injury. According to Dr. Gellrick, Claimant told her that: "He was fine, asymptomatic, no problems until the current injury."
19. Based on the false and misleading history Claimant provided to Dr. Gellrick, Dr. Gellrick concluded that his recent injury and need for medical treatment was work-related. At this first appointment with Dr. Gellrick, he was prescribed physical therapy. (Ex. C, p. 52.)

20. On April 21, 2010, Claimant returned to Dr. Gellrick. At this appointment, Claimant complained of pain radiating into his left SI joint, hip, and thigh. After engaging in physical therapy, Claimant said his pain was getting worse and he rated it at a 9/10. Again, this level of pain was no different than the level of pain he complained about having in 2008 and 2009 with minimal activity. Nor is there any indication Claimant told Dr. Gellrick that his current symptoms were similar, if not the same, to his prior symptoms. As before, minimal activity, whether it be physical therapy, standing, or walking, caused Claimant's pain to increase to a 9/10. Based on Claimant's description of his symptoms, Dr. Gellrick ordered an MRI.
21. On May 13, 2010, Claimant returned to Dr. Gellrick. There is no indication she knew Claimant previously had an MRI and there is no indication she could compare the prior MRI against the new MRI. Based on the information available to her, Dr. Gellrick recommended Claimant undergo an EMG/NCV and a surgical consultation.
22. Based on Claimant's allegations, Respondents admitted liability for his back injury. That said, as Claimant began treating for his back injury, it became evident that he had a significant preexisting back injury that was contributing to his symptoms. As a result, as time went on and more information became available about his prior back injury, it became less clear about whether Claimant's symptoms and need for treatment were related to his 2000 injury or his 2010 injury. Complicating the causation assessment was Claimant's changing story about the extent and permanent nature of his 2000 injury as well as the mechanism and extent of his 2010 injury.
23. On May 28, 2010, Claimant was seen by Dr. Plotkin, Dr. Gellrick's associate, as a walk-in. Claimant reported his current medications, which included Robaxin and Darvocet, were not helping at all. At this appointment, Dr. Plotkin also noted "[Claimant] wants a letter to say take off work and go back when everything is resolved." Despite Claimant's request to be taken completely off work, Dr. Plotkin returned Claimant to sedentary duty. (Exhibit C, p. 53.)
24. On June 1, 2010, Claimant saw Dr. L. Barton Goldman, who performed an EMG/NCV. Although Claimant told Dr. Gellrick that his prior back injury and associated pain resolved, he told Dr. Goldman that he had a prior back injury that resulted chronic but mild back pain. Based on the information provided by Claimant, Dr. Goldman concluded that Claimant's symptoms and findings on EMG/NCV could be preexisting or could be because of the recent work incident described by Claimant.
25. On June 3, 2010, Claimant returned to Dr. Plotkin. Dr. Plotkin noted Claimant voiced displeasure about being returned to modified duty and having to perform indoor sedentary work. After this examination, Claimant was to follow up with Dr. Castro. (Ex. C, p. 53.)
26. On June 21, 2010, Claimant returned to Dr. Plotkin and reported that his pain was 9/10. (Ex. C, p. 53.) Later, Dr. Plotkin referred Claimant Dr. Kawasaki for evaluation and consideration of epidural steroid injections.

27. On July 2, 2010, Claimant was evaluated by Dr. Kawasaki. Claimant had sought treatment with Dr. Kawasaki in 2008 to reopen his 2000 claim and have Dr. Kawasaki assume treatment once his claim was reopened. At this appointment, Dr. Kawasaki noted that Claimant said his prior back injury caused him to be out of work for 7 years, but he was told by "Workers Compensation... that he needed to go find a job." And, according to Claimant, he had only been working for Employer for a few months before his accident. (Ex. C, p. 53.) Claimant told Dr. Kawasaki that he aggravated his back:

[W]hen he was moving a file with another coworker. The other coworker dropped his end of the file, forcing [Claimant] to take the brunt of the weight.

Claimant reported to Dr. Kawasaki the same symptoms he had before the March 24, 2010 incident but suggested that moving the item at work made his pain worse. Based on Claimant's contention that his symptoms were worse after the March incident at work, Dr. Kawasaki's impression included:

- History of chronic low back pain with previous Workers' Compensation claim with similar symptomatology and similar findings.
- Acute aggravation on 02/04/10.

(Exhibit B, pp. 36-38.)

28. On August 8, 2010, Dr. Kawasaki wrote a letter to the adjuster in which he answered various questions about the extent of Claimant's prior condition and whether Claimant's current diagnoses were due to Claimant's 2000 work injury. Dr. Kawasaki concluded that all of Claimant's current diagnoses were preexisting. Dr. Kawasaki stated:

All the diagnoses are due to pre-existing conditions. The patient has had chronic low back pain and pain, numbness, and tingling down the left lower extremity from an injury in 2000 while working for the Denver Mint.

(Exhibit B, p. 42.)

29. Dr. Kawasaki then described Claimant's extensive, chronic, and unrelenting symptoms and restrictions based on the 2000 injury. Dr. Kawasaki stated:

The patient was significantly impaired when I saw him on 01/09/08. There are also records from Dr. Christopher Ryan in a letter on 03/05/07 indicating the patient had significant limitation of lumbar range of motion. His prognosis at that point was that he was permanent and stationary. He was limited in his ability to bend, twist, engage in repetitive neck motions and overhead work, and endure static head positioning. He had a limited ability to tolerate certain positions such as sitting, standing, walking, and even lying down. It was indicated the effects of his injury prevented him from returning to the job that he performed when he was injured, and this is a permanent condition. His limitations were indicated to be profound. His postural intolerance prevented him from engaging in a sedentary job

on a meaningful basis. Otherwise, he would have been placed in a sedentary-duty category.

(Exhibit B, p. 42.)

30. Lastly, Dr. Kawasaki said that it was exceedingly difficult to determine whether Claimant's current complaints were based on his 2000 work injury or his recent incident in 2010. Dr. Kawasaki stated:

[I] is very difficult to differentiate whether the aggravation had resolved as the patient had continued pain complaints, although the same complaints that he had previously with his pre-existing condition but subjectively worse.

(Ex. B, p. 43.)

31. On October 26, 2010, Claimant followed up with Dr. Goldman. Since his 2010 injury, Claimant had undergone some chiropractic treatment and acupuncture. And, at this visit, Claimant noted his pain level was 6-7.5/10 on average. This was similar, if not better, than his average pain complaints in 2008 and 2009. As a result, Claimant's subjective pain complaints had returned to his preinjury baseline. Plus, Claimant's return to baseline was before Claimant had undergone any facet injections or radiofrequency ablation procedures.
32. On December 3, 2010, Claimant returned to Dr. Kawasaki. At this appointment, Claimant stated that the ESI provided no long-term pain relief. At this time, Dr. Kawasaki was not optimistic that any additional injections would help based on Claimant's ten-year history of low back pain. (Ex. C, p. 54.)
33. On December 22, 2010 and January 19, 2011, Dr. Kawasaki performed a left L4-5 and left L5-S1 medial branch block, which decreased Claimant's subjective pain complaints to 0/10. (Ex. B.) After these procedures, Dr. Kawasaki recommended repeat rhizotomies.
34. On May 3, 2011, Andrew Plotkin, M.D. placed Claimant at maximum medical improvement (MMI) with a 15 percent whole person rating. Maintenance care in the form of repeat rhizotomies was recommended. Restrictions were put on Claimant for lifting, pushing, and long-periods of standing. (Ex. A.)
35. On July 22, 2014, Dr. Basse evaluated claimant for an independent medical examination. As for Claimant's medical history, she noted "[b]y 2008-2009, he reports his low back was stable but very functionally limiting for him." (Ex. C, p. 49.) She also noted that by the end of 2009, Claimant's pain was generally 5-7/10 on average and would increase to 8-9/10 "if he would tinker around in the garage and do an hour or so of standing." (Ex. C, p. 50.) Claimant reported to Dr. Basse that he sought to reopen his prior claim because his wife read about rhizotomies online and he thought the treatment may be helpful for him. (Ex. C, p. 50.)
36. Claimant told Dr. Basse that he was injured under this claim in 2010 while helping his supervisor move a bookshelf. Claimant first described the incident to Dr. Base by saying that "He threw it to me without telling me it was coming..." On clarification, Claimant agreed his supervisor did not throw the bookcase to him, but it was more

like he handed to him and then let go. Claimant also stated that the bookshelf hit the ground and he felt a pop in his back and had a lot more pain. Claimant also told Dr. Basse that his supervisor also heard the pop in his back. (Ex. C, p. 50.)

37. After reviewing Claimant's medical history, and performing a physical examination of Claimant, Dr. Basse concluded that Claimant's need for ongoing medical treatment was unrelated to the 2010 incident at work. Dr. Basse credibly and persuasively supported her conclusions in her report as follows:

Mr. Steger presents as pleasant, cooperative, and entrenched in his disability which dates back more than 14 years to February, 2000. As clearly outlined by Dr. Kawasaki, Mr. Steger had significant low back pain complaints, significant range of motion deficits and profound functional limitations PRIOR to 03/24/10. This is consistent with Mr. Steger's report that by the end of 2009 and PRIOR to 03/24/10, his average pain was 5-7/10 and would increase to 8-9/10 with minimal activity to include standing for one hour.

Mr. Steger has a longstanding, complicated, multifactorial Chronic Pain Syndrome with degenerative deconditioned and psychologic components. His February 2000, on-the-job case was closed between 2006 and 2007. Prior to that, he requested radiofrequency treatment from Dr. Ryan and was denied. He "relentlessly" tried to get his case reopened through April 2008, so he could pursue radiofrequency treatment. This was denied and at some point, he gave up.

With this background, Mr. Steger returns to work and after a two to three-month period had an increase in pain with a work activity on 03/24/10. Pre-existing symptoms and disability were not reported and as such, no comparison to prior studies were obtained. It is unknown if actual additional injury occurred versus simply increased pain with increased activity. Regardless, he was treated with physical therapy, chiropractic, pool therapy and ESI without lasting relief. He ultimately underwent radiofrequency rhizotomy with longer lasting relief. He then returned to pool and physical therapy with continued benefit.

Dr. Plotkin placed Mr. Steger at MMI on 05/03/11 with 15 percent whole person impairment and recommended maintenance care to include "two rechecks with Dr. Kawasaki over the next year as needed and for consideration of repeat facet rhizotomies once per year for the next two years." Mr. Steger is already past two years and past two radiofrequency rhizotomy procedures. He has completed his maintenance care as originally outlined at time of determining MMI.

Mr. Steger's report of improvement with facet rhizotomy is subjective and with minimal, if any, improvement in functional status. He is not participating in any home exercise program as recommended by his care providers or the treatment guidelines. Mr. and Mrs. Steger both report patient's request for radiofrequency in approximately 2003 or 2004 and trying to get his claim reopened to obtain radiofrequency procedure

between 2006 and 2008. This suggests that the patient's current desire for the radiofrequency procedure is related to his original low back injury in February 2000, and not the more recent exposure of 03/24/10.

Dr. Kawasaki notes in letter of 08/08/10 that all his diagnoses are due to pre-existing conditions. The radiofrequency is treating a pre-existing condition and not anything that occurred on 03/24/10. Additional radiofrequency should be pursued outside of this claim.

With Mr. Steger's poor memory, Chronic Pain Syndrome, and some radiofrequency procedures lasting less than two months, in my opinion he is not a candidate for further radiofrequency treatment without careful review of all prior medical records to include those of Dr. Disorbio – his prior treating psychologist, and Dr. Ryan - his prior PM&R specialist, who originally denied his radiofrequency rhizotomy request. Cardiac status needs to be clarified as well.

In my opinion, Mr. Steger is best served by resuming an independent home pool program on a regular basis starting at once a week and building to three times a week. He reports benefit with this while in formal treatment and it offers him the safest option for long-term improved function and overall general health. He reports significant cardiac limitations and is status post left total knee arthroplasty. These non-work-related problems would also be best addressed with an independent pool program.

(Exhibit C, pp. 49-60.)

38. On May 1, 2019, Claimant underwent another independent medical examination (IME) with Kathie McCranie (Ex. D.) During this examination, Claimant told Dr. McCranie that he was injured in March 2010 while moving a heavy rack with a coworker. He told Dr. McCranie that he was injured when his coworker threw it while he was holding it.
39. Moreover, in 2010 Claimant originally told his medical providers that the weight of the item he was carrying was about 30 pounds. During this IME, however, Claimant significantly increased the weight of the item he was moving when he was allegedly injured in 2010. Claimant told Dr. McCranie that the item he was moving weighed 200 pounds.
40. On top of misrepresenting the weight of the item he was carrying, Claimant also tried to minimize the extent of his prior injury by telling Dr. McCranie that “He thinks he may have seen Dr. Kawasaki for a prior work injury and had been given muscle relaxants.” But after that statement, Claimant later indicates Dr. Kawasaki ordered an MRI and provided Claimant 9 lumbar facet rhizotomies.
41. During his IME with Dr. McCranie, Claimant also told her that he had been working at this job for 1-2 years before the March 2010 injury. The prior medical records, however, reflect Claimant was only working at this job for 2-3 months before the alleged incident. All in all, the ALJ does not find Claimant’s representations to Dr. McCranie to be reliable or credible.

42. Dr. McCranie concluded that Claimant's current need for medical treatment is unrelated to the incident in March 2010, but due to his prior injury in 2000. Dr. McCranie stated:

[I]n reviewing Mr. Steger's case, records are indicative of Mr. Steger having reached baseline from his 2000 injury. His pain is in the same location as noted by Dr. Kawasaki in January of 2008. It is of the same intensity as it was prior to 3/24/10, according to Dr. Basse's independent medical examination. If anything, he appears less symptomatic and his examination appears improved compared to the baseline state preinjury.

Prior to his work injury of 2010, his MRI showed facet arthropathy. According to Dr. Basse's IME, he was actively seeking facet rhizotomy treatments. While it does appear that the facet rhizotomy treatment has been of benefit to Mr. Steger, there are several concerns in continuing this procedure. First, while he reports six to eight months of benefit, it appears that his symptoms are returning after only two months, making this a much less beneficial procedure.

As the patient has reached baseline, continuing these procedures is no longer related to the work injury of 2010 but rather due to his longstanding preexisting history of lumbar pain and multilevel spondylosis.

(Ex. D, p. 70)

43. The ALJ finds Dr. McCranie's opinions and conclusions to be credible and persuasive. Dr. McCranie's ultimate opinions and conclusions are supported by Claimant's extensive medical record that sets forth the significant and chronic nature of Claimant's 2000 back injury.

44. On February 17, 2020, Claimant also underwent an independent medical examination (IME) by Lloyd Thurston, D.O. (Ex. A.)

45. Dr. Thurston also concluded that Claimant has returned to his baseline before the 2010 work injury. (Ex. A, p. 11.) Dr. Thurston noted:

[I]t is my medical opinion Dr. Basse carefully and accurately summarized this complicated case...Specifically, lumbar rhizotomies are no longer appropriate and reasonable medical care for Mr. Steger's 3/14/2010 incident at Advance Auto Parts. (Ex. A, p. 13.)

46. Furthermore, Dr. Thurston concluded that the Thermo-Care Patches can be replaced with over the counter treatments. (Ex. A, p. 13.)

47. The ALJ finds Dr. Thurston's IME and report to be extremely well documented and footnoted. Dr. Thurston supported his ultimate opinions and conclusions on Claimant's extensive medical record. As a result, the ALJ credits his conclusions and finds his opinions persuasive.

48. Unlike Dr. Thurston's, whose IME report (Exhibit A) is extremely well documented and footnoted with a long medical records review which also formed the basis and foundation for his opinion and conclusions, Dr. Kawasaki's deposition testimony makes clear that he had not reviewed the prior medical records (including his own

pre-DOI records) and had little recall or understanding of his or other physicians prior opinions about claimant's pre-DOI medical history. (Kawasaki depo T @ 54, L2-13.) Thus, Dr. Thurston's opinions on causation and the relatedness of Claimant's current medical treatment needs is found to be more persuasive than the opinions of Dr. Kawasaki.

49. As found, Dr. Kawasaki deferred his current understanding of Claimant's pre-existing medical condition as well as his own prior opinions on causation and when claimant had returned to his pre-DOI medical baseline to his opinions made contemporaneously in his actual medical records before 2015. Dr. Kawasaki testified that his prior opinions contain the truth as he understood that to be when he issued his contemporaneous reports" (Kawasaki deposition at p43, L-1-19, p46, L22-25, p47, L1-2).
50. The ALJ does not find Claimant's statements to medical providers and testimony at hearing to be credible and reliable about the extent of his symptoms before and after the March 24, 2010 incident at work. For example, Claimant misrepresented to Dr. Gellrick that he was asymptomatic before the March 24, 2010 incident. Despite Claimant's statements to Dr. Gellrick to the contrary, Claimant's preexisting back condition was highly symptomatic in March 2010 and was not asymptomatic.
51. Moreover, Claimant's version of what he was carrying and how he was carrying it during the incident has also been inconsistent.
52. As found above, Claimant also misrepresented to Dr. McCranie the weight of the item he was carrying when the incident occurred. Originally, Claimant said the item weighed about 30 pounds. But, when he was seen by Dr. McCranie, he changed the weight of the item to 200 pounds. The ALJ finds that Claimant's misrepresentation over the amount of weight he was carrying in 2010 was made to support his claim that his current need for medical treatment relates to his 2010 work injury and not his preexisting injury from 2000. Such misrepresentation, however, has done the exact opposite.
53. The ALJ does not find Claimant's representations to his medical providers regarding the change in symptoms due to his March 2010 injury to be credible or persuasive. The ALJ also does not find Claimant's testimony to be credible or persuasive.
54. Claimant does not require any medical treatment to relieve him from the effects of the March 24, 2010 incident or to prevent further deterioration of his condition. As a result, Claimant does not require any maintenance medical treatment due to the incident at work.
55. Claimant's current need for medical treatment is not causally related to the March 24, 2010 incident at work.

CONCLUSIONS OF LAW

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

General Provisions

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

- A. The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, *et seq.*, is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). A claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.
- B. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).
- C. In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.
- D. After an award of post-MMI medical benefits, Respondents retain the right to contest any future claims for medical treatment on the basis that such treatment is unrelated to the industrial injury. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). If a dispute over medical benefits arises after the filing of an admission of liability, respondents may assert that the claimant did not establish the threshold requirement

of a direct causal relationship between the on-the-job injury and the need for medical treatment. *Snyder v. Industrial Claim Appeals Office*, *supra*. This principle recognizes that even though an admission is filed, Claimant bears the burden of proof to establish the right to specific medical benefits, and the mere admission that an injury occurred and treatment is needed cannot be construed as a concession that all conditions and treatments which occur after the injury were caused by the injury. See *Maestas v. O'Reilly Auto Parts*, W.C. 4-856-563-01 (ICAO Aug. 31, 2012).

- E. Alternatively, where Respondents seek to withdraw an admission for maintenance benefits, Respondents carry the burden of proof. A party seeking to modify an issue determined by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification. Section 8-43-201(1), C.R.S.
- F. Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. The need for medical treatment may extend beyond the point of maximum medical improvement where the claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995). The evidence must establish a causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.*, 124 Colo. 210, 236 P.2d 2993. Medical evidence is not required to establish causation and lay testimony alone, if credited, may constitute substantial evidence to support an ALJ's determination regarding causation. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Apache Corp. v. Industrial Commission of Colorado*, 717 P.2d 1000 (Colo. App. 1986). The question of whether a particular medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office*, *supra*; *Wal-Mart Stores, Inc. v. Industrial Claims Office*, 989 P.2d 251 (Colo. App. 1999).
- G. To the extent Dr. Kawasaki believes Claimant's need for ongoing treatment is related to the March 2010 incident at work, the ALJ does not find his opinions to be credible or persuasive since they appear to be heavily based upon Claimant's subjective complaints and Claimant's contention as to the onset, development, and extent of his symptoms - which the ALJ does not find credible. Moreover, Dr. Kawasaki did not have and review all of the records regarding Claimant's prior work injury. Like a house built on sand, an expert's opinion is no better than the facts and data on which it is based. See *Kennemur v. State of California*, 184 Cal. Rptr. 393, 402-03 (Cal. Ct. App. 1982).
- H. Claimant has failed to meet his burden to prove that further rhizotomies are reasonable, necessary, and related. The ALJ credits the opinions of Drs. Thurston, McCranie, and Basse that further rhizotomies are not reasonable and necessary and are not related to this claim.

- I. Claimant has failed to meet his burden to prove that the ongoing use of Thermo-Care Patches is reasonable, necessary, and related to the admitted injury. The ALJ notes that Claimant was utilizing Thermo-Care Patches prior to this work-related injury.
- J. Claimant also failed to meet his burden of proof that his ongoing use of a muscle relaxant (currently Baclofen) is casually related to his admitted injury. As found, Claimant's present and future need for muscle relaxers is related to his preexisting medical condition as he had required similar muscle relaxants on a chronic basis for several years before he filed this claim.
- K. The ALJ credits the opinions of Dr. Thurston and Dr. McCranie that Claimant has returned to his pre-injury baseline.
- L. The ALJ finds Respondents met their burden of proving Claimant does not require any ongoing medical maintenance treatment and Respondents are relieved of their ongoing admission for maintenance medical treatment.

ORDER

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

- 1. Claimant's award of ongoing medical maintenance benefits is terminated.
- 2. Any issues not determined in this decision are reserved for future determination.

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

DATED: September 29, 2020.

/s/ Glen Goldman
Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-102-255-004**

ISSUE

1. Whether claimant has established by a preponderance of the evidence that Claimant's scheduled 45% impairment rating for his right lower extremity should be converted to a whole person rating.

FINDINGS OF FACT

1. Claimant is a 48-year-old man who has worked for Employer as a painter for approximately 8 years. Claimant sustained an admitted work-related injury in the spring of 2018. Neither Claimant nor Respondents presented definitive information concerning the date of injury. Claimant's application for hearing indicates the injury occurred on March 24, 2018. Employer's First Report of Injury, filed on June 6, 2018, Final Admission of Liability and correspondence from Insurer indicate the date of injury to be March 21, 2018. (Ex. A). Claimant's medical records indicate the injury occurred on May 7, 2018. Neither Claimant nor Employer offered testimony sufficient to ascertain the specific date of injury.

2. The parties stipulated that Claimant's average weekly wage for this claim is \$1,027.82.

3. On June 7, 2018, Claimant was examined by Brian Cazden, M.D., of Workwell. Claimant reported he fell to his right side while painting on stilts. Claimant reported pain in his right lower back, hip, and knee. Claimant denied prior problems of this type and denied prior work-related injuries. Claimant completed a pain diagram indicating he was experiencing pain in the front of his right hip and the right side of his lower back, as well as left knee pain. Dr. Cazden ordered x-rays of Claimant's right hip, right knee, and lumbar spine. The x-rays showed degenerative disc disease at L4-5 and L5-S1 but were otherwise unremarkable. Dr. Cazden diagnosed Claimant with a contusion of the right hip, contusion of right knee, acute pain due to trauma, radiculopathy, lumbar region, and low back pain. Dr. Cazden recommended that Claimant have physical therapy for his lumbar spine, right knee, and right hip. Otherwise, Claimant was authorized to return to work without restrictions. Dr. Cazden noted Claimant may require further diagnostics, to possibly include MRI of the lower back, right knee if Claimant's symptoms persisted. (Ex. B).

4. On July 13, 2018, Claimant saw Bill Ford, ANP-C at Workwell. Claimant reported right hip discomfort and knee pain, and occasional pins and needles sensation in his right foot near the toes. Claimant did not report any back pain. Mr. Ford's physical examination demonstrated normal range of motion of Claimant's lumbar spine without pain. (Ex. B).

5. Between June 14, 2018 and October 5, 2018, Claimant participated in approximately 17 physical therapy sessions at Workwell. In the course of receiving

physical therapy, Claimant reported difficulty standing on ladders at work, numbness at the bottom of his right foot, and issues with walking and standing for long periods of time. Claimant also reported his hip was his worst issue, and that he experienced intermittent tingling in his leg. On June 25, 2018, the physical therapist noted that it “seems more and more like [he] has an L5S1 issue with neural compromise.” On August 15, 2018, the physical therapist noted Claimant’s “lumbar spine is affected through the right SIJ. We will focus on that to stabilize his pelvic girdle which should allow his hip and knee to heel barring any HNP that might be back there.” On September 19, 2018, the physical therapist indicated Claimant was experiencing significant tightness and tenderness at the right hip flexor which “is most likely caused by compensation due to labral injury.”

6. On July 19, 2018, Claimant saw Kevin Keefe, D.O., at Workwell. Claimant reported, through an interpreter, falling on his left side, which caused his right leg to be forced outward because he was wearing stilts. Claimant reported his primary problem was in his right knee. On examination, Dr. Keefe noted pain to palpation in the right lateral hip, normal hip range of motion, and a diffuse area of pain in the low lumbar spine causing discomfort. Dr. Keefe ordered an MRI of the Claimant’s right knee. (Ex. B).

7. On August 3, 2018, Claimant saw David Kistler, M.D., at Workwell. Claimant’s appointment was conducted through an interpreter. Dr. Kistler noted that Claimant was “not having low back pain despite the position of his exercise on the pain diagram.” [The ALJ infers that the word “exercise” is a dictation or typographical error and is intended to say “Xs.”] Claimant’s pain diagram is marked to indicate pain in the right side of Claimant’s lower back. Claimant reported pain in the right knee and hip and noted he was tolerating work at full duty. (Ex. B).

8. On August 10, 2018, Claimant had an MRI of his right hip. The MRI was interpreted as showing mildly degenerated right hip with degeneration versus subtle tearing of the superior labrum and small sulcus or tear through the anterior superior labrum. A left-sided paralabral cyst suggesting a labral tear and mild tendinosis without tearing of the right gluteus minimus tendon. (Ex. E).

9. On August 24, 2018, Claimant saw Dr. Cazden. Dr. Cazden reviewed the Claimant’s MRI scans, which he interpreted as showing a labral injury to Claimant’s hip, an chondral defect in the knee. On physical examination, Dr. Cazden noted possible decreased sensation between the first and second toes suggesting an S1 nerve root irritation. Dr. Cazden noted Claimant had “severe degenerative changes at L4-5 and L5-S1 in the lumbar spine. This may be causing his numbness.” Dr. Cazden indicated Claimant’s then-primary problem was pain in the right knee and right hip. (Ex. B).

10. On September 5, 2018, Claimant saw Nirav Shah, M.D., of Front Range Orthopedics and Spine. Claimant described experiencing pain in the right hip, groin, and buttocks, aggravated by walking. Claimant also reported knee pain aggravated by squatting and stairs. Dr. Shah diagnosed Claimant with arthritis of the lumbar spine, a tear of the right acetabular labrum, right hip pain, and right knee pain. Dr. Shah performed a cortisone injection in Claimant’s right hip. (Ex. C).

11. On September 14, 2018, Claimant saw David Kistler, M.D at Workwell for right hip and knee pain. Claimant reported tolerating work but avoiding ladders and stairs. Claimant reported his hip bothered him significantly more than his knee. Dr. Kistler recommended a work restriction of no ladders. Dr. Kistler recommended that Claimant see Dr. Brian White for his experience with labral tears. (Ex. B).

12. Claimant saw Dr. Shah on October 3, 2018 and reported the previous cortisone injection did not improve his hip pain but did offer significant improvement to his right knee. Dr. Shah noted that Claimant continued to experience pain in the hip, groin, and buttock with some radiation down his leg. Because of the failure of cortisone injection to impact Claimant's hip pain, Dr. Shah ordered an MRI of Claimant's lumbar spine to determine if the pain was lumbar in origin. (Ex. C).

13. On October 8, 2018, Claimant saw Terrell Webb, M.D. at Workwell. Dr. Webb noted Claimant had completed 17 sessions of physical therapy and continued to do a home exercise program. Claimant reported his primary problem was pain located in the knee and hip. [The ALJ infers that Dr. Webb's record indicating pain located in Claimant's "left knee, left hip" is a typographical or dictation error and was intended to reference the right knee and right hip.] Dr. Webb's examination of Claimant's lumbar spine did not specifically state whether Claimant's motion in the lumbar spine was restricted, noting extension of 10° and lateral bending of approximately 25°. (Ex. B).

14. On October 22, 2018, Claimant saw Dr. Kistler at Workwell. Dr. Kistler opined that Claimant's right hip and knee pain were more than 50% probable to be a work-related condition. Claimant reported his primary problem was pain in his right knee that improved with walking. Claimant also reported numbness in his right leg and toes made worse by walking on uneven ground. On physical exam, Dr. Kistler noted Claimant's gait was normal. He noted mild tenderness over the lateral hip and a decrease in abduction which was painful and pain on flexion of the hip. (Ex. B).

15. On October 26, 2018, Claimant had an MRI of his lumbar spine. The MRI was interpreted as showing multilevel degenerative changes with mild to moderate canal stenosis at the L3-4 level, and moderate canal stenosis at the L4-5 level. Additionally, the MRI showed mild to moderate bilateral foraminal stenosis at L4-5 with subtle effect on the exiting right L4 nerve root. The MRI also showed moderate to severe bilateral foraminal stenosis at L5-S1 with subtle effect on the exiting L5 nerve roots. (Ex. E).

16. On October 31, 2018, Claimant saw Dr. Shah. Dr. Shah noted the MRI confirmed significant lumbar arthrosis, loss of normal lordosis and foraminal stenosis with impingement on the exiting L4 and L5 nerve roots. Dr. Shah opined that Claimant's buttock and leg pain is associated with his lumbar pathology. Dr. Shah performed epidural steroid injections (ESI) at the L4-L5 and L5-S1 levels of Claimant's lumbar spine. (Ex. C).

17. On November 19, 2018, Claimant saw Dr. Kistler at Workwell for right hip and right knee pain. Claimant reported experiencing episodic severe pain in his right hip, especially if he slept on it wrong. Claimant reported not using ladders at work, but otherwise working

full duty. Claimant reported his primary problem to be pain in the right hip and knee. On physical examination, Dr. Kistler noted tenderness in the right knee, full range of motion in the right knee, no low back tenderness, pain on rotation of the right hip. (Ex. B).

18. On December 6, 2018, Claimant saw Katherine Drapeau, D.O., at Workwell. Claimant noted that he received a steroid injection in his right hip which improved his hip. Dr. Drapeau's physical examination of Claimant's right hip noted no click on motion, no decreased sensation, but pain on motion over the hip. (Ex. B).

19. On December 12, 2018, Claimant saw Dr. Shah. Dr. Shah's records from December 12, 2018 do not discuss Claimant's back-related symptoms, hip pain, or the effect of the ESI performed on October 31, 2018. (Ex. C).

20. On December 20, 2018, Claimant saw Dr. Drapeau at Workwell. Claimant reported experiencing pain and weakness in his hip and pain in his right knee. Claimant reported his low back was not bothering him much. (Ex. B).

21. On January 16, 2019, Claimant saw Brian White, M.D. of Western Orthopaedics. Dr. White's January 16, 2019 report appears to be a report following the administration of a steroid injection in Claimant's right hip. Dr. White indicated that the steroid injection resulted in 70% improvement and Claimant was able to work and function. No other records from Dr. White were offered into evidence. (Ex. D).

22. On January 17, 2019, Claimant saw Dr. Cazden for right hip and knee pain. Dr. Cazden found Claimant has a right hip labral injury with residual pain following a prior cortisone injection. Claimant also had right knee pain from the injury and suffered a bone contusion and loss of cartilage over the medial femoral condyle, where his pain is located. Claimant reported his low back was "not really bothering him" and Dr. Cazden opined that Claimant did not seem to have radicular pain. Dr. Cazden noted Claimant was able to walk without significant antalgia and could get in and out of a chair easily. Dr. Cazden re-emphasized Claimant's work restriction of no climbing ladders. (Ex. B).

23. On February 18, 2019, Claimant saw Dr. Cazden for a follow up appointment. Through a translator, Claimant indicated his right hip and knee pain was better and he was following his home exercise program. Claimant reported his primary problem was pain in the right hip and right knee. He reported his right hip hurt when laying down, and his pain was made worse by walking on uneven surfaces. On physical examination, Dr. Cazden noted tenderness in the Claimant's right hip along the greater trochanter and posterior joint capsule which increased with rotation of the hip. Examination of Claimant's right knee showed mild tenderness over the medial femoral condyle, with very little joint line tenderness and full range of motion. Examination of Claimant's lumbar spine showed full range of motion without discomfort, no weakness, and no radicular findings. Claimant reported mild improvement in functional status. Dr. Cazden indicated Claimant had not met his functional goal of being able to lift 70 pounds to chest height without difficulty or sitting for 3 hours at a time without difficulty. Claimant also noted hip pain when sleeping or laying down. (Ex. B).

24. On March 15, 2019, Claimant saw Dr. Cazden for an impairment rating. Dr. Cazden determined that Claimant was at maximum medical improvement (MMI) on March 15, 2019. On physical examination, Dr. Cazden noted Claimant ambulated into the room with significant antalgia favoring the right hip. He found Claimant had restricted range of motion in the right hip, tenderness over the greater trochanter and tenderness in the anterior joint capsule. On examination of the Claimant's lumbar spine, he found no gross deformity or swelling, very little tenderness to palpation, no noted range of motion deficit, no radicular findings, no sensory or vascular deficits and no focal weakness from radicular findings. Dr. Cazden assigned a 15% impairment rating for loss of motion in his right knee and a chondral injury and an impairment rating of 35% for loss of motion of his right hip. Dr. Cazden converted these ratings to a 45% scheduled impairment rating of Claimant's right leg, which corresponds to 18% whole person impairment. Dr. Cazden noted that "this is the only impairment for injury dated May 7, 2018." (Ex. B).

25. On April 1, 2019, Respondent filed a Final Admission of Liability and admitted Claimant's entitlement to PPD benefits for a 45% impairment of his right leg.

26. Claimant credibly testified that he continues to experience pain in his right hip and demonstrated the location of his hip pain to be on the outside of his upper right leg, below his belt line. Claimant testified he is now able to use ladders, but the use is somewhat limited and modified. Claimant also credibly testified that, depending on the amount of work he performs, his hip bothers him when he sleeps approximately two to three times per week, and that he places a pillow between his legs to help him sleep.

27. On January 15, 2020, Dr. Albert Hattem, M.D., conducted a review of Claimant's medical records and issued an opinion regarding whether conversion of Claimant's scheduled impairment rating to a whole person rating is warranted. Dr. Hattem opined that conversion was not appropriate because 1) Claimant only injured his right knee and right hip, not his low back; 2) that Claimant responded diagnostically to a hip injection administered by Dr. White; 3) that although Claimant may have suffered an initial sprain of his low back, the condition resolved; and 4) there was no evidence for an acute injury to Claimant's low back. Dr. Hattem testified that he did not believe the Claimant qualified for a spinal impairment rating, because, in Dr. Hattem's opinion, Claimant did not suffer an injury to his lumbar spine. Dr. Hattem's testimony was not instructive because his opinions regarding conversion of impairment rating were related to the legal issue of conversion, and based on the situs of the Claimant's injury, rather than the situs of the Claimant's functional impairment.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. See § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits

by a preponderance of the evidence. See § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id.* at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Conversion of Scheduled Impairment to Whole Person Impairment

Section 8-42-107(1)(a), C.R.S. limits medical impairment benefits to those provided in §8-42-107(2), C.R.S. when a claimant's injury is one enumerated in the schedule of impairments. § 8-42-107(l)(a), C.R.S. The schedule includes the "loss of a leg at the hip joint or so near thereto as to preclude the use of an artificial limb," but does not define "hip" or specifically include an injury limited to the "hip." § 8-42-107(2)(w), C.R.S., When an injury results in a permanent medical impairment not set forth on a schedule of impairments, an employee is entitled to medical impairment benefits paid as a whole person. See §8-42-107(8)(c), C.R.S.

The term "injury" contained in Section 8-42-107(l)(a), C.R.S. "refers to the situs of the functional impairment, meaning the part of the body that sustained the ultimate loss, and not necessarily the situs of the injury itself." *Walker v. Jim Fuoco Motor Co.*, 942 P.2d 1390, 1391 (Colo. App. 1997); see also *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366 (Colo.App.1996). Depending upon the facts of a particular claim, therefore,

damage to the lower extremity may or may not reflect functional impairment enumerated on the schedule of benefits. See *Strauch v. PSL Swedish Healthcare System, supra*; see also *Abeyta v. Wackenhut Services*, W.C. No. 4-519-399 (September 16, 2004).

The ALJ must thus determine the situs of a claimant's "functional impairment." *Velasquez v. UPS*, W.C. No. 4-573-459 (ICAO Apr. 13, 2006). The situs of the functional impairment is not necessarily the site of the injury. See *In re Hamrick*, W.C. No. 4-868-996-01 (ICAO, Feb. 1, 2016); *In re Zimdars*, W.C. No. 4-922-066-04 (ICAO, Feb. 4, 2015). Pain and discomfort that limit a claimant's ability to use a portion of the body is considered functional impairment for purposes of determining whether an injury is off the schedule of impairments. *In re Johnson –Wood*, W.C. No. 4-536-198 (ICAO, June 20, 2005); *Vargas v. Excel Corp.*, W.C. 4-551-161 (ICAO, Apr. 21, 2005). However, the mere presence of pain in a portion of the body beyond the schedule does not require a finding that the pain represents a functional impairment. *Lovett v. Big Lots*, WC 4-657-285 (ICAO, Nov. 16, 2007); *O'Connell v. Don's Masonry*, W.C. 4-609-719 (ICAO, Dec. 28, 2006).

Claimant bears the burden of proof by a preponderance of the evidence to establish functional impairment beyond the leg at the hip and the consequent right to PPD benefits awarded under § 8-42-107(8)(c), C.R.S. Whether Claimant met the burden of proof presents an issue of fact for determination by the ALJ. *Delaney v. Industrial Claim Appeals Office*, 30 P.3d 691 (Colo. App. 2001); *Johnson-Wood v. City of Colorado Springs*, W.C. No. 4-536-198 (ICAO June 20, 2005). *In re Claim of Barnes*, 042420 COWC, 5-063-493 (ICAO, April 24, 2020).

The Claimant has failed to establish, by a preponderance of the evidence, that he has sustained a functional impairment that limits Claimant's ability to use a part of his body not included in the impairment schedule of § 8-42-107(2), C.R.S. Section 8-42-107(2)(w), provides that the partial loss of use of a leg at the hip is a scheduled disability. See *In re Lewis*, WC 4-517-426 (ICAP September 22, 2003). Claimant's testimony, though credible, does not demonstrate the situs of Claimant's functional impairment extends beyond his right leg at the hip. When demonstrating the location of his pain, Claimant indicated the location to be on the outside of his right leg, at the hip. (Findings of Fact, ¶ 26). Claimant did not testify about loss of use or functional impairment of his torso or other parts of his body extending beyond the right leg. Similarly, Claimant's medical records at the time of and for several months before MMI do not demonstrate any functional impairment beyond Claimant's right leg. (Findings of Fact, ¶ 20-24). The functions that are impaired by Claimant's injury include intermittent difficulty sleeping, a reduced capacity to use ladders, and difficulty walking on uneven ground. The situs of the functional impairment, however, is the Claimant's right leg which manifests itself by impairing these activities. As such, Claimant has not established by a preponderance of the evidence sufficient grounds for converting his 45% right leg scheduled impairment rating to a whole person impairment.

ORDER

It is therefore ordered that:

1. Claimant's request to convert the 45% scheduled impairment rating for loss of use of the right leg at the hip to a whole person impairment rating is denied.
2. All matters not determined herein are reserved for future determination.

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

DATED: September 30, 2020.



Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

- Did Claimant prove he suffered a compensable injury on November 28, 2019?
- Did Claimant prove entitlement to reasonably necessary medical treatment to cure and relieve the November 28, 2019 work injury?
- Was treatment provided by Mr. Quakenbush at CCOM authorized?
- Is Dr. Weinstein an authorized provider?

FINDINGS OF FACT

Claimant works as a tractor trailer driver hauling mail between USPS facilities in Salida and Denver.

Claimant's standard route follows Highway 285 from Salida through Fairplay and over Kenosha Pass to C-470 near Morrison. He then takes C-470 and I-70 to reach the mail distribution center. The return trip retraces the route in reverse. He generally leaves Salida in the late afternoon and returns to Salida between 1:00 AM and 2:00 AM, depending on traffic and road conditions.

Employer operates two trucks daily between Salida and Denver. The trailers are dropped at the USPS facility in Salida after returning from Denver, but the tractors are parked off-site because of limited parking space. The tractor Claimant operated on the date of injury is parked behind Quincy's restaurant, a few miles from the Salida USPS facility. Claimant's usual routine was to leave his personal vehicle parked at Quincy's while he drove the mail route.

Employer's tractors are equipped with "Keep Truckin" Electronic Logging Devices (ELDs). The ELD connects with GPS and records data such as location, speed, and hours driven. The system pings its location several times per minute while the vehicle is in motion, less frequently when the vehicle is stationary.

If the ELD malfunctions, drivers are instructed to contact the Keep Truckin' 24/7 support line. A Keep Truckin' representative goes through a series of troubleshooting steps with the driver on the phone to identify and resolve the issue if possible. The driver is given a case number and instructed to note the case number on the ELD and the paper log.

When Claimant started his shift on November 26, he discovered the ELD had incorrectly showed him as being on duty since his last shift ended the day before. As a result, "it had run me out of hours, and I wasn't eligible to drive." Claimant testified he called Tamarra Williams, Employer's Safety and Compliance manager to report the situation. He testified he was advised to drive his route and maintain paper logs.

Claimant's cell phone records show a five-minute call to Employer's office at 4:17 PM on November 26, closely contemporaneous with the start of his shift.

Ms. Williams testified she did not recall receiving a call from Claimant on November 26 regarding an ELD malfunction. She testified if she did receive such a call, she would tell the driver to contact Keep Truckin' because they can troubleshoot and resolve many problems remotely. She would also tell the driver to switch to paper logs if Keep Truckin' could not fix the issue.

Ms. Williams' testimony appeared credible, but the phone records show Claimant spoke with someone in the office at the start of his shift on November 26. The ALJ infers Claimant spoke with a different person he mistakenly thought was Ms. Williams, and that individual advised him to maintain paper logs.

Claimant completed handwritten Driver's Daily Log sheets for his shifts that started on November 26 and 27.

On November 27, 2019, Claimant drove the usual round-trip route between Salida and Denver. The weather was poor because of a major snowstorm. The ELD monitored and recorded the truck's movements during the shift. The GPS log shows Claimant reached the Salida postal facility at 1:32 and parked at the loading dock at 1:35 AM. He unloaded the mail, disconnected the trailer, and departed the mail facility at 2:09 AM to go park the tractor.

The tractor drove 0.75 miles (primarily south) and stopped at 2:14 AM. The engine started again at 2:38 AM and the tractor drove 0.38 miles (primarily west and slightly north) to Quincy's restaurant. The vehicle stopped again at 2:41 AM and remained stationary in an east facing direction for the remaining two hours shown on the log. Although there was no direct testimony regarding where Claimant was parked between 2:14 AM and 2:38 AM, but the ALJ infers from the distances involved and directions of travel he probably stopped at a gas station on Highway 50 before parking the truck at Quincy's.

After parking the tractor, Claimant transferred his personal gear such as his toolbox, coveralls, gloves, and winter boots to his personal vehicle. He made several trips back and forth between the two vehicles. As Claimant was walking back to the tractor to lock it, he slipped on a patch of ice and fell, landing on his back and left side. After lying on the ground for a few moments, Claimant got up with some difficulty, locked the tractor and got into his personal vehicle. He waited awhile for his vehicle to warm up and drove home to Cotopaxi.

Claimant subsequently gave a recorded statement during Insurer's investigation of his claim. Claimant stated he arrived at the Salida postal facility at approximately 1:30 AM, which is consistent with the GPS log. Claimant estimated the accident occurred at approximately 3:00 AM, also consistent with the GPS log.

Claimant's paper log shows a slightly different timeline than the GPS records and his recorded statement. The paper and electronic logs are essentially identical except for the portion after Claimant's final break in Fairplay. The paper log shows he left Fairplay at 12:30 AM, whereas the GPS shows 12:22 AM. The paper log shows Claimant parked at the loading dock in Salida at 2:30 AM, but GPS shows 1:35 AM. The paper log shows it

took 45 minutes to unload and drop the trailer, but the GPS shows it took 34 minutes. The paper log shows the tractor finally parked at Quincy's at 3:30 AM, but the GPS shows it was 2:41 AM. The remaining portions of the log are reasonably congruent.

The GPS record is probably the most accurate representation of the exact timeline and sequence of events on the morning of November 28, 2019. The pattern of activity shown on the paper log is reasonably consistent with the GPS log. The discrepancies between the paper and electronic logs probably reflect estimation errors on Claimant's part regarding specific times. The ALJ is not persuaded Claimant purposefully falsified his log.

November 28, 2019 was Thanksgiving. Claimant did not call the office to report his accident because it was closed for the holiday. At 6:07 PM that evening, he called his supervisor, Bruce H[Redacted], at home. Claimant did not call earlier because he was reluctant to intrude on Mr. H[Redacted]'s Thanksgiving family time. Mr. H[Redacted] instructed Claimant to call the office manager, Emily A[Redacted], in the morning. Mr. H[Redacted] did not refer Claimant to a physician or clinic for treatment.

Claimant called the office at 9:32 AM on November 29 and spoke with Ms. A[Redacted]. He reported the injury and explained he used paper driver logs because the ELD was not tracking his time properly. Ms. A[Redacted] instructed Claimant to call [Redacted TPA] who would "triage" the situation. Claimant asked Ms. A[Redacted] which doctor he should see, and she said she would need to check and get back to him. Ms. A[Redacted] never referred Claimant to a specific physician or clinic.

Claimant contacted UC Health Urgent Care/CCOM in Canon City in the afternoon on November 29 because he was experiencing severe pain and had not heard back from Ms. A[Redacted] about a doctor. CCOM advised him to come in right away because he was having rib pain making it difficult to breathe.

Claimant was evaluated by PA-C Steven Quakenbush at CCOM on November 29, 2019. He described slipping on ice while unloading items from his truck at the end of his shift, consistent with his hearing testimony. Claimant's primary concern was left lateral posterior chest pain and the possibility of a broken rib. He also reported shoulder pain. Mr. Quakenbush noted, "the patient does have a history of chronic lower back symptoms but no exacerbation of his low back symptoms." Claimant had tenderness to palpation of the mid-posterior lateral chest wall but no obvious discoloration or ecchymosis. Rib x-rays showed no fracture. He was moving his upper extremities freely with no indication of rotator cuff tear. Mr. Quakenbush diagnosed a chest wall contusion and prescribed tramadol and muscle relaxers. He took Claimant off work because it was not safe to drive or operate machinery while taking the medication. Mr. Quakenbush also opined the examination findings were consistent with the history given by Claimant.

Claimant contacted Care Point after his appointment with CCOM. He described the accident as "was walking back and forth between trailer and pickup truck when [he] slipped on ice, injury upper back and shoulder." Although the report states Claimant was referred for care, there is no persuasive evidence of a referral to a specific physician or clinic.

Employer has names of designated providers posted at its Denver facility. There is no persuasive evidence Claimant recalled the names of any of those designated providers

at the time of his accident or that any were in reasonable proximity to him. As Claimant persuasively testified, “considering I was 150 miles away in Salida, [posters in the Denver facility] didn’t do me any good.”

Having received no referral from Employer, Claimant continued to follow up with Mr. Quakenbush. On December 2, 2019, Claimant reported the medication had helped but he was still having persistent pain with deep inspiration and trunk rotation. Mr. Quakenbush advised Claimant to continue the medication and ordered physical therapy for “rib manipulation.” He continued Claimant’s “off work” status. Although not mentioned in the report, Claimant’s pain diagram indicates pain in the left shoulder, scapular area and left upper back. Claimant completed several similar pain diagrams at appointments in December 2019.

Claimant started physical therapy on December 2, 2019. His primary complaints were significant pain over his left-sided chest, scapula and upper back since the accident. He related a prior history of occasional left leg swelling “from a pinched nerve in back, no thoracic/shoulder/neck issues.”

On December 3, 2019, Mr. Quakenbush released Claimant to work with no lifting over 5 pounds and no commercial driving. As of the hearing, Employer had not offered Claimant any modified duty.

On December 11, 2019, Claimant described “popping and pain over his left lateral shoulder without new injury since his initial injury date.” Mr. Quakenbush noted Claimant had complained of shoulder pain at the initial evaluation on November 29. The physical examination revealed tenderness of the left lateral shoulder with “a palpable deformity.” Claimant had pain into the left anterior joint space. His range of motion was good, although he had some popping of the left shoulder with internal rotation. He was again described as moving his extremities “freely,” which indicates apparent movement is not a helpful indicator of Claimant’s shoulder pathology.

Claimant saw Dr. Dale Buckhaults, a chiropractor, on December 3, 2019. His primary complaints were left hip and left hamstring pain. He also mentioned left sacroiliac and left lumbar pain. This was the first post-accident mention of low back or leg issues. He indicated his symptoms were present “since 11/28/2019 . . . after a slip on ice.” There is no persuasive evidence Mr. Quakenbush referred Claimant to Dr. Buckhaults.

Claimant underwent a left shoulder MRI on January 15, 2020. It was interpreted as showing moderate supraspinatus tendinosis, moderate AC joint arthrosis with impingement, a small joint effusion, and a suspected labral tear.

Claimant’s last injury-related appointment with Mr. Quakenbush took place on January 17, 2020. He reviewed the MRI report and referred Claimant to Dr. Minihane for an orthopedic evaluation. Mr. Quakenbush noted, “PT states the adjuster from [Redacted TPA]t called him yesterday and stated his claim has been denied.” He advised Claimant to follow up in a month and opined, “MMI now pending orthopedic review and recommendations regarding his left shoulder.”

Claimant saw Dr. Weinstein, an orthopedic surgeon, on February 26, 2020 under his health insurance. Dr. Weinstein’s report indicates the referral source was Claimant’s PCP,

Dr. Steven Olson. Claimant described problems with his left shoulder since the work accident. Claimant exhibited slight range of motion and strength deficits in the left shoulder. Jobe's sign, Neer impingement sign, and Speed's test were positive. Dr. Weinstein personally reviewed the MRI images, and noted a low-grade partial-thickness supraspinatus tear, subscapularis and proximal biceps tendinitis, and rotator cuff muscle atrophy with fatty deposition. He recommended conservative care and administered a subacromial cortisone injection. Claimant followed up with Dr. Weinstein on May 27, 2020 and received a second cortisone injection.

On February 27, 2020, Claimant was evaluated by Dr. Sergiu Botolin, a spine surgeon, for low back and left leg pain. The referral source is identified as Dr. Steven Olson. Dr. Botolin noted, "the patient reports that his symptoms developed around Thanksgiving of 2019 after a slip and fall. He reports that prior to that he had some rare intermittent low back aches and but nothing as serious as this." Dr. Botolin reviewed films from a lumbar MRI performed on February 17, 2020, which showed multilevel degenerative spondylosis with moderate to severe central canal stenosis at L2-3 and L3-4 and severe left foraminal stenosis at L5-S1. He diagnosed lumbar stenosis and radiculopathy. Dr. Botolin opined, "I would like him to start with physical therapy for core strengthening and stretching. I also would like to place a referral for interventional pain management."

There is no persuasive evidence any ATP referred Claimant to Dr. Weinstein or Dr. Botolin.

Dr. Nicholas Kurz performed an IME for Respondents on June 19, 2020. He also testified at the hearing. Dr. Kurz opined Claimant suffered an acute left chest/rib contusion from the slip and fall. He opined the injury had "resolved" and Claimant reached MMI by December 27, 2019. He did not believe Claimant's shoulder problems were related to the accident. Dr. Kurz examined medical records from Claimant's chiropractor from mid-2017 to the end of January 2018 and opined Claimant's current low back symptoms are a continuation of chronic back pain related to long-standing degenerative changes. Dr. Kurz opined the accident did not "aggravate or accelerate" Claimant's pre-existing condition because he did not report the symptoms for several weeks and the MRI identified no acute structural abnormality.

Claimant saw Dr. Timothy Hall for an IME at his counsel's request on June 26, 2020. Dr. Hall diagnosed left shoulder impingement syndrome, bicipital tendinitis, and rotator cuff tendinosis, traumatic trochanteric bursitis with IT band syndrome, and advanced lumbar degenerative disease with radiculitis "exacerbated by fall." He opined the diagnoses were plausibly associated with the mechanism of injury and were a direct result of the November 28 work accident.

Claimant's description of the accident at hearing was generally credible and supported by the persuasive medical evidence. Claimant proved he suffered a compensable injury on November 28, 2019.

Claimant proved he suffered a chest contusion and left shoulder injury because of the November 28, 2019 accident.

The November 29, 2019 treatment with Mr. Quakenbush at CCOM was reasonably necessary emergency treatment for Claimant's injuries.

Employer did not refer Claimant to a physician after receiving notice of his injury. The right of selection passed to Claimant.

Claimant proved evaluations and treatment provided by Mr. Quakenbush for a chest contusion and left shoulder injury were reasonably necessary to cure and relieve the effects of his work-related injury.

Claimant failed to prove Dr. Weinstein or Dr. Botolin are authorized.

Although some evidence was presented regarding Claimant's low back, no ATP has recommended treatment directed at the low back. The ALJ has no authority to award treatment recommended only by unauthorized providers or IMEs. Accordingly, any ultimate findings regarding reasonable necessity or relatedness pertaining to Claimant's low back would be merely advisory and have no impact on any justiciable issue presented in this hearing.

CONCLUSIONS OF LAW

A. Claimant proved he suffered a compensable injury arising out of and in the course of his employment.

To receive compensation or medical benefits, a claimant must prove he is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo. App. 2001). The "course of employment" requirement is satisfied if the injury occurred within the time and place limits of the employment relationship and during an activity that had some connection with the employee's job-related functions." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991). The term "arising out of" requires an injury "has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered a part of the employee's employment contract." *Horodysyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001).

The claimant need not actually be performing work duties at the time of the injury, nor must the activity be a strict employment requirement or confer an express benefit on the employer. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207, 210 (Colo. 1996). "Many job functions involve discretionary or optional activities on the part of the employee, devoid of any duty component and unrelated to any specific benefit to the employer, but nonetheless sufficiently incidental to the work itself as to be properly considered as arising out of and in the course of employment." *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). The ultimate question is whether the activity is sufficiently "interrelated to the conditions and circumstances under which the employee generally performs the job functions that the activity may reasonably be characterized as an incident of employment." *Price, supra* at 210.

As found, Claimant proved he suffered a compensable injury because of a work-related accident on November 28, 2019. Claimant's description of the accident at hearing was generally credible and consistent with his previous reports to Employer, Insurer, and multiple examining and treating providers. Although not a strict duty of employment, transferring work-related personal items such as tools and winter clothing to his personal vehicle was sufficiently incidental and ancillary to his job that the accident arose out of

and occurred within the course of his employment. The relatively minor discrepancies between Claimant's handwritten driver logs and the GPS data are probably the result of honest mistakes. The ALJ is not persuaded Claimant fabricated his reported accident. The conditions Mr. Quakenbush identified and treated (i.e., a chest contusion and left shoulder injury) are plausibly associated with the described mechanism of injury.

B. The treatment provided by Mr. Quakenbush was reasonably necessary

The respondents are liable for medical treatment reasonably needed to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P.2d 362 (Colo. App. 1995). Where the respondents dispute the claimant's entitlement to medical benefits, the claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The claimant must also prove that the requested treatment is reasonably necessary, if disputed. Section 8-42-101(1)(a).

Claimant proved the treatment from Mr. Quakenbush was reasonably needed to cure and relieve the effects of his injury. The preponderance of persuasive evidence shows Claimant suffered at least a chest contusion and left shoulder injury because of the accident. The diagnostic evaluations and conservative care Mr. Quakenbush recommended were reasonable and appropriate.

C. The treatment from Mr. Quakenbush was authorized

Besides proving treatment is reasonably necessary, the claimant must prove the provider is "authorized." *Bunch v. Industrial Claim Appeals Office*, 148 P.3d 381 (Colo. App. 2006). Authorization refers to a provider's legal right to treat the claimant at the respondents' expense. *Mason Jar Restaurant v. Industrial Claim Appeals Office*, 862 P.2d 1026 (Colo. App. 1993). Providers typically become authorized by the initial selection of a treating physician, agreement of the parties, or upon referrals made in the "normal progression of authorized treatment." *Bestway Concrete v Industrial Claim Appeals Office*, 984 P.2d 680 (Colo. App. 1999); *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985).

Treatment received on an emergency basis is deemed authorized without regard to whether the claimant had prior approval from the employer or a referral. *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990); see also WCRP 8-2. The emergency exception is not necessarily limited to life-threatening situations, and whether a "bona fide emergency" existed is a question of fact for the ALJ to be determined based on the circumstances. *Hoffman v. Wal-Mart Stores*, W.C. No. 4-774-720 (January 12, 2010). As found, Claimant's treatment at CCOM on November 29, 2019 was reasonably necessary emergency treatment for his injuries. Claimant was experiencing severe pain and difficulty breathing and CCOM personnel advised him to come in immediately. Additionally, it was mid-afternoon of the Friday after Thanksgiving, and Claimant perceived his window of opportunity to receive treatment was closing.

Under § 8-43-404(5)(a), the employer has the right to choose the treating physician in the first instance. The employer must tender medical treatment "forthwith" upon

receiving notice of the injury, or the right of selection passes to the claimant. *Rogers v. Industrial Claim Appeals Office*, 746 P.2d 565 (Colo. App. 1987). An employer's attempt to "pre-designate" a provider with posted notices is not a sufficient tender of treatment if the injured worker does not recall the notice at the time of injury. *E.g.*, *Park v. Phil Long Ford d/b/a Academy Ford*, W.C. No. 4-373-188 (December 14, 1999); *Broadmoor Hotel v. Industrial Claim Appeals Office*, (Colo. App. No. 92CA1635, May 27, 1993) (NSOP).

Employer did not refer Claimant to a provider after receiving notice of his accident and injuries. By the time Claimant returned to Mr. Quakenbush on December 2, 2019, he had spoken with two management-level Employer representatives and Employer's accident "triage" service, none of whom referred him to a physician or clinic. Claimant did not recall any provider listed on notices posted at the facility in Denver, and even if he had, there is no persuasive evidence any of those providers were in reasonable proximity to Salida or his home in Cotopaxi. The right of selection passed to Claimant, and he selected Mr. Quakenbush. Treatment provided by, and on referral from, Mr. Quakenbush was authorized.

C. Dr. Weinstein and Dr. Botolin are not authorized

Claimant failed to prove Dr. Weinstein or Dr. Botolin are authorized providers. Once a claimant exercises the right of selection, he may not change physicians without following the statutory procedure for a one-time change of physician, or obtaining permission from the respondents or the Division. *E.g.*, *Pickett v. Colorado State Hospital*, 513 P.2d 228 (Colo. App. 1973). A claimant is not permitted to change physicians simply because the respondents deny liability for the claim. *Yeck v. Industrial Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999). Mr. Quakenbush referred Claimant to Dr. Minihane to evaluate the shoulder and remained willing to treat Claimant even though the claim was denied. There is no persuasive evidence any ATP referred Claimant to Dr. Weinstein or Dr. Botolin.

D. The ALJ cannot adjudicate treatment related to Claimant's back because no treatment has been recommended by any authorized provider.

Respondents are only liable for treatment rendered by ATPs. The ALJ lacks authority to award medical treatment recommended only by unauthorized treating providers or IMEs. *E.g., Torres v. City and County of Denver*, W.C. No. 4-937-329-03 (May 15, 2018); *Short v. Property Management of Telluride*, W.C. No. 3-100-726 (May 4, 1995). Here, no ATP has addressed Claimant's low back or made any treatment recommendations. Although Dr. Botolin and Dr. Hall recommended treatment, neither is an ATP. Any ultimate findings regarding reasonable necessity or relatedness pertaining to Claimant's low back would be merely advisory and have no impact on justiciable issue involved in this hearing. All issues regarding Claimant's low back will be reserved for future determination, if necessary.

ORDER

It is therefore ordered that:

1. Claimant's claim in W.C. No. 5-127-158 for injuries suffered on November 28, 2019 is compensable.
2. Insurer shall cover all treatment from authorized providers reasonably needed to cure and relieve the effects of Claimant's injuries, including treatment provided by and on referral from Mr. Quakenbush on and after November 29, 2019.
3. Claimant's request to hold Insurer liable for treatment already provided by Dr. Weinstein is denied and dismissed.
4. All issues not decided herein are reserved for future determination.

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

DATED: October 3, 2020

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that he suffered compensable left shoulder injuries during the course and scope of his employment with Employer on November 13, 2019.
2. Whether Claimant has established by a preponderance of the evidence that he is entitled to receive Temporary Partial Disability (TPD) benefits for the period November 14, 2019 through January 23, 2019.
3. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period January 24, 2020 until terminated by statute.

STIPULATION

The parties agreed that Claimant earned an Average Weekly Wage (AWW) of \$1,125.83.

FINDINGS OF FACT

1. Employer is a property management company that owns buildings and parking lots throughout Colorado. Claimant is a 62 year old male who worked for Employer as a Lead Maintenance Technician. His job duties involved plumbing, cutting trees, repairing potholes and various other maintenance activities on Employer's properties.
2. Dan B[Redacted] was Employer's Painter and Maintenance Assistant. Claimant worked with Mr. B[Redacted] when he required assistance with his job responsibilities.
3. On November 13, 2019 Claimant arrived at jobsite Green Box Storage at about 7:15 a.m. Claimant and Mr. B[Redacted] were supposed to unload ice melt and then proceed to an emergency paint job at a different location. However, Mr. B[Redacted] failed to arrive to help unload the material. Claimant contacted Mr. B[Redacted] but he was at another job location shampooing carpet. Mr. B[Redacted] responded he would arrive as soon as possible. Claimant finished unloading the ice melt then proceeded to the storage unit to retrieve the paint for the emergency paint job.
4. Claimant went to the back of the storage shed looking for a five gallon bucket of paint. When Mr. B[Redacted] arrived at the storage unit an argument ensued between the parties. Mr. B[Redacted] approached Claimant and got in his face. Claimant asked Mr. B[Redacted] to back away and bent down to look for the paint. Mr. B[Redacted] then struck Claimant with an unknown object on the left side of his face.

The blow knocked Claimant back into scaffolding. Claimant noted he put his arm back to catch himself and Mr. B[Redacted] was immediately on top of him. He specified that Mr. B[Redacted] struck him on the back of his head and back area. Claimant moved his left arm above his head to protect himself. Claimant never struck the ground during the assault but was stuck in the scaffolding between two bars. When Claimant pulled himself out of the scaffolding Mr. B[Redacted] ran out the door.

5. Claimant immediately reported the incident to Employer's Property Manager Adriana W[Redacted]. He told her that he was attacked but did not request medical care or treatment. Ms. W[Redacted] testified that Claimant reported Mr. B[Redacted] was freaking out, got in his face, punched him in the face and ran out of the building where they were working. She noted that Claimant did not tell her there were any punches other than one strike to the face. Claimant did not mention specific body parts that were injured and Ms. W[Redacted] only took pictures of a scrape or cut on the left side of Claimant's face.

6. Claimant completed his work shift, but suffered increased pain during the night. On the following day Claimant reported his injuries to Erica L[Redacted] in Human Resources.

7. Employer directed Claimant to Concentra Medical Centers for treatment. On November 15, 2019 Claimant visited Ron Rasis, PA-C at Concentra for an examination. He reported that he had been assaulted at work, pushed back into equipment and landed on his left side. He noted that he was suffering left shoulder pain. X-rays of the left shoulder were unremarkable. PA-C Rasis diagnosed Claimant with a left shoulder contusion and referred him to physical therapy. He assigned work restrictions of lifting, pushing and pulling up to 10 pounds constantly and no reaching above the head with the left arm.

8. On December 2, 2019 Claimant returned to Concentra and visited PA-C Rasis for an evaluation. Claimant reported that his overall range of motion had improved, but he was still suffering lateral left shoulder pain, soreness and weakness. He also noted left trapezius region soreness with ongoing aching pain along the lateral and posterior shoulder region. PA-C Rasis recommended a left shoulder MRI. He continued work restrictions of lifting, pushing and pulling up to 10 pounds constantly and no reaching above the head with the left arm.

9. On December 13, 2019 Claimant underwent a left shoulder MRI. The MRI revealed an "acute appearing full-thickness" left rotator cuff tear.

10. On December 16, 2019 Claimant returned to PA-C Rasis for an examination. Claimant reported continuing left shoulder pain and intermittent weakness with heavier lifting. PA-C Rasis diagnosed Claimant with a left rotator cuff tear and referred him for an orthopedic evaluation. He continued work restrictions of lifting, pushing and pulling up to 10 pounds constantly and no reaching above the head with the left arm.

11. On January 6, 2020 Claimant visited Orthopedic Surgeon Michael Hewitt, M.D. for an evaluation. Dr. Hewitt recorded that Claimant had been attacked by a fellow employee and was struck in the face and head with a large brush. Claimant fell backwards onto his left shoulder. He reported superior and lateral shoulder pain exacerbated with overhead use. Dr. Hewitt explained that the left shoulder MRI revealed a full thickness tear involving the subscapularis with 1.5 mm retraction and subluxation of the long head of the biceps tendon. He recommended surgical intervention in the form of a left rotator cuff repair.

12. Claimant testified that his work restrictions impeded his ability to perform his job duties. He continued to work light duty under restrictions but suffered a partial wage loss from November 14, 2019 through January 23, 2020 as a result of the assault.

13. On January 24, 2020 Claimant was terminated from employment with Employer. A Waiver and Release Agreement specified the terms and financial details of the separation. Claimant has not reached Maximum Medical Improvement (MMI) subsequent to his termination.

14. On June 25, 2020 Claimant underwent an independent medical examination with John S. Hughes, M.D. Claimant reported that he was preparing for a painting job and contacted his coworker Mr. B[Redacted]. Mr. B[Redacted] became agitated, got on top of Claimant and struck him in the face. Although Claimant returned to work he developed progressive left arm and shoulder pain. Dr. Hughes recounted Claimant's initial medical care with PA-C Rasis, physical therapy treatment, left shoulder MRI and surgical evaluation with Dr. Hewitt. After reviewing Claimant's medical history, Dr. Hughes noted that he did not suffer left shoulder symptoms prior to the assault at work. He reasoned that "it seems clear" that Claimant sustained left shoulder injuries on November 13, 2019. Dr. Hughes specifically concluded that Claimant sustained rotator cuff tear injuries to his left shoulder as a result of the assault. He noted that Claimant "merits" the surgical treatment recommended by Dr. Hewitt.

15. On June 30, 2020 Claimant underwent an independent medical examination with F. Mark Paz, M.D. Claimant reported that on November 13, 2019 he arrived at work at approximately 7:45 a.m. Claimant contacted his co-worker Mr. B[Redacted] to assist him in moving 40-50 bags of ice melt. However, Mr. B[Redacted] did not arrive and Claimant finished moving the ice melt. Claimant moved upstairs to begin work on a paint job when coworker Mr. B[Redacted] arrived. Claimant noted that Mr. B[Redacted] appeared to be agitated. He remarked that he put his hands up in front of him as he was bent forward and advised Mr. B[Redacted] that he was not going to argue. Claimant was about to move a five gallon bucket when Mr. B[Redacted] struck him on the right side of his face with an unidentified object that was possibly a scrub brush. Claimant then fell backwards onto scaffolding behind him and landed between the railings. He was flexed forward between the railings of the scaffolding. Mr. B[Redacted] continued hitting him on the back of the head. After the assault Claimant completed the paint job by climbing on the building and using a paint pole while leaning over the edge of the building.

16. Dr. Paz reviewed Claimant's medical treatment, prior medical history, left shoulder MRI and surgical evaluation with Dr. Hewitt. He diagnosed Claimant with a left shoulder subscapularis tear and impingement syndrome. Dr. Paz determined that Claimant's mechanism of injury was inconsistent with his rotator cuff tear and thus not causally related to the November 13, 2019 assault. He specifically reasoned that the mechanism of injury was "incongruent with the diagnosis of left shoulder subscapularis tear and left shoulder impingement syndrome." The mechanism of injury did not constitute a left shoulder traumatic exposure. Furthermore, if Claimant had been struck one time in the face by Mr. B[Redacted], he would not have suffered a left shoulder injury. However, Dr. Hewitt's record from January 6, 2020 provided that Claimant fell backwards onto his left shoulder during the altercation. Dr. Paz explained that a direct fall onto the left shoulder was "congruent with the left shoulder diagnoses, and the condition would require treatment as a result of the November 13, 2019 incident."

17. On July 6, 2020 Dr. Hughes prepared a Case Review Report. He considered the opinion of Dr. Paz based on inconsistent accounts of Claimant's mechanism of injury to PA-C Ron Rasis on November 15, 2019 and Dr. Hewitt on January 6, 2020. Dr. Paz distinguished between the two histories and determined that the Concentra report was inconsistent with Claimant's left shoulder pathology and Dr. Hewitt's report was consistent with Claimant's left shoulder injuries. Dr. Hughes explained that Claimant did not have a precise recollection of the November 13, 2019 assault and PA-C Rasis' report two days after the incident was consistent with Claimant's left shoulder pathology. Therefore, the surgery proposed by Dr. Hewitt was reasonable, necessary and causally related to the November 13, 2019 attack.

18. Dr. Paz also testified at the hearing in this matter. He reiterated that the November 13, 2019 assault did not cause Claimant's left rotator cuff tear or need for surgery. He specified that Claimant's full thickness tear required significant force. Although Claimant fell backwards during the altercation, his left arm did not support all of his weight. Claimant specifically did not come to rest on his shoulder with his full body weight because he was caught up in the scaffolding. Furthermore, a full thickness tear would have caused immediate pain. However, Claimant completed his painting duties on the day of the incident and developed left shoulder pain over time.

19. Dr. Paz considered three scenarios regarding Claimant's mechanism of injury. The first situation involved a single punch to Claimant's face by Mr. B[Redacted]. Second, while Claimant was bending or leaning down near a paint can, Mr. B[Redacted] struck him multiple times on the head and the back of the shoulder. The third scenario involved Claimant falling backwards, catching himself with his left arm and using his left arm to block Mr. B[Redacted]'s punches. Dr. Paz summarized that none of the preceding scenarios would have placed sufficient force directly on Claimant's left shoulder to cause impingement syndrome or a rotator cuff tear.

20. Claimant has demonstrated that it is more probably true than not that he suffered compensable left shoulder injuries during the course and scope of his employment with Employer on November 13, 2019. Initially, Claimant explained that he was preparing to perform a painting job for Employer when coworker Mr. B[Redacted]

struck him with an unknown object on the left side of his face. The blow knocked Claimant back into scaffolding. Claimant noted he put his arm back to catch himself and Mr. B[Redacted] was immediately on top of him. He specified that Mr. B[Redacted] struck him on the back of his head and back area. Claimant moved his left arm above his head to protect himself. He never struck the ground during the assault but remained stuck in the scaffolding between two bars. In his initial visit to Ron Rasis, PA-C at Concentra Claimant reported that he had been assaulted at work, pushed back into equipment and landed on his left side. PA-C Rasis referred Claimant to physical therapy. He assigned work restrictions of lifting, pushing and pulling up to 10 pounds constantly and no reaching above the head with the left arm.

21. On December 13, 2019 Claimant underwent a left shoulder MRI. The MRI revealed an “acute appearing full-thickness” left rotator cuff tear. Orthopedic Surgeon Dr. Hewitt recorded that Claimant had been attacked by a fellow employee and was struck in the face and head with a large brush. Claimant fell backwards onto his left shoulder. Dr. Hewitt explained that the left shoulder MRI revealed a full thickness tear involving the subscapularis with 1.5 mm retraction and subluxation of the long head of the biceps tendon. He recommended surgical intervention in the form of a left rotator cuff repair. Claimant subsequently underwent an independent medical examination with Dr. Hughes. After reviewing Claimant’s medical history, Dr. Hughes noted that he did not suffer left shoulder symptoms prior to the assault at work. Dr. Hughes reasoned that “it seems clear” that Claimant suffered left shoulder injuries on November 13, 2019. He specifically concluded that Claimant sustained rotator cuff tear injuries to his left shoulder as a result of the assault and “merits” the surgical treatment recommended by Dr. Hewitt.

22. In contrast, Dr. Paz maintained that the November 13, 2019 assault did not cause Claimant’s left rotator cuff tear or need for surgery. He specifically reasoned that Claimant’s mechanism of injury was “incongruent with the diagnosis of left shoulder subscapularis tear and left shoulder impingement syndrome.” The mechanism of injury did not constitute a left shoulder traumatic exposure. At hearing Dr. Paz explained that falling into scaffolding would not place direct force on the shoulder. In fact, he summarized that none of the three injury scenarios presented at hearing would have placed sufficient force directly on Claimant’s left shoulder to cause impingement syndrome or a rotator cuff tear. Despite Dr. Paz’ conclusion that the November 13, 2019 incident did not cause Claimant’s left shoulder condition, the record reflects that Claimant suffered an acute left shoulder rotator cuff tear during the November 13, 2019 assault. Although Claimant presented several different details about the altercation, they were not inconsistent but instead reflect an incident that impacted Claimant’s left shoulder and caused symptoms. Claimant had not suffered any prior left shoulder problems and the temporal proximity of the November 13, 2019 incident to Claimant’s development of symptoms suggests a causal relationship between the assault and the left rotator cuff tear. Moreover, Dr. Hughes explained that Claimant did not have a precise recollection of the November 13, 2019 assault and PA-C Rasis’ report two days after the incident was consistent with Claimant’s left shoulder pathology. Based on the medical records, report of Dr. Hewitt and persuasive opinion of Dr. Hughes, Claimant suffered left shoulder injuries during the course and scope of his employment on

November 13, 2019. Claimant's work activities aggravated, accelerated or combined with his pre-existing condition to produce a need for medical treatment.

23. Claimant has established that it is more probably true than not that he is entitled to receive TPD benefits for the period November 14, 2019 through January 23, 2019. Claimant received work restrictions as a result of his November 13, 2019 industrial injuries. Claimant's work restrictions consisted of lifting, pushing and pulling up to 10 pounds constantly and no reaching above the head with the left arm. Claimant noted that during the approximately two and one-half month time period between the assault and his termination he required help in performing his job duties. Claimant's left shoulder injury and work restrictions impaired his ability to effectively and properly perform his regular employment. He suffered an impairment of earning capacity because the restrictions impeded his ability to effectively and properly perform his regular employment. Claimant continued to work light duty under restrictions but suffered a partial wage loss from November 14, 2019 through January 23, 2020. Claimant has thus demonstrated that the difference between his AWW at the time of his injury and his earnings during the continuance of temporary partial disability was caused by his November 13, 2019 work injuries. Accordingly, claimant shall receive TPD benefits for the period November 14, 2019 through January 23, 2019.

24. Claimant has demonstrated that it is more probably true than not that he is entitled to receive TTD benefits for the period January 24, 2020 until terminated by statute. On January 24, 2020 Claimant was terminated from employment with Employer. A Waiver and Release Agreement specified the terms and financial details of the separation. Claimant has not reached MMI. Claimant's industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss. Accordingly, Claimant shall receive TTD benefits for the period January 24, 2020 until terminated by statute.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings

as unpersuasive. See *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *CJI*, Civil 3:16 (2007).

Compensability

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson*, W.C. No. 4-589-645 (ICAO, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.*, 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner*, 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). *Soto-Carrion v. C & T Plumbing, Inc.*, W.C. No. 4-650-711 (ICAO, Feb. 15, 2007); *David Mailand v. PSC Industrial Outsourcing LP*, W.C. No. 4-898-391-01, (ICAO, Aug. 25, 2014).

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. See *Cotts v. Exempla, Inc.*, W.C. No. 4-606-563 (ICAO, Aug. 18, 2005). Rather, the symptoms could represent the “logical and recurrent consequence” of the pre-existing condition. See *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAO, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs*, W.C. No. 4-745-712 (ICAO, Oct. 27, 2008), simply because a claimant’s symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that “correlation is not causation,” and merely because a coincidental correlation exists between the claimant’s work and his symptoms does not mean there is a causal connection between the claimant’s injury and work activities.

7. The provision of medical care based on a claimant’s report of symptoms does not establish an injury but only demonstrates that the claimant claimed an injury. *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020). Moreover, a

referral for medical care may be made so that the respondent would not forfeit its right to select the medical providers if the claim is later deemed compensable. *Id.* Because a physician provides diagnostic testing, treatment, and work restrictions based on a claimant's reported symptoms does not mandate that the claimant suffered a compensable injury. *Fay v. East Penn manufacturing Co., Inc.*, W.C. No. 5-108-430-001 (ICAO, Apr. 24, 2020); *cf. Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337, 1339 (Colo. App. 1997) ("right to workers' compensation benefits, including medical payments, arises only when an injured employee initially establishes, by a preponderance of the evidence, that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment"). While scientific evidence is not dispositive of compensability, the ALJ may consider and rely on medical opinions regarding the lack of a scientific theory supporting compensability when making a determination. *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983); *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020).

8. As found, Claimant has demonstrated by a preponderance of the evidence that he suffered compensable left shoulder injuries during the course and scope of his employment with Employer on November 13, 2019. Initially, Claimant explained that he was preparing to perform a painting job for Employer when coworker Mr. B[Redacted] struck him with an unknown object on the left side of his face. The blow knocked Claimant back into scaffolding. Claimant noted he put his arm back to catch himself and Mr. B[Redacted] was immediately on top of him. He specified that Mr. B[Redacted] struck him on the back of his head and back area. Claimant moved his left arm above his head to protect himself. He never struck the ground during the assault but remained stuck in the scaffolding between two bars. In his initial visit to Ron Rasis, PA-C at Concentra Claimant reported that he had been assaulted at work, pushed back into equipment and landed on his left side. PA-C Rasis referred Claimant to physical therapy. He assigned work restrictions of lifting, pushing and pulling up to 10 pounds constantly and no reaching above the head with the left arm.

9. As found, on December 13, 2019 Claimant underwent a left shoulder MRI. The MRI revealed an "acute appearing full-thickness" left rotator cuff tear. Orthopedic Surgeon Dr. Hewitt recorded that Claimant had been attacked by a fellow employee and was struck in the face and head with a large brush. Claimant fell backwards onto his left shoulder. Dr. Hewitt explained that the left shoulder MRI revealed a full thickness tear involving the subscapularis with 1.5 mm retraction and subluxation of the long head of the biceps tendon. He recommended surgical intervention in the form of a left rotator cuff repair. Claimant subsequently underwent an independent medical examination with Dr. Hughes. After reviewing Claimant's medical history, Dr. Hughes noted that he did not suffer left shoulder symptoms prior to the assault at work. Dr. Hughes reasoned that "it seems clear" that Claimant suffered left shoulder injuries on November 13, 2019. He specifically concluded that Claimant sustained rotator cuff tear injuries to his left shoulder as a result of the assault and "merits" the surgical treatment recommended by Dr. Hewitt.

10. As found, in contrast, Dr. Paz maintained that the November 13, 2019 assault did not cause Claimant's left rotator cuff tear or need for surgery. He specifically

reasoned that Claimant's mechanism of injury was "incongruent with the diagnosis of left shoulder subscapularis tear and left shoulder impingement syndrome." The mechanism of injury did not constitute a left shoulder traumatic exposure. At hearing Dr. Paz explained that falling into scaffolding would not place direct force on the shoulder. In fact, he summarized that none of the three injury scenarios presented at hearing would have placed sufficient force directly on Claimant's left shoulder to cause impingement syndrome or a rotator cuff tear. Despite Dr. Paz' conclusion that the November 13, 2019 incident did not cause Claimant's left shoulder condition, the record reflects that Claimant suffered an acute left shoulder rotator cuff tear during the November 13, 2019 assault, Although Claimant presented several different details about the altercation, they were not inconsistent but instead reflect an incident that impacted Claimant's left shoulder and caused symptoms. Claimant had not suffered any prior left shoulder problems and the temporal proximity of the November 13, 2019 incident to Claimant's development of symptoms suggests a causal relationship between the assault and the left rotator cuff tear. Moreover, Dr. Hughes explained that Claimant did not have a precise recollection of the November 13, 2019 assault and PA-C Rasis' report two days after the incident was consistent with Claimant's left shoulder pathology. Based on the medical records, report of Dr. Hewitt and persuasive opinion of Dr. Hughes, Claimant suffered left shoulder injuries during the course and scope of his employment on November 13, 2019. Claimant's work activities aggravated, accelerated or combined with his pre-existing condition to produce a need for medical treatment.

Temporary Partial Disability Benefits

11. Section 8-42-106(1), C.R.S., provides for an award of Temporary Partial Disability (TPD) benefits based on the difference between the claimant's Average Weekly Wage (AWW) at the time of injury and the earnings during the continuance of the temporary partial disability. In order to receive TPD benefits the claimant must establish that the injury has caused the disability and consequent partial wage loss. §8-42-103(1), C.R.S.; see *Safeway Stores, Inc. v. Husson*, 732 P.2d 1244 (Colo. App. 1986) (temporary partial compensation benefits are designed as a partial substitute for lost wages or impaired earning capacity arising from a compensable injury). A claimant suffers from an impairment of earning capacity when he has a complete inability to work or there are restrictions that impair his ability to effectively and properly perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997).

12. As found, Claimant has established by a preponderance of the evidence that he is entitled to receive TPD benefits for the period November 14, 2019 through January 23, 2019. Claimant received work restrictions as a result of his November 13, 2019 industrial injuries. Claimant's work restrictions consisted of lifting, pushing and pulling up to 10 pounds constantly and no reaching above the head with the left arm. Claimant noted that during the approximately two and one-half month time period between the assault and his termination he required help in performing his job duties. Claimant's left shoulder injury and work restrictions impaired his ability to effectively and

properly perform his regular employment. He suffered an impairment of earning capacity because the restrictions impeded his ability to effectively and properly perform his regular employment. Claimant continued to work light duty under restrictions but suffered a partial wage loss from November 14, 2019 through January 23, 2020. Claimant has thus demonstrated that the difference between his AWW at the time of his injury and his earnings during the continuance of temporary partial disability was caused by his November 13, 2019 work injuries. Accordingly, claimant shall receive TPD benefits for the period November 14, 2019 through January 23, 2019.

Temporary Total Disability Benefits

13. To prove entitlement to Temporary Total Disability (TTD) benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. See Sections 8-42-(1)(g), 8-42-105(4); *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office*, 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term “disability” connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (citing *Ricks v. Industrial Claim Appeals Office*, P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic*, 952 P.2d 831, 833 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

14. As found, Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive TTD benefits for the period January 24, 2020 until terminated by statute. On January 24, 2020 Claimant was terminated from employment with Employer. A Waiver and Release Agreement specified the terms and financial details of the separation. Claimant has not reached MMI. Claimant's industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss. Accordingly, Claimant shall receive TTD benefits for the period January 24, 2020 until terminated by statute.

ORDER

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

1. On November 13, 2019 Claimant suffered compensable left shoulder injuries during the course and scope of his employment with Employer.
2. Claimant shall receive TPD benefits for the period November 14, 2019 through January 23, 2019.
3. Claimant shall receive TTD benefits for the period January 24, 2020 until terminated by statute.
4. Claimant earned an AWW of \$1,125.83.
5. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at <http://www.colorado.gov/dpa/oac/forms-WC.htm>.*

DATED: October 6, 2020.

DIGITAL SIGNATURE:


Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor

Denver, CO 80203

ISSUES

1. Whether Claimant has proven by a preponderance of the evidence that he sustained a cervical spine injury on August 27, 2017 during the course and scope of his employment with Employer.
2. Whether Claimant has demonstrated by a preponderance of the evidence that the artificial disc replacement and two-level fusion requested by Michael E. Janssen, M.D. is reasonable, necessary and causally related to his industrial injury.

FINDINGS OF FACT

1. Claimant has worked for Employer since 1998. He currently works as a Data Technician. Claimant installs and maintains T1 and fiber lines for commercial and governmental services.
2. Claimant has an extensive history of pre-existing cervical spine symptoms. On April 18, 2006 Claimant was injured in a significant motor vehicle accident involving six vehicles. As a result of the accident, Claimant underwent a cervical fusion at C5-C7 in February 2007.
3. By November 2007 there were significant concerns that Claimant's fusion had failed. A CT scan established incomplete incorporation of the bone grafts. In fact, on November 30, 2007 Sanjay Jatana, M.D. remarked that Claimant would require posterior cervical surgery in the future to solidify the arthrodesis at C5-C7 because it had not completely healed.
4. Claimant's symptoms continued and in 2012 he reported pain in his neck radiating into his head. He also had numbness and tingling in his hands. X-rays in early 2012 revealed mild degenerative changes above the fusion at the C4-C5 level.
5. On July 17, 2012 Claimant underwent hardware removal at the C5-C7 levels. Claimant subsequently suffered an infection as a result of the procedure. On August 16, 2012 he underwent a debridement and removal of infected tissue.
6. Claimant testified that following his treatment for the infection he did not have any other symptoms. He was off work for about two to three months following the 2012 hardware removal, but returned to full duty employment. Claimant commented that from 2012 until August 2017 he did not have any neck issues and worked full duty for Employer.
7. On August 27, 2017 Claimant suffered an admitted industrial injury during the course and scope of his employment with Employer. Claimant specifically tripped over a water meter lid and fell forward onto his outstretched arms while working at a

jobsite. Claimant landed primarily on his right side and struck his chest. He contacted his supervisor within 30 minutes to report his injury. Claimant continued to work over the next two weeks but remained in contact with his supervisor regarding his symptoms.

8. On September 11, 2017 Employer completed a First Report of Injury. On the same day Claimant visited the Emergency Department at Good Samaritan Hospital and reported his symptoms. Claimant's primary concern was whether he sustained a rib fracture. He reported he had fallen onto his chest and experienced right-sided thoracic pain since the fall. Notably, a physical examination of the cervical spine was normal. Claimant was diagnosed with a chest wall contusion and chest wall pain.

9. Claimant visited Concentra Medical Centers on September 19, 2017 and received treatment from Monica Schubert, NP. A physical examination revealed tenderness in the neck area. NP Schubert diagnosed Claimant with a neck strain and recommended message therapy.

10. On September 29, 2017 Claimant visited Debra Smith, M.D. and reported residual pain in the right trapezius and biceps. Dr. Smith noted tenderness in the right trapezius muscle and right-sided muscle spasms.

11. On October 31, 2017 Dr. Smith discharged Claimant at Maximum Medical Improvement (MMI) and released him to full duty employment. She recommended eight sessions of maintenance massage therapy.

12. On November 27, 2017 Respondents voluntarily reopened the claim. Claimant returned to Concentra and visited Dr. Smith. He reported that his work activities aggravated his neck and shoulder symptoms.

13. Claimant continued to experience symptoms and visit Dr. Smith for treatment. On January 23, 2018 Claimant reported persistent pain at the base of the right side of his neck. He noted that the neck pain was aching, sharp, positional and radiated to the shoulder blade. On physical examination, Dr. Smith noted tenderness at the C6-T1 level of the cervical spine, right paraspinal muscle and right trapezius muscle as well as right-sided muscle spasms. She diagnosed Claimant with cervical myofascial pain syndrome and referred him for a cervical MRI.

14. On February 2, 2018 Claimant underwent an MRI of the cervical spine. A comparison of the MRI against an October 22, 2007 CT scan reflected an "unchanged" anterior C5-C7 fusion and mild degenerative changes including mild C4-C5 central canal narrowing.

15. On February 5, 2018 Claimant visited John Sacha, M.D. for an evaluation. He reported right-sided neck pain with occasional headaches and right inferior periscapular pain. Dr. Sacha noted cervical paraspinal spasm and segmental dysfunction. He diagnosed cervical facet syndrome above and below the areas of Claimant's prior fusion. Dr. Sacha recommended staged right C2-C5 and C7-T1 facet injections.

16. Claimant continued to report right-sided neck pain and underwent extensive conservative treatment for his neck pain and related symptoms. During 2018 Claimant attended 28 massage therapy sessions. From December 4, 2018 through May 8, 2019 Claimant also received 12 osteopathic manipulation treatments. Finally, from May 21, 2019 through July 8, 2019 Claimant underwent 10 acupuncture sessions.

17. On June 17, 2019 Claimant underwent a cervical MRI. The MRI revealed a C4-5 disc osteophyte complex causing worsening central canal stenosis and slight progression of bilateral foraminal stenosis. On June 25, 2019 Claimant underwent a right upper extremity EMG that reflected a C5 radiculopathy.

18. On July 9, 2019 Claimant visited Michael E. Janssen, D.O. for an examination. He reviewed Claimant's history, including prior cervical treatment, EMG results and the cervical MRI. Dr. Janssen determined that Claimant suffered a classic C5 radiculopathy and required surgery. He considered whether Claimant's need for surgery was related to the natural progression of his cervical spine condition or his work injury. Dr. Janssen explained that Claimant had surgery 10 years earlier and there was an "incidence of generally about 2 percent per year" regarding the need for additional surgery after the initial 2007 procedure. He reasoned that there was a "less than one in five [chance] that [the current need for surgery was] related to the natural history" rather than the work injury. Dr. Janssen thus concluded that Claimant's need for surgery was causally related to his August 27, 2017 industrial injury. On July 17, 2019 Dr. Janssen requested authorization to perform C4-5 artificial disc replacement with C5-7 hardware removal.

19. On July 22, 2019 Michael J. Rauzzino, M.D. performed a records review regarding Dr. Janssen's request for surgical authorization. Dr. Rauzzino determined Claimant did not sustain a cervical spine injury, there was no clear pain generator, the cervical MRI showed degenerative changes and Claimant did not meet the Workers' Compensation criteria for the recommended surgery.

20. On July 16, 2019 Claimant completed a Workers' Claim for Compensation. On August 26, 2019 Respondents filed a General Admission of Liability (GAL) and denied Claimant sustained a cervical injury. On September 6, 2019 Claimant applied for a hearing on the compensability of his cervical spine condition and whether the surgery recommended by Dr. Janssen was reasonable, necessary and related to his industrial injury.

21. On December 17, 2019 Dr. Janssen issued a summary regarding his treatment of Claimant. He specifically considered whether Claimant's need for surgery was related to his August 27, 2017 industrial injury. Dr. Janssen explained that "100% of the indications of surgery are related to this event for which [Claimant] has been undergoing treatment for the last years. It is not preexisting. It is not related to the 2006 incident either."

22. On January 8, 2020 Dr. Janssen issued another report detailing his opinion regarding the need for surgery as a result of Claimant's August 27, 2017

industrial injury. Dr. Janssen determined that Claimant's need for surgery was most likely related to his industrial injury and not simply a product of adjacent level disease following the prior two-level anterior cervical discectomy and fusion (ACDF). He noted that patients who have had a single-level ACDF and were followed over 10 years have an approximately 2.9% incidence of adjacent level disease per year. Because Claimant underwent a fusion 13 years earlier, his incidence rate and necessity for additional surgery would be 39%. Dr. Janssen stated that patients with a two-level ACDF had a lower incidence of adjacent level disease than patients with a one-level fusion. Because Claimant underwent a two-level fusion, his incidence rate and necessity for additional surgery would be lower than 39%. Dr. Janssen thus concluded that Claimant's need for cervical spine surgery was causally related to his industrial injury.

23. On February 3, 2020 the parties conducted the pre-hearing evidentiary deposition of Michael J. Rauzzino, M.D. Dr. Rauzzino concluded that Claimant did not sustain a cervical injury as part of the August 27, 2017 accident. He relied on the medical records that included reports of the mechanism of injury, the timing of Claimant's symptoms, a review of imaging studies and information about Claimant's prior medical history. Dr. Rauzzino remarked that, if Claimant sustained a disc injury on August 27, 2017, he would have anticipated neurologic deficits to manifest on physical examination at the emergency department on September 11, 2017. He summarized that there was nothing about the 2017 accident that would have altered the structure of Claimant's spine or caused it to progress more rapidly than what would have been anticipated based on the previous fusion.

24. Dr. Rauzzino also relied on imaging studies in reasoning that Claimant did not suffer a cervical spine injury on August 27, 2017. He explained that the 2018 MRI compared to pre-injury studies established there was no acute structural injury to the cervical spine. Dr. Rauzzino specifically commented "[t]here wasn't a new blown out disc or broken bone. There was just the progression of previous degenerative changes which occurred over time as one would expect."

25. Dr. Rauzzino reasoned that, if Claimant suffered a cervical injury on August 27, 2017, it was limited to a strain. He explained that a cervical strain "is a soft tissue or muscular injury... that would resolve over time." Dr. Rauzzino remarked that a soft tissue injury would not have affected the cervical discs, spinal column, cervical nerves or spinal structure. Specifically, a cervical strain would not have caused an injury to the C5 nerve root. Dr. Rauzzino summarized that the proposed surgery would not address a cervical strain.

26. Dr. Rauzzino also explained that the surgery proposed by Dr. Janssen was not causally related to Claimant's August 27, 2017 industrial injury. It was instead necessitated by the natural progression of Claimant's underlying cervical spine condition. Dr. Rauzzino remarked that the proposed surgery was the type of procedure that would have been anticipated within 10 years after the initial 2007 fusion. Specifically, he testified that the cervical MRI findings in 2018 compared to the study performed in 2012 represented a progression of the previous disease rather than an acute structural injury. He explained that Dr. Janssen's reference to the incidence

percentage described “the fact that you can have what’s called adjacent level disease in the setting of a previous cervical or lumbar fusion.” Dr. Rauzzino commented that a known side effect of a cervical fusion as Claimant underwent at C5-C7 in 2007 is the cause of adjacent level disease at the proximal segment or C4-C5 that progresses over time. He elaborated that Dr. Janssen’s assessment of a 2% per year incidence rate in Claimant’s case was likely low. Dr. Rauzzino remarked “if you perform a fusion in a young person, especially at two levels, you would explain to that patient there’s a significant likelihood in their lifetime that they may require additional surgery.” He agreed with Dr. Jatana that there was a 40-60% chance that Claimant’s spine would deteriorate after the 2007 fusion to the point he would require future surgeries within 10 years.

27. Dr. Rauzzino commented that the proposed surgery was designed to address a C5 radiculopathy. His review of the medical records established that there was no evidence of a C5 radiculopathy until July 2019 or almost two years after Claimant’s date of injury. Dr. Rauzzino noted that numerous doctors performed significant examinations and found no C5 radiculopathy on examination. He detailed that

the diagnosis of a classic C5 radiculopathy made by Dr. Janssen was made after multiple providers had seen [Claimant] and had the opportunity to make such a diagnosis and did not. This would include his treating physicians. It would also include Dr. Sacha, who saw the patient, who is well versed in surgical radiculopathy, very much in the position to make a diagnosis of that if it existed. It’s also in contradistinction to Dr. Janssen’s own PA, Ruth Beckham, who saw the patient in June of 2019 and did not note a classic C5 radiculopathy.

Dr. Rauzzino summarized that “there would be no way to relate” the symptoms from Dr. Janssen’s July 2019 exam to the fall Claimant suffered two years earlier. He instead attributed Claimant’s symptoms to the natural progression of the prior C5-C7 fusion that caused a known complication of adjacent level disease at the C4-C5 segment.

28. On March 19, 2020 Dr. Janssen testified through a pre-hearing evidentiary deposition in this matter. Dr. Janssen noted that he reviewed Dr. Rauzzino’s reports and deposition testimony. He commented that Claimant’s lack of an immediate classic C5 radiculopathy did not change his opinion that Claimant sustained a cervical spine injury on August 27, 2017. Dr. Janssen remarked that, although the initial September 11, 2017 emergency department report noted Claimant’s neck range of motion was normal, he may still have injured his neck. He explained that patients with spinal cord disc injuries do not always immediately manifest acute radiculopathy or splinting.

29. Dr. Janssen also explained that Claimant requires decompression and reconstruction surgery. He remarked that a disc replacement will provide Claimant with a shorter recovery, better outcome and decrease the likelihood of additional surgery. Furthermore, Claimant’s need for cervical surgery is related to his industrial injury. Nevertheless, Dr. Janssen recognized that a prior fusion could break down over time.

He explained that the incidence rate of the need for an additional surgery by 2019 after the original 2007 fusion was “between 20 or 25 percent to 30 percent.”

30. Claimant has proven that it is more probably true than not that he sustained a cervical spine injury during the course and scope of his employment with Employer. Initially, on August 27, 2017 Claimant tripped over a water meter lid and fell forward onto his outstretched arms while working at a jobsite. He reported he had fallen onto his chest and experienced right-sided thoracic pain since the fall. At a September 11, 2017 visit to the emergency department a physical examination of the cervical spine was normal and Claimant was diagnosed with a chest wall contusion. At a Concentra visit on September 19, 2017 NP Schubert diagnosed Claimant with a neck strain and recommended message therapy. Claimant subsequently continued to report right-sided neck pain. From September 2017 through mid-2019, Claimant received significant treatment for his cervical spine symptoms. The treatment included a variety of conservative measures including massage therapy, acupuncture, osteopathic manipulation and injections. Although Claimant suffered pre-existing neck symptoms, he was asymptomatic and had not visited a doctor for his neck condition in the five years prior to his August 27, 2017 industrial injury.

31. Although Claimant suffered an industrial injury while working for Employer on August 27, 2017, the record reflects that it was limited to a cervical strain. On February 2, 2018 Claimant underwent an MRI of the cervical spine. A comparison of the MRI against an October 22, 2007 CT scan reflected an “unchanged” anterior C5-C7 fusion and mild degenerative changes including mild C4-C5 central canal narrowing. Dr. Rauzzino persuasively explained that the 2018 MRI compared to pre-injury studies established there was no acute structural injury to the cervical spine. He remarked that there was nothing about the 2017 accident that would have altered the structure of Claimant’s spine or caused it to progress more rapidly than what would have been anticipated based on the previous fusion.

32. In contrast, Dr. Janssen commented that Claimant’s lack of an immediate classic C5 radiculopathy did not change his opinion that he sustained a cervical spine injury on August 27, 2017. Dr. Janssen remarked that, although the initial September 11, 2017 emergency department report noted Claimant’s neck range of motion was normal, he may still have injured his neck. He explained that patients do not always immediately manifest acute radiculopathy or splinting. However, Dr. Rauzzino persuasively reasoned that if Claimant suffered a cervical injury on August 27, 2017 it was limited to a strain. He explained a cervical strain “is a soft tissue or muscular injury... that would resolve over time.” Dr. Rauzzino commented that a soft tissue injury would not have affected the cervical discs, spinal column, cervical nerves or spinal structure. Specifically, a cervical strain would not have caused an injury to the C5 nerve root. Accordingly, based on a review of Claimant’s prior medical history, the medical records and persuasive opinion of Dr. Rauzzino, Claimant did not suffer an acute structural injury to the cervical spine on August 27, 2017. Instead, he only suffered a cervical strain. Claimant’s work activities on August 27, 2017 aggravated, accelerated or combined with his pre-existing condition to produce a need for medical treatment for the cervical strain.

33. Claimant has failed to demonstrate that it is more probably true than not that the artificial disc replacement and two-level fusion requested by Dr. Janssen is reasonable, necessary and causally related to his August 27, 2017 cervical strain. Initially, after reviewing Claimant's medical history, including prior cervical treatment, EMG results and the cervical MRI, Dr. Janssen determined that Claimant suffered a classic C5 radiculopathy and required surgery. In considering whether Claimant's need for surgery was related to the natural progression of his cervical spine condition or work injury, Dr. Janssen explained that Claimant had surgery 10 years earlier and there was an "incidence of generally about 2 percent per year" regarding the need for additional surgery after the initial 2007 procedure. He reasoned that there was a less than one in five chance that Claimant's need for surgery was related to the natural history rather than his work injury. Dr. Janssen thus concluded that Claimant's need for surgery was causally related to his industrial injury and requested authorization to perform a C4-5 artificial disc replacement with C5-7 hardware removal.

34. In contrast, Dr. Rauzzino explained that the proposed surgery is designed to address a C5 radiculopathy. However, the August 27, 2017 work accident did not cause, aggravate or accelerate Claimant's C5 radiculopathy. Dr. Rauzzino persuasively commented that the C5 radiculopathy would have been present at Claimant's initial evaluation on September 11, 2017 if it had been caused by the work injury. Instead, the C5 condition was not documented until July 2019 or nearly two years after the work accident. Dr. Rauzzino noted that numerous doctors performed significant examinations and found no C5 radiculopathy on examination. He detailed that "the diagnosis of a classic C5 radiculopathy made by Dr. Janssen was made after multiple providers had seen [Claimant] and had the opportunity to make such a diagnosis and did not." Dr. Rauzzino summarized that "there would be no way to relate" the symptoms from Dr. Janssen's July 2019 exam to the fall Claimant suffered two years earlier.

35. Dr. Rauzzino detailed that Claimant's symptoms are related to the natural progression of the prior C5-C7 fusion. He explained that a known side effect of a cervical fusion like Claimant underwent at C5-C7 in 2007 is adjacent level disease at the proximal segment or C4-C5 that progresses over time. Dr. Rauzzino elaborated that Dr. Janssen's assessment of a 2% per year incidence rate in Claimant's case was likely low. He remarked "if you perform a fusion in a young person, especially at two levels, you would explain to that patient there's a significant likelihood in their lifetime that they may require additional surgery." Dr. Rauzzino agreed with Dr. Jatana that there was a 40-60% chance that Claimant's spine would deteriorate after the 2007 fusion to the point he would require future surgeries within 10 years. Therefore, based on a review of the medical records and the persuasive opinion of Dr. Rauzzino, Claimant's August 27, 2017 work activities did not aggravate, accelerate or combine with his pre-existing condition to produce the need for Dr. Janssen's proposed surgery. Claimant's need for surgery was instead caused by the natural progression of his pre-existing cervical condition and degeneration of the adjacent segments of his prior cervical fusion. Accordingly, Claimant's request for an artificial disc replacement and two-level fusion as proposed by Dr. Janssen is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the “Workers’ Compensation Act of Colorado” (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers’ Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers’ Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers’ Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge’s factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. See *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness’s testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Compensability

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson*, W.C. No. 4-589-645 (ICAO, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.*, 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner*, 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). *Soto-Carrion v. C & T Plumbing, Inc.*, W.C. No. 4-650-711 (ICAO, Feb. 15, 2007); *David Mailand v. PSC Industrial Outsourcing LP*, W.C. No. 4-898-391-01, (ICAO, Aug. 25, 2014).

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. See *Cotts v. Exempla, Inc.*, W.C. No. 4-606-563 (ICAO, Aug. 18, 2005). Rather, the symptoms could represent the “logical and recurrent consequence” of the pre-existing condition. See *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAO, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs*, W.C. No. 4-745-712 (ICAO, Oct. 27, 2008), simply because a claimant’s symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that “correlation is not causation,” and merely because a coincidental correlation exists between the claimant’s work and his symptoms does not mean there is a causal connection between the claimant’s injury and work activities.

7. The provision of medical care based on a claimant’s report of symptoms does not establish an injury but only demonstrates that the claimant claimed an injury. *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020). Moreover, a referral for medical care may be made so that the respondent would not forfeit its right to select the medical providers if the claim is later deemed compensable. *Id.* Because a physician provides diagnostic testing, treatment, and work restrictions based on a claimant’s reported symptoms does not mandate that the claimant suffered a compensable injury. *Fay v. East Penn manufacturing Co., Inc.*, W.C. No. 5-108-430-001 (ICAO, Apr. 24, 2020); cf. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337, 1339 (Colo. App. 1997) (“right to workers’ compensation benefits, including medical payments, arises only when an injured employee initially establishes, by a preponderance of the evidence, that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment”). While scientific evidence is not dispositive of compensability, the ALJ may consider and rely on medical opinions regarding the lack of a scientific theory supporting compensability when making a determination. *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983); *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020).

8. As found, Claimant has proven by a preponderance of the evidence that he sustained a cervical spine injury during the course and scope of his employment with Employer. Initially, on August 27, 2017 Claimant tripped over a water meter lid and fell forward onto his outstretched arms while working at a jobsite. He reported he had fallen onto his chest and experienced right-sided thoracic pain since the fall. At a September 11, 2017 visit to the emergency department a physical examination of the cervical spine was normal and Claimant was diagnosed with a chest wall contusion. At a Concentra visit on September 19, 2017 NP Schubert diagnosed Claimant with a neck strain and recommended message therapy. Claimant subsequently continued to report right-sided neck pain. From September 2017 through mid-2019, Claimant received significant treatment for his cervical spine symptoms. The treatment included a variety of conservative measures including massage therapy, acupuncture, osteopathic manipulation and injections. Although Claimant suffered pre-existing neck symptoms, he was asymptomatic and had not visited a doctor for his neck condition in the five years prior to his August 27, 2017 industrial injury.

9. As found, although Claimant suffered an industrial injury while working for Employer on August 27, 2017, the record reflects that it was limited to a cervical strain. On February 2, 2018 Claimant underwent an MRI of the cervical spine. A comparison of the MRI against an October 22, 2007 CT scan reflected an “unchanged” anterior C5-C7 fusion and mild degenerative changes including mild C4-C5 central canal narrowing. Dr. Rauzzino persuasively explained that the 2018 MRI compared to pre-injury studies established there was no acute structural injury to the cervical spine. He remarked that there was nothing about the 2017 accident that would have altered the structure of Claimant’s spine or caused it to progress more rapidly than what would have been anticipated based on the previous fusion.

10. As found, in contrast, Dr. Janssen commented that Claimant’s lack of an immediate classic C5 radiculopathy did not change his opinion that he sustained a cervical spine injury on August 27, 2017. Dr. Janssen remarked that, although the initial September 11, 2017 emergency department report noted Claimant’s neck range of motion was normal, he may still have injured his neck. He explained that patients do not always immediately manifest acute radiculopathy or splinting. However, Dr. Rauzzino persuasively reasoned that if Claimant suffered a cervical injury on August 27, 2017 it was limited to a strain. He explained a cervical strain “is a soft tissue or muscular injury... that would resolve over time.” Dr. Rauzzino commented that a soft tissue injury would not have affected the cervical discs, spinal column, cervical nerves or spinal structure. Specifically, a cervical strain would not have caused an injury to the C5 nerve root. Accordingly, based on a review of Claimant’s prior medical history, the medical records and persuasive opinion of Dr. Rauzzino, Claimant did not suffer an acute structural injury to the cervical spine on August 27, 2017. Instead, he only suffered a cervical strain. Claimant’s work activities on August 27, 2017 aggravated, accelerated or combined with his pre-existing condition to produce a need for medical treatment for the cervical strain.

Proposed Surgery

11. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). The claimant bears the burden of demonstrating a causal connection between his industrial injuries and the need for additional medical treatment. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier*, W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

12. As found, Claimant has failed to demonstrate by a preponderance of the evidence that the artificial disc replacement and two-level fusion requested by Dr.

Janssen is reasonable, necessary and causally related to his August 27, 2017 cervical strain. Initially, after reviewing Claimant's medical history, including prior cervical treatment, EMG results and the cervical MRI, Dr. Janssen determined that Claimant suffered a classic C5 radiculopathy and required surgery. In considering whether Claimant's need for surgery was related to the natural progression of his cervical spine condition or work injury, Dr. Janssen explained that Claimant had surgery 10 years earlier and there was an "incidence of generally about 2 percent per year" regarding the need for additional surgery after the initial 2007 procedure. He reasoned that there was a less than one in five chance that Claimant's need for surgery was related to the natural history rather than his work injury. Dr. Janssen thus concluded that Claimant's need for surgery was causally related to his industrial injury and requested authorization to perform a C4-5 artificial disc replacement with C5-7 hardware removal.

13. As found, in contrast, Dr. Rauzzino explained that the proposed surgery is designed to address a C5 radiculopathy. However, the August 27, 2017 work accident did not cause, aggravate or accelerate Claimant's C5 radiculopathy. Dr. Rauzzino persuasively commented that the C5 radiculopathy would have been present at Claimant's initial evaluation on September 11, 2017 if it had been caused by the work injury. Instead, the C5 condition was not documented until July 2019 or nearly two years after the work accident. Dr. Rauzzino noted that numerous doctors performed significant examinations and found no C5 radiculopathy on examination. He detailed that "the diagnosis of a classic C5 radiculopathy made by Dr. Janssen was made after multiple providers had seen [Claimant] and had the opportunity to make such a diagnosis and did not." Dr. Rauzzino summarized that "there would be no way to relate" the symptoms from Dr. Janssen's July 2019 exam to the fall Claimant suffered two years earlier.

14. As found, Dr. Rauzzino detailed that Claimant's symptoms are related to the natural progression of the prior C5-C7 fusion. He explained that a known side effect of a cervical fusion like Claimant underwent at C5-C7 in 2007 is adjacent level disease at the proximal segment or C4-C5 that progresses over time. Dr. Rauzzino elaborated that Dr. Janssen's assessment of a 2% per year incidence rate in Claimant's case was likely low. He remarked "if you perform a fusion in a young person, especially at two levels, you would explain to that patient there's a significant likelihood in their lifetime that they may require additional surgery." Dr. Rauzzino agreed with Dr. Jatana that there was a 40-60% chance that Claimant's spine would deteriorate after the 2007 fusion to the point he would require future surgeries within 10 years. Therefore, based on a review of the medical records and the persuasive opinion of Dr. Rauzzino, Claimant's August 27, 2017 work activities did not aggravate, accelerate or combine with his pre-existing condition to produce the need for Dr. Janssen's proposed surgery. Claimant's need for surgery was instead caused by the natural progression of his pre-existing cervical condition and degeneration of the adjacent segments of his prior cervical fusion. Accordingly, Claimant's request for an artificial disc replacement and two-level fusion as proposed by Dr. Janssen is denied and dismissed.

ORDER

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

1. On August 27, 2017 Claimant suffered a cervical strain during the course and scope of his employment with Employer.
2. Claimant's request for an artificial disc replacement and two-level fusion as proposed by Dr. Janssen is denied and dismissed.
3. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at <http://www.colorado.gov/dpa/oac/forms-WC.htm>.*

DATED: October 7, 2020.

DIGITAL SIGNATURE:


Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

Whether the claimant has demonstrated, by a preponderance of the evidence, that treatment of his cervical spine, (and specifically the surgery performed by Dr. David Corenman on September 4, 2019), is reasonable medical treatment necessary to maintain the claimant at maximum medical improvement (MMI) and/or cure and relieve the claimant from the effects of the admitted February 19, 2007 work injury.

FINDINGS OF FACT

1. The claimant suffered an injury at work on February 19, 2007, when he slipped on ice and fell. The claimant testified that at that time he injured his neck and back. The claimant also testified that after the injury, his symptoms included a stiff neck and migraine headaches.

2. On July 20, 2009, the claimant was seen at The Steadman Clinic by Dr. Sanjitapal Gill for a surgical consultation. At that time, Dr. Gill diagnosed cervical degeneration with disc herniation and lumbar facet degenerative joint disease (DJD). Dr. Gill recommended a computerized tomography (CT) scan and magnetic resonance imaging (MRI) of the claimant's lumbar spine, and an MRI of the claimant's cervical spine.

3. The claimant returned to Dr. Gill on July 30, 2009 to discuss the imaging findings. Dr. Gill noted that there were diffuse disc bulges at the C4-C5 and C5-C6 levels, with significant stenosis. Dr. Gill recommended the claimant undergo a C4-C5 and C5-C6 anterior cervical discectomy and fusion (ACDF), with allograft and plating. The recommended surgery was performed on August 18, 2009.

4. The claimant testified that following the 2009 surgery he noted a decrease in his pain and numbness. However, he continued to experience stiffness in his neck and migraine headaches.

5. In a medical record November 19, 2009, Dr. Gill noted that the claimant had no pain, but continued to have some left posterior neck stiffness. Similar symptoms were noted by Dr. Gill on August 18, 2010, as some cramping in the back of the claimant's neck with daily headaches.

6. On April 4, 2013, the claimant was seen at The Steadman Clinic by Dr. David Corenman and reported an increase in neck pain over the previous six months. At that time, Dr. Corenman opined that the findings in the claimant's neck, mid-back and low back were due to an aggravation of preexisting conditions. He recommended physical therapy and opined the claimant was nearing maximum medical improvement (MMI).

7. On October 24 2013, Dr. Corenman determined the claimant had reached MMI. He assessed permanent work restrictions of no lifting, pushing, or pulling more than 100 pounds. Dr. Corenman assessed permanent impairment of 21 percent whole person for the claimant's cervical spine, and 16 percent whole person for the lumbar spine.

8. On July 2, 2014 Dr. Brain Reiss performed a Division-sponsored independent medical examination (DIME) of the claimant. Dr. Reiss determined that the claimant had reached MMI. With regard to permanent impairment, Dr. Reiss assigned a whole person impairment of 17 percent. Dr. Reiss recommended that the claimant do a home exercise program with core strengthening.

9. Based upon the opinions of Dr. Reiss, on October 14, 2014, the respondents filed a Final Admission of Liability (FAL) admitting for the impairment rating of 17 percent whole person, and the MMI date of July 2, 2014. The respondents also admitted for post-MMI medical treatment that is reasonable, necessary, and related to the 2007 injury.

10. The claimant testified that after he was placed at MMI he continued working for the employer. Since that time, the claimant worked as a roof bolter, a shuttle car driver, and a laborer. The claimant also testified that during that time his neck was always stiff and he continued to have migraines.

11. On June 2, 2019, the claimant sought treatment in the emergency department (ED) at the Ashley Regional Medical Center. The claimant testified that he sought treatment on that date because he woke up with pain shooting down his neck and left arm.

12. The ED medical record of June 2, 2019, indicates that the claimant's symptoms included " 'spasm' pain" in the left side of his chest, the left side of his back and his left arm. The claimant reported that he was injured in 2007 and he had similar pain that "acts up intermittently" and this was not new pain. Dr. Adam Nielson recorded the claimant's condition as strain of muscle and tendon of back wall of thorax.

13. On June 3, 2019, the claimant returned to the ED reporting back pain. On that date, Dr. Nolan Brooksby diagnosed the claimant with cervicalgia; upper extremity pain and spasm; cervical disc disorders; segmental and somatic dysfunction of the cervical region; and chronic pain syndrome. On that same date, Dr. Brooksby administered a trigger point injection to the claimant's left shoulder.

14. On July 1, 2019, an MRI of the claimant's cervical spine showed a mature fusion at C4 through C6; a right C4-C5 subarticular osteophyte; and multilevel neural foraminal narrowing, most prominent at the left C6-C7 level.

15. On August 1, 2019, the claimant was seen at The Steadman Clinic by Eric Strauch, PA-C and Dr. Corenman. At that time, the claimant reported that he experienced severe left trapezius and arm pain when he woke up on May 31, 2019. On August 1, 2019, x-rays of the claimant's cervical spine showed the prior fusion as solidly fused, with normal plate alignment. The x-rays also showed disc narrowing at the C3-C4, C4-C5, and C6-C7 levels. Dr. Corenman opined that the claimant had C7 radiculopathy and

recommended an injection. Dr. Corenman implied that if the injection was not successful, a repeat ACDF would be pursued.

16. On August 20, 2019, Dr. Thos Evans administered a left transforaminal epidural steroid injection (TFESI).

17. On September 4, 2019, Dr. Coreman performed surgery that included removal of the C4 through C6 plate, ACDF at the C6-C7 level, using an iliac crest graft, local bone graft, and plate, with reconstruction of the graft site.

18. The claimant testified that this surgery was paid for by his personal insurance. The claimant also testified that he did not wait to obtain authorization from the respondents because he was in too much pain.

19. On September 13, 2019, the claimant was seen by Ehrich Bean, PA-C in Dr. Coreman's practice. At that time, the claimant reported resolution of his left arm symptoms, with a return of left triceps strength.

20. The claimant testified that following the September 4, 2019 surgery his arm and back pain was "instantly gone". The claimant further testified that he believes his 2019 arm and back symptoms are related to the 2007 work injury because he experienced the same symptoms.

21. At the request of the respondents, Dr. Brian Castro performed a review of the claimant's medical records. In his report dated February 29, 2020, Dr. Castro opined that the claimant was appropriately placed at MMI on July 2, 2014. Dr. Castro further opined that the claimant has suffered a new injury that is not related to the admitted 2007 work injury. Dr. Castro noted that the disc herniation is likely acute, and not due to adjacent segment syndrome.

22. Dr. Castro's testimony at hearing was consistent with his written report. Dr. Castro testified that the claimant had acute cervical radiculopathy with disc herniation and acute symptoms down the arm. Dr. Castro reiterated his opinion that the recent disc herniation is not related to the claimant's original injury. Dr. Castro also testified that the claimant's 2019 symptoms are demonstrative of an acute disc herniation. On cross examination Dr. Castro was asked to address adjacent segment disease. Dr. Castro explained that when a spinal level is fused, the levels above and below that level can become weakened resulting in adjacent segment disease.

23. The ALJ credits the medical records and the opinions of Dr. Castro and finds that the claimant has failed to demonstrate that it is more likely than not that the September 4, 2019 surgery was related to the February 19, 2007 injury. While the surgery may have been reasonable, as it appears to have resolved the claimant's symptoms, the ALJ is not persuaded that claimant's need for surgery was related to his 2007 work injury. Additionally, the ALJ finds no indication that any medical provider has diagnosed the claimant with adjacent segment disease.

CONCLUSIONS OF LAW

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

2. The ALJ’s factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness’s testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

4. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

5. The need for medical treatment may extend beyond the point of maximum medical improvement where claimant requires periodic maintenance care to prevent further deterioration of his physical condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1999); *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995). Section 8-42-101, C.R.S., thus authorizes the ALJ to enter an order for future treatment if supported by substantial evidence of the need for such treatment. *Grover v. Industrial Commission, supra*.

6. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that the claimant’s need for the September 4, 2019 surgery (as performed by Dr. Corenman) is related to the February 19, 2007 work injury. As found, the medical records and the opinions of Dr. Castro are credible and persuasive.

ORDER

It is therefore ordered that the claimant's claim for treatment of his cervical spine, and specifically the September 4, 2019 surgery performed by Dr. Corenman is denied and dismissed.

Dated this 8th day of October 2020.



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

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

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-130-945-001**

ISSUES

- Did Claimant prove he suffered a compensable injury on June 5, 2019?
If Claimant proved a compensable injury, the ALJ will consider the following:
- What is Claimant's average weekly wage (AWW)?
- Did Claimant prove entitlement to temporary partial disability (TPD) benefits from June 6, 2019 through December 1, 2019?
- Did Claimant prove entitlement to temporary total disability (TTD) benefits commencing December 2, 2019?
- Are Dr. Bryan Hynes and Dr. Lance Farnworth authorized providers?
- Did Claimant prove a left shoulder surgery performed by Dr. Farnsworth on March 6, 2020 was reasonably needed to cure and relieve the effects of his compensable injury?

FINDINGS OF FACT

1. Claimant works as a "trimmer" processing rebar coil in Employer's [Redacted Employer].

2. Rebar coil leaves the furnace and travels down the production line on a hook. The hook stops at the trimming station, where the trimmer cuts defective scrap rings from the ends of the coil using hydraulic cutters. The trimmer manually removes the cut rings from the hook and carries them to a discard pile. The cut rings are then sent back to the furnace to be recycled into rebar.

3. Shortly after the start of his shift on June 5, 2019, Claimant was cutting 7/32" high carbon steel rings off the rebar coil. Claimant thought he had cut through approximately 20 rings of coil. When he tried to move the rings, he discovered two rings had not been cut. He jerked the rings twice and then used the hydraulic cutters to free the two remaining rings. He removed the approximately 20 rings from the hook and threw them onto the discard pile.

4. Claimant felt a painful pop in his left arm when he jerked the coils.

5. Video surveillance footage shows Claimant cutting coil and pulling the rings as he described. He first testified the force of jerking the coils caused his hard hat to fall off. He later conceded his hard hat fell off at a different time. The video footage is relatively low resolution, but Claimant displays no obvious signs of injury or pain.

6. Claimant continued working for approximately 10-15 minutes and then reported the injury to a supervisor because the pain was getting worse. He reported the injury to the lead worker at his station, Tony Tafoya. Employer's practice when an employee reports an injury is to call the on-site EMTs to transport the employee to the on-site clinic. Mr. Tafoya accompanied Claimant upstairs to the office to wait for the EMTs to arrive.

7. Chris C[Redacted] is the General Supervisor of Production in the [Redacted Employer]. While waiting for the EMTs to arrive, Mr. C[Redacted] obtained a brief statement from Claimant regarding the injury. Claimant explained the injury occurred when he pulled on two rings that were not cut. Mr. C[Redacted] testified Claimant stated he injured his left elbow but said nothing about his shoulder.

8. Larry M[Redacted] is a Safety Supervisor for the [Redacted Employer]. Mr. M[Redacted] interviewed Claimant briefly in the office while waiting for the EMTs to arrive. Claimant stated the injury occurred when he was pulling rings and some were "hung up." Mr. M[Redacted] testified Claimant stated he injured his left elbow.

9. Claimant was then seen at Onsite Innovations. He reported injuring his left shoulder and left biceps when pulling coils. There is no reference to the left elbow, although Claimant's pain diagram indicates pain in the biceps immediately adjacent to the elbow.

10. After discussing the incident with Claimant, Mr. M[Redacted] and Jeremy Vassar, one of Claimant's supervisors, initiated a "Detailed Report" of the incident. The report describes the accident as:

Employee was trimming on the closed end of the hook at trim station. He was pulling about 20 rings of 7/32 high carbon off the hook. He walked around to the north side of the hook to pull rings off. As he yanked the rings he felt a sharp pain in the left shoulder. He realized he still had two rings he had not cut yet. He dropped stack he had and went back around the hook and cut the last two rings. He had a hard time picking up the rings on ground. His hard hat also fell off at the time.

The report contains no reference to Claimant's left elbow.

11. Claimant followed up at Onsite Innovations on June 6, 2019. He described the accident as:

[H]e was at the trim station and was pulling coils, however 2 coils apparently weren't cut and when he tried to pull he wrenched his L shoulder "pretty good." Continued to work for about 15 min but then pain was too much.

12. The provider ordered an MRI of the left shoulder, which was completed on June 7, 2019. It showed a full-thickness full-width tear/rupture of the supraspinatus tendon, a full-thickness near full-width tear of the infraspinatus tendon, a subacute subscapularis rupture, and a dislocated biceps tendon with tendinosis.

13. Also on June 7, 2019, Employer completed a WC1 Employer's First Report of Injury listing the injury as a left shoulder strain that occurred while Claimant was "pulling rod rings from hook."

14. Claimant received a list of designated providers on June 11, 2019. The listed providers were: Onsite Innovations, Dr. Charles Hanson, Dr. Jorge Klajnbar, and Dr. Jeremy Brown.

15. Onsite Innovations assigned Claimant work restrictions and Employer put him on "light duty." He worked in the upstairs office for approximately one month, and was then was moved to the "tagging station."

16. Claimant started physical therapy on August 13, 2019. The therapist opined the MRI revealed a suspected chronic long head biceps tear likely exacerbated by Claimant's left shoulder injury. Claimant participated in 14 additional PT sessions through October 10, 2019.

17. Claimant saw Dr. Mark Failinger for an IME at Respondent's request on October 18, 2019. Dr. Failinger conceded Claimant could have been injured by pulling the coils but concluded he suffered no injury because there was no objective evidence of any acute or new pathology in the shoulder. Dr. Failinger explained,

[W]hen looking at the MRI, there is evidence of a chronic and massive and retracted rotator cuff tear with atrophy and with dislocation of the biceps tendon. There is not a significant or major joint effusion, which one would expect in this situation if any significant pathology had occurred in the work incident of 06-05-2019. The MRI clearly shows a massive retracted rotator cuff tear, which is, with high medical probability, pre-existing. Most rotator cuff disease is that of degeneration, with many patients not realizing they have a tear unless an event occurs, which begins the subjective symptoms. However, when looking at the films, there does not appear to be any objective evidence of new and acute injury.

Although I have no doubt the patient has some subjective symptoms in terms of his left shoulder, it would not appear, after looking at the films, the patient has sustained any objective evidence of new pathology created at the work incident of 06-05-2019. As stated previously, massive rotator cuff tears almost never occur with an acute event. In most every circumstance, there is a pre-existing large tear and an incident can cause some subjective symptoms. Sometimes, the event which may involve minimal forces after the rotator cuff has already been torn, can extend the tear, especially to the degree of [Claimant's] pre-existing cuff tear.

18. Dr. Failinger thought Claimant was an appropriate candidate for shoulder surgery, but not in relation to any work accident. He was skeptical a rotator cuff repair would succeed and thought Claimant may require a more significant procedure such as a reverse total shoulder arthroplasty.

19. Claimant returned to Onsite Innovations on December 2, 2019. The provider noted the claim had been “denied” based on Dr. Failinger’s report. The provider stated, “Pt was educated about denial of claim. . . . Pt encouraged to contact PCP about further treatment.” The report also states, “since he continues on modified duty and claim was denied he was educated on how to go off on Standard [short term disability].”

20. As instructed, Claimant saw his PCP, Dr. Bryan Hynes, on December 11, 2019. Claimant asked about seeing an orthopedic surgeon because he was having difficulty moving his left shoulder and could not perform his job. On examination, Claimant’s left shoulder was painful to palpation with minimal range of motion. He had popping and clicking with passive range of motion. Dr. Hynes advised Claimant should remain “off work” and referred him to Dr. Lance Farnworth, an orthopedic surgeon.

21. Claimant saw Dr. Farnworth on December 18, 2019. He explained he injured the shoulder at work when his arm “jerked” while pulling on two coils he mistakenly thought had been cut. Claimant told Dr. Farnworth he received no sustained benefit from physical therapy. After examining Claimant in reviewing the MRI films, Dr. Farnworth recommended an arthroscopic rotator cuff repair and biceps tenodesis.

22. On March 6, 2020, Dr. Farnworth performed a left shoulder open biceps tenodesis, arthroscopic acromioplasty and distal clavicle resection, and mini open rotator cuff repair.

23. Dr. Failinger performed a record review for Respondent on June 19, 2020. He reviewed the surveillance video and saw no pain behaviors or apparent difficulty performing work tasks. He stated the video supported his previously expressed opinions that Claimant’s work on June 5, 2019 caused no additional structural damage or otherwise objectively altered his pre-existing massive rotator cuff tear.

24. Claimant proved he suffered a compensable injury to his left arm and shoulder on June 5, 2019. Despite some minor inconsistencies in his hearing testimony, Claimant has described the accident in a consistent manner to his supervisors and multiple treating and examining medical providers over many months. His description of the incident is also supported by the video. Although Claimant had extensive rotator cuff pathology before the accident, it was asymptomatic or minimally symptomatic with no persuasive evidence it required any treatment or caused any functional limitations. As Dr. Failinger explained, many individuals are not even aware they have a rotator cuff tear until some “event” triggers it to become symptomatic. Pulling the rings was the “event” that precipitated Claimant’s left shoulder symptoms, proximately causing disability and a need for treatment. Claimant proved a compensable aggravation of his pre-existing condition.

25. Claimant proved Dr. Hynes and Dr. Farnworth are authorized providers. The provider at Onsite Innovations advised Claimant to seek care from his PCP on December 2, 2019 because the claim had been “denied.”

26. Claimant proved the March 6, 2020 surgery was reasonably necessary to cure and relieve the effects of his injury. Dr. Failing agreed Claimant was a surgical candidate and unlikely to benefit from additional conservative care. Although Dr. Failing thought Claimant might require a more aggressive surgery such as a reverse total shoulder arthroplasty, his opinion reasonably supports Dr. Farnworth's decision to proceed with a less extensive procedure.

27. Claimant earned gross wages of \$8,566.59 in the 12 weeks leading up to the accident (pay periods ending March 30, 2019 through June 8, 2019). This equates to an AWW of \$713.88, with a corresponding TTD rate of \$475.92 per week.

28. Claimant's weekly earnings from June 6, 2019 through November 23, 2019 were higher than the AWW of \$713.88.

29. Claimant was "laid off" on November 16, 2019 because of a "mill outage for maintenance." Confusingly, his pay records show he worked through November 18, 2019. In any event, he was paid \$1,548.94 for the pay period ending November 23, 2019, which is higher than two times his AWW. Claimant failed to prove entitlement to TPD benefits from June 6, 2019 through November 23, 2019.

30. Claimant's paystub for the period ending December 7 shows he was paid \$19.66 for one hour of work between December 1 and December 7, 2019. The ALJ infers the one hour worked was on December 2, 2019, which corresponds to the "Last date worked" stated on his Workers' Claim for Compensation Form. Claimant also took 16 hours of holiday pay from November 24, 2019 through November 30, 2019. No evidence was presented regarding whether holiday pay was a form of accrued leave. Neither party specifically addressed TPD benefits from November 24, 2019 through December 2, 2019, and that period will be reserved for future determination, if necessary.

31. Claimant proved he was disabled and suffered an injury-related wage loss starting December 3, 2019. Claimant was laid off in late November 2019 but returned for one hour on December 2, 2019. There is no persuasive evidence Employer offered any modified duty on or after December 3, 2019. Claimant is entitled to ongoing TTD benefits commencing December 3, 2019.

32. Claimant received short-term disability benefits from Standard on or after December 2, 2019. No persuasive evidence was presented regarding the amount or duration of those benefits. Claimant's counsel argued Claimant will have to repay Standard if awarded any temporary disability benefits, but the policy is not in evidence.

CONCLUSIONS OF LAW

A. Claimant proved a compensable injury

To receive compensation or medical benefits, a claimant must prove he is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo. App. 2001). The claimant must

prove that an injury directly and proximately caused the condition for which she seeks benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

If an industrial injury aggravates, accelerates, or combines with a pre-existing condition to produce disability or a need for treatment, the claim is compensable. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). Pain is a typical symptom from the aggravation of a pre-existing condition, and if the pain triggers the claimant's need for medical treatment, the claimant has suffered a compensable injury. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Dietrich v. Estes Express Lines*, W.C. No. 4-921-616-03 (September 9, 2016). But the mere fact that a claimant experiences symptoms at work does not necessarily mean the employment aggravated or accelerated the pre-existing condition. *Finn v. Industrial Commission*, 437 P.2d 542 (Colo. 1968); *Cotts v. Exempla*, W.C. No. 4-606-563 (August 18, 2005). Rather, the ALJ must determine whether the need for treatment was the proximate result of an industrial aggravation or is merely the direct and natural consequence of the pre-existing condition. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Carlson v. Joslins Dry Goods Company*, W.C. No. 4-177-843 (March 31, 2000).

As found, Claimant proved he suffered a compensable injury on June 5, 2019. Pulling the uncut rings aggravated, accelerated, or combined with his pre-existing condition to cause disability and a need for treatment. Although Dr. Failinger's *medical* analysis regarding Claimant's shoulder pathology is credible and persuasive, his assumption that a compensable aggravation requires objective evidence of "new" pathology is not accurate. To prove an aggravation, a claimant need not show an injury objectively caused any identifiable structural change to their underlying anatomy. A purely symptomatic aggravation is a sufficient basis for an award of compensation or medical benefits if it caused the claimant to need treatment he would not otherwise have required but for the accident. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Cambria v. Flatiron Construction*, W.C. No. 5-066-531-002 (May 7, 2019). As Dr. Failinger pointed out, Claimant's shoulder was susceptible to symptomatic aggravation by a variety of activities, even those involving "minimal forces." Claimant's rotator cuff was massively degenerated when he arrived at work on June 5, 2019, but it was asymptomatic and caused no functional limitations. Pulling the rings precipitated symptoms and caused him to need treatment he did not otherwise need before the accident.

B. Medical benefits

The respondents are liable for medical treatment reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101. The mere occurrence of a compensable injury does not compel the ALJ to approve all requested treatment. Where the respondents dispute the claimant's entitlement to medical benefits, the claimant must prove the treatment is recently necessary and causally related to the industrial accident. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). The claimant must prove entitlement to disputed medical benefits by a preponderance of the evidence. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

Besides proving treatment is reasonably necessary, the claimant must prove the provider is “authorized.” *Bunch v. Industrial Claim Appeals Office*, 148 P.3d 381 (Colo. App. 2006). Authorization refers to a provider’s legal right to treat the claimant at the respondents’ expense. *Mason Jar Restaurant v. Industrial Claim Appeals Office*, 862 P.2d 1026 (Colo. App. 1993). Claimants can, and frequently do, have multiple ATPs. *E.g.*, *Popke v. Industrial Claim Appeals Office*, 944 P.2d 677 (Colo. App. 1997). Aside from the initial selection, the most common way providers become authorized is from referrals made in the normal progression of authorized treatment. *Bestway Concrete v. Industrial Claim Appeals Office*, 984 P.2d 680 (Colo. App. 1999); *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985). Here, Claimant’s authorized provider at Onsite Innovations explicitly advised him to follow up with his primary care physician on December 2, 2019 because the claim was being denied. Claimant dutifully complied with that instruction and saw Dr. Hynes, who referred him to Dr. Farnworth. Accordingly, Dr. Hynes and Dr. Farnworth are ATPs within the chain of authorized referrals.

Claimant also proved the treatment he received from Onsite Innovations, Dr. Hynes and Dr. Farnworth were reasonably needed to cure and relive the effects of his injury. Physical therapy as prescribed by Onsite Innovations is generally accepted conservative care for a non-emergent musculoskeletal injury. Dr. Farnworth’s surgical recommendation was reasonable because Claimant had received no sustained benefit from therapy and significant vocational disability. Dr. Failinger agreed Claimant was a surgical candidate and unlikely to benefit from additional conservative care. Although Dr. Failinger thought Claimant might require a more extensive surgery such as a reverse total shoulder arthroplasty, his opinion reasonably supports Dr. Farnworth’s decision to proceed with a less aggressive procedure.

C. Average weekly wage

The term “wages” is defined as “the money rate at which the services rendered are recompensed under the contract of higher in force at the time of the injury.” Section 8-40-201(19)(a), C.R.S. “Wages” includes per diem payments that are included in the claimant’s federal taxable wages. See § 8-40-201(19)(c), C.R.S. Section 8-42-102(2) provides that compensation shall be based on the employee’s average weekly earnings “at the time of the injury.” The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. But § 8-42-102(3) gives the ALJ wide discretion to “fairly” calculate the employee’s AWW in any manner that seems most appropriate under the circumstances. The entire objective of AWW calculation is to arrive at a “fair approximation” of the claimant’s actual wage loss and diminished earning capacity because of the industrial injury. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993).

As found, Claimant’s average weekly wage is \$713.88, but based on his gross earnings of \$8,566.59 in the 12 weeks leading up to the accident (pay periods ending March 30, 2019 through June 8, 2019). The corresponding TTD rate is \$475.92 per week ($\$713.88 \times 2/3 = \475.92).

D. Temporary partial disability

A temporarily partially disabled claimant is entitled to two-thirds of the difference between their AWW and their reduced earnings during the period of disability. Section 8-42-106, C.R.S. As found, Claimant failed to prove entitlement to TPD benefits from June 6, 2019 through November 23, 2019 because his earnings during that period exceeded his AWW. Entitlement to TPD benefits from November 24, 2019 through December 2, 2019 is reserved.

E. Temporary total disability benefits

A claimant is entitled to TTD benefits if the injury causes a disability, the disability causes the claimant to leave work, and the claimant misses more than three regular working days. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term disability connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function, and (2) impairment of wage-earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999).

Claimant last worked on December 2, 2019, and Employer offered no modified duty on or after that date. Once commenced, TTD benefits continue until the occurrence of one of the terminating events enumerated in § 8-42-105(3), C.R.S. as of the date of the hearing, Claimant had not returned to work, been released to full duty, or been put at MMI by an ATP. Claimant is entitled to ongoing TTD benefits commencing December 3, 2019.

F. Offset for short term disability benefits

Respondents are entitled to an offset against TTD benefits for any disability benefits paid under a plan financed in whole or in part by the employer. Section 8-42-103(1)(d)(I), C.R.S. The statutory offset may be reduced or precluded if the disability policy contains a reciprocal offset provision. Section 8-42-103(1)(d)(I)(B), C.R.S. Respondent proved Claimant received short-term disability benefits from Standard but provided no evidence regarding the amount or duration of those benefits. Claimant's counsel argues Claimant will have to repay Standard if awarded any temporary disability benefits, but the policy was not entered into evidence. Under these circumstances, the ALJ can issue no specific order regarding offsets other than permitting Respondents to take an offset for short-term disability benefits to the extent allowed by the Act.

ORDER

It is therefore ordered that:

1. Claimant's claim for an injury on June 5, 2019 is compensable.
2. Respondent shall cover all treatment from authorized providers reasonably necessary to cure and relieve the effects of Claimant's compensable injury, including, but not limited to, treatment received from Onsite Innovations, Dr. Bryan Hynes and Dr. Farnworth.

3. Respondent shall cover the left shoulder surgery performed by Dr. Farnworth on March 6, 2020.

4. Claimant's AWW is \$713.88, with a corresponding TTD rate of \$475.92.

5. Claimant's claim for TPD benefits from June 6, 2019 through November 23, 2019 is denied and dismissed.

6. Respondent shall pay Claimant TTD benefits at the rate of \$475.92 per week commencing December 3, 2019 and continuing until terminated according to law.

7. Respondent shall pay Claimant statutory interest of 8% per annum on all benefits not paid when due.

8. Respondent may take an offset for short-term disability benefits Claimant received on or after December 3, 2019 to the extent otherwise permitted by § 8-42-103(1)(d), C.R.S.

9. All issues not decided herein, including but not limited to TPD benefits from November 24, 2019 through December 2, 2019, are reserved for future determination.

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

DATED: October 9, 2020

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

- I. Have Respondents, by clear and convincing evidence, overcome the DIME opinion of Dr. Sharma regarding his Impairment Rating of the Whole Person?
- II. Are Claimant's lumbar spine complaints due to a subsequent intervening [not work-related] injury, instead of the work injury?
- III. If the DIME opinion has been overcome, what is the appropriate Impairment Rating for Claimant's injury?
- IV. If only a scheduled Impairment Rating is assigned by the ALJ, has Claimant shown, by a preponderance of the evidence, that it should then be converted to the Whole Person?

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

The Work Injury, and Initial Treatment

1. Claimant was a general manager for Grandezza Landscaping LLC, when he experienced an admitted injury on December 12, 2017. Initially, he reported that he was doing irrigation repair and injured his right foot by pushing a shovel into the dirt. (Ex. M, pp. 155-156). A first report of injury was filed on January 3, 2018. A medical-only General Admission of Liability was filed on October 25, 2018.

2. Dr. Kenneth Raper was Claimant's authorized treating physician. Claimant was also treated by Dr. Brad Drescher, and podiatrist Dr. Kerry Berg. Dr. Michael Zyzda performed an independent orthopedic evaluation at Respondents' request on June 17, 2019. (Ex. K).

3. At this orthopedic examination, Dr. Zyzda noted that Claimant complained to him of back issues, and that he felt that his other providers, up to that point, had ignored his back complaints. It is unclear whether Claimant alleged to Dr. Zyzda that he complained of back issues prior to his 2018 MVA. Claimant also mentioned at this exam that activities actually made his back symptoms better; it was worse when seated. Dr. Zyzda felt that Claimant was at MMI on that date.

4. Claimant was initially referred for x-rays of his right foot and ankle on December 18, 2017. These showed no acute bony abnormality. Dr. Raper gave Claimant a steroid injection in his hip for the pain in the foot. After his first visit with Dr. Raper, Claimant was

assigned no restrictions. The work related diagnosis from Dr. Raper was strain of the right foot. He was seen up through January 2, 2018. (Ex. M, pp. 158-160). Claimant then stopped working for Employer, and began work for his own business in May of 2018.

5. Claimant did not seek further treatment for several months. He then returned to Dr. Raper May 31, 2018. Dr. Raper added plantar fasciitis to the diagnosis, and treatment resumed. (Ex. M, p. 162). Claimant was then referred to Dr. Kerry Berg, MS, DPM, who saw him initially on June 7, 2018. (Ex. K). Dr. Berg provided a diagnosis of Achilles tendonitis/plantar fasciitis. Dr. Berg stated that the use of the foot on the shovel digging holes caused a contusion and strain to the medial band of the plantar fascia and possible partial tearing. Claimant was referred to physical therapy, but continued to work (now for his own landscape company) without restrictions.

6. In Claimant's initial evaluation for physical therapy, the pain was identified as located at the right foot/ankle. Goals were to improve foot pain. There is no mention of Claimant's back. (Ex. J, p. 117). There was no mention of back problems in Claimant's physical therapy notes. By August 9, 2018, Dr. Raper's PA, Donna Oliver, described Claimant's complaints as 'persistent and worsening' pain. There is still no mention of his back. Dr. Raper saw Claimant next on August 30, 2018. He noted muscle spasms in the thigh. Claimant's complaints continued, and Dr. Raper recommended an evaluation by an orthopedic surgeon for Claimant's foot after his November 14, 2018 visit. There was no discussion of back pain at this visit.

Motor Vehicle Accident in December of 2018

7. Claimant was then involved in a Motor Vehicle Accident ("MVA") on December 15, 2018. According to reports, another car ran a red light, and Claimant's car struck this other car in the side at 40 mph. Claimant's car spun and ran through a fence. The airbags did deploy. (Ex. N). Claimant reported that he had loss of consciousness for a second after he stood up.

8. Claimant was a 'walk-in' to the emergency room after the accident. He had abrasion on his left hip, and dried blood in his nose. The notes state that Claimant presented with bilateral hand and wrist, nose and back pain. He reported pain of 7/10. His diagnosis included dorsalgia (pain arising from the lumbar spine). (Ex. A, p. 15).

Continuing Treatment

9. Claimant saw Dr. Brad Drescher for a third opinion on March 11, 2019. (Ex. F). At that visit, he complained of new radicular symptoms down the right lower extremity. Claimant did not mention the MVA at all to Dr. Drescher. Because of radicular symptoms down the right lower extremity. Dr. Drescher suggested an MRI of the lumbar spine along, with the right ankle. He provided a diagnosis of disorder of the ligament in the right foot, radiculopathy in the lumbar region, and peroneal tendinitis. His impression was chronic pain in the right foot, posterior tibial tendinitis in the right ankle and radiculopathy in the right lower extremity. Based

upon Claimant's new complaints of radiculopathy, physical therapy for the lumbar spine was recommended by Dr. Dresher. (Ex. F, p. 96). Complaints of medial foot and lateral thigh numbness resulted in a referral for an EMG. (Ex. D).

Diagnostics

10. The MRI of the right foot on April 11, 2019 showed intact ankle ligaments, small posterior tibialis tendon sheath effusion that may relate to tenosynovitis, and moderate size posterior subtalar joint effusion with no evidence of posterior ankle impingement. (Ex. L, p. 150).

11. The MRI of the lumbar spine was performed the same day. Under *Impression*, it was noted:

No *significant* disc herniation, nerve compression, spinal canal stenosis, or neuroforaminal narrowing noted *at any level*.

Under *Findings*, it was noted:

The normal lumbar lordosis is maintained. No spondylolisthesis. Vertebral body heights and facet alignments are maintained. Marrow signal intensity is within normal limits. Disc space heights are maintained.

Paraspinal soft tissues are normal. The conus is normal in morphology and signal intensity terminating at a normal level. The cauda equina is normal.

T12-L1: No disc herniation, spinal canal stenosis or neuroforaminal narrowing.

L1-L2L No disc herniation, spinal canal stenosis or neuroforaminal narrowing.

L2-L3: No disc herniation, spinal canal stenosis or neuroforaminal narrowing.

L3-L4: No disc herniation, spinal canal stenosis or neuroforaminal narrowing.

L4-L5: *Minimal* disc desiccation. *Minimal* disc bulging. No spinal canal stenosis or neuroforaminal narrowing. Bilateral* facet osteoarthritis and ligamentum flavum thickening. *(not noted to be *mild*, *moderate*, or otherwise)

L5-S1: *Minimal* disc desiccation. *Minimal* disc bulging. No spinal canal stenosis or neuroforaminal narrowing. *Mild* bilateral facet joint osteoarthritis. (Ex. L, p. 152).(emphasis added).

12. An EMG performed on August 7, 2019 was normal. (Ex. F). Claimant was placed at MMI with a diagnosis for right foot pain on October 8, 2019, and referred to Dr. Thomas Higginbotham for an impairment rating for the right foot pain. (Ex. M, pp. 182, 183).

Initial Impairment Rating by Dr. Higginbotham

13. Dr. Thomas Higginbotham performed an impairment rating on October 23, 2019. He described the mechanism of injury as development of right sided foot and ankle pains while working with a shovel. (Ex C p. 57). Dr. Higginbotham's medical review history does reference the MVA of December 15, 2018, but Claimant denied any back injuries to him. Claimant told him that he had only a "black eye" and laceration of the right hand in that accident. (Ex. C, p. 64).

14. Claimant's complaints to Dr. Higginbotham were focused on the right lower extremity and the right buttock. *Id.* Functionally, he related tightness in the sole of the right foot, pain in the sole of the foot with prolonged walking and weight bearing, progressive tightness and discomfort about the right calf and lateral thigh up into the right buttock that progressed through the day with physical activity. With driving, claimant noted aggravation of his right lower extremity problems "from the foot up to the right buttock." No complaints of back pain and functional difficulty were included in Dr. Higginbotham's review of systems. *Id.*

15. Dr. Higginbotham provided a 9% lower extremity impairment for right hind foot range of motion deficits, only. He noted, "there is no impairment schema for a recalcitrant plantar fasciitis." (Ex. C, p. 68). Dr. Higginbotham also provided 6% whole person impairment for the lumbar spine, based solely upon range of motion deficits. He stated that there was no specific disorder associated with the lumbar spine. He stated, "Impairment is provided for the low back because of limitations of the back range of motion as a result of the reactive myofascial tension and tenderness of the right lower extremity. There is no frank injury to the low back." *Id.* "This examiner references the DOWC Desk Aid #11, Impairment rating tips, page 4, (1) using range of motion measurement of the lumbar spine without a Table 53 diagnosis similarly as one would use for cervical range of motion loss, with no specific cervical spine injury, and for pertinent shoulder conditions." *Id at 70.*

DIME Report by Dr. Sharma

16. Respondents then requested a DIME, and Dr. Anjou Sharma was selected. Respondents requested a Prehearing conference with the Division on their motion to hold the DIME in abeyance, pending the receipt of medical records pertaining to Claimant's December, 2018 MVA. That motion was denied, as the Prehearing ALJ did not feel Respondents had shown that the records would be relevant to the DIME. (Ex. V). Thus, at the time Dr. Sharma conducted his exam and issued his report, he was not made aware of the December 2018 MVA.

17. The DIME occurred on January 30, 2020. Dr. Sharma agreed that Claimant reached MMI on October 23, 2019. He provided 12% Whole Person for the lumbar spine and 9% for the lower extremity (which converted to 4% Whole Person). He did not adopt Dr. Higginbotham's reasoning for rating the lumbar spine. Instead, he used the MRI findings of

osteoarthritis at L4-5 and L5-S1 as the basis for a Table 53(II)(C) rating of 7%. In his DIME report, he stated specifically:

Referencing the lumbar spine, the patient does meet criteria for specific disorders. Now the patient has *mostly moderate* findings on L4-L5, L5-S1 with regard to facet arthrosis. I will assign an impairment of 7% from section 2C. This is combined with the range of motion of 5% from the lumbar spine to give a final whole person impairment for lumbar spine of 12%. (Ex. 3, p.17)(emphasis added).

18. Dr. Sharma then added range of motion deficits of 5% for a final combined Whole Person rating of 12% for the back. Combined with 4% for the lower extremity, the cumulative Whole Person Impairment Rating came to 16%. He recommended no maintenance, and no work restrictions. (Ex. B, p. 52).

Dr. Sharma's Deposition

19. Dr. Sharma was deposed by Respondents. He confirmed that the mechanism of injury described to him was that some unclear event occurred when Claimant was shoveling that affected his foot. Claimant did not have back pain or any acute injury to the spine at the time of this incident. (Sharma Depo, p. 7, p. 9). He testified that the EMG that had been done clearly indicated that there was nothing in the lumbar spine causing Claimant's radicular complaints. (Sharma Depo. pp. 10, 11). Dr. Sharma explained that he provided an impairment rating because, although there was no injury that occurred on the date of injury specifically to the lower back, altered gait from the plantar fasciitis caused pain in Claimant's back. (*Sharma Depo p. 14*). Dr. Sharma initially indicated that there was no Table 53 diagnosis. (*Sharma Depo, p. 15*). "And I did indicate that in my report, that there was no Table 53 diagnosis that was assigned from page 80, Table 53. I also had indicated that the patient was not really complaining of a lot of back symptoms until later on in the course of his care...but I do feel I addressed the lumbar spine appropriately." *Id.*

20. Dr. Sharma said that Claimant had complained to him of back soreness. He testified that he concluded that the generator of those complaints was the minimal disk desiccation and bulging at L4-5 seen on the MRI and the bilateral facet joint osteoarthritis at that level and arthrosis at level L5-S1. (Sharma Depo, p. 24, 25). Dr. Sharma did admit that there were just vague back complaints within the records, which he chose to associate with the degenerative changes seen on the MRI. (Sharma Depo. pp. 27, 28).

21. Dr. Sharma testified that he did not know anything about the MVA, and had not received records about that accident. He was shown emergency room records from the date of that accident. He agreed that the emergency room records showing back involvement was 'important data'. (Sharma Depo, p. 28). Despite this, he did not indicate that such information would be pivotal in his conclusions.

22. Later in the deposition, however, Dr. Sharma provided a more detailed rationale for his Table 53(II)(C) assignment:

Q ...Where in the record do we have medically documented injury?

A Right. So we do have complaints of pain in the lumbar spine, and those pain complaints were made, I would say probably nine months before he was placed at MMI, maybe six months, to my recollection...And that is the six months that I considered as meeting the criteria for Table 2C.

Table 2C also includes moderate-to-severe degenerative changes, which is in contrast to section 2B, which is none-to-mild. So I included section C because based upon his MRI, we had *bilateral* facet joint osteoarthritis, ligamentum flavum thickening, and it was *all {at?} two levels, not just L4-L5, but L5-S1*. So again, *I used clinical discretion*, and I assigned 7 percent in that case. (Sharma Depo, p. 24) (emphasis added).

23. He also clarified that he considered Claimant's back issues to be a medically documented injury, thusly:

Q All right. And in your report, I believe you provided the diagnosis of a lumbar strain regarding Mr. Lewis' back. So is it your opinion that that is or is not an injury?

A *It is an injury*. You can have chronic strain. (Sharma Depo, p. 32).

24. Dr. Sharma also clarified that one could consider the diminished range of motion to constitute rigidity for a Table 53(II)(C) diagnosis. He then (and for the first time) definitively opined on the causation link between the foot injury and Claimant's back condition:

Q And in your opinion, would that [Claimant's back problems] be unrelated to the claim or would that be related to the claim?

A Well, *it would be related to the claim*, in my opinion, based upon the fact that he reported initial injury to his foot. And if his foot was causing him significant pain throughout the course of his medical care, *that pain could have affected the dynamics of his back*, the functioning of his back. That could have resulted in range of motion deficit. That could have resulted in an exacerbation of the underlying condition in his spine, which in this case is *facet arthrosis*. (Sharma Depo, pp. 33-34) (emphasis added).

IME by Dr. D'Angelo

25. Dr. Kathy D'Angelo conducted a records review and testified at hearing as an expert in occupational medicine and Level II certified with the DOWC. It is her opinion that Dr. Sharma was clearly wrong when he included a lumbar rating for this injury. She noted that there were no recorded complaints of lumbar radiculopathy due to Claimant's work injury prior

to the 2018 non work-related MVA. Although Dr. Sharma opined that claimant's work related "antalgic gait" was responsible for development of lumbar pain and radiculopathy, those complaints did not occur until long after the initial foot injury, and after the MVA. As she noted, if Claimant were ambulating with an "antalgic gait" from the work injury, there was a significant amount of time prior to the MVA without any complaint of back pain. (Ex. A, p. 20).

26. Dr. D'Angelo viewed and discussed video surveillance of Claimant prior to the MVA, on November 5, 2018 and November 7, 2018. She described Claimant's activity in detail, and noted that this did not show lumbar pain or functional limitations, or even gait disturbance. (Ex. A, pp. 34-36, 38). Dr. D'Angelo discussed medical studies discussing the relationship of abnormal gait and spinal conditions. She noted, "There is not medical or biologic plausibility to the notion that limping would initiate, cause or accelerate to any degree: facet arthrosis, desiccation of disks, ligamentum hypertrophy, tearing disk disruption, disk bulging, disk herniation or curvature of the spine. There is no evidence or potential for sustained pathology of the spine or permanent loss of function from baseline." (Ex. A, p. 40).

27. Dr. D'Angelo also testified at hearing, and in great detail, consistent with her written report.

Claimant's Hearing Testimony

28. Claimant testified at hearing. He described a mechanism of injury inconsistent with what he had earlier told his providers (that he felt pain in his lower foot while driving a shovel into the ground). This time, he stated "I had stepped and turned off of the curb to walk towards the truck and that's when I noticed the pain in my foot." He indicated that he is still feeling the same back pain as when he was examined by Dr. Higginbotham and Dr. Sharma. He stated that he did not seek any follow-up treatment for his back following the MVA in December, 2018.

29. Regarding the video not showing an antalgic gait, Claimant explained:

A I usually walk just fine. I don't have any issues with walking; it's when I stop is when it hurts. Actually sitting – sitting and driving is the worst.

QAnd at any point in time prior to that motor vehicle accident, were you having the antalgic gait?

A Before, yes.

30. The ALJ notes that the surveillance video, taken in November, 2018 (one month prior to the MVA) depicts Claimant engaging in various activities in and around a work truck parked in his driveway. At no point does Claimant appear to be in distress, or demonstrate an antalgic gait. There are no apparent range of motion deficits, including when Claimant is placing items of an unknown weight in or out of the truck. In effect, Claimant appears to be working normally.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

1. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40101, C.R.S. 2007, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

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

3. Assessing the weight, credibility and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). Moreover, the weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55, P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting all, part or none of the testimony of an expert witness. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

4. In this instance, two witnesses testified at hearing, and one via deposition. The ALJ has a healthy skepticism of Claimant's hearing testimony, but will stop short of finding Claimant to be incredible as a witness. For reasons unclear, the mechanism of injury has morphed from pushing his right foot into a shovel into firm ground, to stepping onto cobblestones, then down off a curb. It was initially his foot, then his ankle, then his back some time later. The timing of his increased complaints coincides with his self-

employment. His back complaints appeared after the MVA. Claimant shows no distress while working in his driveway a month before the MVA. Nonetheless, the ALJ must focus on the task at hand, to wit: determining if the DIME has been overcome, and applying the proper burden.

5. The ALJ finds that both Dr. D'Angelo and Dr. Sharma testified sincerely, and to the best of their respective abilities. Both testified consistently with their written reports, but as will be noted, Dr. Sharma had much more to add to his written report at his deposition. Thus, the ALJ will view their testimony not so much in terms of *credibility* per se, but rather of *persuasiveness* - keeping in mind, however, the high burden of proof that Respondents bear in this case.

Overcoming the DIME, Generally

6. In ascertaining a DIME physician's opinion, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office*, 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician's determination regarding MMI and permanent impairment consists of his initial report and any subsequent opinions. *In re Dazzio*, W.C. No. 4-660-149 (ICAO, June 30, 2008); see *Andrade v. Industrial Claim Appeals Office*, 121 P.3d 328 (Colo. App. 2005).

7. A DIME physician is required to rate a Claimant's impairment in accordance with the *AMA Guides*. §8-42-107(8)(c), C.R.S.; *Wilson v. Industrial Claim Appeals Office*, 81 P.3d 1117, 1118 (Colo. App. 2003). However, deviations from the *AMA Guides* do not mandate that the DIME physician's impairment rating was incorrect. *In re Gurrola*, W.C. No. 4-631-447 (ICAO, Nov. 13, 2006). Instead, the ALJ may consider a technical deviation from the *AMA Guides* in determining the weight to be accorded the DIME physician's findings. *Id.* Whether the DIME physician properly applied the *AMA Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In Re Goffinett*, W.C. No. 4-677-750 (ICAO, Apr. 16, 2008).

8. The finding of a DIME physician concerning the claimant's medical impairment rating shall be overcome only by clear and convincing evidence. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995); *Lafont v. WellBridge D/B/A Colorado Athletic Club* W.C. No. 4-914-378-02 (ICAO, June 25, 2015).

9. As a matter of diagnosis the assessment of permanent medical impairment inherently requires the DIME physician to identify and evaluate all losses that result from the injury. *Mosley v. Industrial Claim Appeals Office*, 78 P.3d 1150 (Colo. App. 2003); *Sharpton v. Prospect Airport Services* W.C. No. 4-941-721-03 (ICAO, Nov. 29, 2016). Consequently, a DIME physician's finding that a causal relationship does or does not exist between an injury and a particular impairment must be overcome by clear and convincing evidence. *Cordova v. Industrial Claim Appeals*

Office, 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998); *Watier-Yerkman v. Da Vita, Inc.* W.C. No. 4-882-517-02 (ICAO Jan. 12, 2015). The rating physician's determination concerning the cause or causes of impairment should include an assessment of data collected during a clinical evaluation and the mere existence of impairment does not create a presumption of contribution by a factor with which the impairment is often associated. *Wackenhut Corp. v. Industrial Claim Appeals Office*, 17 P.3d 202 (Colo. App. 2000).

Was Dr. Higginbotham Correct in his Impairment Rating?

10. The Colorado General Assembly, in the Workers' Compensation Act, has chosen to designate the AMA Guides to the Evaluation of Permanent Impairment, Third Edition (Revised) as the basis for physical impairment ratings. Section 8-42-101(3)(a)(I), § 8-42-101(3.7), C.R.S. The Director was instructed to promulgate rules establishing a system for the determination of medical treatment guidelines and utilization standards and medical impairment rating guidelines for impairment ratings. The Workers' Compensation Division's interpretation of the AMA Guides as set forth in the Impairment Rating Tips ("Division Tips") is provided deference by the ICAO. *Guillermo v. Lineage Logistics Holdings, LLC*. W.C. 5-054-538 (ICAO February 11, 2020). These Division Tips were written at the direction of the statute, § 8-42-101(3.5)(a)(II), 24-4-103(1). *Fisher v. State of Colorado*, W.C.. No. 5-068-151 (March 25, 2020). If the applicable language is clear, the court must apply its plain and ordinary meaning. *Lobato v. Industrial Claim Appeals Office*, 105 P.3d 220 at 223 (Colo. 2005). Although the Division Tips are not part of the AMA Guides, the Division Tips may be relevant to the impairment rating. *Davis v. Mohawk Industries*, W.C. No. 4-674-003 (July 21, 2011). Therefore, a physician's application of those Division Tips goes to the weight the ALJ gives to an impairment rating. *Serena v. SSC Pueblo Belmont*, W.C. No. 4-922-394 (December 1, 2015) *aff'd*, *Serena v. Industrial Claim Appeals Office*, (Colo. App. No. 15CA2095, November 3, 2016) (not selected for publication). A finding that the DIME report does not comply with the directions of the AMA Guides supports a conclusion that the DIME determinations have been overcome by clear and convincing evidence. *Silva v. Corporate Services Group Holdings, Inc.*, W.C. No. 4-944-337-03 February 23, 2016). As the Division Tips are integral in our understanding of the proper application of the AMA Guides in Colorado, a finding that the DIME report does not comply with those Tips also supports a conclusion that the DIME determination has been overcome.

11. The Division Tips state, under the heading, "Impairment Ratings Based on Objective Pathology,":

Impairment ratings are given when a specific diagnosis and objective pathology is identified. (*Reference: C.R.S. §8-42-107 (8) (c)*)

The Division Tips state on page two, under the heading, "Spinal and Extremity Rating. Table 53 and Application for Spinal Range of Motion:"

In order to be assigned a spinal rating, the patient must have objective pathology and impairment that qualifies for a numerical impairment rating

of greater than zero under Table 53. Spinal range of motion impairment must be completed and applied to the impairment rating only when a corresponding Table 53 diagnosis has been established. (*References: Spine section of the AMA Guides, 3rd Edition (Revised); Level II Accreditation Curriculum, Spinal Impairment*). . . . (Emphasis in original)

The Division Tips discuss the unusual case of severe shoulder pathology accompanied by treatment of the cervical musculature, but then says, “Otherwise there are no exceptions to the requirement for a corresponding Table 53 rating.” Dr. Higgenbotham opined that he could make an exception in this case and relate the lumbar spine to the foot injury, like can be done in the “unusual case” of cervical rating in a case of severe shoulder pathology. The Division Tips are clear that there are no additional exceptions for body parts other than the shoulder and cervical spine to the requirement of a correspondent Table 53 diagnosis. *Dr. Higgenbotham was incorrect in his representation that there could be a similar exception in this case for the lumbar spine, and the ALJ so finds.* However, the issue before the ALJ is whether Dr. Sharma’s Impairment Rating has been overcome, and not Dr. Higginbotham’s.

Overcoming Dr. Sharma’s Written DIME Opinion

12. In this instance Dr. Sharma was required to provide a lumbar spine Table 53(II)(C) Specific Disorder diagnosis, which may then - and only then - be appended to lumbar range of motion deficits to yield a Whole Person Impairment Rating. He did so in his DIME report, but had it ended there, the ALJ might well have found that his causation analysis fell short. There was no causation analysis at all in his written report; just the bare assignment of a Specific Disorder. Even then, with no analysis in support, he found *moderate-to-severe* degenerative changes to the lumbar spine, when the only mention in the MRI for facet joint osteoarthritis was *undescribed* at L4-L5, and *mild* at L5-S1. That would have placed Claimant into, at most, Table 53(II)(B), with a 5% WP, instead of 7%. The DIME at that point would have been overcome.

Overcoming Dr. Sharma’s [Cumulative] DIME Opinion

13. However, Dr. Sharma was then deposed. In all fairness to Respondents, they then had the opportunity [denied by the prehearing ALJ] to present evidence of the MVA to the DIME physician to see if such evidence might be pivotal to his causation analysis. While *relevant* to Dr. Sharma, it was not *pivotal*. For reasons unclear, Dr. Sharma initially stated that there was no Table 53 diagnosis. If so, game over. But later on, he then provided a rationale that Claimant had indeed suffered an *injury* to his back. He explained that the range of motion deficit itself could constitute six months of *rigidity*, along with six months of *pain* Claimant had complained of. During his deposition, Dr. Sharma justified using Table 53(II)(C), instead of (II)(B), since Claimant’s MRI showed pathology at *two levels* instead of just one, and both levels’ pathology were noted to be *bilateral*. The ALJ is unaware of any Rule or case law which says the DIME may not use his discretion to now assign this as *moderate*. And lastly, Dr. Sharma concluded with a *causation* analysis which, *in his opinion*, linked Claimant’s back complaints to the admitted work injury to his lower extremity – and not to the MVA.

14. In the view of this ALJ, Dr. D'Angelo provided a more detailed, and medically supported rationale for her opinions. Were the burden of proof on a more level playing field, her opinion might well have carried the day. But this is a DIME, and for policy reasons already set forth above, Respondents must show that Dr. Sharma's medical opinion, taken as a whole, is highly probably incorrect. Dr. Sharma effectively rescued his written DIME report during his deposition. In this case, despite strong evidence in support, Dr. D'Angelo's excellent medical opinions are, well, exactly that. And a difference in medical opinion from that of the DIME is insufficient to overcome the presumption that the DIME physician enjoys. The ALJ finds that the DIME opinion of Dr. Sharma has not been overcome.

ORDER

It is therefore Ordered that:

1. The DIME opinion of Dr. Sharma has not been overcome.
2. All matters not determined herein are reserved for future determination.

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

DATED: October 9, 2020

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

Whether the claimant has demonstrated, by a preponderance of the evidence, that treatment of his left hip and low back constitute reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted November 26, 2019 work injury.

FINDINGS OF FACT

1. On October 7, 2019, the claimant began working for the employer as an over-the-road truck driver. The claimant testified that on November 26, 2019, he was driving for the employer. On that date, the claimant stopped at a truck stop near Burlington, Colorado. The claimant slipped on ice and fell to the ground. The claimant immediately had pain in his right knee.

2. The claimant was transported by ambulance to the emergency department at Kit Carson County Memorial Hospital. The claimant testified that while he was in the ED, he was provided with a knee brace and crutches.

3. On November 26, 2019, x-rays of the claimant's right knee showed degenerative changes, but no evidence of a fracture or knee joint effusion.

4. On November 26, 2019, the claimant was seen at Thornton COMP by Monica Fanning-Schubert, APN. Ms. Fanning-Schubert noted the claimant's mechanism of injury and a recommendation from the ED that the claimant obtain a magnetic resonance image (MRI) of his right knee.

5. On November 27, 2019, an MRI of the claimant's right knee showed a high-grade tear of the distal quadriceps tendon of 80 percent thickness, with some retraction of the torn fibers.

6. On December 3, 2019, the claimant was seen by Ms. Fanning-Schubert who reviewed the MRI results. On that same date, Ms. Fanning-Schubert referred the claimant for an orthopedic consultation.

7. On December 4, 2019, the claimant was seen at Panorama Orthopedics and Spine Center by Dr. Hector Mejia. At that time, Dr. Mejia referenced the MRI results and the tear of the right quadriceps tendon and recommended surgical intervention.

8. On December 10, 2019, the claimant experienced pain in his left hip. The pain was such that the claimant was transported by ambulance to the emergency department (ED) at St. Anthony North Health Campus. The claimant was seen by Dr.

Mariana Guerrero who noted that the claimant developed acute left hip pain that was atraumatic. Dr. Guerrero ordered x-rays of the claimant's lumbar spine and pelvis. The lumbar spine x-ray showed no fracture or malalignment. The pelvic x-rays showed bilateral pistol-grip deformities of the femoral heads. Dr. Guerrero diagnosed the claimant with femoral acetabular impingement and noted that the claimant was scheduled for right knee surgery.

9. On December 11, 2020, the claimant was seen at Aspen Valley Hospital by Dr. Tomas Pevny. At that time, Dr. Pevny noted that the claimant had a right quad tendon rupture. Dr. Pevny recommended that the claimant undergo surgical repair of the tendon. In that same medial record, it was noted that the claimant was complaining of left hip pain.

10. On December 12, 2019, Dr. Pevny performed a right quad tendon repair. In addition, Dr. Pevny administered an injection to the claimant's left hip greater trochanteric bursa.

11. The claimant testified that since the December 12, 2019 surgery he walks with a limp. Specifically, he describes the limp as if his right leg is shorter than his left. In addition, this limp has become worse over time.

12. On December 17, 2019, the respondents filed a General Admission of Liability (GAL) for the claimant's November 26, 2019 injury. The GAL specifically states "[a]ccepted body part is right knee. Respondents deny all body parts not admitted to."

13. On January 24, 2020, the claimant first treated with his authorized treating provider (ATP), Dr. Craig Stagg. At that time, Dr. Stagg listed the claimant's complaints as a right knee injury, with surgery, low back pain, and left hip pain. The claimant reported to Dr. Stagg that he developed back pain "sometime after the initial injury".

14. On March 9, 2020, the claimant returned to Dr. Pevny and reported that he was making progress in physical therapy. The claimant also reported that he was having low back pain. In the medical record of that date, the claimant's low back pain is attributed to his limp and antalgic gait.

15. On March 11, 2020, the claimant returned to Dr. Stagg and reported continued back pain. Dr. Stagg noted that an x-ray was taken on that date of the claimant's lumbar spine. Dr. Stagg noted that the x-ray was within normal limits. Dr. Stagg opined that the claimant's low back pain was caused by his right knee issues.

16. On June 3, 2020, the claimant was seen by Dr. Stagg and reported that his back pain had begun to radiate into his right and left buttocks approximately three or four days prior.

17. On June 12, 2020, the claimant attended an independent medical examination (IME) with Dr. John Raschbacher. In connection with the IME, Dr. Raschbacher reviewed the claimant's medical records, obtained a history from the claimant; and performed a physical examination. Dr. Raschbacher opined that the claimant had reached maximum medical improvement (MMI) for his right lower extremity as of the date of the IME. Dr. Raschbacher also assessed a permanent impairment rating

of three percent for the claimant's right lower extremity, (which converts to one percent whole person). Dr. Raschbacher recommended that the claimant continue with a home exercise program and avoid crawling, kneeling, and squatting.

18. With regard to the claimant's reports of hip and back symptoms, Dr. Raschbacher opined that those symptoms are not work related. In support of this opinion, Dr. Raschbacher pointed to the claimant's prior history of chronic back pain. In addition, he noted that if the claimant had injured his left hip and low back at the time of the fall, he would have experienced immediate symptoms.

19. Dr. Raschbacher's testimony by deposition was consistent with his written report. In his testimony, Dr. Raschbacher noted the claimant's history of back and neck pain. Dr. Raschbacher also testified that there was no aggravation of the claimant's pre-existing conditions at the time of his November 26, 2019 fall.

20. On June 18, 2020, an MRI of the claimant's lumbar spine showed right sided moderate to severe neural foraminal narrowing at the L3-L4 level; mild diffuse disc degenerative disease, and mild to moderate diffuse facet arthropathy.

21. On June 19, 2020, the claimant was seen by Dr. Stagg. On that date, Dr. Stagg noted the MRI results and referred the claimant for a neurosurgery consultation.

22. On June 22, 2020, the claimant was seen by Dr. Pevny. At that time, the claimant reported he was continuing to improve, but occasionally his knee would lock up.

23. On June 29, 2020, Dr. Pevny authored a letter in which he opined that the claimant has developed an altered gait as a result of wearing a locked brace on his right knee. Dr. Pevny also opined that that because of the altered gait, the claimant has developed pain in his back, hip, and ankle. Dr. Pevny attributes these new symptoms to the claimant's initial injury and related surgery.

24. On July 10, 2020, Dr. Stagg responded to a number of questions posed to him by respondents' counsel. In that writing, Dr. Stagg noted that the claimant did not injure his back when he fell on November 26, 2019. However, Dr. Stagg opined that the claimant's antalgic gait may have aggravated the claimant's pre-existing lumbar spine condition.

25. On July 14, 2020, Jill Hennebert, FNP-BC authored a letter in which she stated that she has not treated the claimant for back pain and the claimant does not have a back pain related diagnosis.

Prior Medical Treatment

26. Prior to the November 26, 2019 work injury, the claimant received medical treatment from the Veterans' Administration (VA). On January 23, 2018, the claimant was seen at the VA in Grand Junction, Colorado. At that time, it was noted that, as a result of a fall, the claimant had degenerative disc and endplate changes of the spine.

27. On March 12, 2018, a medical record from the VA references a “c-spine injury” as the result of an accident.

28. August 14, 2019, the claimant was seen at the VA for neck stiffness, with cramping in his back, neck, legs, and hands. The medical record of that date references chronic neck and upper back discomfort.

29. On August 22, 2019, the claimant was seen at the VA and reported a “flare” of his low back symptoms. It was noted that the claimant’s pain was in his mid to low back following a motor vehicle accident (MVA) on June 25, 2019. The claimant described three incidents of low back pain that radiated into his coccyx. Jim Blankenship, NP identified this as an “exacerbation of chronic lower back pain”. Mr. Blankenship also noted that the claimant had not experienced a new injury, but demonstrated difficulty moving around and was using a cane.

30. The claimant testified that he does not have a history of left hip pain or treatment. With regard to back pain, the claimant testified that his prior back pain was more of a soreness in the muscle and on the right side. Now, his back pain is in the center of his low back. It is the claimant’s belief that his limp has made his back pain worse.

31. The ALJ credits the claimant’s testimony, the medical records, and the opinions of Drs. Stagg and Pevny over the contrary opinions of Dr. Raschbacher. The ALJ finds that the claimant has successfully demonstrated that it is more likely than not that his fall on November 26, 2019 aggravated, accelerated, or combined with his pre-existing low back condition to necessitate the need for medical treatment of his low back. The ALJ also finds that the claimant has successfully demonstrated that it is more likely than not that his fall on November 26, 2019, and the related right knee surgery, has altered the claimant’s gait to the point that it has caused the claimant’s left hip symptoms, necessitating treatment.

CONCLUSIONS OF LAW

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

Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

4. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a pre-existing medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. See *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); see also *Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with a pre-existing disease or infirmity to produce disability or need for treatment." See *H & H Warehouse v. Vicory, supra*.

5. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; see *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

6. As found, the claimant has demonstrated, by a preponderance of the evidence, that treatment of his left hip and low back constitute reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted November 26, 2019 work injury. As found, the claimant's fall on November 26, 2019 aggravated, accelerated, or combined with his pre-existing low back condition to necessitate the need for medical treatment of his low back. As found, his fall on November 26, 2019, and the related right knee surgery, has altered the claimant's gait to the point that it has caused the claimant's left hip symptoms, necessitating treatment. As found, the claimant's testimony, the medical records, and the opinions of Drs. Stagg and Pevny are credible and persuasive.

ORDER

It is therefore ordered that the respondents shall authorize reasonable and necessary treatment of the claimant's low back and left hip, pursuant to the Colorado Medical Fee Schedule.

Dated this 13th day of October 2020.



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

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

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-108-170-003**

ISSUES

- Did Claimant prove he suffered a compensable injury to his left shoulder on or about June 11, 2018?
- If Claimant proved a compensable injury, did he prove a left total shoulder arthroplasty performed by Dr. David Weinstein

FINDINGS OF FACT

1. Claimant has worked for Employer as an overnight stocker since 2007. During the shift that started the evening of June 11, 2018, Claimant stocked product in the sporting goods section. At some point during the shift he was stocking collapsible water jugs. He was placing some extra jugs on the top shelf used for overstock, approximately 7 feet high. Claimant was facing down the aisle with the shelves to his left. He lifted one of the jugs with his left arm, twisted his torso, and abducted and rotated his left arm to place the jug on the shelf when he felt a sharp pain in his left shoulder. Claimant estimated the jugs weighed approximately 5-10 pounds each. He testified, "it wasn't the weight that bothered me I think it was the rotation, the way I turned my arm when I set it on the shelf."

2. The sharp pain abated soon thereafter but the shoulder continued to bother Claimant as he worked. Claimant testified he tried to keep his left arm close to his side the rest of his shift and mostly used his right arm.

3. Claimant believes the accident occurred sometime around 11:30 PM. Respondents admitted into evidence the store security video which depicts Claimant stocking product from approximately 10:30 PM to 12:30 AM. Although most items Claimant stocked appeared to be relatively light, he used both extremities throughout the video and at no point appeared to be in pain or limited by any injury.

4. Claimant testified he reported the injury to his manager, Michael A[Redacted], around midnight. Mr. A[Redacted] confirmed the conversion but opined Claimant must be mistaken about the timing, because he was in the cash office doing end-of-day processes at midnight. Mr. A[Redacted] asked Claimant he needed medical attention. Claimant assumed it was just a minor strain so he decided to "just wait to see how it feels."

5. Mr. A[Redacted] came through the sporting goods section again near the end of Claimant's shift while making his rounds. Claimant said he wanted to file an accident report because his arm was still painful. Mr. A[Redacted] went to get the paperwork, but when he returned a few minutes later Claimant had clocked out and left the store. Claimant testified he did not realize Mr. A[Redacted] was coming back with the

paperwork. Claimant estimated the second conversation occurred around 4:00-5:00 AM, but it appears he was again mistaken about timing, because his shift ended at 7:00 AM.

6. Claimant worked again the next evening performing his regular duties. Mr. A[Redacted] was not on duty that night and Claimant did not discuss the injury with the manager on duty, who knew nothing about the injury. Claimant testified he “babied” his arm and relied more on his right arm. The next day, Claimant left for an already-planned fishing and camping vacation. Claimant testified he fished from the lake shore and primarily used his right arm while on vacation. He testified he hoped the pain would go away during the vacation, but it did not.

7. Claimant returned from vacation on June 23, 2018. His arm was still painful, so he completed an accident report and asked to see a doctor. He described the accident as, “I was putting something on top stock when I felt a sharp pain in L shoulder.” On June 30, 2018, he completed a “Witness Statement” on which he stated, “I was reaching up to put in item on top stock on aisle K23 when I felt a sharp pain in my left shoulder. After 2 weeks the pain didn’t go away so I went to the doctor.”

8. Mr. A[Redacted] completed a Witness Statement on June 28, 2018. He stated,

[Claimant] came to me on 6/11 and was saying he felt discomfort in his shoulder. He said he did not feel it was injured and he would see how he felt later. He told me toward the end of the night shift we should fill out a paper after all, so when I broke away from [illegible] moments later to find him to sit down and fill it out, he had clocked out for the night and proceeded to go on vacation. I noticed no visible symptoms coming from him that night. When he returned, we filled out said paperwork immediately.”

9. Employer referred Claimant to Highlands Medical Group for authorized treatment. He saw Stacey Concelman, NP at his initial visit on June 26, 2018. Claimant’s chief complaint was described as, “LEFT shoulder pain for 2 weeks after WC injury. He was placing items onto a shelf above his head. It was not heavy. He is unsure of what happened but had immediate pain while placing the item on the shelf. He has rested for 2 weeks and the pain is mildly improved. Pain improved with rest. Worse with movement.” On examination, he had a positive crossover test, mildly positive Hawkins sign and empty can sign, and could not forward flex or abduct his left arm past horizontal. Ms. Concelman diagnosed left shoulder pain, biceps tendinitis, and osteoarthritis. She ordered x-rays and referred Claimant to physical therapy.

10. Claimant had a cortisone injection on July 25, 2018, which provided no sustained benefit.

11. A left shoulder MRI on July 30, 2018 showed degenerative changes of the left shoulder, small partial-thickness infraspinatus and supraspinatus tears, tendinopathy and a partial-thickness tear of the proximal biceps tendon, and chronic degenerative labral tears.

12. Claimant was evaluated by PA-C Sara Beauchamp at Colorado Springs Orthopedic Group on August 9, 2018. Claimant reported his symptoms started when he “lifted a 5 lb object onto a higher shelf and felt pain in his shoulder. He has had this pain since.” Ms. Beauchamp diagnosed left shoulder pain, osteoarthritis, and impingement syndrome.

13. A CT scan on August 17, 2018 showed advanced glenohumeral arthritis with significant joint space loss, osteophyte formation, subchondral cyst exchanges, and AC joint degenerative changes.

14. Claimant saw Dr. Christopher Jones at CSOG on September 7, 2018. He reported continuing difficulty lifting any weight with the left arm or reaching overhead. Claimant stated, “he did not have any symptoms at all until he was doing overhead lifting at work and ever since then he is unable to get back to preinjury status.” Dr. Jones opined Claimant had failed conservative treatment and the only reasonable surgical option was a total shoulder arthroplasty.

15. Claimant asked Ms. Concelman for a second opinion, and she referred him to Dr. David Weinstein.

16. Claimant saw Dr. Weinstein and PA-C Jeremy Raulie on October 31, 2018. He explained, “he was reaching overhead and lifting approximately a 10 pound item and felt searing pain in the left shoulder and has continued to have trouble with pain and function since that time. . . . Prior to that time he states he did not have any problems with the left shoulder.” Claimant was diagnosed with a left shoulder injury on June 11, 2018 with rotator cuff and biceps strain and “aggravation of underlying pre-existing degenerative joint disease.” Dr. Weinstein and Mr. Raulie opined “he does have significant advanced arthritis of the left shoulder which was present prior to his injury but aggravated by the event in addition to soft tissue strain and subsequent inflammation of the rotator cuff and biceps with some partial-thickness tearing.”

17. Claimant had an ultrasound-guided intra-articular injection and continued to perform his therapy exercises at home to see if it would give him some relief. When those treatment modalities failed, he returned to Dr. Weinstein on December 17, 2018, who reiterated his opinion Claimant suffered a rotator cuff and biceps strain that aggravated his pre-existing degenerative condition. He recommended a total shoulder arthroplasty.

18. On February 19, 2020, Claimant returned to Dr. Weinstein who noted progression of posterior glenoid wear with early posterior subluxation. He again recommended total shoulder arthroplasty. Claimant underwent the surgery on June 16, 2020 through Medicare.

19. Claimant had a remote history of injury to the left shoulder. In approximately 1993 he underwent surgery to remove “bone spurs” in the left shoulder. He recovered well and had no further problems with the left shoulder for many years. He neither desired nor pursued any treatment for his left shoulder before the work accident in June 2018. Mr. A[Redacted] confirmed Claimant never complained of or gave any indication of left

shoulder problems in the many years he worked as a stocker for Employer. Claimant's testimony his left shoulder was asymptomatic and caused no functional limitations before the work accident is credible and persuasive.

20. Dr. Wallace Larson performed an IME for Respondents on July 30, 2019. Dr. Larson reviewed the surveillance tapes from the store and was "unable to identify anything in the videos that could reasonably be described as a traumatic injury." Dr. Larson opined aggravated osteoarthritis typically requires some demonstration of trauma and a two-year time frame from the injury until the patient is a candidate for a total joint arthroplasty. He noted Claimant's described work injury only involved lifting 5-10 pounds at most slightly overhead, and there was no repetitive lifting or evidence of trauma. Therefore, Dr. Larson concluded Claimant did not aggravate his underlying osteoarthritis and suffered no work-related injury. He agreed the total shoulder arthroplasty recommended by Dr. Weinstein was reasonably necessary, but not causally related to Claimant's work.

21. Claimant saw Dr. Timothy Hall for an IME at his counsel's request on February 6, 2020. Dr. Hall disagreed with Dr. Larson's hypothesis that it "would take some specific level of trauma to aggravate underlying osteoarthritis such as in this case." He opined underlying degenerative changes such as these "do not require a great deal of trauma to create symptomatology. It is clear from the patient's history in reviewing the record that he did not have shoulder pain prior to this date of injury. He had no restrictions and was functioning normally. That is not the case now. It is the work injury/event that created the symptoms"

22. Dr. Larson provided an updated opinion in March 2020 after reviewing additional medical records. Dr. Larson opined there was no evidence Claimant sustained any damage to any articular surface because of occupational exposure, and no evidence of any traumatic change in the shoulder. Dr. Larson opined Dr. Hall's conclusions were based primarily on "subjective reports" and not medical imaging or other objective studies. Dr. Larson reiterated Claimant's pre-existing left shoulder osteoarthritis was not exacerbated by any alleged work injury.

23. Dr. Weinstein testified via deposition on June 10, 2020. He agreed the June 11, 2018 incident did not cause Claimant's advanced underlying arthritis, but opined it caused a rotator cuff and biceps strain that aggravated his pre-existing arthritis and caused it to become symptomatic. He emphasized Claimant's left shoulder was asymptomatic and caused no limitations before June 11, 2018. He opined it is not unusual for an individual with significant degenerative shoulder pathology to have little or even no pain. Dr. Weinstein opined the motion and position of Claimant's arm at the time of the injury were more significant than the fact he was only lifting 5-10 pounds. He opined the described mechanism of injury is sufficient to injure one's shoulder, especially in the context of severe pre-existing arthritis. Dr. Weinstein opined Claimant's shoulder was more susceptible to injury compared to a non-degenerated shoulder. Dr. Weinstein opined that Claimant would probably have required a shoulder replacement at some point, but the work accident accelerated the timeline and caused him to need the surgery now. He emphasized he would "absolutely not" recommend a total shoulder replacement

for an individual with an asymptomatic shoulder even if the individual had severe pre-existing degenerative arthritis.

24. Dr. Larson testified at hearing consistent with his reports. He opined the position of Claimant's arm while reaching with the jug did not cause any injury, or aggravate or accelerate any pre-existing conditions. He explained the advanced osteoarthritis seen on Claimant's MRI probably started with the acute trauma from the accident in the 1990s and subsequently progressed because of age-related wear and tear over the next 25 years. He opined the need for total shoulder arthroplasty is not causally related to the June 11, 2018 reaching event in Claimant's experience of pain while reaching at work was simply an expression of the underlying progressive degenerative condition in his shoulder. He reviewed multiple portions of the surveillance video and sought no appreciable difference in Claimant's presentation at any time.

25. Dr. Weinstein and Dr. Hall's causation opinions are credible and more persuasive than the contrary opinions offered by Dr. Larson.

26. Claimant proved he suffered a compensable injury at work on June 11, 2018. Although he suffered from advanced pre-existing osteoarthritis, it was asymptomatic before June 11, 2018. The work accident aggravated, accelerated, or combined with his pre-existing condition to produce a need for treatment.

27. Claimant proved the total shoulder arthroplasty performed by Dr. Weinstein was reasonably needed to cure and relieve the effects of his compensable injury. Multiple providers, including Dr. Larson, agree the shoulder surgery was reasonably necessary, and the binary dispute here is over causation.

CONCLUSIONS OF LAW

A. Claimant proved a compensable injury

To receive compensation or medical benefits, a claimant must prove he is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo. App. 2001). The claimant must prove that an injury directly and proximately caused the condition for which she seeks benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

If an industrial injury aggravates, accelerates, or combines with a pre-existing condition to produce disability or a need for treatment, the claim is compensable. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). Pain is a typical symptom from the aggravation of a pre-existing condition, and if the pain triggers the claimant's need for medical treatment, the claimant has suffered a compensable injury. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Dietrich v. Estes Express Lines*, W.C. No. 4-921-616-03 (September 9, 2016). To prove an aggravation, a claimant need not show an injury objectively caused any identifiable structural change to their underlying anatomy. A purely symptomatic aggravation is a sufficient basis for an award of compensation or

medical benefits if it caused the claimant to need treatment he would not otherwise have required but for the accident. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Cambria v. Flatiron Construction*, W.C. No. 5-066-531-002 (May 7, 2019). But the mere fact that a claimant experiences symptoms at work does not necessarily mean the employment aggravated or accelerated the pre-existing condition. *Finn v. Industrial Commission*, 437 P.2d 542 (Colo. 1968); *Cotts v. Exempla*, W.C. No. 4-606-563 (August 18, 2005). Rather, the ALJ must determine whether the need for treatment was the proximate result of an industrial aggravation or is merely the direct and natural consequence of the pre-existing condition. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Carlson v. Joslins Dry Goods Company*, W.C. No. 4-177-843 (March 31, 2000).

As found, Claimant proved the accident at work aggravated, accelerated, or combined with his pre-existing condition to produce a need for treatment, including a total shoulder arthroplasty. Admittedly, the lack of any apparent pain or difficulty working with both arms as shown on the video detracts somewhat from Claimant's credibility. But on balance, the persuasive evidence shows the incident he described probably occurred and caused his shoulder to become symptomatic. Claimant reported the injury to his manager promptly but did not immediately seek treatment because he assumed it was a minor strain that would improve on its own. Mr. A[Redacted] corroborated Claimant spoke to him about the injury twice during his shift. Mr. A[Redacted] testified Claimant appeared to be in pain based on his facial expressions but not his movements. Claimant appears to be a relatively stoic individual not given to ostentatious displays of pain behavior. He has described the accident in similar terms to Employer, multiple treating and examining providers, and at the hearing. Claimant worked a relatively demanding job for eleven years with no suggestion of any shoulder problems. He sought no treatment for any shoulder symptoms for many years leading up to the work accident. These factors support his testimony the shoulder was asymptomatic until June 11, 2018. Although he undeniably had advanced osteoarthritis before the accident, surgeons do perform arthroplasties on asymptomatic joints no matter how bad the underlying degeneration. Additionally, Claimant was demonstrably wrong about the timing of events that night at least twice, so it is at least possible the accident occurred after the time covered by the video. In any event, the discrepancy between the video and Claimant's testimony about limiting the use of his arm after the injury is insufficient to overcome the rest of the evidence in Claimant's favor.

B. The total shoulder arthroplasty was reasonable and necessary

The respondents are liable for medical treatment reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101. The mere occurrence of a compensable injury does not compel the ALJ to approve all requested treatment. Where the respondents dispute the claimant's entitlement to medical benefits, the claimant must prove the treatment is recently necessary and causally related to the industrial accident. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). The claimant must prove entitlement to disputed medical benefits by a preponderance of the evidence. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

As found, Claimant proved the total shoulder arthroplasty performed by Dr. Weinstein was reasonably needed to cure and relieve the effects of his compensable injury. Multiple providers, including Dr. Larson, agree the shoulder surgery was reasonably necessary, and the primary dispute here relates to causation.

ORDER

It is therefore ordered that:

1. Claimant's claim for workers' compensation benefits in W.C. No. 5-108-170 is compensable.
2. Insurer shall cover all medical treatment from authorized providers reasonably needed to cure and relieve the effects of Claimant's compensable injury, including, but not limited to, the total shoulder arthroplasty performed by Dr. Weinstein on June 16, 2020.
3. All issues not decided herein are reserved for future determination.

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

DATED: October 13, 2020

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-112-166-001**

ISSUE

1. Whether Claimant was a "victim of a crime of violence" thereby exempting her from the twelve (12) week limitation on medical impairment benefits under § 8-41-301(2)(b), C.R.S.

FINDINGS OF FACT

1. Claimant is a 25-year-old oncology nurse employed by Employer. Claimant sustained an admitted permanent mental impairment arising out of and in the course of her employment with Employer.
2. On June 22, 2019, an incident occurred at University of Colorado Health, in which an oncology patient was shot in the face by a family member. The assailant immediately committed suicide in the patient's room by shooting himself in the head. The patient did not immediately expire from the gunshot wound. Claimant was working as a nurse and was one of the first people to enter the patient's room with the crash cart to initiate efforts to save the patient's life. After approximately 30 minutes, the patient expired. (Ex. A).
3. The parties stipulated to the following facts:
 - a. The incident that occurred on June 22, 2019 was a crime of violence.
 - b. When Claimant entered the room, the perpetrator of the crime was deceased.
 - c. What Claimant saw when she entered the room was a psychologically traumatic event.
 - d. As a result of this psychologically traumatic event, Claimant suffered post-traumatic stress disorder (PTSD), which resulted in permanent mental impairment.
 - e. Claimant experienced no physical injuries as a result of the June 22, 2019 incident.
4. On April 3, 2020, Claimant was placed at MMI with a 7% whole person impairment rating for mental impairment. Respondents filed a Final Admission of Liability on April 10, 2020, admitting to temporary total disability and temporary partial disability benefits. (Ex. 5).

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. See § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. See § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id.* at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

INTERPRETATION OF § 8-41-301 (2)(b), C.R.S.

Section 8-41-301(2)(b) provides that where a claim is "by reason of mental impairment" the "claimant shall be limited to twelve weeks of medical impairment benefits," which is inclusive of "any temporary disability benefits." The limitation does not, however, apply to a "victim of a crime of violence." Claimant's entitlement to medical impairment benefits due to a mental impairment is not disputed. The issue before the ALJ is whether Claimant was the "victim of a crime of violence," thereby rendering the twelve-week limitation contained in § 8-41-301 (2)(b), C.R.S., inapplicable. Respondents contend the term "victim" is limited to persons against whom a crime of violence is directly perpetrated (*i.e.*, a "direct victim"). Claimant contends the term encompasses "direct victims" and persons, such as Claimant, who sustained a mental impairment as the result of a crime violence committed against another person (*i.e.*, an "indirect victim").

Section 8-41-301 (2)(b), C.R.S., states:

Notwithstanding any other provision of articles 40 to 47 of this title, where a claim is by reason of mental impairment, the claimant shall be limited to twelve weeks of medical impairment benefits, which shall be in an amount not less than one hundred fifty dollars per week and not more than fifty percent of the state average weekly wage, inclusive of any temporary disability benefits; except that this limitation shall not apply to any victim of a crime of violence, without regard to the intent of the perpetrator of the crime, nor to the victim of a physical injury or occupational disease that causes neurological brain damage; and nothing in this section shall limit the determination of the percentage of impairment pursuant to section 8-42-107(8) for the purposes of establishing the applicable cap on benefits pursuant to section 8-42-107.5. (Emphasis added).

When construing a statute, the ALJ must give effect to the General Assembly's purpose and intent as reflected in the plain language of the statute. *State, Dept. of Labor and Employment v. Esser*, 30 P.3d 189, 195 (Colo. 2001). "To that end, the words in a statute should be given their plain and ordinary meanings, and the statute should be construed so as to give consistent, harmonious, and sensible effect to all its parts." *In Re Spencer*, WC. 4-580-221 (ICAO June 15, 2004) (citations omitted). A court may consider dictionary definitions, but also the context in which the words are used to harmonize the meaning with the remainder of the statutory provisions. *People v. Berry*, 459 P.3d 578, 581 (Colo. App. 2017). The ALJ should not depart from the plain meaning unless it leads to an absurd result. *Colo. Dep't of Soc. Servs. v. Bd. of County Comm'rs*, 697 P.2d 1 (Colo.1985). If, after applying these principles, the statute remains ambiguous, the court may resort to other rules of statutory construction. *Francen v. Colo. Dept. of Revenue*, 411 P.3d 693, 698 (Colo. App. 2012); *Midboe v. Industrial Claim Appeals Office*, 88 P.3d 643 (Colo. App. 2003).

Because the Act does not define "victim," the ALJ must begin by applying the plain and ordinary meaning of the term "victim." The term "victim" by itself is not sufficiently clear to resolve the issue because, as illustrated by this case, "victim" can have different meanings. Various dictionaries limit "victim" to mean the "object" of a crime (*i.e.*, a "direct victim"), but others include someone, such as Claimant, who suffered harm from a crime committed against another person (*i.e.*, the "indirect victim").

Definitions supporting the "direct victim" meaning include the 5th and 6th editions of Black's Law Dictionary which define "victim" as "the person who is the object of a crime or tort, as the victim of a robbery is the person robbed." *Black's Law Dictionary*, (6th Ed., 1990); *Black's Law Dictionary* (5th Ed., 1979). Additionally, Merriam-Webster defines "victim" as "one that is acted on and usually adversely affected by a force or agent." <https://www.merriam-webster.com/dictionary/victim>.

In contrast, the 10th edition of Black's Law Dictionary, as cited by Claimant, includes "a person harmed by a crime, tort or other wrong." Ballentine's Law Dictionary

defines the term as “one who has suffered the commission of a crime, tort or wrong.” *Ballentine’s Law Dictionary* (2010). The Cambridge Dictionary defines the term as “someone or something that has been hurt, damaged, or killed or has suffered, either because of the actions of someone or something else, or because of illness or chance.” <https://dictionary.cambridge.org/us/dictionary/english/victim>.

The General Assembly’s use of the word “victim” within § 8-41-301 (2)(b) provides a better indication of the meaning of the “victim.” Section 8-41-301(2)(b) uses the term “victim” twice, exempting from the twelve-week limitation a “victim of a crime of violence” and a “victim of a physical injury or occupational disease that causes neurological brain damage...” When discussing § 8-41-301(2)(b), the Colorado Supreme Court explained the section as follows: “[A] worker is compensated for mental impairment with permanent partial disability benefits for no more than twelve weeks unless she is the victim of a violent crime or suffers from a ‘physical injury or occupational disease that causes neurological brain damage.’” *Dillard v. Industrial Claim Appeals Office of State of Colorado*, 134 P.3d 407, 441 (Colo. 2006). The Supreme Court’s characterization indicates the meaning of “victim” in the context of a “physical injury or occupational disease” is the object or “direct victim” of such injury or disease (*i.e.*, the person who sustains the physical injury or occupational disease).

The rules of statutory construction require that if “separate clauses in the same statutory scheme may be harmonized by one construction, but would be antagonistic under a different construction, [courts] should adopt that construction which results in harmony rather than that which produces inconsistency.” *Colorado-Ute Elec. Ass’n, Inc. v. Public Utilities Com’n of State of Colo.*, 760 P.2d 627, 635 (Colo. 1988). The ALJ must, therefore, presume the General Assembly intended the term “victim” to have the same meaning when referring to a “victim of a crime of violence” as when referring to the “victim of a physical injury or occupational disease” within the same sentence. The interpretation that gives a consistent and harmonious meaning to the term “victim” is that it means the person upon whom a physical injury, occupational disease, or crime of violence was inflicted (*i.e.*, the “direct victim”).

This interpretation is consistent the General Assembly’s use of the term “victim” in other statutes where the term is not defined. In Colorado’s criminal statutes that use but do not define “victim,” the word refers to the person against whom the crime is perpetrated. For example, § 18-3-102, C.R.S., defining “murder in the first degree” includes the following among the elements of the crime: “A person commits the crime of murder in the first degree if: ... (f) The person knowingly causes the death of a child who has not yet attained twelve years of age and the person committing the offense is one in a position of trust with respect to the victim.” § 18-3-102 (1), C.R.S. (emphasis added). In this context, the statute clearly and unambiguously uses the term “victim” to refer to the person against whom the crime was directly perpetrated (*i.e.*, the person murdered). See *also e.g.*, § 18-3-107(1) (First degree murder of a peace officer, fire fighter, or emergency medical service provider) § 18-3-202(1)(e) and (e.5); (Assault in the first degree); § 18-3-301 (First degree kidnapping); § 18-6.5-103(3), (4) & (5), C.R.S. (Crimes against at-risk persons). These criminal statutes clearly and unambiguously use the undefined term

“victim” to refer to the person against whom the criminal act is perpetrated (*i.e.*, the “direct victim”).

Had the General Assembly intended to expand the definition of “victim” in § 8-41-301(2)(b) to include “indirect victims,” it could have done so expressly, as it has in other contexts. The General Assembly has applied expanded definitions of “victim” to include “indirect victims” in statutes governing crime victim compensation boards. For example, in § 24-4.1-102(10), C.R.S., (Crime Victim Compensation Act), the term “victim” is defined to include the person against whom a crime is perpetrated (“primary victim”), any person who attempts to assist or assists a “primary victim,” and any relative of a “primary victim.”

Section 24-4.1-302 (5), defines “victim” as “any natural person against whom any crime had been perpetrated or attempted...or if such person is deceased or incapacitated, the person’s spouse, parent, legal guardian, child, sibling, grandparent, grandchild, significant other or other lawful representative.” Section 24-4.1-302 (5), also states: “It is the intent of the general assembly that this definition of the term ‘victim’ shall apply only to this part 3 and shall not be applied to any other provision of the laws of the state of Colorado that refer to the term ‘victim’.”

Similarly, § 18-1.3-602 (4)(a), C.R.S., (Restitution), includes within its definition of “victim” relatives, guardians, and lawful representatives of the person against whom a crime has been perpetrated or attempted. Section 18-1.3-602 (4)(a)(V), defines a “victim” to be a “child living with the victim,” the use of the term “victim” within the definition of “victim” is an apparent recognition that the statutory definition expands the term to include those who would not otherwise be considered “victims” under the plain and ordinary meaning of the term. Again, the General Assembly specifically excludes this definition from wider application in § 18-1.3-602 (4), stating the definition “shall not be applied to any other provision of [Colorado law] that refers to the term ‘victim’.”

The limiting language in these statutes demonstrates the General Assembly’s intent to expand the definition only in certain, well-defined circumstances. The statutory construct also demonstrates the General Assembly’s understanding of the plain and ordinary term “victim” and its ability to expand that definition when intended. *See also*, *e.g.*, § 24-4.1-201(1.3); § 19-1-103(112). Had the General Assembly intended to include “indirect” victims in § 8-41-301 (2)(b), C.R.S., it would have done so expressly.

The inclusion of the phrase “without regard to the intent of the perpetrator of the crime” does not lead to a different conclusion. This phrase was added to § 8-41-301 (2)(b) in a 2006 amendment. The 2006 amendment permits a victim of crime of violence to receive Workers’ Compensation Benefits without the necessity of establishing that the perpetrator possessed the requisite criminal intent. Prior to the 2006 amendment, the Colorado Court of Appeals found that the mental state of a third-party actor must be considered when determining whether a workers’ compensation claimant was the “victim of a crime of violence.” *See Bralish v. Indus. Claim Appeals Office*, 81 P.3d 1091 (Colo. App. 2003). It is presumed “when the General Assembly adopts legislation it is aware of judicial precedent relating to the subject matter under review.” *Pulsifer v. Pueblo Professional Contractors, Inc.*, 161 P.3d 656 (Colo. 2007). The ALJ does not interpret

this phrase as altering the definition of “victims of a crime of violence,” but rather eliminating the requirement from *Bralish* that a claimant must prove the perpetrator’s mental state.

The ALJ finds the phrase “victim of a crime of violence” as used in § 8-41-301(2)(b), C.R.S., to refer to the person against whom a crime was directly committed (the “direct victim”). The Claimant undoubtedly witnessed a horrific crime scene, and undisputedly sustained severe emotional trauma and a permanent mental disability. However, because no crime was perpetrated directly against her, she was not the “victim of a crime of violence” as that phrase is used in the Workers’ Compensation Act. Therefore, the Claimant is limited to twelve weeks of medical impairment benefits.

ORDER

It is therefore ordered that:

1. Claimant’s medical impairment benefits are subject to the twelve-week limitation set forth in § 8-41-301 (2)(b), C.R.S.
2. All matters not determined herein are reserved for future determination.

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



DATED: October 13, 2020.

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

- I. Whether Claimant's permanent total disability ("PTD") benefits can be reduced or suspended pursuant to section 8-43-404(3), C.R.S.
- II. Whether Claimant's permanent total disability ("PTD") benefits should be reduced or suspended pursuant to section 8-43-404(3), C.R.S.

FINDINGS OF FACT

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

1. Claimant sustained a work-related injury on November 13, 2017, when he fell off a platform. He fell about eight feet and landed on his feet and buttocks. A co-worker fell simultaneously and landed on claimant's neck.
2. Claimant was evaluated at UC Health the same day, where he was diagnosed with a teardrop fracture at C-5 and underwent an anterior C-5 corpectomy and interbody fusion from C-4 through C-6. *Respondents' Hearing Exhibit B, Bates Number 3 (hereinafter formatted as, for example, "Resp. Ex. B-3")*. Claimant has been diagnosed with quadriplegia because of the injury. *Id. at 9*.
3. Claimant was treated at Craig Hospital for several months after the accident. After being discharged, he began treating with authorized treating providers ("ATP") Allison Fall, M.D., Katherine McCranie, M.D., and Lloyd Thurston, M.D. *Resp. Ex. B-5*.
4. Claimant first visited Dr. Fall on July 17, 2018, at which time he was living in a care center and waiting to be discharged into an adapted private residence. *Resp. Ex. C-11*. Dr. Fall noted that she would assist with claimant's transfer to the outpatient setting, and Dr. McCranie would be providing pain management services. *Id. at 12*. Claimant did not have any decubitus ulcers at that time. *Id. at 11*.
5. Claimant first saw Dr. Thurston on November 14, 2018, at which time he was pleasant, cooperative, and in good spirits. *Resp. Ex. D-21*. Drs. Thurston and McCranie were each responsible for different parts of claimant's medication regimen. *Id. at 22*.
6. On December 10, 2018, Dr. Fall noted Claimant had recently missed an appointment with Dr. Sceleza, a physiatrist at Craig Hospital. *Resp. Ex. A-5*.
7. On February 18, 2019, Dr. Fall placed Claimant at maximum medical improvement ("MMI") and assigned an 88% whole person impairment rating. *Resp. Ex. C-14*. Dr. Fall recommended lifetime maintenance care, including wound care, monitoring of

urinary function and the skin, and additional visits with Dr. McCranie, Craig Hospital, and hematologist Raul Alvarez, M.D. *Id. at 15.*

8. On March 19, 2019, Claimant underwent a drug screen. The drug screen was positive for cocaine, methamphetamine, and marijuana. *Resp. Ex. B-6.*
9. On April 18, 2019, Respondents filed a final admission in which liability was accepted for PTD benefits and post-MMI maintenance medical benefits. *Resp. Ex. A-1.*
10. On April 20, 2019, Dr. McCranie authored a report stating Claimant had missed several appointments and was no longer a candidate for opioids due to the drug screen results. *Resp. Ex. C-19.*
11. Fran Tafuro, R.N., nurse case manager, authored a report dated April 30, 2019, which documented several missed appointments, Claimant's failure to return phone calls from Dr. Alvarez's office, and a refusal of psychological care despite depression. *Resp. Ex. G-69, 70, and 75.* Nurse Tafuro expressed concern that Claimant's actions had led to his health "deteriorating badly," recurrent constipation, and emergency room ("ER") visits. *Id. at 75.* She also documented that Claimant "expects an external source to take care of everything for him," yet he "is maximally resistant to being 'told what to do' in relation to any aspect of his life." *Id.*
12. As a result, Claimant's refusal to attend several medical appointments, call doctor Alvarez back, and accept psychological care led to more health care costs associated with Claimant's emergency room visits.
13. Claimant was disagreeable and appeared inebriated when he visited Dr. McCranie on May 10, 2019. *Resp. Ex. C-16.* Dr. McCranie tried to address the drug screen results, but Claimant refused to discuss whether he was still using drugs, speak with a counselor, or see a psychologist. *Id. at 16.* Claimant told Dr. McCranie that he "was on his way to the bar," and, "go to Hell." *Id. at 16 and 17.* Dr. McCranie informed Claimant that she would no longer prescribe opioids considering the drug screen results, although she renewed his non-narcotic medications. *Id.* She also noted Claimant had forgotten to call in for refills of his medications several times, which led to four ER visits. *Id. at 16.*
14. Nurse Tafuro authored a report on May 22, 2019, in which she documented the need for more hospitalizations based on Claimant running out of gabapentin and his failure to communicate with his providers. *Resp. Ex. G-77, 78, and 80.* She also noted that applicant was "combative" with her and Dr. McCranie during the appointment on May 10, 2019, he appeared to be under the influence, and he accused them of "keeping him from drinking with [his] buddies." *Id. at 79.* Nurse Tafuro said that she was closing her file and the case was being transferred to Mary Thomas-DuBois, R.N. *Id. at 81.*
15. Ms. Thomas was accepted as an expert in nursing. She testified that she became involved here in May 2019, and Claimant's condition has significantly deteriorated since then, which she attributes to missed appointments, injurious practices, and refusals to undergo medical treatment.
16. Claimant was scheduled for an appointment with Dr. Alvarez on September 26, 2019

but failed to attend. *Resp. Ex. H-82*. Dr. Alvarez needed to evaluate him in person to begin tapering him off anticoagulants. *Id. at 1-84 and 85*. Ms. Thomas testified that Claimant had arrived late for a previous appointment, Dr. Alvarez warned Claimant that he would be discharged for missing another appointment, and she reminded Claimant about his next appointment with Dr. Alvarez on December 5, 2019, but he still no-showed. Ms. Thomas also testified that Dr. Alvarez discharged Claimant after missing that appointment and Dr. Alvarez has not been replaced by another hematologist to date. Claimant testified that he did not have any excuse for the missed appointments with Dr. Alvarez, but also testified that there are days that he simply does not feel well.

17. Ms. Thomas testified that Claimant was also discharged by Craig Hospital after failing to attend several appointments, including a urology visit with Dr. Ferdinand Mueller on September 26, 2019, and wound clinic evaluations on October 23, 2019, November 6, 2019, November 13, 2019, and November 20, 2019. She also testified that Claimant told her that he did not attend the appointment on November 13, 2019, because he was “tired of all of this.” In the interim, a home care report dated November 12, 2019, documented Claimant had several wounds on his legs. *Resp. Ex. A-7*.
18. Claimant testified that his wounds got worse due to him not going to the wound care clinic. He also testified that he notified Ms. Thomas before missing appointments, but Ms. Thomas testified that he did not provide any notice for some of the missed appointments and gave minimal notice for others. Claimant testified that it can be troublesome to find a driver, but on cross-examination, he admitted that he has access to a driver and entered into stipulations with respondents, which made him responsible for his own transportation and provided him with a modified van.
19. Lon Noel, M.D., replaced Dr. Thurston when he retired. Claimant first saw Dr. Noel on February 20, 2020, who referred him to a new hematologist and for wound care evaluations every three months. *Resp. Ex. D-24 and 25*.
20. Ms. Thomas testified that she spoke with Claimant’s mother on March 24, 2020, who advised that the wounds on his legs had reopened. Following that conversation, Ms. Thomas scheduled claimant for an appointment with the wound care clinic at St. Luke’s Medical Center (hereinafter “St. Luke’s”) on April 6, 2020. Claimant travelled to St. Luke’s for the appointment but left before his evaluation. He testified that he left because Ms. Thomas was not there, and he was allegedly expected to enter the hospital by himself without assistance. Ms. Thomas testified, however, that she arranged for a different nurse to attend that appointment (Jerome Stone), who Claimant met previously. Ms. Thomas explained that Mr. Stone was waiting at the doorstep of the hospital and would have helped Claimant enter the building. Ms. Thomas also testified that the wound care clinic provided Claimant with directions and he was in contact with Mr. Stone after arriving at the building while parking or looking for the entrance.
21. Claimant presented to the Denver Wound Healing Center where Paul Thombs, M.D., saw him on April 22, 2020, for treatment of several decubitus ulcers on his posterior legs. *Resp. Ex. E-30*. It was noted that Claimant “did finally agree to be seen”

despite the ulcers existing “for approximately 3 to 4 months.” *Id.* Dr. Thombs documented his strong belief that Claimant needed to “be admitted to a long-term acute care setting for further evaluation of these wounds as well as significant nonemergent medical issues,” to which Claimant consented. *Id. at 32.*

22. Ms. Thomas testified that Dr. Thombs recommended that Claimant undergo the inpatient wound care at Post-Acute Medical Specialty Hospital (hereinafter “PAMS”). She also testified that PAMS specializes in the treatment of severe injuries, PAMS has a high rate of successfully closing wounds, PAMS admits only those candidates who they believe will succeed, and Respondent-Insurer approved an admission into PAMS. She also testified that “there is not one physician that did not request or require an inpatient hospitalization for the [sic] types of injuries.” Claimant testified that he believes an inpatient stay is unnecessary.
23. Claimant was admitted into St. Luke’s the next day, April 23, 2020, because of the ulcers. *Resp. Ex. E-35.* Krista Culp, M.D., wrote that he was “failing outpatient therapy and will need admission and likely placement in a long-term care facility.” *Id. at 37.*
24. Claimant was seen by David Schnur, M.D., of St. Luke’s on April 24, 2020. *Resp. Ex. E-43.* In an effort to reduce the wound closure timeframe by months or years, Dr. Schnur recommended surgery for the ulcers, which he performed on April 28, 2020. *Id. at 43 and 45.* The ulcer on the right thigh was so severe that it was noted to “go down to femur.” *Id. at 45; see also Resp. Ex. J.*
25. Ms. Thomas testified that Claimant and his mother sent her photos of the ulcers in 2020. *See Resp. Ex. J.* She also testified that Claimant misled her about their severity because the wounds in the photos were much less severe than what she observed in person (“the pictures weren’t recent”).
26. Dr. Schnur performed a second surgery on April 30, 2020, to excise and close the ulcers. *Resp. Ex. E-47.* An MRI was taken the same day, which confirmed the presence of osteomyelitis. *Resp. Ex. F-67.*
27. Claimant left St. Luke’s against medical advice on May 3, 2020, despite being advised to stay and receive IV antibiotics to treat the osteomyelitis. *Resp. Ex. E-49.* He was still on vancomycin/Zosyn and had a PICC line and wound vacuum in place on the right thigh. *Id.* Claimant was given a two-week prescription of oral antibiotics upon departure but was advised that this would “not be sufficient to treat his osteomyelitis.” *Id. at 49 and 50.* St. Luke’s was unable to coordinate a portable wound vacuum or home healthcare due to the sudden departure. *Id. at 50.* Claimant “was able to articulate” the risks of leaving prematurely, including “worsening infection, septic shock, loss of limb, and death.” *Id. at 49.* Ms. Thomas testified that she was present when Claimant left St. Luke’s, and he refused to disclose where he was going when she asked.
28. On the same day that he left St. Luke’s (May 3, 2020), Claimant checked himself into Swedish Medical Center (hereinafter “Swedish”). *Resp. Ex. F-56.* Claimant told Swedish that he left St. Luke’s because he “was unhappy with his care,” “being treated unfairly and not receiving his meds.” *Id. at 57 and 64.* William Scott, M.D.,

documented that Claimant was smoking cigarettes every day, using marijuana, and had “a history of noncompliance with medical instructions.” *Id. at 58, 61 and 64.* The doctors at Swedish restarted Claimant on vancomycin/Zosyn, prescribed antibiotics, and recommended another wound surgery for debridement and possible closure. *Id. at 67.* After undergoing that surgery, Claimant checked out of Swedish against medical advice. *Resp. Ex. A-9.* Ms. Thomas testified that this was concerning because Claimant still had post-surgical staples, the wounds were severe, he was still on antibiotics, he was prescribed two medications which had not yet been filled, and more post-operative care was needed. Ms. Thomas also testified that she was unaware of Claimant’s whereabouts thereafter despite trying to reach him, and respondents asked the Adams County Police Department to perform a welfare check on claimant on May 8, 2020.

29. Ms. Thomas testified that she met with Claimant in his home on May 18, 2020, at which time he agreed to be admitted into PAMS. Ms. Thomas also testified that Claimant still had staples and stitches in both legs, which needed to be removed, he lacked necessary wound care supplies, and she has no information to suggest that the stitches or staples were ever removed. She also testified that Claimant reported smoking tobacco, which his providers had recommended against because of the open wounds.
30. Ms. Thomas testified that she participated in a conference call with Claimant and PAMS on May 20, 2020, at which point he refused to be admitted. She testified that he refused because he disliked a “zero visitor” policy PAMS instituted during the COVID-19 pandemic, which contradicts his testimony about him checking out of the hospitals against medical advice due to COVID-19 concerns.
31. On May 26, 2020, Claimant attended a telemedicine appointment with Dr. Noel and Ms. Thomas. *Resp. Ex. D-27.* Dr. Noel noted that claimant’s ulcers were “completely healed after he was seen at Craig,” and, “[a]fter he went home, his decubiti began to return . . .” *Id.* Dr. Noel diagnosed the ulcers as being “stage IV,” noting that they penetrated all the way to the femur, and cultures taken at St. Luke’s revealed “four different bacteria” requiring the PICC line and IV medications. *Id.* Dr. Noel observed that Claimant self-discharged from St. Luke’s and Swedish, disconnected his phone, and terminated communications with Ms. Thomas. *Id. at 28.* Dr. Noel noted Claimant was “agitated and not cooperative,” refused psychological care, and was “verbally abusive and eventually hung up . . .” *Id.* Dr. Noel stated that Claimant was not benefitting from any care “because of his noncompliance and noncooperativeness [sic],” and he therefore did not want to continue treating him “as it would be futile . . .” *Id.*
32. On May 29, 2020, Dr. Fall responded to a questionnaire and confirmed that she is willing to keep treating Claimant. *Resp. Ex. C-20.* Ms. Thomas also testified that Dr. Fall remains willing to treat Claimant.
33. Ms. Thomas testified that Claimant was scheduled for an appointment with Dr. Fall on June 2, 2020. She explained that one of the reasons Respondents scheduled the appointment was to obtain home health care orders if Claimant planned to refuse treatment at PAMS. She also testified that Claimant sent her a text message the day

before stating that he was refusing to attend, and his mother was no longer providing him with in-home attendant care (“bitch don’t want to listen she is gone too”). Ms. Thomas also testified that Claimant did not attend that appointment.

34. The testimony of Claimant and Ms. Thomas confirms that he has refused to follow up with any ATPs since being discharged by Dr. Noel.
35. Claimant testified that he checked himself out of the hospitals because of COVID-19 concerns and because they “just leave [him] there” and do not care about him. Claimant also testified, however, that he has been going into the public for in-person medical appointments at Denver Health and St. Anthony’s.
36. Claimant testified that respondents have failed to timely authorize medications, but Ms. Thomas testified that she coordinated a new medication vendor, she facilitated the approval of medication several times, some medications could not be authorized due to the lack of current prescriptions, and Claimant might have been able to obtain updated prescriptions if he saw Dr. Fall or was not discharged by Dr. Noel.
37. Ms. Thomas testified that claimant’s mother contacted the admission coordinator at PAMS and requested wound care on July 7, 2020. She also testified that the insurer again approved Claimant for an admission into PAMS. Ms. Thomas explained that she arranged for Claimant to be transported to PAMS on July 10, 2020, but he called 911 one hour before the transportation was scheduled to arrive due to stomach pain and was therefore taken to Lutheran, but Lutheran did not admit him and instead sent him to PAMS. Ms. Thomas testified that Claimant was admitted into PAMS on July 10, 2020, briefly, but he left against medical advice that same evening.
38. Lawrence Lesnak, D.O., authored a report on July 13, 2020, based on his review of Claimant’s medical records. *Resp. Ex. B-2*. Dr. Lesnak concluded that Claimant has been increasingly noncompliant and engaged in “significant injurious activities” which have dramatically worsened his condition and the ulcers, “severely negatively impact[ed] his recovery,” and led to several medical providers discharging him. *Id. at 2 and 10*. Ms. Thomas testified that she agrees with this opinion. As examples, Dr. Lesnak referenced the polysubstance abuse, verbal abuse of several providers, and leaving St. Luke’s and Swedish against medical advice. *Resp. Ex. A-10*.
39. Although claimant’s MMI status was not adjusted, the work-related injury worsened and became subject to additional recovery due to the ulcers which developed in late 2019. To restore his previous status, two hospitalizations and three surgeries were performed, antibiotics were prescribed for the resulting osteomyelitis, and a wound vacuum remains necessary. Claimant refused to undergo an inpatient stay, but this additional wound treatment was recommended by Dr. Thombs, Dr. Culp, and Ms. Thomas.
40. In the months before the ulcer surgeries, Claimant engaged in injurious and unsanitary practices which imperiled or retarded his recovery and refused or willfully neglected medical treatment which was reasonably essential to promote his recovery. Contrary to the recommendations of Drs. Alvarez, Fall, and Noel, he missed or failed to undergo several appointments with wound care specialists, hematologists, and other providers. He did not contact Respondents about the

worsening ulcers until March 24, 2020, by which point they had reopened. He then unreasonably left St. Luke's without being seen for the wound care evaluation, which was scheduled by Ms. Thomas due to his mother's concerns. Before eventually seeking treatment, Claimant misled Ms. Thomas about the severity of the ulcers, abused alcohol and illicit drugs, declined physical therapy, and refused psychological care despite depression.

41. Claimant's injurious practices and refusals of care since undergoing the ulcer surgeries have further imperiled or slowed his recovery and have also increased the extent and cost of his care. His post-surgical recovery was incomplete when he left St. Luke's and Swedish against medical advice. When he left St. Luke's, he acknowledged the severe risks which he incurred by refusing to stay and receive IV antibiotics. When Claimant left Swedish, he still had open wounds, surgical stitches, and staples. Claimant's abrupt exodus and failure to communicate also jeopardized his ability to obtain in-home care and wound care supplies. His refusal to submit to inpatient treatment for the ulcers has prolonged his recovery, as evidenced by the ongoing use of a wound vacuum, and Ms. Thomas's testimony that PAMS expected an inpatient wound care program to be completed within six to eight weeks (i.e., by mid-June 2020). Claimant's abuse of Dr. Noel and refusal to see any remaining ATPs has further imperiled his recovery by eliminating the well-rounded and multi-disciplined treatment plan he had before 2020.
42. Ms. Thomas testified that the treatment which Claimant failed to complete with PAMS, Dr. Pacheco, and Nurse Alvarez was reasonably essential to promote his recovery from the work injury. She also testified that the changes needed for Claimant to stop impairing his recovery include an inpatient hospitalization, improved communication, and attending appointments with his physicians to facilitate the treatment and medications he needs. The testimony of Ms. Thomas, and the consistent medical opinions of Drs. Lesnak, Thombs, and Culp, are credible and persuasive.
43. Claimant did not offer any compelling justifications for his conduct. Claimant had access to transportation and a driver while missing the appointments. Although missing an occasional appointment due to sickness is understandable, the number and importance of the appointments which claimant failed to attend has been unreasonable. Claimant's explanation that he left the hospitals due to COVID-19 concerns is contradicted by the evidence, which indicates that he refused admission into PAMS based on that facility's strict anti-COVID policies and his own testimony that he ventures into the general public for treatment with providers outside the chain of ATPs.
44. Claimant's unsanitary and injurious practices are not only not imperiling and retarding his recovery, but his conduct is aggravating the compensable consequences of his industrial injury and thereby imposing increased liability on Respondents.

CONCLUSIONS OF LAW

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

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

- I. **Whether Claimant's permanent total disability ("PTD") benefits can be reduced or suspended pursuant to section 8-43-404(3), C.R.S.**
- II. **Whether Claimant's permanent total disability ("PTD") benefits should be reduced or suspended pursuant to section 8-43-404(3), C.R.S.**

The injurious practice statute, §8-43-404(3), C.R.S., states as follows, in relevant part:

If any employee persists in any unsanitary or injurious practice which tends to imperil or retard recovery or refuses to submit to such medical or surgical treatment or vocational evaluation as is reasonably essential to promote recovery, the director shall have the discretion to reduce or suspend the compensation of any such injured employee.

Respondents bear the burden of proving an entitlement to relief under §8-43-404(3) by a preponderance of the evidence. *C.R.S. §8-43-201*. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792, 800 (Colo. 1979) (en banc). Based on the facts and additional legal conclusions outlined below, the ALJ concludes Respondents carried their burden to establish a reduction or suspension of Claimant's PTD benefits pursuant §8-43-404(3).

When relief is sought under §8-43-404(3) based on a refusal to undergo treatment, respondents must establish only that the treatment is "reasonably essential to promote recovery" for the injury; there is no obligation to establish a "worsening" of condition due to the refusal. *Parks v. Ft. Collins Ready Mix, Inc.*, W. C. No. 4-251-955, 1999 WL 203122, at *2 (ICAO Mar. 31, 1999). Whether Claimant has unreasonably refused to submit to such medical treatment is a question of fact for resolution by the ALJ. *Id.*

When construing a statute, courts must ascertain and give effect to the intent of the General Assembly and refrain from rendering judgments that are inconsistent with that intent. *Walker v. People*, 932 P.2d 303, 309 (Colo.1997). To determine legislative intent, a court must first look to the plain language of the statute. *Vaughan v. McMinn*, 945 P.2d 404, 408 (Colo.1997). When interpreting statutes, "[w]ords and phrases should be given effect according to their plain and ordinary meaning." *S. Ute Indian Tribe v. King Consol. Ditch Co.*, 250 P.3d 1226, 1233 (Colo. 2011).

One of the ordinary definitions of the word "recovery" in the litigation context is "[t]he regaining or restoration of something lost or taken away." *Lanahan v. Chi Psi Fraternity*, 175 P.3d 97 (Colo. 2008), citing Black's Law Dictionary 1302 (8th ed. 2004). Another ordinary definition of the word "recovery," according to Merriam-Webster.com is "the act of regaining or returning toward a normal or healthy state." *Merriam-Webster.com* Dictionary, s.v. "recovery," accessed October 9, 2020, <https://www.merriam-webster.com/dictionary/recovery>. The context of Dr. Lesnak's report demonstrates that he used a similar definition in opining that Claimant's actions negatively impacted "his recovery," without tethering the word "recovery" to the distinct legal concept of MMI or claimant's entitlement to a particularly category of indemnity benefits.

Courts should "not construe a statute in a manner that assumes the General Assembly made an omission; rather, the General Assembly's failure to include particular language is a statement of legislative intent." *Specialty Restaurants Corp. v. Nelson*, 231 P.3d 393, 397 (Colo. 2010) (en banc). The phrase "MMI" is used throughout the

Act and the legislature could have conditioned the applicability of §8-43-404(3) upon refusing treatment needed to attain MMI, or unsanitary practices delaying MMI, but intended otherwise. By utilizing the broader standard of whether the treatment refused was “reasonably essential to promote recovery” of the injury, the legislature accounted for cases like this where the injured worker’s post-MMI condition worsens and becomes subject to additional recovery. From a practical standpoint, cases involving ongoing PTD benefits need not be reopened to deliver full indemnity compensation to a claimant whose injury worsens, because the amounts payable for PTD benefits and temporary total disability benefits are equivalent. Interpreting §8-43-404(3) as applying when PTD benefits are payable furthers the Act’s goals of efficiency and cost reduction by foregoing the administrative inefficiencies which would be associated with reopening and reclosing a claim every time that a permanently and totally disabled worker’s injury worsens.

The case of *Hays v. Industrial Comm’n of Colo.*, 138 Colo. 334 (1958) (en banc), suggests that a reduction or suspension of benefits under §8-43-404(3) is available even in cases involving permanent total disability (“PTD”) benefits. As the Court noted in *Hays*, “[W]hile the option is his to refuse treatment, he may not do so and continue to receive full compensation for the balance of his life.” *Id.* at 337. “[I]t would appear that even if no favorable result was obtained from the recommended surgery, he would be no worse off, since one cannot become more than 100% disabled.” *Id.* The *Hays* Court construed the 1953 version of the injurious practice statute, C.R.S. 1953, 81-12-12, which is nearly identical to the current version, and stated as follows: “If any employee shall refuse to submit to such medical or surgical treatment as is reasonably essential to promote his recovery, the commission in its discretion may, reduce or suspend the compensation of any such injured employee.” See *Cain v. Industrial Comm’n*, 136 Colo. 227, 235 (1967) (quoting the statute).

Hays remains valid because the subsequent changes to the injurious practice statute did not pertain to whether the offset is available in cases involving PTD benefits. Rather, those changes merely broadened the statute’s scope to make suspension or reduction available in more circumstances, now including when a claimant “persists in any unsanitary or injurious practice which tends to imperil or retard recovery.” Pursuant to *Hays* and a plain language reading of the statute, the ALJ concludes that a reduction or suspension of indemnity benefits under §8-43-404(3) is available in cases like this, where the work-related injury worsens and becomes subject to additional recovery while PTD benefits are being paid. In this regard, the ALJ concludes that Respondents are entitled to relief under §8-43-404(3), because the work-related injury worsened and became subject to additional recovery due to the ulcers, Claimant engaged in several injurious and unsanitary practices which imperiled or delayed his recovery, Claimant refused a variety of medical care that was reasonably essential to promote his recovery, and such actions increased the amount, duration, and cost of medical treatment that Respondents are providing.

Section 8-43-404(3) gives ALJs wide discretion to fashion an appropriate remedy. Indeed, the statute does not place any parameters on the timeframe or quantity of such a suspension or reduction of benefits. Furthermore, nothing in the *Hays*

opinion suggests that a reduction must be calculated based on the same methodology which the referee used in that case.¹

Based on the evidence presented, the ALJ concludes that the most appropriate sanction in this particular case is a fifty percent reduction of Claimant's PTD benefits if Claimant refuses to be admitted to an inpatient wound care facility such as PAMS within the next two weeks and refuses to resume treatment with his ATPs, which includes Dr. Fall. The ALJ concludes that this amount - and the timing - is fair and appropriate under these circumstances, where it seems that a significant financial incentive is needed for Claimant to become compliant with his treatment recommendations, and Claimant's injurious conduct has been particularly risky and unreasonable.

The ALJ also concludes that Claimant's PTD benefits shall be fully reinstated once he is admitted to an inpatient stay facility for wound care such as PAMS and resumes medical treatment with his ATPs, which includes Dr. Fall. Thus, if Claimant cooperates and is admitted into a facility within two weeks and follows up with Dr. Fall, there will be no reduction in benefits.

Should Claimant get admitted to an inpatient stay facility for wound care such as PAMS and leave prematurely and against the advice of his treating physician at the wound care clinic, Respondents shall be entitled to again reduce Claimant's PTD benefits by 50%. Such reduction shall remain in effect until Claimant's wounds heal to the extent necessary where inpatient wound care is no longer reasonable and necessary.

ORDER

1. Each party shall cooperate with each other and work expeditiously to get Claimant admitted to an inpatient wound care facility so treatment can begin as soon as possible.
2. Each party shall cooperate with each other and work expeditiously to get Claimant back in active treatment with his ATPs, including Dr. Allison Fall, so treatment can resume as soon as possible. The treatment with his ATPs can include telemedicine visits if reasonable and appropriate under the circumstances. For example, Claimant's inpatient care at a wound care facility, COVID 19 concerns, or both, might require Claimant to resume treatment with his ATPs via telemedicine. Whether a telemedicine visit with each ATP is reasonable and appropriate under the circumstances, instead of an in-person visit, shall be determined by each ATP.
3. If within 14 days from the date of this order, Claimant has not been admitted into an inpatient wound care facility and has not resumed care

¹ The ICAO reached a different conclusion in *Aranda v. Evraz, Inc.*, W.C. No. 4-628-418 (Feb. 17, 2020), but this non-precedential opinion is distinguishable. *Aranda* did not involve a situation like this case where Claimant's conduct aggravates the compensable consequences of his industrial injury and thereby imposes increased liability on Respondents. As found in this case, Claimant's refusal of treatment delayed his recovery and increased the liability of Respondents for additional medical treatment.

with his ATP physician, Dr. Allison Fall, Claimant's ongoing PTD benefits shall be reduced by fifty percent (50%) pursuant to §8-43-404(3), C.R.S.

4. Claimant's PTD benefits shall be reinstated at their full rate upon Claimant's physical admission to an inpatient wound facility such as PAMS and his resumption of medical treatment with his ATPs, which includes Dr. Allison Fall.
5. Should Claimant get admitted to an inpatient stay wound care facility such as PAMS, but leave before treatment has been completed and against the medical advice of his treating physician at the wound care facility, Respondents may again reduce Claimant's PTD benefits by 50% until Claimant attends and fully participates in inpatient treatment or until his wounds heal and inpatient care is no longer reasonable and necessary.
6. Issues not expressly decided herein are reserved to the parties for future determination.

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

DATED: October 14, 2020.

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that he suffered a compensable left knee injury during the course and scope of his employment with Employer on June 18, 2019.

2. Whether Claimant has established by a preponderance of the evidence that he is entitled to reasonable, necessary and causally related medical treatment for his June 18, 2019 left knee injury.

3. Whether Claimant has proven by a preponderance of the evidence that he is entitled to Temporary Total Disability (TTD) benefits for the period April 26, 2020 until terminated by statute.

4. Whether Respondents have established by a preponderance of the evidence that Claimant was responsible for his termination from employment under §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. (collectively "termination statutes") and is thus precluded from receiving TTD benefits effective April 26, 2020.

5. A determination of Claimant's Average Weekly Wage (AWW).

FINDINGS OF FACT

1. Claimant is a 45-year old male who worked at Employer's front-end service desk and fuel center. His fuel center job responsibilities included helping customers at fuel pumps, cleaning the fuel area, removing equipment from the kiosk and taking products out of the kiosk to display for customer purchase.

2. Claimant testified that on June 18, 2019 he was moving a cooler of Red Bull out of a kiosk to display at the fuel center. The Red Bull cooler was top-heavy and there was about a half-inch threshold at the bottom of the doorway. As Claimant was wheeling the cooler through the kiosk's doorway and over the raised threshold it started to tip. In attempting to catch the cooler, Claimant twisted and felt a pop in his left knee. Claimant remarked that his left knee pain worsened throughout the remainder of his shift.

3. Claimant reported his injury on the following day to Store Manager Chris R[Redacted]. He then completed an Associate Work Related Injury/Illness Report.

4. Claimant obtained medical treatment through Concentra Medical Centers. On June 19, 2019 Claimant visited Concentra for an initial evaluation. Claimant reported that he injured his left knee on June 18, 2019 when he was moving a display barrel outside and it became caught on the door threshold. The handle broke and the barrel started to tip over. He twisted his left knee when he tried to prevent the barrel from falling over. Deanna Halat, N.P. diagnosed Claimant with a left knee sprain and determined it was

more than 51% likely that Claimant suffered “a work related injury due to twisting knee while trying to stop Red Bull display from falling over.” NP Halat assigned work restrictions including lifting up to 20 pounds occasionally, pushing/pulling up to 20 pounds occasionally and no squatting. She permitted Claimant to work his entire shift.

5. Claimant subsequently underwent conservative care in the form of physical therapy. However, his symptoms failed to improve.

6. On August 9, 2019 Claimant underwent a left knee MRI. The MRI revealed a medial meniscus tear of the left knee.

7. By August 21, 2019 Claimant returned to Concentra for an examination. Claimant reported continuing left knee pain. He had been working with restrictions but his pain increased by the end of each day. Kathryn Bird, D.O. assigned work restrictions including lifting up to 20 pounds constantly, pushing/pulling up to 20 pounds constantly and no squatting or kneeling. She permitted Claimant to work his entire shift.

8. On September 5, 2019 Claimant visited Mark S. Failinger, M.D. for an orthopedic examination. After reviewing Claimant’s medical records and performing a physical examination Dr. Failinger diagnosed Claimant with a left knee medial meniscus tear and medial compartment chondromalacia. Dr. Failinger recommended surgical intervention in the form of a left knee scope, meniscectomy and chondroplasty.

9. On April 26, 2020 Claimant was terminated from employment. Store Manager Chris R[Redacted] testified that Employer utilized a progressive disciplinary structure for employees with attendance issues. The structure started with a written warning, followed by increasingly lengthened suspensions and culminated in termination after a five-day suspension.

10. The record reflects that Claimant had an extensive disciplinary history with Employer. On March 16, 2016 Claimant received a verbal warning pertaining to lunch violations. A Behavior Notice reflected that further violations would result in disciplinary action up to and including termination. On March 12, 2017 Claimant was scheduled to work at 1:45 pm but did not report to work until 2:30 pm. Claimant received a written warning that further infractions would result in additional disciplinary action including suspension and termination. On March 26, 2017 Claimant arrived one hour and 36 minutes late for his shift and received a one-day suspension to be served on April 11, 2017. On May 6, 2017 Claimant received a five day final suspension to be served from May 29, 2017 to June 2, 2017 for trading his May 4, 2017 shift to another co-worker resulting in overtime without management approval. Employer again documented that “any further matters of the kind would result in termination.”

11. Despite numerous warnings, Claimant’s disciplinary violations continued into 2018 and 2019. On January 1, 2018 Claimant received a warning regarding attendance issues and was notified of a final 10-day suspension. Documentation again noted that any further infractions or attendance issues would result in immediate termination. On May 27, 2019 Claimant was again disciplined for continued attendance

issues and received a one day suspension. The Behavior Notice specifically provided that Claimant “continues to be late for his shifts.” Claimant had received a written warning on April 24, 2019 for reporting to work late and was absent on May 14, 2019. The Notice specified that any further infractions “of this nature would lead to progressive discipline up to and including termination.” On August 1, 2019 Claimant was again disciplined for habitual tardiness. The Behavior Notice documented that Claimant received a three-day suspension for the period August 11-13, 2019. The Behavior Notice stated that Claimant’s failure to arrive for all shifts and any further infractions could lead to further discipline up to termination.

12. On August 12, 2020 Dr. Failinger authored a three-page supplemental report after reviewing video footage of the June 18, 2019 accident. Dr. Failinger explained that Claimant moved a Red Bull cooler out of a small room. Claimant began moving the cooler out of the door “with some difficulty, as it did not appear the cooler had rolling wheels.” Dr. Failinger described that as Claimant was moving the cooler out the door “there was a partial brief give way episode where [Claimant] torqued the left side of his body.” Although Claimant did not fall “he appear[ed] to have sustained some twisting mechanism of his body.” Dr. Failinger noted that throughout the rest of the video Claimant did not exhibit a “dramatic limp or dramatically favor his knee.” He concluded that the “video of [Claimant’s] reported injury, with reasonable medical probability, is consistent with an acceleration of pre-existing disease.”

13. Dr. Failinger explained that Claimant’s persistent symptoms were not uncommon and “[t]here was no significant arthritis noted on the MRI or other significant pre-existing other pathology, which would explain [Claimant’s] symptoms.” He reasoned that individuals with meniscus tears of Claimant’s type do not immediately develop severe pain or limping. However, with a pre-existing tear and no symptoms, further acceleration can occur with a load and a twist as exhibited by Claimant in the video footage. Dr. Failinger thus reasoned that the June 18, 2019 incident accelerated Claimant’s pre-existing disease and caused him to become symptomatic.

14. On August 12, 2020 Claimant underwent an independent medical examination with John Burris, M.D. Dr. Burris recounted that on June 18, 2019 Claimant was moving a Red Bull cooler from the inside of a kiosk so that it could be displayed outside. While maneuvering the cooler over the door threshold, the cooler began to tip. In attempting to prevent the cooler from falling to the ground, the handle of the cooler broke and Claimant was not able to catch it before some of the drinks fell onto the ground. In the process of catching the cooler Claimant twisted and heard a pop in his left knee. Dr. Burris reviewed Claimant’s medical history, performed a physical examination and considered video footage of the accident. He remarked that the left knee MRI revealed several degenerative changes including a complex medial meniscus tear.

15. Dr. Burris explained that “an acute knee meniscus injury requires a combination of knee flexion (or extension) and rotation, during weight-bearing, which results in an increase in shear forces between the femoral condyles and the tibia.” He reasoned that the “observed movements on the video surveillance do not support a combination of left knee flexion (or extension) and rotation, occurring during the 6/18/2019

workplace event.” Dr. Burris detailed that the events on the video did not constitute an event of sufficient magnitude to cause, accelerate, or contribute to Claimant’s left knee condition. He thus concluded that, because the MRI demonstrated degenerative findings and there was no specific mechanism of injury, Claimant’s left knee condition was not related to the June 18, 2019 incident.

16. On August 17, 2020 Claimant underwent an independent medical examination with Timothy O. Hall, M.D. Dr. Hall reviewed Claimant’s medical history, performed a physical examination and considered video footage of the June 18, 2019 accident. Dr. Hall determined that Claimant suffered a left knee injury on June 18, 2019 when he was walking backward with the Red Bull cooler. He noted that Claimant’s foot was planted when he potentially twisted his knee. Claimant’s activities constituted a reasonable mechanism of injury that would result in a meniscal tear.

17. Dr. Hall also testified at the hearing in this matter. He maintained that Claimant suffered a left knee medial meniscus tear when he was exiting a kiosk while pulling a cooler of Red Bull on June 18, 2019. Dr. Hall acknowledged that Claimant had pre-existing asymptomatic changes in his left knee prior to his work injury. He specified that Individuals with complex meniscus tears can be asymptomatic because degenerative tears typically occur slowly over time with minimal swelling or inflammation. Dr. Hall determined that the mechanism of injury depicted in the video footage was sufficient to cause Claimant’s injury. Claimant specifically suffered a torqueing of the left knee while his foot was planted. Dr. Hall detailed that it is not his experience that meniscus tears only occur when there is a combination of twisting and a deep flex bend or significant weight-bearing/lifting activity. Extension and flexion are not necessary movements to cause a meniscus tear. Instead, simply planting one’s foot and then turning to the side can cause a meniscus tear. Dr. Hall commented that, although Claimant’s left knee is not visible in the video, his upper body was shifting. He thus reasoned that Claimant engaged in a torqueing maneuver of his left knee while exiting the kiosk with the Red Bull Cooler on June 18, 2019. Furthermore, a meniscus tear is not generally an injury that would prevent a person from continuing his work activities as long as they do not include “repetitive kneeling, bending, or torqueing.” Dr. Hall concluded that it is greater than 51% probable that the event in the video caused Claimant’s left knee to become symptomatic and created the need for medical treatment including the meniscectomy recommended by Dr. Failing.

18. Claimant has demonstrated that it is more probably true than not that he suffered a compensable left knee injury during the course and scope of his employment with Employer on June 18, 2019. Initially, Claimant testified that on June 18, 2019 he was moving a cooler of Red Bull out of a kiosk to display at the fuel center. As Claimant was wheeling the cooler through the doorway of the kiosk and over the raised threshold it started to tip. In attempting to catch the cooler, Claimant twisted and felt a pop in his left knee. His left knee pain worsened throughout the remainder of his shift. On June 19, 2019 NP Halat at Concentra diagnosed Claimant with a left knee sprain and determined it was more than 51% likely that Claimant suffered “a work related injury due to twisting knee while trying to stop Red Bull display from falling over.” An August 9, 2019 MRI revealed a medial meniscus tear of the left knee.

19. Dr. Failinger described that when Claimant was moving the Red Bull cooler out the kiosk “there was a partial brief give way episode where [Claimant] torqued the left side of his body.” Although Claimant did not fall “he appear[ed] to have sustained some twisting mechanism of his body.” Dr. Failinger explained that Claimant’s persistent symptoms were not uncommon and “[t]here was no significant arthritis noted on the MRI or other significant pre-existing other pathology, which would explain [Claimant’s] symptoms.” He noted that with a pre-existing meniscus tear and no symptoms, further acceleration can occur with a load and a twist as exhibited by Claimant in the video footage. Dr. Failinger thus reasoned that the June 18, 2019 incident accelerated Claimant’s pre-existing disease and caused him to become symptomatic. Similarly, Dr. Hall acknowledged that Claimant had pre-existing asymptomatic changes in his left knee prior to his work injury. He specified that Individuals with complex meniscus tears can be asymptomatic because degenerative tears typically occur slowly over time with minimal swelling or inflammation. Dr. Hall determined that the mechanism of injury depicted in the video footage was sufficient to cause Claimant’s injury. Extension and flexion are not necessary movements to cause a meniscus tear. Instead, simply planting one’s foot and then turning to the side can cause a meniscus tear. Dr. Hall commented that, although Claimant’s left knee is not visible in the video, his upper body was shifting. He thus reasoned that Claimant engaged in a torquing maneuver of his left knee while exiting the kiosk with the Red Bull Cooler on June 18, 2019. Dr. Hall concluded that it is greater than 51% probable that the event in the video caused Claimant’s left knee to become symptomatic.

20. In contrast, Dr. Burris explained that “an acute knee meniscus injury requires a combination of knee flexion (or extension) and rotation, during weight-bearing, which results in an increase in shear forces between the femoral condyles and the tibia.” He reasoned that the “observed movements on the video surveillance do not support a combination of left knee flexion (or extension) and rotation, occurring during the 6/18/2019 workplace event.” Dr. Burris detailed that the events on the video did not constitute an event of sufficient magnitude to cause, accelerate or contribute to Claimant’s left knee condition. He thus concluded that, because the MRI demonstrated degenerative findings and there was no specific mechanism of injury, Claimant’s left knee condition was not related to the June 18, 2019 incident. Despite Dr. Burris’ determination, the record demonstrates that Claimant suffered a left knee injury during the course and scope of his employment with employer on June 18, 2019. Although Claimant presented several different details about the incident, they were not inconsistent but instead reflect an event that impacted Claimant’s left knee and caused it to become symptomatic. Claimant had not suffered any prior left knee problems and the temporal proximity of the June 18, 2019 incident to Claimant’s development of symptoms suggests a causal relationship between the event and the left knee meniscus tear. Specifically, the medical records, persuasive opinions of Drs. Failinger and Hall and the video footage reflect that Claimant’s mechanism of injury was sufficient to cause a meniscus tear. Accordingly, Claimant’s work activities on June 18, 2019 aggravated, accelerated or combined with his pre-existing left knee condition to produce a need for medical treatment.

21. Claimant has established that it is more probably true than not that he is entitled to reasonable, necessary and causally related medical treatment for his June 18,

2019 left knee injury. Subsequent to his left knee injury Claimant received conservative treatment in the form of physical therapy but his symptoms failed to improve. After an MRI revealed a meniscus tear Dr. Failinger diagnosed Claimant with a left knee medial meniscus tear and medial compartment chondromalacia. Dr. Failinger recommended surgical intervention in the form of a left knee scope, meniscectomy and chondroplasty. Similarly, Dr. Hall concluded that it is greater than 51% probable that the event in the video caused Claimant's left knee to become symptomatic and created the need for medical treatment including the meniscectomy recommended by Dr. Failinger. The persuasive medical opinions thus reveal that the recommended surgery constitutes reasonable, necessary and related medical treatment for Claimant's left knee medial meniscus tear. Accordingly, Claimant's request for medical benefits and the left knee surgery recommended by Dr. Failinger is granted.

22. Claimant contends that he is entitled to receive TTD benefits for the period April 26, 2020 until terminated by statute. However, Respondents assert that Claimant was responsible for his termination from employment under the termination statutes and is thus precluded from receiving TTD benefits effective April 26, 2020. Initially, Claimant suffered an industrial injury to his left knee on June 18, 2019. On June 19, 2019 NP Halat assigned work restrictions including lifting up to 20 pounds occasionally, pushing/pulling up to 20 pounds occasionally and no squatting. She permitted Claimant to work his entire shift. By August 21, 2019 Claimant returned to Concentra for an examination. Claimant reported he had been working with restrictions but his left knee pain increased by the end of each day. Dr. Bird assigned work restrictions including lifting up to 20 pounds constantly, pushing/pulling up to 20 pounds constantly and no squatting or kneeling. She permitted Claimant to work his entire shift. Employer terminated Claimant's employment on April 26, 2020 because he had numerous attendance violations during his period of employment. The record reveals that Employer applied a progressive disciplinary policy and Claimant received numerous warnings that further violations could result in termination. Claimant's actions reflect that he willfully violated Employer's attendance policy.

23. During 2016-17 Claimant received verbal notifications, written warnings and suspensions for various attendance infractions. Behavior Notices reflected that further violations would result in disciplinary action up to and including termination. By May 6, 2017 Claimant received a five day final suspension to be served from May 29, 2017 to June 2, 2017 for trading his May 4, 2017 shift to another co-worker resulting in overtime without management approval. Employer again documented that "any further matters of the kind would result in termination." Despite numerous warnings, Claimant's disciplinary violations continued into 2018 and 2019. On January 1, 2018 Claimant received a warning regarding attendance issues and was notified of a final 10-day suspension. Claimant subsequently received additional warnings and suspensions. He was again advised that further infractions could result in termination. On August 1, 2019 Claimant was again disciplined for habitual tardiness. The Behavior Notice documented that Claimant received a three-day suspension for the period August 11-13, 2019. The Behavior Notice stated that Claimant's failure to arrive for all shifts and any further infractions could lead to further discipline up to termination. Although Claimant was not terminated until April 26, 2020 the record reveals that Claimant had numerous prior attendance violations that

could result in termination. Through his repeated attendance violations Claimant exercised some control over the circumstances causing his termination. Claimant precipitated his employment termination by a volitional act that he would reasonably expect to cause the loss of employment. He was thus responsible for his termination and is therefore precluded from receiving TTD benefits effective April 26, 2020.

24. Claimant suffered a left knee medial meniscus tear while working for Employer on June 18, 2019. He finished his work shift and reported his injury on the following day and completed an Associate Work Related Injury/Illness Report. The record reflects that during the 13 week period preceding his industrial injury between March 19, 2019 and June 19, 2019 Claimant earned \$9,232.77. Dividing \$9,232.77 by 13 yields an Average Weekly Wage (AWW) of \$710.21. An AWW of \$710.21 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. See *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *CJI*, Civil 3:16 (2007).

Compensability

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson*, W.C. No. 4-589-645 (ICAO, Sept. 13, 2006). Proof of causation is a threshold

requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.*, 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner*, 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). *Soto-Carrion v. C & T Plumbing, Inc.*, W.C. No. 4-650-711 (ICAO, Feb. 15, 2007); *David Mailand v. PSC Industrial Outsourcing LP*, W.C. No. 4-898-391-01, (ICAO, Aug. 25, 2014).

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. See *Cotts v. Exempla, Inc.*, W.C. No. 4-606-563 (ICAO, Aug. 18, 2005). Rather, the symptoms could represent the “logical and recurrent consequence” of the pre-existing condition. See *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAO, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs*, W.C. No. 4-745-712 (ICAO, Oct. 27, 2008), simply because a claimant’s symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that “correlation is not causation,” and merely because a coincidental correlation exists between the claimant’s work and his symptoms does not mean there is a causal connection between the claimant’s injury and work activities.

7. The provision of medical care based on a claimant’s report of symptoms does not establish an injury but only demonstrates that the claimant claimed an injury. *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020). Moreover, a referral for medical care may be made so that the respondent would not forfeit its right to select the medical providers if the claim is later deemed compensable. *Id.* Because a physician provides diagnostic testing, treatment, and work restrictions based on a claimant’s reported symptoms does not mandate that the claimant suffered a compensable injury. *Fay v. East Penn manufacturing Co., Inc.*, W.C. No. 5-108-430-001 (ICAO, Apr. 24, 2020); cf. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337, 1339 (Colo. App. 1997) (“right to workers’ compensation benefits, including medical payments, arises only when an injured employee initially establishes, by a preponderance of the evidence, that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment”). While scientific evidence is not dispositive of compensability, the ALJ may consider and rely on medical opinions regarding the lack of a scientific theory supporting compensability when making a determination. *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983); *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020).

8. As found, Claimant has demonstrated by a preponderance of the evidence that he suffered a compensable left knee injury during the course and scope of his employment with Employer on June 18, 2019. Initially, Claimant testified that on June 18, 2019 he was moving a cooler of Red Bull out of a kiosk to display at the fuel center. As Claimant was wheeling the cooler through the doorway of the kiosk and over the raised threshold it started to tip. In attempting to catch the cooler, Claimant twisted and felt a pop in his left knee. His left knee pain worsened throughout the remainder of his shift. On June 19, 2019 NP Halat at Concentra diagnosed Claimant with a left knee sprain and determined it was more than 51% likely that Claimant suffered “a work related injury due to twisting knee while trying to stop Red Bull display from falling over.” An August 9, 2019 MRI revealed a medial meniscus tear of the left knee.

9. As found, Dr. Failinger described that when Claimant was moving the Red Bull cooler out the kiosk “there was a partial brief give way episode where [Claimant] torqued the left side of his body.” Although Claimant did not fall “he appear[ed] to have sustained some twisting mechanism of his body.” Dr. Failinger explained that Claimant’s persistent symptoms were not uncommon and “[t]here was no significant arthritis noted on the MRI or other significant pre-existing other pathology, which would explain [Claimant’s] symptoms.” He noted that with a pre-existing meniscus tear and no symptoms, further acceleration can occur with a load and a twist as exhibited by Claimant in the video footage. Dr. Failinger thus reasoned that the June 18, 2019 incident accelerated Claimant’s pre-existing disease and caused him to become symptomatic. Similarly, Dr. Hall acknowledged that Claimant had pre-existing asymptomatic changes in his left knee prior to his work injury. He specified that Individuals with complex meniscus tears can be asymptomatic because degenerative tears typically occur slowly over time with minimal swelling or inflammation. Dr. Hall determined that the mechanism of injury depicted in the video footage was sufficient to cause Claimant’s injury. Extension and flexion are not necessary movements to cause a meniscus tear. Instead, simply planting one’s foot and then turning to the side can cause a meniscus tear. Dr. Hall commented that, although Claimant’s left knee is not visible in the video, his upper body was shifting. He thus reasoned that Claimant engaged in a torqueing maneuver of his left knee while exiting the kiosk with the Red Bull Cooler on June 18, 2019. Dr. Hall concluded that it is greater than 51% probable that the event in the video caused Claimant’s left knee to become symptomatic.

10. As found, in contrast, Dr. Burriss explained that “an acute knee meniscus injury requires a combination of knee flexion (or extension) and rotation, during weight-bearing, which results in an increase in shear forces between the femoral condyles and the tibia.” He reasoned that the “observed movements on the video surveillance do not support a combination of left knee flexion (or extension) and rotation, occurring during the 6/18/2019 workplace event.” Dr. Burriss detailed that the events on the video did not constitute an event of sufficient magnitude to cause, accelerate or contribute to Claimant’s left knee condition. He thus concluded that, because the MRI demonstrated degenerative findings and there was no specific mechanism of injury, Claimant’s left knee condition was not related to the June 18, 2019 incident. Despite Dr. Burriss’ determination, the record demonstrates that Claimant suffered a left knee injury during the course and scope of his employment with employer on June 18, 2019. Although Claimant presented several

different details about the incident, they were not inconsistent but instead reflect an event that impacted Claimant's left knee and caused it to become symptomatic. Claimant had not suffered any prior left knee problems and the temporal proximity of the June 18, 2019 incident to Claimant's development of symptoms suggests a causal relationship between the event and the left knee meniscus tear. Specifically, the medical records, persuasive opinions of Drs. Failinger and Hall and the video footage reflect that Claimant's mechanism of injury was sufficient to cause a meniscus tear. Accordingly, Claimant's work activities on June 18, 2019 aggravated, accelerated or combined with his pre-existing left knee condition to produce a need for medical treatment.

Medical Benefits

11. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). The claimant bears the burden of demonstrating a causal connection between his industrial injuries and the need for additional medical treatment. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier*, W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

12. As found, Claimant has established by a preponderance of the evidence that he is entitled to reasonable, necessary and causally related medical treatment for his June 18, 2019 left knee injury. Subsequent to his left knee injury Claimant received conservative treatment in the form of physical therapy but his symptoms failed to improve. After an MRI revealed a meniscus tear Dr. Failinger diagnosed Claimant with a left knee medial meniscus tear and medial compartment chondromalacia. Dr. Failinger recommended surgical intervention in the form of a left knee scope, meniscectomy and chondroplasty. Similarly, Dr. Hall concluded that it is greater than 51% probable that the event in the video caused Claimant's left knee to become symptomatic and created the need for medical treatment including the meniscectomy recommended by Dr. Failinger. The persuasive medical opinions thus reveal that the recommended surgery constitutes reasonable, necessary and related medical treatment for Claimant's left knee medial meniscus tear. Accordingly, Claimant's request for medical benefits and the left knee surgery recommended by Dr. Failinger is granted.

Temporary Total Disability Benefits/Termination For Cause

13. To prove entitlement to Temporary Total Disability (TTD) benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. See Sections 8-42-(1)(g), 8-42-105(4); *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office*, 954 P.2d 637

(Colo. App. 1997). Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term “disability” connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (citing *Ricks v. Industrial Claim Appeals Office*, P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic*, 952 P.2d 831, 833 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

14. Under the termination statutes in §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. a claimant who is responsible for his or her termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and wage loss. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1131 (Colo. App. 2008). The termination statutes provide that, in cases where an employee is responsible for her termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, W.C. No. 4-631-681 (ICAO, Apr. 24, 2006). A claimant does not act “volitionally” or exercise control over the circumstances leading to her termination if the effects of the injury prevent her from performing her assigned duties and cause the termination. *In re of Eskridge*, W.C. No. 4-651-260 (ICAO, Apr. 21, 2006). Therefore, to establish that Claimant was responsible for her termination, respondents must demonstrate by a preponderance of the evidence that Claimant committed a volitional act, or exercised some control over her termination under the totality of the circumstances. *See Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994). An employee is thus “responsible” if she precipitated the employment termination by a volitional act that she would reasonably expect to cause the loss of employment. *Patchek v. Dep't of Public Safety*, W.C. No. 4-432-301 (ICAP, Sept. 27, 2001).

15. As found, Claimant contends that he is entitled to receive TTD benefits for the period April 26, 2020 until terminated by statute. However, Respondents assert that Claimant was responsible for his termination from employment under the termination statutes and is thus precluded from receiving TTD benefits effective April 26, 2020. Initially, Claimant suffered an industrial injury to his left knee on June 18, 2019. On June 19, 2019 NP Halat assigned work restrictions including lifting up to 20 pounds occasionally, pushing/pulling up to 20 pounds occasionally and no squatting. She permitted Claimant to work his entire shift. By August 21, 2019 Claimant returned to Concentra for an examination. Claimant reported he had been working with restrictions

but his left knee pain increased by the end of each day. Dr. Bird assigned work restrictions including lifting up to 20 pounds constantly, pushing/pulling up to 20 pounds constantly and no squatting or kneeling. She permitted Claimant to work his entire shift. Employer terminated Claimant's employment on April 26, 2020 because he had numerous attendance violations during his period of employment. The record reveals that Employer applied a progressive disciplinary policy and Claimant received numerous warnings that further violations could result in termination. Claimant's actions reflect that he willfully violated Employer's attendance policy.

16. As found, during 2016-17 Claimant received verbal notifications, written warnings and suspensions for various attendance infractions. Behavior Notices reflected that further violations would result in disciplinary action up to and including termination. By May 6, 2017 Claimant received a five day final suspension to be served from May 29, 2017 to June 2, 2017 for trading his May 4, 2017 shift to another co-worker resulting in overtime without management approval. Employer again documented that "any further matters of the kind would result in termination." Despite numerous warnings, Claimant's disciplinary violations continued into 2018 and 2019. On January 1, 2018 Claimant received a warning regarding attendance issues and was notified of a final 10-day suspension. Claimant subsequently received additional warnings and suspensions. He was again advised that further infractions could result in termination. On August 1, 2019 Claimant was again disciplined for habitual tardiness. The Behavior Notice documented that Claimant received a three-day suspension for the period August 11-13, 2019. The Behavior Notice stated that Claimant's failure to arrive for all shifts and any further infractions could lead to further discipline up to termination. Although Claimant was not terminated until April 26, 2020 the record reveals that Claimant had numerous prior attendance violations that could result in termination. Through his repeated attendance violations Claimant exercised some control over the circumstances causing his termination. Claimant precipitated his employment termination by a volitional act that he would reasonably expect to cause the loss of employment. He was thus responsible for his termination and is therefore precluded from receiving TTD benefits effective April 26, 2020.

Average Weekly Wage

17. Section 8-42-102(2), C.R.S. requires the Judge to determine a claimant's AWW based on his earnings at the time of injury. The Judge must calculate the money rate at which services are paid to the claimant under the contract of hire in force at the time of injury. *Pizza Hut v. ICAO*, 18 P.3d 867, 869 (Colo. App. 2001). However, §8-42-102(3), C.R.S. authorizes a Judge to exercise discretionary authority to calculate an AWW in another manner if the prescribed methods will not fairly calculate the AWW based on the particular circumstances. *Campbell v. IBM Corp.*, 867 P.2d 77, 82 (Colo. App. 1993). The overall objective in calculating an AWW is to arrive at a fair approximation of a claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO May 7, 1997). Therefore, §8-42-102(3), C.R.S. grants an ALJ substantial discretion to modify the AWW if the statutorily prescribed method will not fairly compute a claimant's wages based on the

particular circumstances of the case. *In Re Broomfield*, W.C. No. 4-651-471 (ICAP, Mar. 5, 2007).

18. As found, Claimant suffered a left knee medial meniscus tear while working for Employer on June 18, 2019. He finished his work shift and reported his injury on the following day and completed an Associate Work Related Injury/Illness Report. The record reflects that during the 13 week period preceding his industrial injury between March 19, 2019 and June 19, 2019 Claimant earned \$9,232.77. Dividing \$9,232.77 by 13 yields an Average Weekly Wage (AWW) of \$710.21. An AWW of \$710.21 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

ORDER

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

1. On June 18, 2019 Claimant suffered a compensable left knee injury during the course and scope of his employment with Employer.
2. Claimant shall receive reasonable, necessary and causally related medical benefits for his industrial injury including the surgery recommended by Dr. Failingner.
3. Claimant's request for TTD benefits for the period April 26, 2020 until terminated by statute is denied and dismissed. Claimant was responsible for his termination and is thus precluded from receiving TTD benefits effective April 26, 2020.
4. Claimant earned an AWW of \$710.21.
5. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at <http://www.colorado.gov/dpa/oac/forms-WC.htm>.*

DATED: October 14, 2020.

DIGITAL SIGNATURE:

A rectangular box containing a handwritten signature in black ink that reads "Peter J. Cannici".

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

Whether the claimant has demonstrated, by a preponderance of the evidence, that treatment of his right knee (and more specifically a computerized tomography (CT) scan of the right knee), is reasonable medical treatment necessary to cure or relieve the claimant from the effects of an admitted February 28, 2017 work injury.

PROCEDURAL HISTORY

Prior to hearing, the respondents filed a motion for summary judgment on the basis that the parties had entered into a Partial Settlement Agreement in this matter. The ALJ denied the motion as there were issues of material fact in dispute.

FINDINGS OF FACT

1. The claimant was injured at work on February 28, 2017. The injury occurred while the claimant was working as a security guard at a hospital. Specifically, the claimant approached two individuals at a vehicle, when the individuals backed the vehicle the claimant was stuck and knocked to the ground.

2. Following the February 28, 2017 injury, the claimant was initially seen in the emergency department at Community Hospital. On that date, Dr. Michael Kueber diagnosed the claimant with an acute L4 compression fracture, and a left talus fracture. Of note, Dr. Kueber specifically noted that the claimant's left lower extremity was atraumatic.

3. Throughout the claimant's post-injury medical records he has been diagnosed with a left foot crush injury, and low back pain with radiculopathy. The claimant has undergone significant medical treatment including left ankle surgery, and diagnosis of left lower extremity complex regional pain syndrome (CRPS). The claimant has been seen by a number of medical providers during this claim. Those providers include Dr. Dale Utt, Dr. Ellen Price, Dr. Kirk Clifford, and Dr. Christopher Copeland.

4. At the request of the respondents, Dr. B. Andrew Castro performed a review of the claimant's medical records. In his September 19, 2018 report, Dr. Castro noted that the claimant suffered injuries to his left ankle and low back on February 28, 2017, followed by the development of CRPS. Dr. Castro also noted that the claimant had a history of low back symptoms. Dr. Castro opined that the February 28, 2017 injury exacerbated the claimant's pre-existing back symptoms. Dr. Castro also noted that due to the advancing CRPS, the claimant might not be a good surgical candidate (as it related to a recommended lumbar surgery).

5. On March 7, 2019, the claimant was seen by Dr. Price. At that time, Dr. Price determined that the claimant had reached maximum medical improvement (MMI). She assessed permanent impairment for the claimant's lumbar spine of 22 percent whole person. In addition, Dr. Price assessed a 30 percent left lower extremity impairment (which converts to 12 percent whole person). Dr Price calculated a total whole person impairment of 31 percent.

6. Respondents timely requested a Division-sponsored IME (DIME) on April 18, 2019. The following regions/body parts were requested to be reviewed by the DIME physician: lumbar spine, left foot, left ankle, and left lower extremity CRPS. At no time after this request did the claimant request additional body parts to be considered by the Division IME.

7. On June 28, 2019, the claimant presented for a DIME with Dr. Yusuke Wakeshima. In connection with the DIME, Dr. Wakeshima reviewed the claimant's medical records, obtained a history for the claimant, and performed a physical examination. In his DIME report, Dr. Wakeshima documented that the claimant's chief complaint on the date of the exam was low back pain and left lower extremity pain to the ankle and the foot. Significantly, Dr. Wakeshima performed a physical examination of the right knee and found "right leg, ankle and foot exam demonstrates no pain and tenderness". In addition, the right knee exam "demonstrates full active range of motion with no pain and tenderness bilaterally." Dr. Wakeshima opined that the claimant had the following work-related diagnoses: left ankle and foot pain, low back pain, and CRPS. Dr. Wakeshima assessed a permanent impairment rating of 48 percent whole person; (30 percent for CRPS and 24 percent for lumbar spine impairment). Dr. Wakeshima did not find a right knee condition to be work-related, nor did he assess an impairment for any right knee condition.

8. On August 8, 2019, the claimant was seen by Dr. Price and reported right knee pain. In that same medical record, Dr. Price referenced a hematoma on the claimant's right knee at the time of the February 28, 2017 work injury. Dr. Price opined that the claimant needed evaluation of his right knee, because he was "gaiting heavily on the right side". At that time, she ordered x-rays of the claimant's right knee.

9. On September 4, 2019, the claimant reported to physical therapist, Matthew MacAskill, the claimant reported pain in his right knee when going up and down stairs.

10. Based upon Dr. Wakeshima's DIME report, on September 5, 2019, the respondents filed a Final Admission of Liability (FAL) admitting for the MMI date of March 7, 2019 and a whole person impairment rating of 47 percent.

11. The claimant timely objected to the FAL, and on September 12, 2017 filed an Application for Hearing (AFH) endorsing the issues of permanent total disability (PTD) benefits and disfigurement. A hearing was scheduled on those issues.

12. Thereafter, the parties entered into a Partial Settlement Agreement, leaving maintenance care open. The settlement agreement specifically provides that on February 28, 2017, the claimant suffered injuries "including, but not limited to his low back, left ankle, right foot, and CRPS condition." The settlement agreement also provides that

“[o]ther disabilities, impairments and conditions that may be the result of these injuries or diseases but that are not listed here are, nevertheless, intended by all parties to be included and resolved FOREVER by this settlement.” (*emphasis in the original*).

13. The signed settlement agreement also includes the following language:

Claimant realizes that there may be unknown injuries, conditions, diseases, or disabilities as a consequence of these alleged injuries or occupational diseases, including the possibility of a worsening of the conditions. In return for the money paid or other consideration provided in this settlement, Claimant rejects, waives, and FOREVER gives up the right to make any kind of claim for workers’ compensation benefits against Respondents for any such unknown injuries, conditions, diseases, or disabilities resulting from the injuries or occupational diseases, whether or not admitted, that are the subject of this settlement. (*emphasis in the original*).

14. The agreement also includes the following specific language “this is a final settlement of all benefits except for medical benefits” and once approved the agreement “FOREVER closes all issues relating to this matter except medical benefits and issues related to medical benefits.” (*emphasis in the original*). The parties further clarified the medical benefits to be covered with the language: “[r]espondents will continue to pay [c]laimant’s future reasonable, necessary, and related medical expenses”.

15. As a result of the settlement, the hearing set on the September 12, 2019 AFH was vacated. On December 19, 2019, the Partial Settlement Agreement was approved by the Division of Workers’ Compensation.

16. On December 19, 2019, the claimant was seen by Dr. Copeland. At that time, the claimant reported right knee symptoms that included pain, giving way, swelling, weakness and decreased range of motion. In the medical record of that date, Dr. Copeland noted that the claimant had right knee symptoms “following a specific injury.” While in Dr. Copeland’s practice on December 19, 2019, the claimant underwent an x-ray of his right knee. The x-ray showed moderate degenerative joint disease (DJD) in the claimant’s right knee. Noting the x-rays, Dr. Copeland recommended and administered a right knee steroid injection on that same date.

17. On February 11, 2020, the claimant returned to Dr. Copeland. On that date, Dr. Copeland noted continued right knee symptoms. In addition, he noted that the prior right knee injection provided between five and six weeks of relief.

18. On March 26, 2020, the claimant was seen by Dr. Copeland who noted the claimant’s continued right knee symptoms. Dr. Copeland recommended a computerized tomography (CT) scan of the claimant’s right knee. On March 30, 2020, Dr. Copeland submitted a request to the respondents for authorization for the recommended right knee CT scan. The respondents denied authorization on the basis that compensability for a right knee condition had not been established as part of the claim.

19. Dr. Copeland testified by deposition. Dr. Copeland testified that he first treated the claimant shortly after the work injury. At that time, the focus was on the

claimant's ankles. Dr. Copeland also testified that he examined the claimant's right knee in December 2019 and had concerns with regard to internal derangement of that knee. As a result, Dr. Copeland recommended the claimant undergo a CT scan of his right knee. Dr. Copeland stated his opinion that the condition of the claimant's right knee is secondary to the work injury, combined with overuse of the right knee. Dr. Copeland further testified that due to the claimant's other injuries his biomechanics have changed, which has impacted the condition of the claimant's right knee.

20. At the request of the respondents, Dr. Timothy O'Brien reviewed the claimant's medical records and issued a report on August 3, 2020. In his report, Dr. O'Brien opined that the February 28, 2017 incident at work did not aggravate or accelerate the preexisting osteoarthritis in the claimant's right knee. Dr. O'Brien also noted that individuals recovering from surgery in one lower extremity limb do not develop overuse of the contralateral limb. In support of this opinion, Dr. O'Brien explained that those recovering from surgery "are simply not active enough to result in overuse of the contralateral extremity".

21. Dr. O'Brien's testimony by deposition was consistent with his written report. In his testimony, Dr. O'Brien reiterated his opinion that the claimant did not experience an aggravation of his right knee condition when he fell on February 28, 2017. Dr. O'Brien testified that as early as 2015, the claimant had substantial arthritic changes in his right knee. Dr. O'Brien also noted that in 2015 the claimant's treating providers discussed the need for a possible total right knee replacement. Dr. O'Brien also testified that the claimant's right knee was not injured at the time of the February 28, 2017 fall. In support of that statement, Dr. O'Brien noted that the emergency room records list the claimant's right lower extremity as atraumatic. Finally, Dr. O'Brien testified that there is no scientific evidence that injury of one extremity would result in an injury to the contralateral extremity through overuse.

22. On May 8, 2020, the claimant filed an AFH on the issue of medical benefits, specifically the recommended CT scan of the claimant's right knee.

23. In a medical record dated May 15, 2020, Dr. Price noted that the claimant's primary complaint was pain in his right knee. Dr. Price specifically noted the claimant had "increased pain in right knee over the last three years because he has been avoiding putting weight on his left leg". Dr. Price opined that the claimant's right knee symptoms were "the direct consequence of an altered gait secondary to his [left lower extremity] pain."

24. Based upon the medical records entered into evidence, the claimant underwent right knee treatment prior to the February 28, 2017 injury. On July 28, 2015, the claimant sought treatment for his right knee at Community Hospital and was seen by Terry Villarreal Golba, PA. At that time, the claimant reported right knee pain, swelling, stiffness, decreased range of motion, locking, and difficulty ambulating. The claimant also reported that he had experienced chronic knee pain for years, but his pain had increased over the prior two months. PA Golba referred the claimant to Western Orthopedics and Sports Medicine for consultation.

25. Based upon the evidence and testimony presented at hearing, the ALJ concludes that pursuant to the Partial Settlement Agreement, the ALJ lacks jurisdiction to award medical benefits for the claimant's right knee. As an initial matter, the ALJ finds that pursuant to the Partial Settlement Agreement, the claimant's claim remains open with regard to medical treatment that is reasonable, necessary and causally related to the February 28, 2017 work injury. The claimant's right knee was not a body part included with the initial injury and related workers' compensation claim. Any complaints of right knee symptoms were reported after the DIME performed by Dr. Wakeshima. The ALJ finds that the claimant's right knee symptoms fall within "unknown injuries, conditions, diseases, or disabilities as a consequence of these alleged injuries" in the Partial Settlement Agreement.

26. Based upon the above, the ALJ concludes that the claimant's right knee was not a body part contemplated to be covered by the medical benefits exemption of the parties' Partial Settlement Agreement. As a result, treatment of the claimant's right knee was forever excluded from this claim by application of Partial Settlement Agreement.

27. Furthermore, although the claimant timely requested a hearing following the DIME report of Dr. Wakeshima, the only issues endorsed at that time were PTD benefits and disfigurement. The claimant did not contest Dr. Wakeshima's opinions regarding causation, diagnoses, or MMI. All of these issues were addressed and resolved pursuant to the language of the Partial Settlement Agreement. Based upon all of the foregoing, the ALJ concludes that pursuant to the Partial Settlement Agreement, the claimant is precluded from asserting a compensable right knee injury and/or aggravation of a pre-existing right knee condition.

CONCLUSIONS OF LAW

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

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the

reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

4. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; see *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

5. A settlement agreement must be interpreted in accordance with the general principles applied to the construction of contracts. *Bopp v. Garden Square Assisted Living* (WC 4-893-767 ICAO February 6, 2014); citing *Cary v. Chevron U.S.A., Inc.*, 867 P.2d 117 (Colo. App. 1993); and *Resolution Trust Corp. v. Avon Center Holdings*, 832 P.2d 1073 (Colo. App. 1992). In *Bopp*, the ALJ determined that the parties' settlement agreement was clear and unambiguous and did not leave the claim open for adjudication of additional issues. In addition, filing requirements are jurisdictional and statutory provisions governing such requirements must be strictly enforced. *Schneider National Carriers, Inc. v. Indus. Claim Appeals Office*, 969 P.2d 817 (Colo. App. 1998).

6. The ALJ finds the parties' Partial Settlement Agreement to be clear and unambiguous. The parties' intent was to settle all issues, with an exception for reasonable, necessary, and related medical expenses. At that time, the claimant's right knee symptoms were unknown to the parties. The ALJ concludes that the claimant waived any treatment of his right knee when he entered into the Partial Settlement Agreement. The ALJ also concludes that the very language of the Partial Settlement Agreement forecloses litigation of additional body parts and conditions. Therefore, the ALJ lacks jurisdiction to award medical benefits for the claimant's right knee. As found, pursuant to the Partial Settlement Agreement, the claimant is precluded from asserting a compensable right knee injury and/or aggravation of a pre-existing right knee condition.

ORDER

It is therefore ordered that the claimant's claim for treatment of his right knee is denied and dismissed.

Dated this 15th day of October 2020.



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUE

1. Whether Respondents established, by a preponderance of the evidence, that Claimant's February 3, 2020 industrial injury resulted from Claimant's willful failure to obey a reasonable rule adopted by Employer for the safety of the employee.

ADMISSIBILITY OF EXHIBIT C

Claimant's objected to the admissibility of Exhibit C on the basis of non-disclosure. Exhibit C is a drawing created by Respondents' expert accident reconstruction expert as part of his notes. Because Exhibit C was not disclosed prior to deposition, Claimant was unable to examine Respondents' expert with respect to this page. Based on the non-disclosure, the ALJ has excluded Exhibit C, and it is not admitted into evidence.

FINDINGS OF FACT

1. Claimant is a 36-year-old forklift operator who has been employed by Employer since February 26, 2018. Claimant was initially hired in another position and was promoted to forklift operator in approximately September 2019. Claimant sustained an admitted injury on February 3, 2020, arising out of and in the course of his employment with Employer.
2. The parties stipulated that Claimant's average weekly wage (AWW) is \$1,854.65, resulting in a maximum benefit rate of \$1,022.56.
3. On February 3, 2020, Claimant was working the night-shift at Employer's warehouse operating a forklift.
4. Claimant's job involved retrieving pallets of various food items from elevated, multi-level racks using a forklift. The elevated product racks consist of four levels, including a ground level, and three elevated shelves approximately 5-7 feet in height. Each elevated shelf is loaded with various pallets of food product that are stored four-deep. Some shelves contain a sliding "pushback" pallet rack mechanism that permits pallets to slide forward on a slightly-sloped rail system to the access point when the preceding pallet in the queue is unloaded. Example photographs of the product racks and the sliding mechanism are contained in Exhibit D. The sliding mechanism is a gravity-fed device which causes pallets to slide forward on the rack to the access point when the preceding pallet is removed.
5. On February 3, 2020, Claimant was operating a forklift attempting to retrieve a pallet of packaged onions from the first elevated shelf on a product rack. He could not access the pallet he was attempting to retrieve because the pallet was set back four to five feet from the front of the shelf, and the push-back mechanism had not slid the pallet forward to allow it to be accessible. Claimant exited his forklift and walked under the

elevated shelf to determine the reason the sliding mechanism had not moved the pallet into the proper position. Claimant testified he was not directly under the pallet but was to the side of the pallet he was inspecting. Claimant did not notify a supervisor or seek assistance with the inaccessible pallet. Instead, Claimant found a 3-4-foot-long piece of wood on the floor, picked it up and used the piece of wood to touch the immobile pallet. When Claimant touched the pallet, the pallet moved forward, and a bag of onions fell from above, striking Claimant in the back of the neck, causing his injury.

6. Employer's safety manager, Edward R[Redacted], testified regarding Employer's safety rules and training for forklift operators. Mr. R[Redacted] did not personally train Claimant or witness the incident on February 3, 2020. Mr. R[Redacted] testified that Employer's forklift operators are trained to contact a supervisor if, during the performance of their job, they encounter a problematic pallet. Mr. R[Redacted] defined a "problematic pallet" as one tipping, stuck, inaccessible or in danger of falling. Mr. R[Redacted] testified that a safety cage may be used in such circumstances to address the problematic pallet, and that this decision would be made by a supervisor. Mr. R[Redacted] testified that Claimant violated the safety rule because he did not notify a supervisor and attempted to remedy a problematic pallet on his own.

7. Prior to becoming a forklift driver, Claimant underwent training with Employer on the safe operation of a forklift. Included within the training materials is a Class II – Forklift Certification Packet, acknowledge by Claimant on September 18, 2019. (Ex. G). In the Pedestrian Safety Training Final Examination successfully completed by Claimant accurately answered that "all safety hazards need to be immediately reported to ... Supervisor/Manager." (Ex. G).

8. Claimant testified that a "stuck" pallet constituted a safety hazard. Claimant also testified that his training required him to notify a member of management in the event a pallet became stuck. Claimant testified that he did not contact a supervisor prior to investigating the inaccessible pallet, and that he made the decision to use the piece of wood to touch the pallet.

9. Claimant testified that he did not believe he was in violation of any safety rule. Claimant testified that he had not previously moved a problem pallet into place without calling a supervisor. Claimant also testified that he would feel it necessary to contact a supervisor if he felt the pallet was up too high to access, or product was falling off of it. Claimant also testified that if it had taken more than one push to dislodge the pallet, he would have called a supervisor.

10. Claimant testified he did not call a supervisor in this instance because he did not have the time to do so. Claimant also testified that he did not believe he violated a safety rule because he needed to be able to "check on things that were happening." Claimant did not believe that the pallet was "stuck" because it moved after he touched it. The ALJ infers from this testimony that Claimant believed he was not obligated to call a supervisor until he had made a determination that the pallet in question was stuck, and that Claimant was using the wooden stick to determine if there was an issue. Claimant testified that he made the decision to address the pallet at issue using the piece of wood he found.

11. Employer conducted a “Safety Committee” review of this incident on or about February 13, 2020 and determined Claimant “acted in a willful manner leading to an injury due to bypassing safety protocols.” The two “protocols” the Safety Committee determined were violated were “What to do if a pallet has fallen or tipped over or is in danger of same (stop and seek a supervisor immediately)” and “Proper use of pallet cage and safety restraints. Get extra help when fixing a pallet. NEVER use a pallet to lift another associate.” (Ex. L). Claimant appealed the Safety Committee decision and participated in an appeal meeting on April 10, 2020.

12. At hearing, Claimant testified that he “lightly” touched the subject pallet with a piece of wood. Claimant’s testimony is inconsistent with other evidence in the case. As part of his appeal, Claimant indicated that he “was going to push [the pallet] with the board, but the pallet released.” (Ex. J). Nurse case management notes indicate that Claimant reported “he tried to unjam [the pallet] with a piece of wood.” (Ex. M). The First Report of Injury, completed by Claimant’s supervisor, indicates Claimant reported that he “pushed the pallet forward with a piece of wood.” (Ex. 4). In the recorded statement Claimant provided to Insurer, Claimant indicated that he “pushed [the pallet] a little” and “Those pallets are easily stuck. So I, I had to push it in order for them to roll....” (Ex. A). The ALJ finds it more likely than not that Claimant applied pressure to the subject pallet, causing it to move.

13. Respondents offered the pre-hearing deposition testimony of Garrick F. Miller, P.E. Mr. Miller is a mechanical engineer with experience and education in accident reconstruction. Mr. Miller conducted an “accident reconstruction” analysis and offered opinions on whether Claimant violated Employer’s safety rules and whether Claimant caused the bag of onions to fall. Mr. Miller’s report indicates the mechanism that caused the bag of onions to fall is not known. Mr. Miller’s report speculates as to the potential causes, and concludes that “irrespective of the exact cause, the bags of onions would not have fallen onto [Claimant] but for his attempt to manually free the stuck pallet from below.” Mr. Miller’s report contains no engineering analysis for this conclusion. While not constituting an “expert” opinion, Mr. Miller’s lay opinion is merely the assertion of a commonsense proposition. The ALJ does not find Mr. Miller’s testimony on causation to be of assistance in understanding the evidence or determining a fact in issue.

14. Mr. Miller’s report and testimony also includes his opinion on whether Claimant’s conduct constituted a violation of Employer’s safety rules. Nothing in Mr. Miller’s curriculum vitae, testimony or report establishes that Mr. Miller is qualified by knowledge, skill, experience, training, or education to offer an expert opinion on the legal issue of whether Claimant violated Employer’s safety rules. Accordingly, the ALJ affords no weight to Mr. Miller’s testimony on this issue.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers’ Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to

injured workers at a reasonable cost to employers, without the necessity of litigation. See § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. See § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id.* at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

SAFETY RULE VIOLATION

Section 8-42-112(1)(b), C.R.S. authorizes a fifty percent reduction in an employee's compensation "[w]here injury results from the employee's willful failure to obey any reasonable rule adopted by the employer for the safety of the employee." A safety rule does not have to be either formally adopted or in writing to be effective. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office*, 907 P.2d 715, 719 (Colo. App. 1995). Therefore, in order to prove a safety rule violation, Respondents must prove 1) there was a known safety rule, 2) Claimant "willfully" violated the enforced safety rule, and 3) Claimant's injury was proximately caused by a willful violation of a safety rule. See, *Bennett Properties Co. v. Indus. Comm'n*, 437 P.2d 548 (Colo. 1969), *Johnson v. Denver Tramway Corp.*, 171 P.2d 410 (Colo. 1946); *Grose v. Riviera Electric*, W.C. No. 4-418-465 (ICAO, Aug. 25, 2000). To establish the existence of a safety rule, respondents must either show that there was a written or oral rule that is given by someone generally in authority and heard and understood by the employee. *Bennett*, 437 P.2d at 552; *Jentzen v. Northwest Transport*, W.C. No. 4-009-435 *1 (ICAO, Apr. 24, 1992) (employee must know of the device or the rule).

To establish that a violation of §8-42-112(1)(b), C.R.S. has been willful, a respondent must prove by a preponderance of the evidence that a claimant acted with “deliberate intent.” *In re Alvarado*, W.C. No. 4-559-275 (ICAO, Dec. 10, 2003). “The claimant’s conduct is “willful” if he intentionally does the forbidden act, and it is not necessary for the respondents to prove that the claimant had the rule ‘in mind’ and determined to break it.” *In re Burd*, W.C. No. 5-085-572-01 (ICAO July 9, 2019).

Respondents need not establish that an employee had the safety rule in mind and decided to break it. *In re Alvarado*, W.C. No. 4-559-275 (ICAO, Dec. 10, 2003). Rather, it is sufficient to show the employee knew the rule and deliberately performed the forbidden act. *Id.* However, willfulness will not be established if the conduct is the result of thoughtlessness or negligence. *In re Bauer*, W.C. No. 4-495-198 (ICAO, Oct. 20, 2003). “Willfulness” also does not encompass “the negligent deviation from safe conduct dictated by common sense.” *In re Gutierrez*, W.C. No. 4-561-352 (ICAO, Apr. 29, 2004). Whether an employee has deliberately violated a safety rule is a question of fact to be determined by the ALJ. *Lori’s Family Dining, Inc.*, 907 P.2d at 719.

Generally, an employee’s violation of a rule to facilitate the accomplishment of the employer’s business does not constitute willful misconduct. *Grose v. Rivera Electric*, W.C. No. 4-418-465 (ICAO, Aug. 25, 2000). However, an employee’s violation of a rule to make the job easier and speed operations is not a “plausible purpose.” *Id.*; see 2 *Larson’s Workers’ Compensation Law*, § 35.04.

Respondents have met their burden of establishing that Claimant’s injuries were the result of his knowing violation of a safety rule. The safety rule requiring a forklift operator to contact a supervisor when a pallet is stuck or inaccessible was a known rule. Both Claimant and Mr. R[Redacted] testified that one of the safety rules applicable to Claimant’s position was that Claimant contact a supervisor if he were to encounter a pallet that was stuck, inaccessible, or otherwise problematic.

Claimant’s conduct was willful. Claimant encountered a pallet that was apparently stuck. Rather than contact a supervisor, Claimant attempted to remedy the issue by walking below (or to the side below) the pallet and using a piece of wood he found on the floor to attempt to dislodge the pallet. Claimant’s testimony established that he deliberately used the piece of wood to inspect or attempt to move the pallet. If a pallet is in a precarious position, the rule exists to permit a supervisor to decide how to address the situation. Rather than consult a supervisor, Claimant made the decision to attempt to dislodge the pallet. This was done knowingly and intentionally (i.e., Claimant deliberately touched the pallet with a piece of wood while standing within the confines of the storage racks).

The ALJ finds it more likely than not that Claimant’s action caused his injury. Claimant initiated a sequence of events that caused the stuck pallet to move. Claimant testified that the bag of onions fell immediately when the pallet began to move. It is more likely that the Claimant’s actions caused the movement of the pallet, which dislodged the bag of onions, than for the sequence of events to have been merely coincidental.

Respondents have proven by a preponderance of the evidence that Claimant willfully failed to obey a safety rule on February 3, 2020, and his non-medical benefits should thus be reduced by fifty percent.

ORDER

It is therefore ordered that:

1. Claimant committed a willful failure to obey a reasonable safety rule adopted by Employer in violation of §8-42-112(1)(b) C.R.S. Accordingly, his non-medical benefits shall be reduced by fifty percent.
2. All matters not determined herein are reserved for future determination.

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



DATED: October 15, 2020.

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

- Did Respondents prove Claimant's post-MMI medical benefits should be terminated as no longer reasonably necessary or related to the admitted industrial accident?

FINDINGS OF FACT

1. Claimant worked for Employer as a Medical Assistant. On November 27, 2015, she was working with a young patient at the Colorado Springs clinic when Robert Dear attacked the clinic and perpetrated a mass shooting. Fearing for their lives, Claimant and the client barricaded themselves in the room and hoped Dear would not find them. For the next several hours, Claimant could hear Dear rampaging through the facility, terrorizing and killing other occupants of the building and engaging in a protracted standoff with police. At one point, bullets penetrated the room in which Claimant and the patient were hiding. The situation ended when SWAT teams crashed armored vehicles into the lobby of the building and Dear surrendered. Claimant and the patient were the last to be rescued because no one knew they were there.

2. The experience was extremely frightening and highly traumatic for Claimant. Although Claimant suffered no physical injuries, she developed post-traumatic stress disorder (PTSD).

3. Claimant has received psychiatric treatment since the injury, including psychotherapy and medications. Eventually, Dr. Timothy Sandell was designated the primary ATP, although treatment has been managed by providers at Aspen Pointe.

4. Claimant has a remote history of situational depression for which she received brief treatment. She briefly sought mental health treatment while she was 19 years old and attending college in Montana. Claimant went through a period of depression related to stressful family issues and the death of her best friend. She was prescribed Prozac, 20 mg on March 3, 2009. The last treatment note from that time period was dated May 5, 2009, and states "regarding depression, she is doing much better. Almost finished moving back to home for the summer and then transferring, feels confident. Stopped Ambien and sleeping well without it." Claimant stopped taking Prozac by June or July 2009.

5. In December 2012, Claimant sought counseling because she was going through a period of high stress. She wanted a referral to a therapist because she was "really stressed and would appreciate someone to talk to." Her physician, Dr. Kurt Lesh, stated her problem was "high stress at work and at home, obviously situational."

6. There is no persuasive evidence of any other mental health issues before the traumatic event on November 27, 2015.

7. Dr. Robert Kleinman performed multiple IMEs for Respondents during this claim. In his initial report dated February 15, 2018, Dr. Kleinman opined Claimant developed PTSD solely because of the workplace trauma. He thought she was approaching MMI and would have permanent impairment when she reached MMI. He recommended no more than 12 additional psychotherapy sessions over the ensuing six months, at which point she should be at MMI. Once at MMI, she should receive no more than 12 sessions over six months, although periodic psychotherapy sessions may be needed to manage her PTSD through civil and criminal trials involving Dear. Dr. Kleinman opined medications should continue for one year after MMI, and then be tapered off or continued outside the claim.

8. On August 11, 2018, Dr. Kleinman opined Claimant had reached MMI. He recommended one final psychotherapy session, and if desired, she could transition treatment outside the claim. Concurrently, Dr. Kleinman recommended continuing medication for 3 to 6 months. After that, if claimant wished to continue medication, she should transition outside the workers' compensation system.

9. Claimant followed up with Dr. Sandell on December 18, 2018. He noted he had not seen her since August 28, 2017 because "she has appropriately been primarily under the care of a psychiatrist and a psychotherapist." Claimant reported she was still in therapy and did not feel she had returned to her preinjury "baseline." Dr. Sandell agreed Claimant was at MMI, although he utilized the date of the appointment because he had not seen her in over a year. He agreed she had impairment but would need a referral to a Level II psychiatrist because he does not perform psychiatric ratings. Regarding treatment after MMI, Dr. Sandell agreed with some of Dr. Kleinman's recommendations. He agreed psychotherapy could be stopped but recommended four to six more visits to facilitate a "smooth transition." Regarding medications, he opined,

I think these should be continued long-term and possibly chronically. She was not on any type of antidepressant prior to this industrial injury and therefore, ongoing need will relate to the injury. I do not feel that this type of medication can simply be switched and determined at one point that it is no longer related to the injury, as that was the original cause of her anxiety/depression. Therefore, I would recommend ongoing medication as covered by workers' compensation.

10. He also thought Claimant was at risk for periodic recurrence of symptoms and decompensation because of triggers such as a pending court proceeding regarding Dear. Accordingly, he believed maintenance care should include provision for re-engagement with treatment to deal with periodic exacerbations.

11. On April 17, 2019, Dr. Kleinman completed a psychiatric impairment rating. He assigned a 19% whole person rating based on Claimant's continuing PTSD. Regarding maintenance treatment, Dr. Kleinman recommended she complete a limited

course of psychotherapy to smoothly transition from treatment, although she could treatment outside the claim, if she chose to do so. He recommended continuing medications for one year and reassessing at that time whether they are still necessary in relation to the work accident.

12. Claimant saw Dr. Sandell on May 7, 2019. He noted Claimant was “doing fair. She still deals with some of the psychological sequelae as relates to the work injury/episode.” He indicated he would continue to see her for maintenance care and asked her to follow-up in a year.

13. Respondents filed a Final Admission of Liability (FAL) on June 7, 2019 admitting for the rating and reasonably necessary medical treatment after MMI.

14. Dr. Kleinman performed an additional record review on February 18, 2020. He opined Claimant had completed psychotherapy related to the occupational injury and any further therapy should be done “outside of workers’ compensation.” He also recommended Claimant’s medications “be transitioned to a provider outside of workers’ compensation within the next three months. Medications are no longer related to the occupational injury but are related to persistent depression with anxious distress as well as personality issues that have been identified in therapy.”

15. Claimant returned to Dr. Sandell on May 5, 2020. Dr. Sandell noted “she has remained on psychiatric medications including venlafaxine, prazosin, and as-needed use of buspirone. This has been followed by providers at Aspen Pointe and Dr. Day Gould [sic]. She reports the same symptoms in dealing with posttraumatic stress disorder. She still has some triggers.” Dr. Sandell opined, “I support her need for ongoing maintenance care which has included medications and follow-up through Aspen Pointe and Dr. Gould. I never put a time limit on the need for maintenance care as it may be a long-term/chronic need. . . . I have seen her intermittently and have primarily addressed case management issues. I will follow-up with her in 1 year. Her follow-ups here can be discontinued if her treatment is stable and she continues care through her treating providers. If her ongoing psychiatric needs as relates to the work comp injury are being questioned, I will again defer those issues to a specialist in psychiatry.”

16. On May 26, 2020, Dr. Sandell completed a questionnaire from Respondents in which he “deferred” to Dr. Kleinman regarding whether ongoing medications and therapy were causally related to the work injury.

17. Dr. Kleinman testified at hearing consistent with his report. He opined further psychotherapy or medication only treats Claimant’s personal issues, unrelated to the workplace injury. He testified recent Aspen Pointe records demonstrate Claimant has other issues she has been dealing with, and her continued therapy is focused personal issues relating to her family, new relationships, the death of her niece, and a new job.

18. Claimant’s medications were initially prescribed by Dr. Chanel Heerman at Aspen Pointe, and are currently managed by Dayanara Gohil, a psychiatric nurse practitioner. Claimant’s medications are reassessed at approximately three-month

intervals. Although Claimant's PTSD symptoms have improved over time, they continue to impact her functioning. Her moods are generally stable, but she continues to struggle with intrusive thoughts, avoid behavior, and nightmares. The medications are helpful and Claimant would probably decompensate were the medications stopped. The records contain no persuasive evidence of any significant non-PTSD-related mental health issues that would warrant regular medications.

19. Claimant attends psychotherapy sessions at Aspen Pointe approximately every 7-14 days. Her current therapist is Sam Martin, MSW, LCSW. The most recent treatment note submitted into evidence is dated January 9, 2020. Records from November 2019 to January 9, 2020 show PTSD-related issues were a focus of treatment during at least 75% of the sessions. On July 25, 2020, Mr. Martin wrote a letter confirming Claimant was actively addressing issues of PTSD in therapy. He opined PTSD "impacts the whole individual, socially, emotionally, relationships with others, view of themselves, and their place in the world. During [Claimant's] time in clinical services, the whole person is being addressed as the symptoms of Post-Traumatic Stress Syndrome impact the entire individual." He persuasively opined Claimant would benefit from continued therapy.

20. Respondents failed to prove a basis to withdraw their admission for medical benefits after MMI. Respondents failed to prove psychiatric medications and psychotherapy are no longer reasonably needed or causally related to Claimant's admitted injury.

CONCLUSIONS OF LAW

The respondents are liable for medical treatment from authorized providers that is reasonably necessary to cure or relieve the employee from the effects of the industrial injury. Section 8-42-101(1)(a); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). The need for medical treatment may extend beyond maximum medical improvement (MMI) if the claimant requires periodic maintenance care to prevent further deterioration of their physical condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). An injury need not be the sole cause of a claimant's need for treatment so long as there is a "direct causal relationship" to the industrial accident. *Seifreid v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1996); *Munoz v. JBS Swift & Co. USA, LLC*, W.C. No. 4-780-871-03 (October 7, 2014).

Even where the respondents admit liability for medical benefits after MMI, they retain the right to challenge the compensability and reasonable necessity of specific treatment. *Hanna v. Print Expeditors Inc.*, 77 P.3d 863 (Colo. App. 2003). Ordinarily, the claimant must prove by a preponderance of the evidence that an injury directly and proximately caused the condition for which he seeks benefits, and that the requested treatment is reasonably necessary. *Walmart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). But § 8-43-201(1) was amended in 2009 to place the burden of proof on the party seeking to modify an issue determined by an admission or order. If the effect of the respondents' challenge to medical treatment is to terminate all previously admitted maintenance benefits, the respondents must prove no further treatment is

reasonably necessary or related to the injury. *Salisbury v. Prowers County School District RE2*, W.C. No. 7-702-144 (June 5, 2013); *Dunn v. St. Mary Corwin Hospital*, W.C. No. 4-754-838 (October 1, 2013). The fact a claimant received a rating for a particular diagnosis or body part does not bind the ALJ when considering relatedness of medical treatment after MMI. *Yeutter v. CBW Automation, Inc.*, W.C. No. 4-895-940-03 (February 26, 2018).

Respondents failed to prove a basis to withdraw their admission and terminate Claimant's entitlement to post-MMI medical treatment. The persuasive evidence shows Claimant still needs treatment for PTSD, and the treatment she has been receiving is reasonably necessary. Dr. Sandell's opinions expressed in his December 18, 2018 and May 5, 2020 reports regarding Claimant's likely "chronic" need for medication and lack of arbitrary "time limits" on treatment are credible and persuasive. It is unclear why Dr. Sandell suddenly punted the causation issue to Dr. Kleinman on May 26, 2020, particularly given that Claimant's circumstances have not changed significantly in the interim. It is also puzzling that he would "support her need for ongoing maintenance care which had included medications" but simultaneously "defer" a causation determination to an IME. The rationale regarding medications he set forth in 2018 is equally valid now. Regardless of whether Claimant had some predisposition to anxiety or depression, she was not receiving psychiatric treatment before the work accident and everyone agrees the traumatic experience at work caused her to develop PTSD. In any event, Dr. Sandell is probably not the best treating provider to ask whether ongoing medications or therapy are reasonably needed or related to the accident because he is not actively managing Claimant's psychological treatment. Records from Claimant's quarterly medication review appointments at Aspen Pointe show she continues to struggle with hypervigilance, avoidance behaviors, intrusive thoughts, and nightmares. The medication helps manage her PTSD-related symptoms and stabilize her moods. The ALJ agrees with Dr. Kleinman the medications are needed to treat "persistent depression with anxious distress," but disagrees those symptoms are unrelated to the work accident and PTSD. Respondents failed to prove Claimant's access to psychotropic medications should be terminated. The preponderance of persuasive evidence shows medications are reasonably needed to relieve the effects of the work injury and prevent deterioration of Claimant's condition.

The arguments that Claimant no longer needs psychotherapy related to the injury and should transition to paying for it herself "outside of workers' compensation" are not persuasive. Dr. Kleinman's assertion that therapy is now primarily focused on routine personal issues is not accurate. PTSD remains a significant aspect of her therapy sessions. Claimant persuasively testified psychotherapy helps manage her PTSD. Although she also works through some personal, non-PTSD related issues in therapy, it is difficult, if not impossible, to cordon off those issues given how broadly PTSD impacts the "whole individual," as noted by Mr. Martin. Psychological sequelae of the November 2015 trauma is the predominant driver of Claimant's current need for therapy. Given the ongoing causal nexus to the injury, there is no justification for forcing Claimant to assume the cost of therapy "outside of workers' compensation." As with the medications, the preponderance of evidence shows ongoing psychotherapy is reasonably needed to relieve the effects of the work injury and prevent decompensation.

ORDER

It is therefore ordered that:

1. Respondents' request to terminate Claimant's post-MMI medical benefits is denied and dismissed. Insurer shall continue to cover medical treatment after MMI from authorized providers reasonably needed to relieve the effects of Claimant's admitted injury and prevent deterioration of her condition.
2. All issues not decided herein are reserved for future determination.

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

DATED: October 16, 2020

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

- Whether claimant has demonstrated by a preponderance of the evidence that her claim should be reopened pursuant to Section 8-43-303, C.R.S.?
- The parties stipulated at the commencement of the hearing that if the claimant prevails on the reopening issue, respondents have the opportunity to respond to the whole person impairment rating as they would if the claim were open pursuant to Section 8-42-107(8)(c), C.R.S. and W.C.R.P. 5-5(D)(1), including the ability to request a Division-sponsored Independent Medical Examination ("DIME").

FINDINGS OF FACT

1. Claimant was employed with employer as an assistant grocery manager. Claimant sustained a compensable work injury on July 1, 2018 when she was pushing a bookshelf and felt a pop in her right knee. Claimant sustained a second injury that same day when a co-worker kicked out claimant's right knee causing her knee to buckle.

2. Claimant came under the care of Dr. McLellan for her work injury. Dr. McLellan treated claimant conservatively and provided claimant with work restrictions that included no lifting more than 10 pounds and no walking or standing greater than two hours per day as of July 5, 2017.

3. Claimant underwent a magnetic resonance image ("MRI") of her hip and was diagnosed with a labral tear. Claimant subsequently underwent an arthroscopy of the left hip on October 24, 2017 and was diagnosed with synovitis.

4. Claimant underwent left hip surgery with Dr. Scheffel on October 5, 2017. The postoperative diagnosis was a small labral tear requiring minimal debridement but no repair and iliopsoas tendonitis and synovitis. Following surgery, claimant was referred for physical therapy.

5. Claimant continued to treat with Dr. Scheffel with complaints of left hip pain and low back pain. Dr. Scheffel also noted complaints of numbness in her foot as well as continued groin pain. Dr. Scheffel recommended evaluation of claimant's low back.

6. Claimant was referred to Dr. Tice on April 23, 2018. Dr. Tice noted claimant's complaints of left hip and groin pain with pain that occasionally goes to her knee with numbness in her big toe. Dr. Tice noted claimant was pregnant and in her first trimester. Dr. Tice diagnosed claimant with possible left sacroiliitis and possible left L5 radiculopathy. Dr. Tice opined that claimant's injury was simply related to the hip, but noted that she had features of sciatica and nerve root issues that were mild to

moderate. Dr. Tice recommended an MRI along with conservative treatment as claimant was currently pregnant.

7. Claimant underwent an independent medical examination (“IME”) with Dr. Bernton on June 13, 2018. Dr. Bernton reviewed claimant’s medical records, obtained a medical history and performed a physical examination in connection with his IME. Dr. Bernton noted that his evaluation demonstrated tenderness with palpation of the left SI joint, tenderness of the left trochanteric bursal region and a positive left piriformis test. Dr. Bernton recommended claimant be evaluated for a rheumatologic perspective since she was not improved post operatively. Dr. Bernton also noted claimant had a history of a similar episode previously in her right hip. Dr. Bernton noted that claimant was pregnant and back pain was quite common, including SI joint pain. Dr. Bernton opined that claimant had pregnancy associated low back pain which he anticipated would worsen as claimant’s pregnancy progressed. Dr. Bernton further opined that pregnancy related back pain will often times resolve after delivery. Dr. Bernton recommended a rheumatology evaluation and a repeat MRI of the hip.

8. Claimant returned to Dr. Scheffel on June 19, 2018. Dr. Scheffel noted claimant reported her groin pain and intraarticular hip joint pain had improved, but was complaining of increased trochanteric iliotibial band pain. Dr. Scheffel recommended claimant continue physical therapy. Dr. Scheffel recommended that claimant continue to explore further workup of the SI joint pain, but did not recommend any further treatment for her hip.

9. Claimant returned to Dr. Tice on June 21, 2018. Dr. Tice recommended a repeat MRI scan. The MRI scan was performed on March 7, 2019 which revealed degenerative disc disease at L5-S1 with a disc bulge resulting in right lateral recess stenosis and mild right neural foraminal stenosis.

10. Claimant returned to Dr. McClellan on March 27, 2019. Dr. McClellan reviewed the MRI and noted that it did not reveal any findings that would correlate to the symptoms claimant was reporting on the left side of her low back. Dr. McClellan opined that the source of claimant’s pain was likely the left hip and noted that the pain had persisted since the time of her initial injury. Dr. McClellan recommended a repeat MRI of the left hip.

11. The repeat MRI of the left hip was performed on March 29, 2019 and showed no evidence of a labral tear and no definite etiology of claimant’s left sided symptoms.

12. Dr. Bernton issued a supplemental report on April 2, 2019 after reviewing the low back MRI. Dr. Bernton opined that the MRI did not demonstrate objective evidence that would correspond to claimant’s reported left sided symptoms.

13. Claimant underwent an IME with Dr. Scott on June 25, 2019. Dr. Scott opined that claimant’s original mechanism of injury was minor and resulted in complaints of left hip pain. Dr. Scott opined that the mechanism of injury did not explain

claimant's continuing symptoms including the left SI joint pain. Dr. Scott opined that there could be a possible inflammatory cause of claimant's synovitis, tendonitis and bursitis that would not be related to claimant's work injury.

14. Claimant returned to Dr. McClellan on September 25, 2019. Dr. McClellan opined claimant was at maximum medical improvement ("MMI") and referred claimant to Dr. Price for an impairment rating.

15. Claimant was examined by Dr. Price on October 23, 2019. Dr. Price opined that claimant was at MMI and provided claimant with an impairment rating of 11% of the lower extremity for loss of range of motion. Dr. Price also provided claimant with an additional 3% impairment under "other musculoskeletal system defect" on page 52 of the AMA Guides Third Edition, Revised, because claimant's rating did not adequately define the severity of her clinical findings. Dr. Price combined the ratings and provided claimant with a permanent impairment rating of 14% of the lower extremity. Dr. Price noted that this converted to a whole person impairment rating of 6%.

16. Respondent filed a final admission of liability ("FAL") on November 19, 2019 admitting for the 14% scheduled impairment rating. Claimant filed an objection to the FAL and an Application for Hearing on December 18, 2019 endorsing the issues of PPD and disfigurement.

17. Claimant's counsel inquired with Dr. Price on January 28, 2020 as to whether claimant's ongoing SI joint dysfunction was ratable under Table 53 II(B) as a whole person impairment rating¹. Dr. Price marked the letter on January 28, 2020 indicating that the impairment was ratable under Table 53 II(B) and noted that she was willing to evaluate claimant to determine the extent of her impairment under Table 53 II(B).

18. Dr. Price made an appointment with claimant that was set for the day after the hearing set on claimant's December 18, 2019 application for hearing. Claimant's request for an extension of time until after the appointment with Dr. Price for the medical appointment was denied by Pre-hearing Administrative Law Judge Sandberg on February 27, 2020.

19. Claimant proceeded to hearing on the issue of PPD benefits on April 7, 2020. Claimant again sought an extension of time for the hearing which was denied by the ALJ. The court converted claimant's scheduled impairment rating to a non-scheduled award of PPD benefits on April 30, 2020 with a subsequent Corrected Order being issued on May 13, 2020.

20. Claimant was examined by Dr. Price on April 8, 2020. Dr. Price provided claimant with an additional 10% whole person impairment consisting of 5% for a specific

¹ The letter to Dr. Price cites to Table 52, however the ALJ finds this to be a typographical error as the appropriate Table referenced in the rating tips and Dr. Price's evaluation is Table 53.

disorder of the lumbar spine pursuant to Table 53 II(B), and 5% for loss of range of motion.

21. Respondent filed a revised FAL on May 8, 2020 awarding claimant PPD benefits based on the 6% whole person award of benefits. Claimant filed an Objection to the FAL on June 3, 2020 along with a Petition to Reopen and an Application for Hearing endorsing the issue of additional benefits based on Dr. Price's new impairment rating.

22. Claimant argues at hearing that this case should be reopened based on a mistake in that Dr. Price's initial impairment rating omitted the evaluation of claimant's lumbar spine. Respondent argues that claimant's case should not be reopened as the attempt to reopen the case would circumvent the DIME process. Respondent argues that *Justiniano v. Industrial Claim Appeals Office*, 2016 COA 83, 410 P.3d 659 (Colo. App. 2016) supports the finding that seeking a Petition to Reopen the claim where the proper avenue to challenge the claim is through a DIME would be improper.

23. The ALJ notes that in the present case, Dr. Price only evaluated claimant for an impairment rating. Dr. Price's finding with regard to the extent of the impairment rating failed to include a rating for her lumbar spine. When asked by claimant about the impairment rating, Dr. Price conceded that her impairment rating should have included a lumbar spine rating and requested a follow up appointment.

24. Under the circumstances of this case, the ALJ finds that claimant has established that it is more likely than not that Dr. Price made a mistake by failing to include an impairment rating for her lumbar spine and grants Claimant's Petition to Reopen the claim. The ALJ finds that the mistake in this case is one that is contemplated by the language of Section 8-43-303, C.R.S. and therefore, finds that the claimant's claim should be reopened based on the opinion of Dr. Price that an impairment rating for the lumbar spine should have been included in her final impairment rating.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2017).

3. At any time within six years after the date of injury, the ALJ may reopen an award on the ground of a fraud, an overpayment, an error, a mistake, or a change in condition. Section 8-43-303(1), C.R.S. The party attempting to reopen an issue or claim shall bear the burden of proof as to any issues sought to be reopened. Section 8-43-303(4).

4. A mistake in diagnosis has previously been held sufficient to justify reopening. *Berg v. Industrial Claim Appeals Office*, 128 P.3d 270, 273 (Colo. App. 2005), citing *Standard Metals Corp. v. Gallegos*, 781 P.2d 142 (Colo. App. 1989). At the time a final award is entered, available medical information may be inadequate, a diagnosis may be incorrect, or a worker may experience an unexpected or unforeseeable change in condition subsequent to the entry of a final award. *Id.* When such circumstances occur, Section 8-43-303 provides recourse to both the injury worker and the employer by giving either party the opportunity to file a petition to reopen the award. *Id.* The reopening provision, therefore, reflects the legislative determination that in "worker's compensation cases the goal of achieving a just result overrides the interest of litigants in achieving a final resolution of their dispute." *Id.*

5. In this case, pursuant to the opinion by Dr. Price, claimant should have been provided an impairment rating for her lumbar spine condition during the October 23, 2019 evaluation. As found, claimant has demonstrated by a preponderance of the evidence that Dr. Price made a mistake by not including an impairment rating for her lumbar spine condition until after the April 8, 2020 examination.

6. As found, claimant has established by a preponderance of the evidence that her claim should be reopened based on a mistake. The parties retain all rights reserved at the commencement of the hearing.

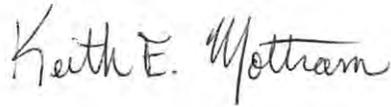
ORDER

It is therefore ordered:

1. Claimant's petition to reopen is hereby GRANTED.

2. All matters not determined here are reserved for future determination.

Dated: October 19, 2020



Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

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

ISSUES

- I. Has Claimant shown, by a preponderance of the evidence, that she is entitled to medical maintenance benefits as a result of her admitted work injuries?
- II. Has Claimant shown, by a preponderance of the evidence, that her left shoulder scheduled impairment rating should be converted to the whole person?
- III. Has Claimant shown that she is entitled to disfigurement benefits?

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

The Work Injury

1. Claimant is a police officer for the Pueblo Police Department. On February 2, 2018, Claimant was involved in a motor vehicle accident, and sustained injury to her left shoulder. Claimant was wearing her seatbelt, and the airbags deployed. That claim was admitted. Claimant began to treat a CCOM in Pueblo, CO.
2. Claimant was still symptomatic from the February 2, 2018 injury when she sustained a second, admitted injury on April 12, 2018. Claimant was restraining a combative suspect. During this event, Claimant heard a loud pop, also in her left shoulder, and reported an immediate onset of severe pain. Claimant reported this injury to Employer, and she was again referred to CCOM for medical treatment.
3. No additional benefits issued on the February 2, 2018 claim after the April 12, 2018 injury. Instead, all benefits were issued under this second claim.
4. Following the second injury, Claimant has continued to work as a police offer, but has now been promoted to detective.

Claimant's Treatment through her ATP

5. On April 20, 2018, Claimant first reported to Dr. Centi at CCOM pain 70% of the time, at a level of 6/10. (Ex. D, p. 33). On physical examination, Dr. Centi noted normal cervical spine range of motion and no pain to palpation of the cervical spine. Dr. Centi diagnosed "[s]train of muscle(s) and tendon(s) of the rotator cuff of left shoulder.." Claimant was to continue home exercises and chiropractic care. *Id* at 30.
6. Claimant has treated with CCOM up through the date of MMI. As noted, Claimant was initially treated by Dr. Thomas Centi, but her care was eventually changed

to Dr. Daniel Olson. While Claimant was still under Dr. Centi's care, on numerous dates, his notes indicate that Claimant had full cervical range of motion ("ROM"), and was pain free. However, on a number of those dates, Claimant reported, via her written pain diagram, that in fact she was experiencing pain and ROM issues, often including areas proximal to the left glenohumeral joint.

7. Claimant was also referred by Dr. Centi to Derek Stickler, DC, for chiropractic treatment of her neck and left shoulder. Claimant treated with Dr. Stickler from April 25, 2018 to February 4, 2019. (Ex. 3). On April 25, 2018, Dr. Stickler performed a physical evaluation. Dr. Stickler noted that he performed a spinal palpation evaluation of Claimant that revealed

Spinal Palpation: Palpation of the patient's spine and extremities revealed the following areas of restrictions; cervical, thoracic and anterior humerus left. Palpitation of the muscles revealed spasm in the following areas; bilateral cervical paraspinals, upper left trapezius left, levator scapula left, rotator cuff muscles (SITS) left and thoracic paraspinals. (Ex. 3, p. 15).

8. During Claimant's treatment with Dr. Stickler her physical presentation and Dr. Stickler's palpation examinations remained fairly consistent. Dr. Stickler also documents Claimant's lumbar dysfunction. At hearing, Claimant testified that that she does have lumbar dysfunction, which she mentioned to Dr. Stickler; however, that this is not a work-related condition. Instead, it has been a longstanding issue.

9. Claimant was also referred by her ATP to massage therapist Joyce Kratzer for therapy on her neck and shoulder area. Claimant treated with Ms. Kratzer from June 12, 2018 to July 18, 2018. On each visit, Ms. Kratzer noted that her "Palpatory Examination" showed objective signs of hypertonicity as well as trigger points of the "supraspinatus, subscapularis, teres, infraspinatus, deltoid, pectoralis major and minor, trapezius and levator scapula." (Ex. 2).

10. The pain diagram produced by Claimant on her first visit to this provider shows Claimant's pain complaints extended up to the side of her neck on the left side. The treatment notes indicate that the massage therapy was beneficial, but temporary. When the massage therapy was completed, Claimant was still reporting symptoms.

Left Shoulder Surgery

11. Claimant was referred by Dr. Olson to Dr. Thomas Noonan for orthopedic evaluation. On 11/18/2018, Dr. Noonan performed a left sided arthroscopic posterior labral repair with suture capsulorrhaphy. (Ex. R. pp. 114-17).

12. At a follow-up, on April 16, 2019, Dr. Noonan saw Claimant, who reported doing well with some mild weakness. Upon left shoulder physical examination, Dr. Noonan found the surgical incision well-healed, excellent motion, stable with posterior translation of the humeral head and good strength. (Ex. CC, p. 172).

13. On May 14, 2019, Dr. Noonan again saw Claimant, who reported doing

quite well. Claimant reported, “[S]he can return to full duty at this time.” Upon left shoulder physical examination, Dr. Noonan found excellent motion, excellent strength and no instability. Dr. Noonan’s only treatment recommendation was to continue home strengthening. Dr. Noonan opined that Claimant was at MMI and may resume full duty work without restriction. Dr. Noonan noted Claimant could follow-up as needed. (Ex. EE, pp. 181-82).

Continued Treatment, Post-Surgery

14. Following Dr. Noonan’s surgery, Claimant continued to treat with Dr. Olson at CCOM. Claimant was examined by Dr. Olson on February 26, 2019. He noted her post-surgical shoulder pain and documented “[s]he also got some discomfort up in to the neck area.” (Ex. AA, p. 154).

15. As Claimant recovered from her surgery, and began to return to her job duties, Claimant’s pain diagrams consistently show pain up into the neck area on the following dates: 2/26/19 (Ex. AA, p. 159), 3/26/19 (Ex. BB, p. 170), 5/5/19 (Ex. DD, p. 179), 5/15/19 (Ex. FF, p. 186), and 6/12/19* (Ex. GG, p. 192). *Claimant was placed at MMI on 6/12/19.

16. Claimant was also referred by her ATP to Nora Harley, C.M.M.T, for more massage therapy. Claimant treated with Ms. Harley from February 2, 2019 to April 8, 2019. (Ex. 4, pp. 86-89). These medical records document Claimant’s pain and functional limitations in her neck. Despite several massage therapy sessions, Claimant remained symptomatic in her neck as of April 8, 2019 when this treatment was discontinued. (Ex. 4, p. 89).

17. Claimant was formally placed at MMI by Dr. Olson via letter on June 24, 2019. (Ex. HH). Dr. Olson makes no mention of symptomology of the cervical spine. Dr. Olson provided a 5% left upper extremity impairment rating, declined to provide Claimant with any permanent restrictions, and opined that future medical care was not warranted. Dr. Olson noted Claimant “can do A.D.Ls” and that there was no reason to believe Claimant was likely to suffer injury, harm, or further medical impairment by engaging in usual activities of daily living or other activities necessary to meet personal, social, and occupational demands. (Id. at p. 198).

18. On November 6, 2019, Respondent filed a FAL consistent with Dr. Olson’s opinions. Claimant objected in a timely manner and requested a Division sponsored Independent Medical Evaluation. Dr. Miguel Castrejon was selected to be the DIME physician.

DIME by Dr. Castrejon

19. Claimant was seen by Dr. Castrejon on March 6, 2020. (Ex. II, pp. 207-218). Dr. Castrejon agreed with the MMI date of 6/12/2019 by Dr. Olson. Dr. Castrejon noted Claimant’s continued complaints of pain and functional limitations in the left shoulder, shoulder girdle, and neck. In his physical exam, Dr. Castrejon noted that

there was a limitation of Claimant's cervical extension at 50 degrees. Dr. Castrejon stated that he does not believe that Claimant sustained a direct injury to her neck. Instead, he notes that "it is my professional opinion that there is sufficient documentation that supports involvement proximal to the glenohumeral joint that supports a whole person level of impairment." (Ex. II, p. 215). Dr. Castrejon recommended maintenance care intended to maintain Claimant's level of functioning. *Id* at 216.

20. On April 21, 2020, Respondents filed a new FAL. Respondents admitted to 8% impairment of the left upper extremity, but not to the converted 5% whole person as opined by Dr. Castrejon. Respondents denied maintenance medical benefits. (Ex. II, p. 200). Claimant timely objected to the FAL. and the matter was set for hearing.

IME by Dr. Ciccone

21. Respondents obtained the IME of Dr. William Ciccone. Dr. Ciccone summarized, "As stated above, the claimant never had complaints of symptoms in the cervical spine in any examination (outside of the chiropractic notes)." (Ex. B, p. 27). It is unclear whether Dr. Ciccone reviewed Claimant's pain diagrams, as well as the chiropractic notes. The pain diagrams document cervical spine pain leading up to being placed at MMI. Dr. Ciccone does not mention that Dr. Olson referred Claimant to massage therapy with Nora Harley due to her ongoing neck pain. Dr. Ciccone does not mention Dr. Olson's discussion of neck pain.

Claimant's Hearing Testimony

22. Claimant testified at hearing. She testified that since she has been placed at MMI, she continues to have pain in her shoulder, her shoulder girdle, and the left side of her neck. Claimant testified that she notices that when she uses her shoulder too much, either at work or around the house, she experiences muscle pain and tightness that extends all of the way to the left side of her neck. She testified that when she experiences this condition, it limits how much she can move her neck from side to side or up and down. Claimant testified that the chiropractic treatment was beneficial, but temporary in nature. As of February 4, 2019, Claimant testified that Respondent was no longer willing to authorize additional sessions.

23. Claimant testified that when her pain flared up her neck could hurt to turn to look at her co-workers while in her cubicle. Claimant testified that occasionally while driving her police vehicle the tightness in her neck could cause problems looking over her shoulder at her blind spot. Claimant did not testify that she literally could not perform her regular work duties.

24. Claimant confirmed that since her return to work, she had apprehended suspects and wrestled with people. When asked if "any of your injuries or anything affect how you can do that job or maybe the aftermath" of apprehending or wrestling with suspects. Claimant testified that it "affects the aftermath"; her shoulder and neck area throb and are sore in the aftermath. Claimant did not testify that she literally could

not apprehend or wrestle with suspects.

25. Claimant further testified that she is aware of some things that will cause her neck to flare up, and she attempts to avoid those activities. She also testified that there are things that will flare her neck symptoms without any advanced warning. The stiffness and range of motion issues in her neck affect her activities of daily living. She listed some specific examples of activities in which she is limited, Driving, both at work and outside the work environment, is compromised by her inability to have full range of motion in her neck. She is limited in her yard work, due to the pain and functional deficit in her neck. She testified that her muscle pain in her neck limited her ability to use a computer for long periods of time. Claimant did not testify that these flare ups prevented her from performing her job duties or that she could not actually perform her job duties.

26. On January 7, 2019, Claimant returned to modified duty. During her testimony, Claimant confirmed that since she returned to work, her condition had not changed. Claimant was asked if her condition had now “plateaued”, that “it is what it is”, to which Claimant answered “yes”.

Disfigurement

27. By agreement of the parties, 3 still, color photographs of Claimant’s left shoulder were admitted, and have been labeled as Claimant’s Exhibits 5a, 5b, 5c. Such photographs depict two well-healed arthroscopic surgical scars surrounding the shoulder, each being approximately 10mm x 2mm, without significant coloration contrast or relief compared to the surrounding skin.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers’ Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. §8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers’ compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. §8-43-201, C.R.S.

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

C. Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). In this instance, the ALJ finds Claimant to be sincere and credible in describing her symptoms, both to her medical providers throughout her treatment, and during her hearing testimony.

D. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55, P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968). In this instance, the ALJ finds that while Dr. Ciccone is no doubt sincere in rendering his opinions, he was less than convincing when he effectively sidestepped questioning regarding the observations and findings of the chiropractor, regardless of how he might regard the profession in general.

E. Further, courts are to be "mindful that the Workmen's Compensation Act is to be liberally construed to effectuate its humanitarian purpose of assisting injured workers." *James v. Irrigation Motor and Pump Co.*, 503 P.2d 1025 (Colo 1972).

Medical Maintenance Benefits, Generally

F. To prove entitlement to medical maintenance benefits, the Claimant must present *substantial evidence* to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover v. Industrial Comm'n.*, 759 P.2d 705, 710-13 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609, 611 (Colo.

App. 1995). Once a claimant establishes the probable need for future medical treatment [s]he “is entitled to a general award of future medical benefits, subject to the employer's right to contest compensability, reasonableness, or necessity.” *Hanna v. Print Expeditors, Inc.*, 77 P.3d 863, 866 (Colo. App. 2003); see *Karathanasis v. Chilis Grill & Bar*, W.C. No. 4-461-989 (ICAP, Aug. 8, 2003). An award for *Grover*-type medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that a claimant is actually receiving medical treatment. *Holly Nursing Care Center v. ICAO*, 992 P.2d 701 (Colo. App. 1999); *Stollmeyer v. ICAO*, 916 P.2d 609 (Colo. App. 1995). Whether a claimant has presented substantial evidence justifying an award of *Grover* medical benefits is one of fact for determination by the ALJ. *Holly Nursing Care Center v. Industrial Claim Appeals Office*, 919 P.2d 701, 704 (Colo. App. 1999).

Medical Maintenance Benefits, as Applied

G. While Claimant's apparently does not suffer from shoulder instability per se, and has been released from her orthopedist, the record shows that she still suffers from ongoing myofascial issues proximal to the glenohumeral joint. For reasons unclear, her consistent complaints, up through the date of MMI, of pain in and around her neck were not diligently noted by her ATP. Nonetheless, the ALJ finds that Claimant made such complaints through her pain diagrams. While Dr. Castrejon's opinions on maintenance medical care are not to entitled to presumptive weight, the ALJ nonetheless finds his rationale persuasive. The ALJ also finds Claimant persuasive, insofar as she is willing to undertake any treatment which will assist with her recovery or prevent further deterioration. Claimant has met her burden, and the ALJ finds that a general award of medical maintenance benefits is appropriate.

Conversion of Shoulder to Whole Person, Generally

H. Whether the Claimant sustained a "loss of an arm at the shoulder" within the meaning of § 8-42-107 (2) (a), C.R.S., or a whole person medical impairment compensable under § 8-42-107 (8), C.R.S. is one of fact for determination by the ALJ. In resolving this question, the ALJ must determine the situs of the Claimant's "functional impairment," and the situs of the functional impairment is not necessarily the location of the injury itself. *Langton v. Rocky Mountain Health Care Corp.*, supra; *Strauch v. PSL Swedish HealthcaSystem*, supra. Because the issue is factual in nature, we must uphold the ALJ's determination if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.; *Walker v. Jim Fuoco Motor Co.*, 942 P.2d 1390 (Colo. App. 1997). This standard of review requires us to defer to the ALJ's resolution of conflicts in the evidence, credibility determinations, and plausible inferences drawn from the record. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

I. Whether the Claimant has sustained an "injury" which is on or off the schedule of impairment depends on whether the claimant has sustained a "functional impairment" to a part of the body that is not contained on the schedule. *Strauch v. PSL Swedish Health Care System*, 917 P.2d 366 (Colo. App. 1996). Functional impairment

need not take any particular impairment. Discomfort which interferes with the claimant's ability to use a portion of his body may be considered "impairment." *Mader v. Popejoy Construction Company, Inc.*, W.C. No. 4-198-489, (ICAO August 9, 1996). Pain and discomfort which limits a claimant's ability to use a portion of his body may be considered a "functional impairment" for determining whether an injury is on or off the schedule. See, e.g., *Beck v. Mile Hi Express Inc.*, W.C. No. 4- 238-483 (ICAO February 11, 1997).

Conversion, as Applied

J. Claimant's medical records document throughout her treatment that she has suffered from left shoulder pain that extends all the way to her cervical spine. Dr. Centi referred Claimant for chiropractic care on her neck, due to Claimant's complaints of pain and functional limitations. Dr. Centi also referred Claimant for massage due to cervical spine complaints. Dr. Olson noted these complaints, and Dr. Castrejon found objective evidence of myofascial dysfunction which affected the left side of Claimant's neck. Claimant's testimony is consistent with her medical records. Not only does she have pain in her neck, she has functional limitations in her neck that affect her activities. Once again, while the ALJ does not afford any presumption to the DIME physician's opinion on conversion, the ALJ does find Dr. Castrejon's reasoning persuasive. As such, the *situs of Claimant's functional impairment* extends up past the glenohumeral joint into Claimant's shoulder girdle and up into her neck.

Disfigurement

K. Claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles Claimant to additional compensation. Section 8-42-108 (1), C.R.S. The ALJ Orders that Insurer shall pay Claimant \$500 for that disfigurement. Insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

ORDER

It is therefore Ordered that:

1. Claimant is entitled to a general award of medical maintenance benefits.
2. Claimant's scheduled left shoulder extremity rating is converted to the whole person.
3. Respondents shall compensate Claimant for her disfigurement in the amount of \$500.
4. Respondents shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.
5. All matters not determined herein are reserved for future determination.

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

DATED: October 19, 2020

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

1. Whether Claimant has proven by a preponderance of the evidence that he is entitled to Temporary Total Disability (TTD) benefits for the period April 30, 2020 through July 28, 2020.
2. Whether Respondents have established by a preponderance of the evidence that Claimant was responsible for his termination from employment under §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. (collectively "termination statutes") and is thus precluded from receiving TTD benefits.
3. A determination of Claimant's Average Weekly Wage (AWW).

FINDINGS OF FACT

1. Claimant was hired by Employer on November 13, 2019 as a Warehouse Personnel employee. Claimant was a probationary employee for his first 135 days and could be terminated at Employer's discretion.
2. On January 20, 2020 Claimant suffered admitted industrial injuries to his left foot and left wrist during the course and scope of his employment with Employer. Claimant was specifically riding on an electric pallet jack when he struck a bumper guard, fell off the pallet jack and struck the ground.
3. Claimant obtained medical treatment through Authorized Treating Physician (ATP) Bryan T. Alvarez, M.D. at Thornton COMP. On January 28, 2020 Dr. Alvarez assigned temporary work restrictions including seated duty only, five minutes of stretching every 60 minutes, and no repetitive use or gripping, grasping and squeezing with the left hand.
4. On January 30, 2020 Dr. Alvarez changed Claimant's temporary restrictions to sitting every three hours to ice his left foot, icing his left hand every three hours and prohibiting use of the "Easy Rider" machine. Dr. Alvarez maintained the preceding temporary work restrictions until he released Claimant to full duty employment on February 27, 2020. From January 28, 2020 through February 26, 2020 Claimant continued to earn full wages while working modified duty under restrictions.
5. In a letter dated February 26, 2020 Employer terminated Claimant's employment. The letter specified that new full-time employees were considered probationary employees during their first 135 days working for Employer. During the probationary period employees could be terminated at Employer's sole discretion. The letter noted that Claimant was dismissed for having "failed to demonstrate an acceptable level of performance."

6. Employer's Senior Manager of Warehouse Operations Parker M[Redacted] testified at the hearing in this matter. Mr. M[Redacted] remarked that prior to February 2020 he worked as Employer's Operations Supervisor. He explained that he was responsible for day-to-day operations including hiring and firing recommendations.

7. Mr. M[Redacted] commented that Employer accommodated Claimant's work restrictions with a position that involved repacking/washing beer cans. He explained that the job allowed Claimant to stand or sit as needed and rest his left ankle. Mr. M[Redacted] stated that the position was not created by Employer to accommodate Claimant's modified work restrictions. Instead, the job had always been available and needed to be filled by an employee. Mr. M[Redacted] remarked that there are no limits regarding the length of time Employer will offer modified duty to an injured worker.

8. Mr. M[Redacted] noted that Claimant's disciplinary issues with Employer began on November 17, 2019 or four days after he was hired. Claimant specifically received a Verbal Reprimand for violation of Employer's unexcused absence policy. The notification stated that "[a]ll employees are expected to report to work on time, report to work as scheduled, and to perform a full day's work." The document specified that, because of the "seriousness of this violation, you are receiving a verbal reprimand. Any further violations may result in additional disciplinary action, up to and including dismissal."

9. On December 1, 2019 Claimant received a Written Reprimand for again violating Employer's unexcused absence policy. The document provided that "[a]ll employees are expected to report to work on time, report to work as scheduled, and to perform a full day's work." However, on December 1, 2019 Claimant violated the policy. The document noted that, because of the "seriousness of this violation, you are receiving a written reprimand. Any further violations may result in additional disciplinary action, up to and including dismissal."

10. In addition to formal reprimands, Claimant received coaching from various supervisors between January and February 2020 for safety and attendance concerns. Employer specifically issued warnings to Claimant for violations on January 7, 13, 14 and 15, 2020 as well as February 4, 2020.

11. Mr. M[Redacted] remarked that in early January 2020 he recommended Claimant's termination for his poor work ethic, safety issues and leaving work early on numerous occasions. The termination recommendation occurred within Claimant's 135 day probationary period and prior to his January 20, 2020 industrial injuries.

12. Following Claimant's February 26, 2020 termination from employment, Dr. Alvarez maintained his full duty release from February 27, 2020 through April 29, 2020. On April 30, 2020 Matthew R. Lugliani, M.D. at Thornton COMP assigned temporary work restrictions of 15 minutes of seated work per hour.

13. Claimant's ATP's maintained his temporary work restrictions from April 30 through July 27, 2020. In addressing Claimant's temporary work restrictions, Mr.

M[Redacted] testified that, but for Claimant's termination, Employer would have continued to provide him with modified duty employment.

14. The record reflects that for the period from November 13, 2019 through January 17, 2020 Claimant earned gross wages of \$7,854.79. The preceding period lasted 66 days or 9.4285 weeks. Dividing \$7,854.79 by 9.4285 weeks yields an AWW of \$833.09. An AWW of \$833.09 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

15. Claimant contends that he is entitled to receive TTD benefits for the period April 30, 2020 through July 28, 2020. However, Respondents assert that Claimant was responsible for his February 26, 2020 termination from employment under the termination statutes and is thus precluded from receiving TTD benefits. Initially, on January 20, 2020 Claimant suffered admitted industrial injuries to his left foot and left wrist during the course and scope of his employment with Employer. On January 30, 2020 Dr. Alvarez modified Claimant's temporary work restrictions to sitting every three hours to ice his left foot, icing his left hand every three hours and prohibiting use of the "Easy Rider" machine. Dr. Alvarez maintained the preceding temporary work restrictions until he released Claimant to full duty employment on February 27, 2020. From January 28, 2020 through February 26, 2020, Claimant continued to earn full wages from Employer while working modified duty under restrictions. Employer accommodated Claimant's work restrictions with a position that involved repacking/washing beer cans. The job allowed Claimant to stand or sit as needed and rest his left ankle. However, Employer terminated Claimant's employment on February 26, 2020 based on numerous safety and attendance violations during his period of employment. The record reveals that Claimant received several warnings and coaching from various supervisors preceding his termination. Claimant's actions reflect that he willfully violated Employer's attendance policy.

16. Mr. M[Redacted] noted that Claimant's disciplinary issues with Employer began on November 17, 2019 or four days after he was hired. Claimant specifically received a Verbal Reprimand for violation of Employer's unexcused absence policy. On December 1, 2019 Claimant received a Written Reprimand for again violating Employer's unexcused absence policy. Both infractions specified that "[a]ll employees are expected to report to work on time, report to work as scheduled, and to perform a full day's work." The documents noted that, "[a]ny further violations may result in additional disciplinary action, up to and including dismissal." In addition to formal Reprimands, Claimant received coaching from various supervisors between January and February 2020 for safety and attendance concerns. Notably, Employer issued warnings for Claimant's violations on January 7, 13, 14 and 15, 2020 as well as February 4, 2020. Mr. M[Redacted] remarked that in early January 2020 he recommended Claimant's termination because of a poor work ethic, safety issues and leaving work early on numerous occasions. The termination recommendation occurred within Claimant's 135 day probationary period and prior to his January 20, 2020 industrial injuries. A February 26, 2020 termination letter stated that "new full-time employees were considered probationary employees during their first 135 days working for Employer. During the probationary period, employees could be terminated at Employer's sole discretion. The letter provided that Claimant was dismissed for having

“failed to demonstrate an acceptable level of performance.” Through his repeated attendance and safety violations Claimant exercised some control over the circumstances causing his termination. Claimant precipitated his employment termination by a volitional act that he would reasonably expect to cause the loss of employment. He was thus responsible for his termination and is precluded from receiving TTD benefits.

CONCLUSIONS OF LAW

1. The purpose of the “Workers’ Compensation Act of Colorado” (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers’ Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers’ Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers’ Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge’s factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. See *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *CJI*, Civil 3:16 (2007).

Temporary Total Disability Benefits/Termination For Cause

4. To prove entitlement to Temporary Total Disability (TTD) benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. See Sections 8-42-(1)(g), 8-42-105(4); *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office*, 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term “disability” connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work,

or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (citing *Ricks v. Industrial Claim Appeals Office*, P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic*, 952 P.2d 831, 833 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

5. Under the termination statutes in §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. a claimant who is responsible for his or her termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and wage loss. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1131 (Colo. App. 2008). The termination statutes provide that, in cases where an employee is responsible for her termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, W.C. No. 4-631-681 (ICAO, Apr. 24, 2006). A claimant does not act "volitionally" or exercise control over the circumstances leading to her termination if the effects of the injury prevent her from performing her assigned duties and cause the termination. *In re of Eskridge*, W.C. No. 4-651-260 (ICAO, Apr. 21, 2006). Therefore, to establish that Claimant was responsible for her termination, respondents must demonstrate by a preponderance of the evidence that Claimant committed a volitional act, or exercised some control over her termination under the totality of the circumstances. *See Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994). An employee is thus "responsible" if she precipitated the employment termination by a volitional act that she would reasonably expect to cause the loss of employment. *Patchek v. Dep't of Public Safety*, W.C. No. 4-432-301 (ICAP, Sept. 27, 2001).

6. As found, Claimant contends that he is entitled to receive TTD benefits for the period April 30, 2020 through July 28, 2020. However, Respondents assert that Claimant was responsible for his February 26, 2020 termination from employment under the termination statutes and is thus precluded from receiving TTD benefits. Initially, on January 20, 2020 Claimant suffered admitted industrial injuries to his left foot and left wrist during the course and scope of his employment with Employer. On January 30, 2020 Dr. Alvarez modified Claimant's temporary work restrictions to sitting every three hours to ice his left foot, icing his left hand every three hours and prohibiting use of the "Easy Rider" machine. Dr. Alvarez maintained the preceding temporary work restrictions until he released Claimant to full duty employment on February 27, 2020. From January 28, 2020 through February 26, 2020, Claimant continued to earn full wages from Employer while working modified duty under restrictions. Employer accommodated Claimant's work restrictions with a position that involved repacking/washing beer cans. The job allowed Claimant to stand or sit as needed and rest his left ankle. However, Employer terminated Claimant's employment on February 26, 2020 based on numerous safety and attendance violations during his period of employment. The record reveals

that Claimant received several warnings and coaching from various supervisors preceding his termination. Claimant's actions reflect that he willfully violated Employer's attendance policy.

7. As found, Mr. M[Redacted] noted that Claimant's disciplinary issues with Employer began on November 17, 2019 or four days after he was hired. Claimant specifically received a Verbal Reprimand for violation of Employer's unexcused absence policy. On December 1, 2019 Claimant received a Written Reprimand for again violating Employer's unexcused absence policy. Both infractions specified that "[a]ll employees are expected to report to work on time, report to work as scheduled, and to perform a full day's work." The documents noted that, "[a]ny further violations may result in additional disciplinary action, up to and including dismissal." In addition to formal Reprimands, Claimant received coaching from various supervisors between January and February 2020 for safety and attendance concerns. Notably, Employer issued warnings for Claimant's violations on January 7, 13, 14 and 15, 2020 as well as February 4, 2020. Mr. M[Redacted] remarked that in early January 2020 he recommended Claimant's termination because of a poor work ethic, safety issues and leaving work early on numerous occasions. The termination recommendation occurred within Claimant's 135 day probationary period and prior to his January 20, 2020 industrial injuries. A February 26, 2020 termination letter stated that "new full-time employees were considered probationary employees during their first 135 days working for Employer. During the probationary period, employees could be terminated at Employer's sole discretion. The letter provided that Claimant was dismissed for having "failed to demonstrate an acceptable level of performance." Through his repeated attendance and safety violations Claimant exercised some control over the circumstances causing his termination. Claimant precipitated his employment termination by a volitional act that he would reasonably expect to cause the loss of employment. He was thus responsible for his termination and is precluded from receiving TTD benefits.

Average Weekly Wage

8. Section 8-42-102(2), C.R.S. requires the Judge to determine a claimant's AWW based on his earnings at the time of injury. The Judge must calculate the money rate at which services are paid to the claimant under the contract of hire in force at the time of injury. *Pizza Hut v. ICAO*, 18 P.3d 867, 869 (Colo. App. 2001). However, §8-42-102(3), C.R.S. authorizes a Judge to exercise discretionary authority to calculate an AWW in another manner if the prescribed methods will not fairly calculate the AWW based on the particular circumstances. *Campbell v. IBM Corp.*, 867 P.2d 77, 82 (Colo. App. 1993). The overall objective in calculating an AWW is to arrive at a fair approximation of a claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO May 7, 1997). Therefore, §8-42-102(3), C.R.S. grants an ALJ substantial discretion to modify the AWW if the statutorily prescribed method will not fairly compute a claimant's wages based on the particular circumstances of the case. *In Re Broomfield*, W.C. No. 4-651-471 (ICAP, Mar. 5, 2007).

9. As found, the record reflects that for the period from November 13, 2019 through January 17, 2020 Claimant earned gross wages of \$7,854.79. The preceding period lasted 66 days or 9.4285 weeks. Dividing \$7,854.79 by 9.4285 weeks yields an AWW of \$833.09. An AWW of \$833.09 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

ORDER

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

1. Claimant's request for TTD benefits for the period April 30, 2020 through July 28, 2020 is denied and dismissed. Claimant was responsible for his termination and is thus precluded from receiving TTD benefits.
2. Claimant earned an AWW of \$833.09.
3. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at <http://www.colorado.gov/dpa/oac/forms-WC.htm>.*

DATED: October 20, 2020.

DIGITAL SIGNATURE:


Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

Whether the claimant has demonstrated, by a preponderance of the evidence, that the spinal cord stimulator, and related surgery (as recommended by Dr. Peter Syre) is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted June 2, 2019 work injury.

FINDINGS OF FACT

1. On June 2, 2019, the claimant was employed at the employer's golf course. On that date, the claimant and a coworker were performing maintenance in sandtrap when the claimant was struck by lightning.

2. The claimant was immediately transported by ambulance to Montrose Memorial Hospital. Dr. Justin Tanner noted that following the lightning strike, the claimant was thrown 10 to 15 feet and lost consciousness. At the hospital, the claimant reported pain in his back and tailbone area. On that same date, x-rays showed that the claimant fractured his tailbone.

3. The claimant's authorized treating provider (ATP) is Dr. John Ribadeneyra. At an office visit on July 31, 2019, Dr. Ribadeneyra noted the claimant had an oval shaped mass in his left buttock that had appeared shortly after the June 2, 2019 injury. Dr. Ribadeneyra recorded the size of the mass as "12-14 cm" and noted that it was causing the claimant pain. Dr. Ribadeneyra referred the claimant to neurology to address the claimant's ongoing back pain and the buttock mass. In addition, Dr. Ribadeneyra recommended the claimant use a walker.

4. The claimant continued to complain of back pain and the mass. On September 11, 2019, Dr. Ribadeneyra referred the claimant to a general surgeon for consultation regarding the mass.

5. On September 30, 2019, the respondents filed a General Admission of Liability (GAL) admitting for the June 2, 2019 injury.

6. On October 11, 2019, the claimant was seen by Dr. George Baumchen. On that date, Dr. Baumchen noted that the claimant had S1 radiculopathy on the left. Dr. Baumchen also referenced a magnetic resonance image (MRI) that showed a L5-S1 disc protrusion with contact with the left S1 nerve root. Dr. Baumchen recommended a left S1 injection. Dr. Baumchen also recommended the claimant see a plastic surgeon with a burn unit to address the buttock mass.

7. On January 9, 2020, the claimant was seen by Dr. Ribadeneyra. At that time, Dr. Ribadeneyra noted that the mass on the claimant's left buttock was seven to eight centimeters in height.

8. On January 14, 2020, the claimant was seen by plastic surgeon Dr. Lily Daniali at Swedish Medical Center. The claimant reported to Dr. Daniali that the buttock mass developed approximately one week after he was injured. The claimant also reported significant and sharp pain that radiates down his thigh and into his back and left hip. Dr. Daniali referred the claimant to neurosurgeon, Dr. Peter Syre for evaluation of nerve injury.

9. On March 4, 2020, Dr. Ribadeneyra noted results from a neurogram that showed a "very ambiguous mass" that was "not amenable to resection".

10. On March 11, 2010, the claimant was seen by Dr. Syre. At that time, Dr. Syre noted that the mass on the claimant's left buttock was "tennis ball size" and mobile on palpation. Dr. Syre noted that an MRI of the claimant's lumbar spine showed degenerative disc disease at the L5-S1 level with mild foraminal narrowing. Dr. Syre recommended an ultrasound and MR neurogram of the mass.

11. On April 2, 2020, Dr. Ribadeneyra made a referral to a pain management specialist.

12. On April 24, 2020, the claimant returned to Dr. Syre. At that time, the claimant reported that he had burning pain that radiated from his left iliac crest into the posterior and mid thigh. The claimant also reported that his pain was so severe that he was unable to use his "entire left side". Dr. Syre noted that an MRI of the claimant's left pelvis showed no abnormality. In addition, the neurogram of the mass showed no abnormality. Dr. Syre recommended that the claimant undergo placement of a spinal cord stimulator (SCS) for pain control.

13. On May 15, 2020, Dr. Syre submitted a request for authorization to the respondents. Specifically, Dr. Syre recommended a T10-T11 laminectomy and placement of an epidural paddle lead, and placement of a subcutaneous pulse generator.

14. At the request of the respondents, Dr. John Douthit reviewed the claimant's medical records and issued a report on May 26, 2020. Dr. Douthit was asked to opine regarding the reasonableness and necessity of the surgery recommended by Dr. Syre. In his report, Dr. Douthit noted that the Colorado Workers' Compensation Medical Treatment Guidelines (MTG) do not allow for the use of an SCS to treat axial back pain. Dr. Douthit opined that the claimant suffers from axial back pain. Therefore, Dr. Douthit opined that the claimant would not benefit from the procedure. Based upon the opinions of Dr. Douthit, the respondents denied authorization for the recommended procedure.

15. The claimant testified that although he was initially provided crutches, he currently uses a walker to ambulate. The claimant also testified that due to pain he is unable to shower alone and he is essentially home bound. The claimant further testified that prior to his injury, he was active, had no injuries, and did not need to use a walker.

16. The ALJ credits the claimant's testimony, the medical records, and the opinions of Dr. Syre over the contrary opinions of Dr. Douthit. The ALJ is persuaded that the SCS would be beneficial to the claimant in addressing his pain management. The ALJ finds that the claimant has demonstrated that it is more likely than not that the

recommended SCS placement and related surgery is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury.

CONCLUSIONS OF LAW

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

2. The ALJ’s factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness’s testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

4. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

5. The Colorado Workers’ Compensation Medical Treatment Guidelines (MTG) are regarded as accepted professional standards for care under the Workers’ Compensation Act. *Rook v. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005). The statement of purpose of the MTG is as follows: “In an effort to comply with its legislative charge to assure appropriate medical care at a reasonable cost, the director of the Division has promulgated these ‘Medical Treatment Guidelines.’ This rule provides a system of evaluation and treatment guidelines for high cost or high frequency categories of occupational injury or disease to assure appropriate medical care at a reasonable cost.” WCRP 17-1(A). In addition, WCRP 17-5(C) provides that the MTG “set forth care that is generally considered reasonable for most injured workers. However, the Division recognizes that reasonable medical practice may include deviations from these guidelines, as individual cases dictate.”

6. While it is appropriate for an ALJ to consider the MTG while weighing evidence, the MTG are not definitive. See *Jones v. T.T.C. Illinois, Inc.*, W.C. No. 4-503-150 (May 5, 2006); *aff'd Jones v. Industrial Claim Appeals Office* No. 06CA1053 (Colo. App. March 1, 2007) (not selected for publication); see also *Stamey v. C2 Utility Contractors et al*, W.C. No. 4-503-974 (August 21, 2008).

7. As found, the claimant has demonstrated, by a preponderance of the evidence, that the spinal cord stimulator and related surgery, as recommended by Dr. Syre, is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted June 2, 2019 work injury. As found, the claimant's testimony, the medical records, and the opinions of Dr. Syre are credible and persuasive.

ORDER

It is therefore ordered that the respondents shall pay for the spinal cord stimulator and related surgery, as recommended by Dr. Syre, pursuant to the Colorado Medical Fee Schedule

Dated this 21st day of October 2020.



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

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

ISSUES

- Did Claimant prove he suffered a compensable injury because of a motor vehicle accident on July 2, 2019?
- Did Claimant prove entitlement to a general award of reasonable and necessary medical benefits?
- Is Claimant entitled to TTD benefits?
- What is Claimant's average weekly wage (AWW)?
- Did Respondents prove Claimant was responsible for termination of his employment?

FINDINGS OF FACT

1. Claimant worked for Employer as an HVAC service technician.
2. On July 2, 2019, Claimant was involved in a motor vehicle accident (MVA) while en route to a service call. Claimant was traveling approximately 25 mph when another vehicle backed into him. He tried to avoid the other car, but it struck the rear passenger-side wheel well.
3. The impact damaged the right rear tire of Claimant's van and caused it to become flat. Claimant testified the fender "was pretty much tore off." Claimant testified he felt no pain at the time of the accident, but later developed shoulder and neck pain.
4. Claimant called his supervisors to report the accident immediately after it occurred. Brent C[Redacted], the office manager, went to check on Claimant. When he arrived at the scene, Claimant had the van raised on a jack and was changing the tire. Claimant showed no signs of pain and had no apparent difficulty changing the tire. Mr. C[Redacted] credibly testified the fender suffered no significant damage and the vehicle required no other repairs beyond replacing the tire.
5. Claimant and Mr. C[Redacted] proceeded to the next job, where they spent approximately four hours replacing a residential condensing unit. The condenser was approximately 3 feet by 3 feet and weighed approximately 100 pounds. Claimant removed the old condenser and installed the new condenser, primarily by himself, with no apparent difficulty or outward sign of injury.
6. Claimant worked without limitation for the next three weeks. Employer was short-staffed and "swamped" at the time, so Claimant's shifts typically lasted 14-16 hours.

Claimant completed all assignments without limitation from his shoulder or any other physical condition.

7. Claimant testified he was pulling a compressor from an AC system on July 20, 2019 when he felt a painful “pop” in his arm. Claimant testified, “I felt it pop like . . . it ripped my arm off almost it felt like. . . . [W]hen I did that . . . it really tore everything up.”

8. Claimant sought treatment at the North Suburban Medical Center emergency room on July 21, 2019. The report states, “he was involved in a motor vehicle accident yesterday afternoon, little less than 24 hours ago and has been experiencing pain in his bilateral shoulders since. His right is worse than his left. He reports pain in his anterior shoulder regions with pain that radiates into his proximal upper arm particularly on the right.” The report makes no mention of pulling a compressor the day before. Claimant denied neck pain, back pain, or headaches. Physical examination showed tenderness to palpation over the right anterior shoulder joint, particularly around the long head of the biceps attachment with some mild tenderness of the proximal biceps region. He also had mild tenderness “in the same area on the left side.” His cervical spine was nontender with full range of motion. X-rays showed bilateral shoulder joint arthritis but no effusions, fracture, or other acute findings. The provider opined Claimant’s history and exam was most consistent with rotator cuff tendinitis and arthrosis. She put Claimant in a sling, gave him anti-inflammatories and muscle relaxers, and recommended orthopedic follow-up.

9. Claimant saw Dr. Alexa Shepherd, a chiropractor at Denver Chiropractic, on July 30, 2019. He reported neck pain, low back pain, and headaches “since the accident.” His right arm was in a sling, and he had limited movement of his shoulder. He reported weakness in his right arm and “feels like arm is being pulled off.” Claimant did not mention any issue with his left shoulder, but endorsed numerous other problems he attributed to the MVA including anxiety, flashbacks, nightmares, unusual behavior, irritability, loss of balance, vertigo, difficulty concentrating, and sleep disturbance. He indicated he was impaired in most ADLs including dressing, brushing his teeth, bathing, household chores, and exercise.

10. On August 2, 2019, Claimant saw PA-C Ryan Mansholt, who appears to be affiliated with Denver Chiropractic. Claimant’s primary complaint was right shoulder pain with popping and instability. He also complained of frequent headaches, cervical, thoracic, and lumbar spine pain, and upper extremity paresthesias. Mr. Holt diagnosed cervical facet syndrome, headache, post-concussive syndrome, cervical sprain/strain, thoracic sprain/strain, brachial neuritis/radiculitis, cervical spondylosis without myelopathy, thoracic spondylosis without myelopathy, and a right shoulder sprain/strain. Mr. Mansholt opined, without explanation, all the diagnoses were related to the MVA. He recommended additional chiropractic treatment, physical therapy, and massage therapy.

11. Claimant continued working his regular duties until he was terminated on August 14, 2019. He was terminated for numerous performance issues including repeated instances of tardiness, multiple “no call/no shows,” and violating company policies against having his dog and his girlfriend in the company vehicle. Immediately

before terminating Claimant, Mr. C[Redacted] learned Claimant had received a cash payment from a customer but failed to turn in the invoice or the cash.

12. Claimant underwent a right shoulder MRI arthrogram on August 30, 2019. It showed extensive pathology including a partial-thickness supraspinatus tear, and intra-articular biceps tendon dislocation with severe tendon fraying and split tearing suggesting “recent exacerbation of a chronic process,” a tear in the posterior-Superior glenoid labrum with a low grade subacute subchondral conclusion in the posterior glenoid, and a subchondral contusion with chronic impingement-related pseudocyst in the anterior humeral head.

13. A cervical MRI on August 30, 2019 showed osteophytes, annular tears, stenosis, and facet arthropathy at multiple levels. Dr. Joseph Ugorji was the interpreting radiologist for the lumbar, cervical, and shoulder MRIs.

14. Claimant underwent an IME with Dr. Kathy McCranie at Respondents’ request on May 15, 2020. He reported left-sided chest pain, right shoulder pain, cervical pain, lumbar pain, and depression, all of which he attributed to the July 2, 2019 MVA. Claimant also told Dr. McCranie he injured his right biceps in September 2019¹ while he was cleaning his house and turned his arm “the wrong way.” He said this caused immediate pain accompanied by a “Popeye” deformity of the biceps. Dr. McCranie opined she could not determine a work-related accident occurred on July 2, 2019 due to significant inconsistencies between Claimant’s reported history the medical records. She noted Claimant had only complained of bilateral shoulder pain at the ER on July 21, and specifically denied headaches, neck pain, or back pain. He first reported allegedly injury-related chest pain in November 2019. She opined, “although cervical and lumbar strains can occur with motor vehicle accidents, this does not appear to be the case with [Claimant].”

15. Dr. McCranie testified at hearing consistent with her report. Dr. McCranie opined Claimant may have suffered a right shoulder strain/strain from the MVA, but if so, it resolved without treatment.

16. Dr. McCranie’s opinions are credible and persuasive.

17. Mr. C[Redacted]’s testimony was credible and persuasive.

18. Claimant failed to prove he suffered a compensable injury because of the July 2, 2019 MVA.

CONCLUSIONS OF LAW

To receive compensation or medical benefits, a claimant must prove he is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App.

¹ This incident probably occurred before September 2019, because the shoulder MR arthrogram on August 30 already showed a dislocated and torn biceps tendon.

2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo. App. 2001). The claimant must prove that an injury directly and proximately caused the condition for which benefits are sought by a preponderance of the evidence. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). A preponderance of the evidence is that which leads the trier-of-fact, after considering all the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case are not interpreted liberally in favor of either the claimant or the respondents. Section 8-43-201.

The Workers' Compensation Act recognizes a distinction between an "accident" and an "injury." The term "accident" refers to an "unexpected, unusual, or undesigned occurrence," whereas an "injury" is the physical trauma caused by the accident. Section 8-40-201(1). In other words, an "accident" is the cause and an "injury" is the result. *City of Boulder v. Payne*, 426 P.2d 194 (Colo. 1967). Workers' compensation benefits are only payable if an accident results in a compensable "injury." The mere fact that an incident occurred at work does not necessarily establish a compensable injury. Rather, a compensable injury is one that requires medical treatment or causes a disability. *E.g., Montgomery v. HSS, Inc.*, W.C. No. 4-989-682-01 (August 17, 2016). Compensable medical treatment includes evaluations or diagnostic

Claimant failed to prove he suffered a compensable injury on July 2, 2019. As an initial matter, it is not readily apparent how the accident described in testimony and medical records would have been sufficient to cause the extensive shoulder pathology shown on the MRI. Furthermore, had Claimant suffered rotator cuff and labral tears and/or dislocated and torn his biceps tendon, he probably would have experienced immediate severe pain and had limited use his arm. By Claimant's own admission, he felt no pain immediately or closely contemporaneous to the accident. He was subsequently able to complete physically demanding tasks including an air-conditioner installation without limitation. Thereafter, Claimant sought no treatment for almost 3 weeks, while continuing to perform his regular work. And according to Claimant, the eventual catalyst for seeking treatment on July 21, 2019 was not the MVA, but was a specific injury he allegedly suffered the day before while moving a heavy condenser.

As Dr. McCranie noted, there are simply too many inconsistencies in the record to give Claimant's testimony significant weight. When Claimant first sought treatment on July 21, he reported only shoulder pain and specifically denied neck pain, back pain, or headaches. He made no mention of an injury while moving a condenser the day before. On July 30, Claimant reported neck pain, back pain, and headaches, and also endorsed numerous other issues such as flashbacks and vertigo not plausibly associated with the minor MVA on July 2, 2019. Similarly, he first complained of chest pain allegedly related to the accident on November 2, 2019, four months after the MVA. Claimant testified the rear fender of his van was "pretty much tore off," but Mr. C[Redacted] credibly explained there was minimal damage and no repairs were required other than replacing the tire. This suggests Claimant was embellishing the severity of the accident to bolster his claim. Claimant denied any prior MVAs, but he was involved in at least two other accidents involving company vehicles. Finally, Claimant has given multiple conflicting accounts of

how he allegedly injured his shoulder. His workers' compensation claim states the injury occurred on July 2. At hearing, he described an incident while moving a compressor on July 20, which he had not previously mentioned to anyone. And Claimant told Dr. McCranie that he injured his arm at home while cleaning, causing immediate pain and a Popeye deformity (a classic sign of a biceps tendon tear).

Although it is undisputed Claimant was involved in an MVA on July 2, 2019, there is insufficient persuasive evidence he required any medical treatment or suffered any disability. Thus, while Claimant proved he had an "accident," he failed to prove he suffered a compensable "injury."

ORDER

It is therefore ordered that:

1. Claimant's claim for workers' compensation benefits is denied and dismissed.

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

DATED: October 21, 2020

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-136-517-001**

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that she suffered a compensable right knee injury during the course and scope of her employment with Employer on April 8, 2020.

2. Whether Claimant has established by a preponderance of the evidence that she is entitled to reasonable, necessary and causally related medical treatment for her April 8, 2020 right knee injury.

3. Whether Claimant has proven by a preponderance of the evidence that she is entitled to Temporary Total Disability (TTD) benefits for the period April 9, 2020 until terminated by statute.

4. Whether Respondents have established by a preponderance of the evidence that Claimant was responsible for her termination from employment under §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. (collectively "termination statutes") and is thus precluded from receiving TTD benefits.

STIPULATION

The parties agreed that Claimant earned an Average Weekly Wage (AWW) of \$1,450.00.

FINDINGS OF FACT

1. Employer is a relatively new two-year old wholesale chemical supply company with 35 employees that provides products including absorbents, solvents and enzymes used in multiple industries. Employer is equally owned by its President Sheldon L[Redacted] and his brother. Mr. L[Redacted]'s wife Breanna L[Redacted] is Chief of Staff. Claimant is a 49-year old female who was hired as a Warehouse Manager and worked with Employer through the rapid growth of the company over the prior two years. Claimant's job duties involved overseeing the day-to-day operations of Employer's warehouse. She specifically hired and fired employees as well as operated a forklift to move chemicals around the facility.

2. During 2018 and 2019 Mr. L[Redacted] had phone conversations with Claimant about her job performance. Mr. L[Redacted]'s specific concerns included Claimant's failure to properly use required communication platforms, unwillingness to take responsibility for her actions and quick criticism of others. Around Thanksgiving 2019 Mr. L[Redacted] spoke with Claimant about impeding Employer's operations. In December 2019 Mr. L[Redacted] had a meeting with Claimant regarding issues with her team and improving communication skills. However, Claimant's performance issues persisted and she was demoted in January 2020.

3. In February 2020 Mr. L[Redacted] again spoke to Claimant about her continued performance and communication issues. He explained that he considered terminating Claimant in January or February 2020 because he was beginning to realize that her job performance was not likely to improve.

4. In March 2020 Employer hired Eric B[Redacted] as Director of Operations. He was Claimant's direct supervisor. However, Mr. L[Redacted] explained that Claimant circumvented Mr. B[Redacted]'s authority and generally ignored his role as her superior.

5. On March 26, 2020 Mr. B[Redacted] completed a Supervisor Level Disciplinary and Corrective Action Form. The Form documented that Claimant had received a verbal warning for insubordination and poor communication. The period of the infraction spanned from March 9-26, 2020. The Form also delineated Claimant's job responsibilities, production procedures and communication directives. The Form specifically noted that Mr. B[Redacted] would run warehouse operations as a whole and Claimant would manage day-to-day functions "with direct communication and delegation to the Production and Distribution supervisor." Mr. B[Redacted] would direct his delegation through Claimant "to both teams." The Form provided that "[t]his should be considered a written warning to you that any recurrent or similar conduct may be grounds for further disciplinary action."

6. On March 26, 2020 Claimant also attended a three hour meeting with Mr. L[Redacted] and Mr. B[Redacted] to discuss performance concerns and methods for improvement. In an e-mail to Mr. L[Redacted] and Claimant, Mr. B[Redacted] reviewed the meeting. He enumerated several discussion topics including communication, delegation and warehouse procedures. Mr. B[Redacted] specified that he would run the warehouse and Claimant would manage day-to-day warehouse operations. He summarized that "I feel like we covered a lot of outstanding issues and concerns during this meeting. As we have now put the past behind us we can move forward with building [Employer] into the brand and supplier we know it can be."

7. Despite the corrective action and meeting, Mr. B[Redacted] reported to Mr. L[Redacted] that Claimant's work performance and communication did not improve during late March and early April, 2020. Based on continued performance concerns Mr. L[Redacted] decided to terminate Claimant sometime around April 5-7, 2020. Mr. L[Redacted] could not recall the exact date, but realized that Claimant was not going to improve her work performance, communication or deference to Mr. B[Redacted].

8. On April 7, 2020 Claimant read a message on Employer's Slack Communication System. Human Resources and Benefits Coordinator Rachel B[Redacted] thought she was posting a private message to Mr. B[Redacted] and Mr. L[Redacted] asking about how to compute severance pay. However, the message was inadvertently posted to all employees. Claimant acknowledged that she read the message before leaving for the day. Claimant testified that she did not believe the post was about her because she had never been reprimanded verbally or in writing by Employer.

9. On April 8, 2020 Claimant became confrontational because she believed that Employer should shut down based on the COVID-19 pandemic. However, Mr. L[Redacted] testified that Employer was exempt from State and Federal shut-down

protocols at the time because it was a chemical company. Moreover, warehouse employees wore medical masks and protective clothing. Mr. B[Redacted] sent Claimant home early on April 8, 2020 due to insubordination and inappropriate conduct. However, she refused to leave the warehouse and continued performing her job duties.

10. Claimant testified that while performing her job duties on April 8, 2020 she suffered a right knee injury at about 4:45 p.m. Claimant explained that she was dismounting a forklift when her boot stuck on the foot plate and she fell to the ground. She specified that as she fell, her right knee twisted and made a popping sound. Claimant experienced immediate right knee pain.

11. Claimant did not immediately report her injury, but drove home after the accident. During the evening Claimant noticed right knee swelling and suffered increased pain.

12. Claimant testified that when she awoke on April 9, 2020 her knee was “swollen 2 to 3 times its normal size and it [was] very painful.” Nevertheless, Claimant did not contact Employer to report the injury. Instead, Claimant began to drive to work for her regular 8:30 a.m. shift. On her drive to Employer’s warehouse Claimant stopped at a Maverick convenience store to buy coffee. After purchasing coffee, Claimant returned to her car. She began reading and sending work related emails from the Maverick parking lot. Claimant specifically drafted and sent an email to Employer from the Maverick parking lot at 8:35 a.m. to report her work injury. She noted that the Maverick was located about three to five miles or five to ten minutes from Employer’s warehouse.

13. Claimant specifically sent the following email at 8:35 a.m. on April 9, 2020 to Ms. B[Redacted]:

Hi guys, I just wanted to let you know I will be filing an incident report today for my knee. I hurt it dismounting and then remounting the forklift yesterday and I just want to have it on file in case I need to see the doc for it. Thank you [Claimant.] Rachel, Eric was not in so I have to ask him exactly how to do the report . . . “ Regards, [Claimant] Director of Operations

14. Ms. B[Redacted] testified that she immediately forwarded Claimant’s email to Mr. L[Redacted]. Mr. L[Redacted] remarked that he received the email at about 8:35 a.m. as he was standing in the office waiting for Claimant to arrive at 8:30 a.m. However, Mr. L[Redacted] was unable to read the email because two or three minutes later Claimant arrived at Employer’s office.

15. When Claimant arrived at the warehouse she was invited to a meeting with Mr. L[Redacted], Ms. L[Redacted] and Mr. B[Redacted]. Mr. L[Redacted] had arranged the meeting in preparation for Claimant’s termination. Claimant was immediately apprised of her termination. Claimant testified that she was “shocked” that she was terminated. During the entire 45 minute meeting all four attendees remained standing despite the availability of chairs. Claimant never reported or mentioned the right knee injury or complained of pain.

16. Following the meeting, Mr. L[Redacted] observed Claimant walking to her car in Employer's parking lot, return to the office to use the restroom, walk to the common area to talk to co-workers and finally return to her car. Prior to walking back to her car for the final time Claimant informed Mr. L[Redacted] of her right knee injury at work. Mr. L[Redacted] was surprised because he had not observed anything in Claimant's demeanor to suggest she was injured.

17. On April 10, 2020 Claimant sent an email to Mr. L[Redacted] detailing that she suffered a work injury on April 8, 2020. Claimant explained she was

coming down on one of my last dismounts [off the forklift], my knee twisted and made a popping sound. I had to get up one more time and it was very painful. On 4-9 I woke with it swollen 2-3 times its normal size and it was very painful. I sent an email to HR and my direct report 4-9 early Am because the manager I would report to was not in when the injury occurred. I would like to be seen by a workers comp doctor.

18. On April 10, 2020 Employer completed a First Report of Injury or illness. The First Report specified that on "Wednesday the 8th [Claimant] was getting on and off the forklift as necessary. Coming down on one of my last dismounts, my knee twisted and made a popping sound. I had to get up one more time and it was very painful. On 4-9 I woke with it"

19. On April 13, 2020 Claimant sought medical treatment for her right knee injury at CareNow Urgent Care. Claimant reported that on April 8, 2020 she twisted her right knee while dismounting a forklift at work. After undergoing a right knee x-ray Claimant was diagnosed with right knee pain. David Nuhfer, M.D. recommended Ibuprofen and a hinged knee brace. He also referred Claimant for an MRI.

20. On April 22, 2020 Claimant returned to CareNow Urgent Care for right knee treatment. David Frank, M.D. diagnosed Claimant with a meniscal tear and sprain. He referred Claimant to Michael S. Hewitt, M.D. for an orthopedic evaluation.

21. On May 1, 2020 Claimant visited Dr. Hewitt for an examination. Claimant reported that she injured her right knee when she was stepping off a forklift at work and caught her right foot in a grate. She specifically twisted her knee, felt a pop and fell. After performing a physical examination and reviewing imaging studies Dr. Hewitt discussed treatment options for Claimant's ACL tear, medial meniscus tear and underlying arthritis. Claimant would consider her options of therapy, a brace or surgery.

22. On May 6, 2020 Dr. Hewitt submitted a surgical request for Claimant's right knee condition. He specifically sought to perform a right knee scope and an ACL repair with allograft and meniscectomy.

23. On July 22, 2020 Claimant underwent an independent medical examination with knee surgeon Jon Erickson, M.D. He conducted a causality assessment pursuant to the Colorado Level II Guidelines. After reviewing Claimant's imaging studies and conducting a physical examination Dr. Erickson determined that Claimant suffered from

a chronic ACL rupture and medial meniscus tear. In fact, Dr. Erickson explained that, because of the critical importance of the MRI, he reviewed it on two separate occasions with an MSK expert radiologist. They both concluded that the MRI did not reveal any evidence of an acute injury. Dr. Erickson detailed that Claimant's ACL rupture and medial meniscus tear did not occur on April 8, 2020 and were not preexisting conditions that became symptomatic. Notably, ACL ruptures and medial meniscus tears are severely painful. Dr. Erickson testified that it is highly unlikely that Claimant would have been able to stand for 45 minutes and walk without any difficulties less than 24 hours after her right knee ACL rupture and medial meniscus tear.

24. Dr. Erickson explained that clinical findings documented on Claimant's early medical exams following the April 8, 2020 incident do not support a determination that Claimant's ACL rupture and medial meniscus tear were caused or aggravated by a work event. If Claimant sustained an injury on April 8, 2020 that resulted in an ACL rupture and medial meniscus tear, her right knee would have been full of blood and fluid in the soft tissue. A meniscus tear would also have caused edema. However, none of the findings were present on the MRI. Instead, evidence of swelling on clinical examination was consistent with a pre-existing ACL rupture and/or meniscus tear with minimal symptoms and/or arthritis. Finally, Dr. Erickson concluded that Claimant's mechanism of injury on April 8, 2020 would have at most caused a minor strain or sprain.

25. Between May 6, 2020 and August 4, 2020 Claimant visited her primary care physician Kaiser Permanente for unrelated medical conditions including long standing chronic back and neck pain. Claimant also underwent surgery on May 21, 2020 for a left thyroid nodule. On June 9, 2020 Claimant sought to visit an orthopedic knee surgeon at Kaiser.

26. On August 25, 2020 Claimant underwent right knee surgery with Wayne Gersoff, M.D. at DTC Surgery Center. The procedure specifically involved a "right knee medial meniscus tear, ACL tear, and grade 4 chondral injury of the lateral trochlea and lateral patella."

27. Claimant has failed to demonstrate that it is more probably true than not that she suffered a compensable right knee injury during the course and scope of her employment with Employer on April 8, 2020. Initially, Claimant explained that on April 8, 2020 she was dismounting a forklift when her boot stuck on the foot plate and she fell to the ground. She specified that as she fell, her right knee twisted and made a popping sound. Claimant experienced immediate pain. Notably, the injury occurred after she had been asked to leave work for the day by Mr. B[Redacted]. Furthermore, Claimant did not immediately report her injury, but her symptoms worsened during the evening. On the following day she was terminated from employment. Notably, Claimant had sent an email mentioning her injury from the parking lot of a Maverick convenience store just prior to the termination meeting. However, during the 45 minute termination meeting Claimant never reported or mentioned the right knee injury or complained of pain. Claimant mentioned the injury to Mr. L[Redacted] while leaving after the termination meeting and then followed-up with an email on the following day. As the preceding chronology reflects, the circumstances surrounding Claimant's right knee injury and reporting of the incident raise concerns about the veracity of her account.

28. More importantly, the medical evidence and persuasive opinion of Dr. Erickson reflect that Claimant did not likely suffer an acute right knee ACL rupture and medial meniscus tear while working for Employer on April 8, 2020. After reviewing Claimant's imaging studies and conducting a physical examination Dr. Erickson determined that Claimant suffered from a chronic ACL rupture and medial meniscus tear. In fact, Dr. Erickson explained that, because of the critical importance of the MRI, he reviewed it on two separate occasions with an MSK expert radiologist. They both concluded that the MRI did not reveal any evidence of an acute injury. Dr. Erickson detailed that Claimant's work activities on April 8, 2020 did not cause or aggravate her ACL rupture and medial meniscus tear. Furthermore, Dr. Erickson persuasively explained that clinical findings documented on Claimant's early medical exams following the April 8, 2020 incident did not support a determination that a work event caused or aggravated her ACL rupture and medial meniscus tear. If Claimant sustained an injury on April 8, 2020 that resulted in an ACL rupture and medial meniscus tear, her right knee would have been full of blood and fluid in the soft tissue. A meniscus tear would also have caused edema. However, none of the findings were present on the MRI. Instead, evidence of swelling on clinical examination was consistent with a pre-existing ACL rupture and/or meniscus tear with minimal symptoms and/or arthritis.

29. Claimant's physicians at CareNow Urgent Care determined that Claimant had an ACL rupture and medial meniscus tear. Moreover, Dr. Hewitt recommended a right knee scope and an ACL repair with allograft and meniscectomy to treat Claimant's right knee condition. However, the record reflects that no physicians other than Dr. Erickson performed a causation analysis to determine whether Claimant's right knee symptoms were related to her work activities on April 8, 2020. The circumstances surrounding the April 8, 2020 incident, in conjunction with Dr. Erickson's persuasive medical opinion and the medical records, reveal that it is unlikely Claimant's work activities on April 8, 2020 aggravated, accelerated or combined with her preexisting condition to produce a need for medical treatment. Accordingly, Claimant's claim for Workers' Compensation benefits is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to

a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. See *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson*, W.C. No. 4-589-645 (ICAO, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.*, 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner*, 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). *Soto-Carrion v. C & T Plumbing, Inc.*, W.C. No. 4-650-711 (ICAO, Feb. 15, 2007); *David Mailand v. PSC Industrial Outsourcing LP*, W.C. No. 4-898-391-01, (ICAO, Aug. 25, 2014).

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. See *Cotts v. Exempla, Inc.*, W.C. No. 4-606-563 (ICAO, Aug. 18, 2005). Rather, the symptoms could represent the “logical and recurrent consequence” of the pre-existing condition. See *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAO, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs*, W.C. No. 4-745-712 (ICAO, Oct. 27, 2008), simply because a claimant’s symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that “correlation is not causation,” and merely because a coincidental correlation exists between the claimant’s work and his symptoms does not mean there is a causal connection between the claimant’s injury and work activities.

7. The provision of medical care based on a claimant’s report of symptoms does not establish an injury but only demonstrates that the claimant claimed an injury. *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020). Moreover, a referral for medical care may be made so that the respondent would not forfeit its right to select the medical providers if the claim is later deemed compensable. *Id.* Because a physician provides diagnostic testing, treatment, and work restrictions based on a claimant’s

reported symptoms does not mandate that the claimant suffered a compensable injury. *Fay v. East Penn manufacturing Co., Inc.*, W.C. No. 5-108-430-001 (ICAO, Apr. 24, 2020); *cf. Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337, 1339 (Colo. App. 1997) (“right to workers’ compensation benefits, including medical payments, arises only when an injured employee initially establishes, by a preponderance of the evidence, that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment”). While scientific evidence is not dispositive of compensability, the ALJ may consider and rely on medical opinions regarding the lack of a scientific theory supporting compensability when making a determination. *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983); *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020).

ORDER

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

Claimant’s claim for Workers’ Compensation benefits is denied and dismissed.

If you are a party dissatisfied with the Judge’s order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge’s order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at <http://www.colorado.gov/dpa/oac/forms-WC.htm>.*

DATED: October 26, 2020.

DIGITAL SIGNATURE:


Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Did Respondents prove they should be permitted to withdraw their admission of liability?

FINDINGS OF FACT

1. [Redacted Corporate Entity] is a holding company that owns numerous professional sports franchises and entertainment venues, including the [Redacted subsidiaries]. [Redacted Corporate Entity] does not own the various franchises and venues directly. Rather, it owns numerous subsidiary companies, which in turn own and operate their respective enterprises.

2. The subsidiaries of [Redacted Corporate Entity] are separate legal entities, with their own workers' compensation insurance policies. [Corporate Entity Insurer] insures some of the subsidiaries, including [Redacted Corporate Entity] , while other subsidiaries are insured by other carriers.

3. [Redacted Employer] is one of [Redacted Corporate Entity]'s subsidiaries. [Redacted Employer] is insured by [Redacted Insurer] .

4. On December 28, 2019, Claimant slipped on ice while walking from the Pepsi Center building to the parking lot. He injured his knees in the accident.

5. Claimant was employed by [Redacted Employer] on the date of injury, and remained employed by [Redacted Employer] as of the hearing.

6. On December 30, 2019, Amy F[Redacted] , an employee in [Redacted Corporate Entity] ' business office, inadvertently filed an Employer's First Report of Injury identifying the employer as "[Redacted Corporate Entity] Holdings, LLC" and the insurer as "[Redacted Corporate Entity Insurer] ."

7. [Redacted Corporate Entity Insurer] filed a General Admission of Liability on April 14, 2020. Claimant subsequently underwent knee surgery on June 3, 2020 and missed almost three weeks from work. [Redacted Corporate Entity Insurer] provided medical benefits on the claim, and also paid Claimant TTD benefits from June 3, 2020 through June 21, 2020.

8. Jenna M[Redacted] is the claims representative at [Redacted Corporate Entity Insurer] assigned to Claimant's claim. Initially, the claim was assigned to a different adjuster as a "medical only" claim. When the claim became more involved with surgery and lost time, the file was transferred to Ms. M[Redacted] . After reviewing Claimant's wage records, Ms. M[Redacted] learned that Claimant was an employee of [REDACTED EMPLOYER] , not [Redacted Corporate Entity] .

9. Upon realizing Claimant was not an employee of [Redacted Corporate Entity] , Respondents filed a Petition to Reopen and applied for a hearing seeking to withdraw their admission of liability.

10. [Redacted Corporate Entity Insurer] intends to seek reimbursement from [Redacted Employer] and [Redacted Insurer]] for funds it erroneously expended on this claim. Respondents stipulated on the record they will not seek to recover any overpayment from Claimant if the admission of liability is withdrawn. Respondents did not waive their right to seek reimbursement from any other party who may be liable for Claimant's injuries.

11. The wage records in evidence show Claimant was on [REDACTED EMPLOYER] 's payroll in 2019. Claimant conceded he is and has been employed by [Redacted Employer] rather than [Redacted Corporate Entity] .

12. [Redacted Corporate Entity] proved it should be permitted to withdraw its admission of liability because Claimant was not its employee at the time of his injury.

CONCLUSIONS OF LAW

To receive compensation or medical benefits, a claimant must prove he is a covered employee who suffered an injury arising out of and in the course of his employment. Section 8-40-202(1), C.R.S. By filing an admission of liability, the respondents have "admitted that the claimant has sustained the burden of proving entitlement to benefits." *City of Brighton v. Rodriguez*, 318 P.3d 496, 507 (Colo. 2014). If the respondents subsequently seek to withdraw the admission of liability, they must prove by a preponderance of the evidence that the claimant did not suffer a compensable injury. See § 8-43-201(1) ("a party seeking to modify an issue determined by a general or final admission . . . shall bear the burden of proof for any such modification."). As found, [Redacted Corporate Entity] proved Claimant was not its employee at the time of the injury (or at any time). Accordingly, [Redacted Corporate Entity] is not liable for benefits relating to Claimant's injuries.

ORDER

It is therefore ordered that:

1. Respondents' request to withdraw the admission of liability is granted. [Redacted Corporate Entity] and [Redacted Corporate Entity Insurer] shall have no further obligation or liability with respect to this claim.

2. Pursuant to the stipulation on the record, Respondents shall not seek to recoup any benefits paid on this claim from Claimant.

3. Respondents may pursue reimbursement from any party other than Claimant.

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

DATED: October 26, 2020

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

1. Has Claimant shown, by a preponderance of the evidence, that the right shoulder surgery as proposed by Dr. Simpson, is reasonable, necessary, and causally related to her 6/17/2019 work injury?

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

The Work Injury

1. On June 27, 2019, Claimant worked for Professional Contract Services as an industrial cleaner at a hospital. Claimant's job duties that day entailed cleaning the locker room in the Pediatrics unit. The locker room had 4 shower stalls. Claimant reports she had to repeatedly scrub the shower walls with a broken wet mop. Claimant testified that the mop head was broken off from the handle. She explained that she had to push the mop handle hard against the mop head, and scrub above her head.
2. Claimant indicated she did not feel pain during this mopping task; instead, her condition worsened about an hour and a half afterwards.

Claimant's Initial Treatment

3. Claimant went to the emergency department at UCHealth on June 28, 2019. (Ex. 4). Claimant reported that she injured her *back* while cleaning a shower with a mop the night before. *Id.*
4. Claimant was initially evaluated at Concentra on July 1, 2019 by Wendy Kleppinger. (Ex. 5, p. 20). Claimant presented with right shoulder and right-side pain. *Id.* Claimant reported that she was at work, cleaning a wall overhead with a wet broken mop. Claimant described that she developed severe pain in her right side and upper back on her way home from work. Claimant was assessed with thoracic pain and right shoulder pain. *Id.* at 22. She was referred to physical therapy.
5. At her physical therapy appointment from the same day, PT Scott Sullivan noted:

Much of the testing was deferred due to high levels of irritability with any movement of the shoulder and pts hesitancy of going onto the

table to test joint mobility and perform therapeutic exercise due to patient's self-reported OCD. *Id* at 24.

Dr. Thurston IME

6. On December 6, 2019, Dr. Lloyd Thurston performed an independent medical evaluation at the Respondents' request. (Ex. C). Dr. Thurston performed a physical examination of Claimant during this IME. Dr. Thurston noted that Claimant's right shoulder showed no redness, warmth or atrophy. No scapular winging, with range of motion being somewhat slow and hesitant, but with consistent effort. He only noted "very slight crepitus" which was "normal for her age" when palpating the shoulder when she went through active range of motion measurements. *Id* at 27.
7. As part of the IME, Claimant completed a pain diagram to show the location of her complaints. *Id* at 29. Claimant showed pain in the right side of her neck, the right parascapular region, and down the right side of her ribs. Notably, Claimant did not depict any pain in her glenohumeral joint.
8. Dr. Thurston concluded that Claimant suffered from a work-related strain of the periscapular region and strain of the right shoulder. *Id* at 28. Dr. Thurston recommended 4 weeks of physical therapy by a provider other than Concentra. *Id*. Dr. Thurston also recommended 4 weeks of massage therapy.
9. Respondents then filed a General Admission of Liability on December 11, 2019. (Ex. 1, A).

Claimant's Treatment Continues

10. On January 2, 2020, Claimant returned to Concentra and was examined by Dr. Peterson. (Ex. 5, p. 28). Claimant requested to transfer her physical therapy to Select Physical Therapy. *Id*. Claimant explained that before her work injury, she received trigger point injections in her neck, shoulders, and traps every three months. *Id*. She further clarified that the pain she experienced after June 27, 2019, injury was very different. *Id*. It was also noted that "Tabatha c/o that the female PT at Concentra made her cry and the male PT ignored her." (Ex. E, p. 38).
11. Claimant was referred for massage therapy and physical therapy. *Id*. at 30. At this same appointment, Claimant indicated to Dr. Peterson that she was also going to see her PCP for her shoulder condition, and he had diagnosed her with a "pulled muscle" and told her it would heal with time. (Ex. 5, p. 28).
12. On February 6, 2020, Claimant return to Concentra and was examined by Tina Voros. (Ex. 5, p. 39). Claimant reported no improvement to her neck and right shoulder pain. Claimant was going to massage therapy by this time. Claimant

alleged that she had not been able to start physical therapy due to the physical therapy clinic refusing to schedule an appointment.

13. On February 14, 2020, Claimant underwent an MRI of her right shoulder. Under *Findings*, the report states:

Mild supraspinatus tendinosis. Supraspinatus and infraspinatus tendon intact. Sub scapularis tendon intact. Biceps tendon normally located. Glenoid labrum grossly intact. Normal marrow signal. "No fractures. Degenerative AC arthropathy. Trace fluid in the subacromial subdeltoid bursa.

Impression: Supraspinatus tendinosis. Degenerative changes right AC joint. (Ex. D, p. 33) (emphasis added).

14. Claimant went to Dr. Peterson on February 20, 2020. According to his reports, Claimant has shown no improvement. According to Claimant, her massage therapist has told her that her upper back and neck are 'swollen'.*{note: no medical records in the file indicate that any provider has described Claimant's upper back or neck as being 'swollen'}. "She [Claimant] did not go to PT and we received a letter from Select PT stating that she refused to schedule appts. She denies this." (Ex. E, p. 37).

Claimant is Referred to Dr. Simpson

15. On February 25, 2020, Claimant was examined by an orthopedic surgeon, Dr. Michael Simpson. (Ex. 6, p. 61). Dr. Simpson reviewed the MRI films and concluded that Claimant had a "pretty significant" arthritic change at the acromioclavicular joint with significant marrow edema both in the acromion and the distal clavicle. He opined that Claimant had some signal change in the region of the superior aspect of the supraspinatus.
16. Dr. Simpson opined that it was unclear whether there was a band of bursal-sided scar tissue over the supraspinatus tendon or whether Claimant has a partial-thickness tear. He recommended a series of selective diagnostic injections for the acromioclavicular and subacromial bursa to determine how much the pain improves with a diagnostic/therapeutic injection. He also recommended a chiropractic evaluation. *Id.*

Chiropractic Treatment / Mixed Results

17. On March 5, 2020, Claimant underwent chiropractic treatment at Concentra with Randy Knoche, DC. Claimant reported having little treatment because of difficulty getting treatment authorized. Claimant reported that massage therapy was mildly helpful. However, once again, she states she has not been able to continue massage therapy because she was having trouble with authorization. Dr. Randy

Knoche opined that Claimant had a somewhat chronic cervicothoracic transition sprain/strain injury including the costovertebral junctions between T4 and T7, resulting in cervical hypertonicity and tension headaches. He also noted:

In attempting to do a facet load test, she complains of pain prior to adequately testing the facet, so facet load test would be inconclusive. Valsalva is negative. Foraminal compression test is also inconclusive due to the inability to adequately challenge range of motion. (Ex. 5, p. 43).

18. One week later, Claimant returned to see DC Knoche on March 12, 2020. This time, however, he notes

The patient states that her right sided neck pain and right scapular pain have *reduced*. Her range of motion is increased. Her ability to do exercises that we have prescribed is improving. She demonstrates a *fairly full range of motion* with her shoulder, with the ability to reach up over her head, reach behind her back, reach forward, and pull back as if rowing. These have all *dramatically improved* over the last week or so. (Ex. 5, p. 45 (emphasis added)).

Claimant reported similar pain issues at the next visit on March 17, 2020. *Id* at 47. On March 19, 2020, it had actually *improved* (from previous). *Id* at 48.

Return to Dr. Simpson

19. Then, on April 6, 2020, Claimant was re-evaluated by Dr. Simpson. (Ex. 6, p. 64). This time, Claimant presented with 10/10 pain. Dr. Simpson's notes now indicate, "She has tried physical therapy, which have remain unchanged her symptoms(sic). She pain has is *unchanged (sic) in the past 12 months*" (Emphasis added).
20. Dr. Simpson performed ultrasound-guided diagnostic/therapeutic injections in Claimant's shoulder. *Id*. Claimant experienced improvement with her range of motion approximately 10 minutes following the injections. Claimant experienced a full passive range of motion and improved forward elevation. However, Claimant continued to report painful popping in her shoulder. *Id* at 67.
21. On April 27, 2020, Claimant returned to Dr. Simpson. (Ex. 6, p. 68). Claimant now reported 8/10 pain. Claimant described the pain as severe, dull, and sharp, and "worse all the time." Claimant reported that the injections did not help. She displayed full passive range of motion, but limited active range of motion. Claimant exhibited tenderness in the AC joint, but *also* in the parascapular paraspinal regions. *Id* at 70.

22. Dr. Simpson noted that Claimant's injections had actually improved her pain (in contrast to what Claimant herself reported) although it lasted only as long as the anesthetic itself. *"I had a frank discussion with her that I cannot be certain whether her symptoms would be improved by surgical intervention."* *Id.* at 70.
23. However, Dr. Simpson opined that Claimant had failed conservative treatment and the diagnostic injection provided some improvement. *Id.* at 69. Dr. Simpson opined that Claimant is a reasonable candidate for arthroscopic evaluation of her shoulder subacromial decompression and distal clavicle excision with debridement. He opined that Claimant meets the Colorado Medical Treatment Guidelines for arthroscopic evaluation of her shoulder given her continued pain and failure to respond to conservative measures including therapy, activity modifications, and injections. *Id.*
24. Dr. Simpson noted that Claimant had a "pretty significant arthritic change in the acromioclavicular joint", but further noted under his *Assessment*, "No diagnosis found." Further, Dr. Simpson's records do not address any analysis of *causation*.
25. Dr. Simpson sent Respondents a request for prior authorization of the recommended surgery on April 28, 2020. (Ex. 6, p. 72).
26. On April 30, 2020, Dr. Peterson noted that Claimant underwent 5 chiropractic sessions that have provided some relief. (Ex. 5, p. 49). Claimant also purportedly underwent 10 physical therapy sessions that have provided some relief. However, Claimant reported that none of the treatment has provided sustained relief.

IME Addendum by Dr. Thurston

27. On May 6, 2020, Dr. Thurston issued an Addendum IME report, responding to Dr. Simpson's surgical request. (Ex. C). Dr. Thurston opined that the recommended surgery should be denied by Respondents. He opined that the surgery is not reasonable, necessary, and related due to a strong psychosocial component. Dr. Thurston opined that the radiologist's interpretation of the MRI report was more accurate than Dr. Simpson's interpretation; however, Dr. Thurston's report indicates that he did not personally view the films.
28. Dr. Thurston noted that the medical treatment guidelines state that "Distal clavicular resection is *not recommended* for patients without AC joint pain. This should only be performed on patients with reproducible pain at the AC joint, which is *relieved with local anesthetic injection.*" (Ex. C, p. 21) (emphasis added).
29. Claimant did not ascribe symptomatic benefit to the injection of local anesthetic. "(t)here was no identified symptomatic benefit from the lidocaine and bupivacaine. This would indicate the AC joint was not a pain generator." *Id.* Dr. Thurston then opined that the requested "Right shoulder arthroscopy,

extensive debridement, arthroscopic distal clavicle excision” is not reasonably necessary to treat Claimant’s right shoulder pain.

30. Dr. Thurston provided an explanation for this position since his November 20, 2019 exam showed soft tissue pain, with no evidence of AC Joint pain; Claimant’s shoulder pain had not improved since stopping work on July 11, 2019, that Claimant’s shoulder pain were now sometimes 10/10 in severity, which is not physiologic and suggests psychological overlay, the right shoulder MRI demonstrated AC arthrosis and supraspinatus tendinosis which are normal for her age, that the AC join has not been appropriately confirmed as a pain generator, and that there is significant psychosocial component to Claimant’s right shoulder pain. *Id* at 22.

Claimant is Referred to Dr. Ricci by Dr. Peterson

31. On May 20, 2020, Dr. Peterson again examined Claimant. (Ex. 5, p. 49). Claimant now reported worsened symptoms following a Toradol Injection. Dr. Peterson noted that Respondents denied the recommended surgery due to lack of a psychological evaluation. Dr. Peterson noted that Claimant’s symptoms persist after a year of unsuccessful recovery and failure of normal treatment modalities. Dr. Peterson referred Claimant to Dr. Anthony Ricci, psychologist, for evaluation of persistent right shoulder pain. *Id* at 52. Nothing in the record indicates that this evaluation ever occurred.

Dr. Hall IME and Testimony

32. Dr. Timothy Hall conducted an independent medical evaluation on July 30, 2020. (Ex. 3.) Dr. Hall concluded that Claimant had impingement syndrome. *Id* at 15. Dr. Hall also opined that Claimant met the requirements under the Medical Treatment Guidelines to undergo shoulder surgery.
33. Dr. Hall explained that the Medical Treatment Guidelines referring to surgeries states “when functional deficits interfere with activities of daily living and/or job duties after three to six months of *active patient participation* in an appropriate shoulder rehabilitation program, surgery may restore the functional anatomy and reduce the potential for repeated impingement.” Dr. Hall further explained that it is not uncommon for soft tissue problems to persist when there is underlying shoulder impingement.
34. Dr. Hall reviewed additional records and drafted an Addendum report on August 18, 2020. (Ex. 3, p. 16). Dr. Hall opined that the additional records continued to indicate that Claimant remained symptomatic, despite further treatment. Dr. Hall opined that the surgery recommended by Dr. Simpson was reasonable, given the circumstances. Dr. Hall noted that Claimant is not a *good* surgical candidate because she has diabetes. However, he concluded that the recommended surgery was still *reasonable*.

35. Dr. Hall also testified at the hearing. Dr. Hall opined that Claimant was a good historian and credible. He testified that the Claimant's pain generator *may* be a partial tear of the supraspinatus tendon and impingement syndrome. Dr. Hall testified that Claimant was positive for impingement syndrome when he performed a physical examination.
36. Dr. Hall explained that impingement syndrome is when the humeral head rubs up against the acromion and impinges the rotator cuff that is between the two structures. Impingement occurs when the bones rub together and cause inflammation of the bursa. Impingement can cause and injury to the supraspinatus tendon. Dr. Hall explained that bursitis is inflammation of the bursa. Dr. Hall further explained that trace fluids present on the MRI could be an indicator of inflammation.
37. Dr. Hall opined that the surgery recommended by Dr. Simpson is reasonably necessary. He explained that Claimant has failed conservative treatment. MRIs are not perfect, and sometimes a surgeon needs to do a scope to figure out what is going on. There is really nothing else, besides arthroscopic surgery, to do to help Claimant at this time. Dr. Hall testified that the surgery recommended by Dr. Simpson is related to the work injury.
38. Dr. Hall disagrees with Dr. Thurston's conclusion that the AC joint has not been confirmed as the pain generator. Dr. Hall opined that Claimant has pain in the AC joint. He explained that Claimant has improvement with a range of motion under local anesthetic in the AC joint. He further explained that Claimant has a type 2 acromion, which predisposes her to a partial thickness tear in the supraspinatus tendon.
39. Dr. Hall opined that the pain scale is subjective, and can't be used as a scale for psychological soundness. Dr. Hall opined that Claimant is disgusted with the situation and anxious about her condition. Dr. Hall further explained that he did not pick up any signs of specific psychological dysfunction during his examination. Dr. Hall opined that Claimant is a good surgical candidate from a psychological perspective.

Claimant Testifies at Hearing

40. Claimant testified at hearing that she wants to have the surgery recommended by Dr. Simpson. She testified that her primary care physician cleared her to have surgery. Claimant testified that besides the work injury, she has not done anything else to injure her right shoulder.
41. Claimant testified that the chiropractic, massage therapy, and physical therapy provided some relief. However, the treatment kept starting and stopping due to authorization issues and the COVID-19 pandemic. Claimant testified that her

symptoms have remained the same since her work injury. Claimant also confirmed that she has not received any psychological treatment in the past year.

42. Claimant testified that she might experience pain of 10/10 probably twice a week. No specific activities precipitate this pain. When asked if it just jumps to 10/10, Claimant stated:

A Yes and no. It depends on what I'm doing. I could be cooking dinner in the kitchen and just moving around the spatula trying to get dinner done it just feels like a stabbing pain *in my back and my neck, my shoulder, and my neck*. Transcript at p. 22) (emphasis added).

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

1. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.
2. In accordance with §8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law, and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).
3. Assessing weight, credibility, and sufficiency of the evidence in Workers Compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has

been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). Taken as whole, both in hearing testimony, and in reporting symptoms to the myriad of medical providers, the ALJ has concerns about Claimant's consistency as a medical historian. As mentioned by Dr. Thurston and ATP Dr. Peterson, Claimant has an apparent psychological overlay which has not been adequately addressed.

4. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55, P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968). In this instance, the ALJ has heard oral testimony from one expert, Dr. Hall, but will also evaluate the reports from Dr. Thurston, and compare them to the written and oral opinions of Dr. Hall. The ALJ finds that both experts have provided sincere, yet contrasting, professionally rendered medical opinions. As such, the ALJ will determine which expert is more *persuasive*, as opposed to *per se credible*.

Medical Benefits, Generally

5. The Claimant is not entitled to medical care that is not *causally related* to his work-related injury or condition. As noted in *Bekkouche v. Riviera Electric*, W.C. No. 4-514-998 (May 10, 2007), "A showing that the compensable injury caused the need for treatment is a threshold prerequisite to the further showing that treatment is reasonable and necessary." Where the relatedness, reasonableness or necessity of medical treatment is disputed, the Claimant has the burden to prove, by a preponderance of the evidence, that the disputed treatment is *causally related* to the injury, and *reasonably necessary* to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc.*, W.C. No. 4-117-758 (ICAO April 7, 2003).
6. The Claimant has the burden to prove his entitlement to medical benefits by a preponderance of the evidence. §8-43-201, C.R.S. The Respondents are only liable for the medical treatment that is *reasonable and necessary* to cure and relieve the work-related injury. §8-42-101(1)(a), C.R.S.
7. The Medical Treatment Guidelines (Guidelines) are regarded as the accepted professional standards for care under the Workers' Compensation Act. *Hernandez v. University of Colorado Hospital*, W.C. No. 4-714-372 (January 11, 2008); see also *Rook v. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005). The Medical Treatment Guidelines, Rule 17-2(A), W.C.R.P. provide: All health care providers shall use the Guidelines adopted by the Division. In spite of this direction, it is generally acknowledged that the Guidelines are not

sacrosanct and may be deviated from under appropriate circumstances. See, Section 8-43-201(3) (C.R.S. 2014). Nonetheless, they carry substantial weight.

Causally Related

8. In this matter, Claimant has what is essentially a normal MRI for someone her age. She does not have a torn rotator cuff. There remains the *possibility*, but not *probability*, that she has a *partial* tear. She also has degenerative changes in her shoulder joint, and appears to have a type II acromion. All Claimant alleges as a work 'injury' was working overhead with a poorly adapted mop for some period, with pain manifesting itself later on. Neither of her MRI conditions were *caused* by this soft tissue work injury – nor did Claimant's preexisting shoulder conditions become permanently symptomatic as a result of this mop incident. As such, Respondents have admitted for soft tissue strain only. The ALJ is not persuaded that what is now being proposed by Dr. Simpson - who performed no causation analysis - is *causally related* to the work injury.

Reasonable and Necessary

9. Based upon the evidence, the ALJ further finds that a pain generator has still not been adequately identified. This is emphasized by Claimant's own hearing testimony, which indicated diffuse pain across her back, neck, and shoulder, and which is not precipitated by actions pointing to her shoulder joint. Claimant's pain complaints have varied with her provider. They vary with the time. Her very temporary pain relief from the injections provided by Dr. Simpson does not indicate an AC joint issue. Even Dr. Simpson is hedging his own bets, by having the 'frank discussion' with Claimant. This exploratory surgery might help; it might not. All causality aside, the ALJ is more persuaded by Dr. Thurston's analysis than that of Dr. Hall on the issue of being *reasonable and necessary*.
10. While clearly warranted under the Guidelines, and given Claimant's delicate psyche, there was no follow-through in getting a psychological evaluation. Further, the medical records supplied do not show, according to Dr. Hall's own criteria, that Claimant has been an *active participant* in a shoulder rehabilitation program for three to six months. While a year may have elapsed, the records do not show consistent effort for a three to six-month period within that year. In fact, the records appear to show resistance to that process by Claimant – to the point that her medical providers just want to give her what she wants, even if it's not medically warranted under the Workers Compensation system.

ORDER

It is therefore Ordered that:

1. Claimant's request for shoulder surgery by Dr. Simpson is denied and dismissed.
2. All matters not determined herein are reserved for future determination.

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

DATED: October 26, 2020

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-131-093-001**

ISSUES

1. Whether the claimant has demonstrated, by a preponderance of the evidence, that on February 14, 2020, she suffered an injury arising out of and in the course and scope of her employment with the employer.
2. If the claimant proves a compensable injury, whether the claimant has demonstrated, by a preponderance of the evidence, that the respondent is liable for reasonable, necessary, and related medical treatment.
3. If the claimant proves a compensable injury, whether the claimant has demonstrated, by a preponderance of the evidence, that she is entitled to temporary total disability (TTD) benefits from February 15, 2020 through and including February 21, 2020.
4. The issue of temporary partial disability (TPD) benefits beginning February 22, 2020, was reserved for future determination.
5. The issue of the claimant's average weekly wage (AWW) was properly endorsed for hearing. Following the hearing, the parties stipulated that if the claim is found compensable, the claimant's AWW is \$500.00.

FINDINGS OF FACT

1. The claimant works for the respondent in the style department.
2. The claimant sustained two prior injuries while employed with the respondent. The first injury occurred on February 20, 2015, and involved the claimant's right knee. The second injury occurred on January 7, 2016 and involved the claimant's neck, both arms, and low back.
3. While undergoing treatment for the February 20, 2015 and January 7, 2016 work injuries, the claimant reported a variety of symptoms to her medical providers. Those symptoms included: right hip pain, gluteal region pain, pain on the right side of her face and jaw, neck pain, upper back pain, mid back pain, low back pain, buttock pain, left leg pain, right leg pain, right knee pain, right arm pain, left wrist pain, and right ankle pain.
4. The claimant's primary care provider (PCP) is Dr. Darrin Green with Cedar Point Health. In a February 19, 2018 medical record, the claimant reported to Dr. Green that she had pain in her right hip, knee and ankle, and felt like they all "go out." The claimant reported pain with sitting, standing, and laying down. The claimant also reported that she had fallen at work three times, three years prior.

5. In a medical record dated April 30, 2018, the claimant reported to Dr. Green that she had pain and swelling in her right ankle, with popping and rolling. The claimant also reported she had experienced these symptoms for three years.

6. The claimant alleged another work injury with the respondent on July 26, 2018. The matter proceeded to hearing before the undersigned ALJ. In an order dated January 14, 2020, the claimant's claim for benefits was denied. The claimant did not appeal the order.

7. On January 27, 2020, the claimant was again seen by Dr. Green. In the medical record of that date, Dr. Green noted the claimant was experiencing "pain right ankle from work comp injury".

8. The claimant testified that she had no prior right ankle problems and also stated she could not remember if she had prior medical treatment for her ankle.

9. On February 14, 2020, the claimant was not scheduled to work. However, it was necessary for her to report to work to break down a signage pallet, and train another employee on signage.

10. The claimant recalls that on February 14, 2020, she stepped into a dark hallway, then noted that she was on the floor and her hands were wet. The inference is that the claimant slipped on a wet floor and fell to the ground. The claimant does not recall how she fell. The claimant does not recall what body parts struck the floor. The claimant's fall was not witnessed. However, her co-workers promptly came to her assistance following the incident. The claimant testified that she immediately had pain in her right ankle, right knee, right side, and head. In a written statement, the claimant's coworker Ashley Vasile noted that the floor "was [definitely] wet".

11. The claimant was transported by ambulance to the emergency department (ED) at Montrose Memorial Hospital. The EMT report lists the claimant's subjective complaints as pain in her right hip, knee, and ankle. The claimant also reported that when she fell she hit her head. The EMT noted that the claimant had pain on palpation in her right hip, right knee, and right ankle.

12. In the ED, the claimant was seen by Dr. Avery Mackenzie who noted that the claimant was reporting pain in her right ankle, right hip, right chest, neck, and head. The claimant denied numbness, dizziness, loss of vision, hearing loss, and chest pain.

13. While in the ED, the claimant underwent computerized tomography (CT) scans of her head and cervical spine; x-rays of her right ankle; and x-rays of her right hip. The imaging showed no acute injuries or fractures. The claimant was provided with a brace for her right ankle and crutches.

14. The claimant's authorized treating provider (ATP) is Dr. Joseph Adragna with Peak Professionals. The claimant was first seen by Dr. Adragna on February 19, 2020. The claimant reported that she "hurt everywhere". More specifically, the claimant had pain in her right ankle, neck, left shoulder, right shoulder, right elbow, and left elbow. The claimant also reported a history of right knee symptoms "because of my 5000 other

falls' ". On exam, Dr. Adragna noted no effusion in the claimant's elbows. In addition there was no effusion or bruising in the claimant's right ankle.

15. On February 26, 2020, the claimant returned to Dr. Adragna. At that time, Dr. Adragna listed the claimant's diagnoses as trochanteric bursitis of the right hip; bilateral cubital tunnel syndrome; right shoulder contusion; left shoulder contusion; and sprain of the tibiofibular ligament of the right ankle. Dr. Adragna recommended a right hip injection, physical therapy, and chiropractic treatment.

16. On February 26, 2020, the claimant was seen by chiropractor, Dr. Douglas Brannam. At that time, the claimant reported neck pain, thoracic pain, pelvic pain, shoulder and elbow pain, and right ankle pain.

17. On March 9, 2020, Dr. Adragna administered a steroid injection to the claimant's right greater trochanter bursa.

18. On March 23, 2020, the claimant was not wearing her ankle brace when seen by Dr. Brannam. At that time, Dr. Brannam encouraged the claimant to see how long she could go without the brace. Subsequently, on April 27, 2020, Dr. Brannam noted that the claimant was not wearing her brace, and was walking and standing equally on both legs. Dr. Brannam's records during this time indicate that the claimant was continuing to improve.

19. On June 18, 2020, the claimant was seen at Peak Professionals by Isaac Klostermann, PA. The claimant reported diffuse pain symptoms, with her right ankle, right knee, and right hip being the worst. Mr. Klostermann noted that the claimant's right knee was not included in the initial medical records. The claimant opined that she was walking differently and that was causing her knee pain.

20. On June 29, 2020, the claimant returned to Mr. Klostermann. On that date, Mr. Klostermann noted the claimant was reporting a "sudden spontaneous worsening after vast improvement". Mr. Klostermann noted that the claimant's ongoing symptoms were "perplexing" and she was now reporting new left sided radicular symptoms.

21. On July 6, 2020, the claimant returned to Dr. Brannam. At that time, the claimant reported that she was " 'doing horrible' " and that the pain in her right ankle, right knee, and right hip was causing her to feel nauseous.

22. The claimant testified that prior to February 14, 2020, she had pain in her neck, right knee, and right hip. The claimant testified that following February 14, 2020, all of these symptoms intensified. The claimant also testified that since February 14, 2020, she has developed pain in her head, right shoulder, and right ankle. The claimant testified that Dr. Adragna has informed her that she will need to continue to wear her ankle brace for a year.

23. At the request of the respondent, Dr. Lawrence Lesnak reviewed the claimant's medical records and issued a written report. In his July 27, 2020 report, Dr. Lesnak noted that he had previously performed an independent medical examination (IME) of the claimant on November 5, 2019 related to the alleged July 2018 work injury .

Dr. Lesnak noted that following the February 14, 2020 incident, the claimant's subjective complaints were the same as those she reported at her IME in November 2019. Dr. Lesnak opined that there is "no medical evidence" that the claimant sustained an injury on February 14, 2020. Dr. Lesnak noted that the claimant has a history of chronic pain dating back to 2004, and a prior diagnosis of fibromyalgia.

24. Dr. Lesnak's testimony was consistent with his written report. Dr. Lesnak testified that he finds no medical evidence that the claimant suffered an injury on February 14, 2020. Dr. Lesnak also testified that the claimant has an extensive prior history for right ankle symptoms, including reports of swelling in 2015, and pain and swelling at the November 2019 IME. With regard to the sudden worsening that the claimant reported in June 2020, Dr. Lesnak testified that such a worsening is "completely non-physiologic".

25. The ALJ credits the medical records and the opinions of Dr. Lesnak. The ALJ does not find the claimant's testimony to be credible or persuasive. The ALJ finds that the claimant has failed to demonstrate that it is more likely than not that on February 14, 2020 she suffered an injury arising out of her employment with the respondent. Although the claimant appears to have been found seated on the floor on that date, the ALJ is not persuaded that she sustained an injury necessitating medical treatment. All medical treatment the claimant has undergone since February 14, 2020, is due to the claimant's subjective complaints and not objective findings. The ALJ also finds that the claimant's reported symptoms are identical to those she had prior to February 14, 2020.

CONCLUSIONS OF LAW

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

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias,

prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

4. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. See *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); see also *Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it “aggravates accelerates or combines with a preexisting disease or infirmity to produce disability or need for treatment.” See *H & H Warehouse v. Vicory*, *supra*.

5. The Act creates a distinction between an “accident” and an “injury.” The term “accident” refers to an “unexpected, unusual, or undesigned occurrence.” Section 8-40-201(1), C.R.S. In contrast, an “injury” contemplates the physical or emotional trauma caused by an “accident.” An “accident” is the cause and an “injury” is the result. No benefits flow to the victim of an industrial accident unless the accident causes a compensable “injury.” A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). *Soto-Carrion v. C & T Plumbing, Inc.*, W.C. No. 4-650-711 (ICAO, Feb. 15, 2007); *David Mailand v. PSC Industrial Outsourcing LP*, W.C. No. 4-898-391-01, (ICAO, Aug. 25, 2014).

6. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that on February 14, 2020, she suffered an injury arising out of and in the course and scope of her employment with the respondent. While an incident did occur on that date, the ALJ concludes that the claimant did not suffer an injury necessitating medical treatment. The medical records and the opinions of Dr. Lesnak are found to be credible and persuasive.

ORDER

It is therefore ordered that the claimant’s claim related to an alleged date of injury of February 14, 2020 is denied and dismissed.

Dated this 27th day of October 2020.



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

- Whether claimant has proven by a preponderance of the evidence that she sustained a compensable injury arising out of and in the course of her employment with employer?
- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that she is entitled to an award of temporary total disability (“TTD”) benefits for the period of May 6, 2020 through June 6, 2020?
- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that she is entitled to an award of temporary partial disability (“T9D”) benefits for the period of June 7, 2020 through ongoing?
- If claimant has proven a compensable injury, what is claimant’s average weekly wage (“AWW”)?
- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that she is entitled to a change of physician?
- Have respondents proven by a preponderance of the evidence that claimant’s injury resulted from a deviation of her employment?

FINDINGS OF FACT

1. Claimant was employed by employer as a full time caregiver under the Consumer Directed Attendant Support Services (“CDASS”) program. The CDASS program allows a client to manage their own health care and allows for family members to be hired to participate in providing a client with home health care. Employer is a financial management services company that serves as the financial administrator/fiscal employer agent under the CDASS program. Employer’s roll is to handle the attendant paperwork, run the background checks, and pay the employee’s hired to care for the client. Claimant worked exclusively for one client. For the purposes of privacy the client will not be referred to by name in this Order, but will simply be called “the client”.

2. Claimant’s job duties for employer included cleaning, cooking, bathing, feeding and personal grooming of the client. The client in this case suffers from ALS and is confined to a wheelchair with limited ability to communicate. The client requires care 24 hours a day, 7 days a week. The client continues to have full function of her mind, but her physical capabilities are extremely limited and she needs dependent care in order to be fed, go to the bathroom, bathe, dress, groom and provide daily care for her activities of daily living.

3. The client lives in a mobile home next door to her 90 year old mother, Ms. F[Redacted]. Ms. F[Redacted] is also a caregiver for the client and will provide care for the client when one of the other caregivers does not show up for work.

4. Claimant testified that she showed up for work at her regular shift at approximately 7:50 or 7:55 a.m. on May 6, 2020. Claimant testified that when she arrived at work, she noticed that there was a Kleenex in the trash can in the bathroom, without a plastic in the trash can. Claimant testified that she spoke to the attendant who was finishing up her shift, Ms. B[Redacted], and told her that she needed to put a plastic liner in the trash can. Claimant testified that Ms. B[Redacted] told claimant not to tell her what to do and began swearing at claimant. Claimant testified she went back to the bathroom and told Ms. B[Redacted] to clean the tissue before she left. Claimant testified Ms. B[Redacted] then grabbed claimant by the hair and dragged her into the back yard where Ms. B[Redacted] began beating claimant.

5. Claimant testified she attempted to call Ms. F[Redacted], but Ms. F[Redacted] hung up on her. Claimant testified at some point during the assault, Ms. F[Redacted] came between claimant and Ms. B[Redacted], but Ms. B[Redacted] continued to assault claimant. Claimant testified she screamed for Mr. B[Redacted] to stop, and after screaming five times, Ms. B[Redacted] stopped assaulting claimant and she fled to the front yard.

6. Claimant testified that a neighbor called the police who eventually arrived and called an ambulance for claimant. Claimant testified she was taken by ambulance to the hospital. Claimant testified she was given a citation by the police for disturbing the peace.

7. Ms. B[Redacted] testified at hearing in this matter. Ms. B[Redacted] testified that she is employed by employer as a full time caregiver. Ms. B[Redacted] testified that on May 6, 2020 she arrived at work and noticed there was a napkin on the floor. Ms. B[Redacted] testified she picked up the napkin and threw it into the trash in the bathroom. Ms. B[Redacted] testified that later when claimant arrived at work, claimant came out of the bathroom and began swearing at Ms. B[Redacted] telling her to go clean up the napkin.

8. Ms. B[Redacted] testified she asked claimant if she wanted to go outside, and claimant and Ms. B[Redacted] went outside. Once outside, Ms. B[Redacted] testified Ms. B[Redacted] put her finger in claimant's face. Ms. B[Redacted] testified claimant grabbed her finger and her hair, following which she picked up claimant and threw her to the ground.

9. Ms. B[Redacted] testified to other conflicts she had with claimant involving work, including a conflict involving cleaning a suction pump used for the client. Ms. B[Redacted] testified that she had complained to Ms. F[Redacted] regarding the bullying claimant had been doing to the other caregivers.

10. Ms. B[Redacted] testified that while she and claimant went outside to fight, the client was left alone in the house.

11. Following the fight, claimant was taken by ambulance to North Suburban Emergency Department emergency room ("ER") for evaluation. Claimant was evaluated by Dr. Bassett and was referred for a computed tomography ("CT") scan. The CT scan showed right periorbital swelling, but no intracranial hemorrhage and no fracture of the cervical spine. Claimant was discharged and instructed to follow up with a physician.

12. Claimant testified that after treating in the emergency room she reported the injury to Ms. M[Redacted], the client's sister and the person in charge of the client's care, and requested to be referred to a physician. Claimant testified Ms. M[Redacted] told claimant that they would not refer her to a physician.

13. Ms. M[Redacted] testified at hearing in this matter. Ms. M[Redacted] testified she did not refer claimant to a physician because she did not believe claimant's injury was a compensable workers' compensation claim. Ms. M[Redacted] testified she was offended that claimant and Ms. B[Redacted] had left her sister alone, unable to care for herself, in order to go outside and fight.

14. When she wasn't referred to a physician, claimant sought medical treatment at Advanced Urgent Care. Claimant reported injuries to her right eye, forehead, base of neck, base of head, right cheek, inner lip and bilateral upper extremities. Claimant reported she felt as though her jaw was not lining up and her vision in her right eye was blurry. Claimant also reported chest pain, swelling, joint pain and headaches. The Urgent Care physician noted claimant had upper lip swelling, a scratch on her right upper back, right elbow pain with an abrasion.

15. Claimant returned to North Suburban Medical Center on May 9, 2020 on instruction from the urgent care and was again seen in the ER. Claimant reported to the ER physician that she had persistent pain in her right elbow, chest and right eye since the incident. Claimant underwent x-rays of her right elbow, and ocular ultrasound and a CT scan of the ribs. None of the diagnostic tests showed an acute abnormality. Claimant was provided an eye drop for her eye complaints.

16. Claimant sought treatment with Denver Ophthalmology on May 12, 2020. Claimant presented with complaints of blurring in her right eye associated with irritation, pain, red eyes, swelling in her eyelids and headaches. Claimant was diagnosed with subconjunctival hemorrhage and orbital contusion. Claimant returned to Denver Ophthalmology on May 28, 2020 with complaints of headaches and throbbing behind her right eye. Claimant was diagnosed with an orbital contusion and iridocyclitis. The physician recommended topical steroids and released claimant to return to work without restrictions.

17. Claimant testified that she brought the work release to her employer, but was advised that she would only be used as "back up". Claimant testified she was not given any hours by employer after she presented the release to return to work. Claimant testified she subsequently went to work for Merry Maids as a new employer because she needed to earn money. Claimant testified she began this work in June 2020.

18. Claimant subsequently sought medical treatment with Dr. Chicoine on July 2, 2020. Claimant reported a history of being assaulted by a co-worker and continuing to experience vision change. Claimant reported an injury to her right shoulder, right elbow and right TMJ. Dr. Chicoine instructed claimant to follow up in two weeks. Dr. Chicoine did not provide claimant with any work restrictions.

19. Claimant returned to Dr. Chicoine's office on July 17, 2020 and was examined by Physicians' Assistant ("PA") Krueger. PA Krueger noted claimant reported minimal improvement since her last visit. PA Krueger recommended claimant be evaluated for a consultation regarding her TMJ and follow up with an ophthalmologist. Claimant was instructed to return in three weeks. Claimant was again not given any work restrictions.

20. Claimant testified she continues to experience popping in her jaw and she cannot see clearly out of her right eye. Claimant testified that she continues to need medical care for her injuries. Claimant testified that if she returned to work for employer, she would have trouble transferring the client due to the required lifting and the continued issues with her injury. Claimant's testimony in this regard is found to be credible and persuasive.

21. The ALJ finds that claimant has demonstrated that it is more probable than not that the physical assault in this case arose out of a dispute related to the employment, namely the disagreement over which employee would be cleaning the napkin from the work area. Both claimant and Ms. B[Redacted] testified as to the animosity between them. The testimony was consistent that the animosity had an inherent relationship to their work and did not represent a personal conflict from outside of work. Therefore, the ALJ finds that claimant has demonstrated that it is more probable than not that the injuries sustained in the physical assault represent a compensable work injury.

22. Respondents argue at hearing that claimant's actions in entering into the physical confrontation with Ms. B[Redacted] and abandoning the client represents a deviation from her work duties that take her out of the course and scope of her employment. The ALJ is not persuaded.

23. Respondents argue that claimant's number one job priority was to take care of the client and that by leaving the client alone in her home, claimant placed the client at risk as no one was present to monitor the health status of the client. However, almost all physical assault cases involve employees abandoning their work duties in order to take part in the physical confrontation. It would be the rare case where the employee finds a co-worker to cover their work duties during the time of the confrontation.

24. The ALJ notes that the assault in this case occurred during claimant's work shift, albeit right at the beginning of the shift, and occurred on the employer's premises. The ALJ notes that the claimant and Ms. B[Redacted] took the fight outside the home of the client but the nature of the disagreement generated from the conditions of the employment and a dispute over job duties while both claimant and Ms.

B[Redacted] were inside. The ALJ further notes that while claimant was never provided with additional work for employer after the confrontation, Ms. B[Redacted] remains employed with employer, even though she abandoned the client to engage in the fight in the same manner as claimant.

25. Moreover, the fact that the employee abandons their job duties during the physical confrontation does not make the injuries from the confrontation non-compensable under Colorado case law that addresses the test to determine if injuries from a physical confrontation are compensable. Therefore, the ALJ rejects respondents argument that the claim in this case is not compensable based on a deviation from claimant's employment.

26. Claimant testified at hearing that she works full time, seven day per week. Claimant testified she earns \$15.15 per hour. According to the wage records entered into evidence at hearing, taking into consideration the time period of March 1, 2020 through April 30, 2020, a period of 8 5/7 weeks, claimant earned \$8770.00. This equates to an average weekly wage ("AWW") of \$1006.39.

27. Claimant argues at hearing that the AWW calculation should use the earnings through May 5, 2020, as evidenced by a check issued for the period of May 1, 2020 through May 15, 2020. However, the ALJ finds that based on the nature of claimant's work, it is best to use the entire pay periods for the time prior to her injury. The ALJ notes that the pay stubs for the period of March 1, 2020 through April 30, 2020 would document that claimant was averaging roughly between 8 and 9.5 "units" per day contained in the pay period. For the period of May 1 through May 5, claimant would have averaged 10.2 "units". There was no explanation at hearing to explain why claimant's "units" would be higher for this particular time period that would justify including this time period in the ALJ's calculation of the AWW.

28. Following claimant's injury, she was taken off of work and was not provided with modified duty by employer. The ALJ credits the claimant's testimony at hearing and the medical records entered into evidence and finds that claimant has proven that it is more likely than not that she is entitled to an award of temporary total disability ("TTD") benefits from May 6, 2020 through June 6, 2020 when claimant began working for Merry Maids. Claimant's testimony that she would not have been able to perform her work duties including transferring the client is found to be credible and persuasive regarding the issue of TTD benefits.

29. After claimant began working for Merry Maids on June 6, 2020, claimant was earning reduced wages. The ALJ credits claimant's testimony at hearing and the records from Merry Maids entered into evidence and finds that claimant has proven that it is more likely than not that she is entitled to an award of temporary partial disability beginning June 6, 2020 and continuing until terminated by law.

30. Respondents argued at hearing that the TTD benefits should end with the May 28, 2020 release to return to work without restrictions. The ALJ credits claimant's testimony that she would have needed accommodations to perform her work for employer, including assistance with the transfers. The ALJ further notes that employer

refused to refer claimant to an authorized treating physician in this case and finds that the employer refused to provide claimant with work after being presented with the release to return to work. The ALJ therefore finds that claimant's entitlement to temporary disability benefits continued after May 28, 2020 and includes the period of temporary partial disability.

31. With regard to the issue of authorized treating physician, respondents failed to refer claimant to a physician willing to treat her injuries. Therefore, claimant was forced to seek treatment with the ER and urgent care center. Claimant argued at hearing that because the employer failed to refer her to a treating physician she should be allowed to choose Dr. Yamamoto as her treating physician. However, claimant did select a physician by virtue of her seeking treatment with Dr. Chicoine in July 2020. Therefore, claimant cannot choose a new treating physician. Insofar as claimant is requesting a change of physician, the ALJ finds that claimant has failed to demonstrate that a change of physician is appropriate in this case.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2010. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

3. Claimant must show that the injury was sustained in the course and scope of his employment and that the injury arose out of his employment. The "arising out of" and "in the course of" employment criteria present distinct elements of compensability. *Madden v. Mountain West Fabricators*, 977 P.2d 861 (Colo. 1999). For an injury to occur "in the course of" employment, the claimant must demonstrate that the injury occurred in the time and place limits of his employment and during an activity that had

some connection with his work-related functions. *Id.* For an injury to “arise out of” employment, the claimant must show a causal connection between the employment and the injury such that the injury has its origins in the employee’s work related functions and is sufficiently related to those functions to be considered a part of the employment contract. *Id.* Whether there is a sufficient “nexus” or relationship between the Claimant’s employment and his injury is one of fact for resolution by the ALJ based on the totality of the circumstances. *In re Question Submitted by the United States Court of Appeals*, 759 P.2d 17 (Colo. 1988).

4. Under the tests set forth by the Colorado Supreme Court involving willful assaults by co-employees, injuries are broken down into three categories: (1) those assaults that have an inherent connection with the employment; (2) those assaults that are inherently private; and (3) those assaults that are neutral. *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991); see also *In re Question, supra*. Both the first and third categories of assaults are held to arise out of the employment for the purposes of the Workers’ Compensation Act and therefore prevent an employee from suing his or her employer in tort for injuries based on such assaults. Only the second category of injuries, inherently private assaults, does not arise out of employment.

5. An activity that is sufficiently related to the circumstances under which the claimant normally performs his or her duties is reasonably characterized as an incident of employment or a condition of the workplace. *City of Boulder v. Streeb*, 706 P.2d 786. The fact that a claimant is the initial aggressor in assaultive behavior does not, in itself, render an injury non-compensable. *Banks v. Industrial Claim Appeals Office*, 794 P.2d 1062 (Colo. App. 1990).

6. As found, claimant has proven by a preponderance of the evidence that the assault in this case resulted from an inherent connection with the employment, and not a private conflict that was brought into the work relationship. As found, claimant has demonstrated by a preponderance of the evidence that she sustained a compensable injury arising out of and in the course of her employment with employer.

7. Respondents argue that claimant was on a deviation at the time of the injury and therefore the injury did not arise out of her employment with employer. For the reasons stated below, the ALJ rejects respondents argument that claimant was on a deviation at the time of the injury.

8. It is generally not necessary for an employee to be actually engaged in work duties at the time of an accident for an injury to be compensable. See *Phillips Contracting, Inc. v. Hirst*, 905 P.2d 9 (Colo. App. 1995). When a personal deviation is asserted, the issue is whether the activity giving rise to the injury constituted a deviation from employment so substantial as to remove it from the employment relationship. *Silver Engineering Works, Inc. v. Simmons*, 180 Colo. 309, 505 P.2d 966 (1973); *Roache v. Industrial Commission*, 729 P.2d 991 (Colo. App. 1986). The general test for deviation from employment in Colorado is whether the deviation is substantial. *Kelly v. Industrial Claim Appeals Office*, 214 P.3d 516 (Colo. App. 2009).

9. In this case, the confrontation between claimant and Ms. B[Redacted] arose out of a dispute involving the conditions of employment and job duties related to the employment. The assault in this case took place on the property of employer. As found, claimant and Ms. B[Redacted] both abandoned the client in order to engage in the fight, but Ms. B[Redacted] continued to be employed by employer while claimant was not provided with any more employment shifts after the assault occurred. Based on the facts of this case, the ALJ finds that the deviation in this case was not so substantial as to remove it from the employment relationship.

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

11. As found, claimant has demonstrated by a preponderance of the evidence that she is entitled to an award of TTD benefits beginning May 6, 2020 and continuing until June 6, 2020, after which claimant began working for a new employer. As found, claimant's testimony that she would have needed accommodations with employer, including assistance with transfers is found to be credible and persuasive. The fact that claimant was released to return to her work without restrictions on May 12, 2020 does not preclude claimant from receiving temporary disability benefits in this case where claimant testified credibly that she would have needed assistance with transfers and claimant was not offered work by employer when she presented the release to her employer.

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

13. As found, claimant has proven by a preponderance of the evidence that she is entitled to an award of TPD benefits beginning June 7, 2020 when she returned to work for a new employer. As found, the employment records from the new employer and claimant's testimony at hearing regarding her inability to perform her previous job

without accommodations are found to be credible and persuasive with regard to the issue of claimant's entitlement to TPD benefits.

14. The ALJ further notes that even though claimant was released to return to work without restrictions by Dr. Chicoine in July 2020, a release to return to work without restrictions is not the basis for a cut off of temporary partial disability benefits under Section 8-42-106, C.R.S.

15. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; see *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). "Authorization" refers to the physician's legal status to treat the injury at the respondents' expense. *Popke v. Industrial claim Appeals Office*, 797 P.2d 677 (Colo. App. 1990) Pursuant to Section 8-43-404(5), C.R.S., Respondents are afforded the right, in the first instance, to select a physician to treat the industrial injury. Once respondents have exercised their right to select the treating physician, claimant may not change physicians without first obtaining permission from the insurer or an ALJ. See *Gianetto Oil Co. v. Industrial Claim Appeals Office*, 931 P.2d 570 (Colo. App. 1996). However, Section 8-43-404(5)(a)(I)(A) implicitly contemplates that the respondent will designate a physician who is willing to provide treatment. See *Ruybal v. University Health Sciences Center*, 768 P.2d 1259 (Colo. App. 1988). Therefore, if the physician selected by respondents refuses to treat the claimant for non-medical reasons, the respondents must designate a new treating physician in a timely manner, otherwise the right of selection of the authorized treating physician passes to the claimant, and the physician selected by the claimant is authorized. See *Ruybal v. University Health Sciences Center*, *supra*.

16. As found, respondents failed to properly designate a physician to treat claimant for her work injuries, and therefore, the right to select a physician transfers to claimant. As found, claimant selected Dr. Chicione to treat her for her work injury and is the authorized provider by virtue of claimant's election to treat there. Insofar as claimant is requesting a change of physician to Dr. Yamamoto, the ALJ finds that claimant has failed to prove by a preponderance of the evidence that a change of physician is appropriate in this case. As found, the medical treatment from the ER, urgent care, Denver Ophthalmology and Dr. Chicoine is reasonable care necessary to cure and relieve claimant from the effects of the work injury.

17. The ALJ must determine an employee's AWW by calculating the money rate at which services are paid the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995).

18. As found, for the complete time periods in the two months (8 5/7 weeks) prior to claimant's injury, claimant was paid \$8,770.00. As found, this equates to an AWW of \$1,006.39. As found, the ALJ finds that it is not appropriate to include the earnings claimant had for the incomplete pay period that involved her injury in this case.

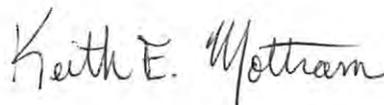
ORDER

It is therefore ordered that:

1. Respondents shall pay for the reasonable medical treatment necessary to cure and relieve claimant from the effects of the industrial injury.
2. Respondents shall pay Claimant TTD benefits based on an AWW of \$1,006.39 for the period of May 6, 2020 through June 6, 2020. Respondents shall pay claimant TPD benefits beginning June 7, 2020 and continuing until terminated by law.
3. Respondents argument that claimant's injury resulted from a deviation of her employment is denied and dismissed.
4. Claimant's treating physician in this case is Dr. Chicoine. Claimant's request for a change of physician is denied.
5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 633 17th Street, Suite 1300, Denver, Colorado, 80202. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: <http://www.colorado.gov/dpa/oac/forms-WC.htm>.

DATED: October 27, 2020



Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-140-107-001**

ISSUES

1. Whether respondents have proven by a preponderance of the evidence that claimant's injury was the result of a safety rule violation pursuant to Section 8-42-112(1)(b), C.R.S.?

2. Whether respondents have proven by a preponderance of the evidence that Dr. Zwerdinger is claimant's designated authorized treating physician?

3. Whether claimant has proven by a preponderance of the evidence that he is entitled to an award of medical benefits in the form of a home gym, gym membership, and biking shoes?

4. Claimant endorsed the issue of penalties against respondents. The court dismissed the penalty claim at the commencement of the October 20, 2020 hearing based on claimant's failure to sufficiently answer discovery and set forth, with specificity, the grounds on which the penalty was being asserted.

5. Claimant moved to have ALJ Mottram recuse himself multiple times both before the hearings and during the hearings. The motion to recuse was denied as part of the Status Conference Order dated September 24, 2020 and was denied orally during the hearing. Claimant's exhibit 2 was entered into evidence based on claimant's assertion that he intended to appeal denial of the motion to recuse.

6. After the October 8, 2020 hearing, claimant moved to stay the proceedings and suspend the October 20, 2020 hearing until the "Colorado State Legislature responds on how felony perjury will be enforced and ensure maximum medical improvement, my case and thousands of primarily Latinx workers, is addressed." Claimant's motion to suspend the proceedings was denied by the ALJ. Claimant's exhibit 2 was admitted for purposes of the appeal of the denial of this motion.

FINDINGS OF FACT

1. Claimant was employed by employer working on a construction site in Vail, Colorado. Mr. F[Redacted], the field project coordinator for employer, testified at hearing in this matter. Mr. F[Redacted] testified that on June 3, 2020 he was instructed by his project supervisor, Mr. A[Redacted], with assigning claimant the task of putting up safety rails on an upper level rough opening and securing plastic around multiple rough openings on the job site. A rough opening is a term used on the construction site to describe an area where a window or door is to be installed, but leaves an opening in the building before installation is complete. Mr. F[Redacted] testified he laid out the tasks for claimant between 3:30 and 3:45 p.m.

2. Mr. F[Redacted] testified that the rough opening where claimant was to install the safety rail and hang the plastic was 9' 8 1/2" wide and 8' 8 1/2" tall. Mr. F[Redacted] testified that the safety rails were removed so that the employees could use a forklift to put in heating ventilation and cooling ("HVAC") equipment in the upper level of the house. Mr. F[Redacted] testified that the safety rails were constructed out of 2x4 wood. Mr. F[Redacted] testified that pursuant to OSHA requirements, the safety rails would need to withstand 200 pounds of pressure down and out. Mr. F[Redacted] testified that as he walked with claimant to show him the rough opening and where to hang the plastic, he pointed out ladders that were on the job site that claimant could use to complete the job of hanging the plastic. Mr. F[Redacted] testified that a step ladder would have been the correct tool for claimant to use on the job site.

3. Mr. F[Redacted] testified that at approximately 4:30 p.m. he noticed claimant was still working on hanging the plastic about the rough opening as he was preparing to shuttle workers down to the parking lot. Mr. F[Redacted] testified employees would park at a different parking lot and then be shuttled by employer to the work site. Mr. F[Redacted] testified that he could see claimant in the rough opening from where he was next to the van in the parking lot and called up to claimant to let him know that he was going to shuttle the employees down to the parking lot and would then come back and pick up claimant. Mr. F[Redacted] testified he took the employees down to the parking lot, then returned for claimant. Mr. F[Redacted] testified that when he returned to pick up claimant, claimant advised him that he had injured his ankle while trying to hang the plastic over the rough opening.

4. Mr. F[Redacted] testified that later that evening he received a text message from claimant that stated as follows:

Can't really walk, think I tore calf muscle. It'll be alright, but unlikely by tomorrow. Didn't want to bother Gene, so could you tell him I'll work Friday it's better, but not likely, more likely get on regular 40 hour week starting Monday. It was my fault so would really prefer not to deal with paperwork. Not serious, just limiting right now. Just tell him I was rushing so as not to hold people up and stupidly thought the safety rail would hold. Thanks.

5. Mr. F[Redacted] testified that employer had several skilled carpenters on the job site on June 3, 2020. Mr. F[Redacted] testified that he did not ask a skilled carpenter to reinstall the safety rail because he believed claimant was capable of performing the task and claimant did not raise any concerns with regard to his ability to reinstall the safety rail when Mr. F[Redacted] asked him to perform the task.

6. Mr. F[Redacted] testified as to safety meetings held by employer. Mr. F[Redacted] testified safety meetings are held weekly and attendance by the employees is mandatory. Mr. F[Redacted] testified that the meetings take place during work hours, and employees are paid their hourly rate to attend the meetings. Mr. F[Redacted] testified that employer had a safety meeting on March 2, 2020 regarding fall arrest

systems. Mr. F[Redacted] testified that employees would sign in for attending the safety meetings, but sometime after March 2, 2020, employer changed the sign in process due to concerns with the spread of COVID-19 that were raised by claimant. Mr. F[Redacted] testified that based on these concerns, instead of passing around a piece of paper and a pen to each employee to sign at the beginning of the safety meeting, he would simply note that the employees from the employer and employees from specific contractors were present. Mr. F[Redacted] testified that they would then be able to verify that the employees were present based on wage records that would document that the specific employee was at work that day. Mr. F[Redacted] testified that there were additional safety meetings including fall protection guardrails on April 21, 2020; inspecting ladders on May 21, 2020; and ladder safety and step ladders on May 28, 2020. Employment records entered into evidence at hearing document that claimant was at work on May 28, 2020. The safety meeting attendance sheet indicates that BPC employees had a safety meeting on May 28, 2020 involving ladder safety and step ladders.

7. Mr. F[Redacted] testified that there were multiple ladders on site, some of which were owned by employer and some owned by contractors. Mr. F[Redacted] testified that the ladders were available for claimant's use in performing the tasks he was assigned. Mr. F[Redacted] testified that claimant's failure to use a step ladder to hang the plastic was a violation of the safety rules/expectations established by employer that the employees should use the proper tool for the job. Mr. F[Redacted] testified that the safety rule setting forth that the employee should use the proper tool for the job was mentioned to the employees at the safety meetings held by employer. Mr. F[Redacted]'s testimony in this regard is found to be credible and persuasive.

8. Mr. F[Redacted] testified on cross-examination that once the COVID-19 pandemic becoming apparent, he would ask employees about their symptoms each day and take the temperature of each employee before they are allowed to begin work. Mr. F[Redacted] testified that the employee is then required to sign off on a sheet of paper acknowledging that they are symptom free. Mr. F[Redacted] testified that there have not been any concerns raised by employees with regard to signing in each day prior to work.

9. Mr. F[Redacted] testified that the day following the injury, claimant did not show up to work due to his injury. Mr. F[Redacted] testified that he filled out an incident report on June 4, 2020 based on the claimant's report of his injury to Mr. F[Redacted]. Mr. F[Redacted] testified he did not seek claimant's input with regard to the incident report due to the fact that claimant had indicated that he did not want to deal with paperwork. Mr. F[Redacted] testified that he needed to fill out an incident report because claimant had begun to miss time from work for the injury.

10. Mr. A[Redacted] testified at hearing in this matter. Mr. A[Redacted] is the superintendent for employer. Mr. A[Redacted] testified he is at the job site daily to oversee the work being performed. Mr. A[Redacted] testified that on June 3, 2020, he instructed Mr. F[Redacted] to assign the job of reinstalling the safety rail and hanging the plastic over the rough openings to claimant.

11. Mr. A[Redacted] testified consistent with Mr. F[Redacted] in that he confirmed that the sign in process for safety meetings changed after issues involving the COVID-19 pandemic became apparent in the Spring of 2020. Mr. A[Redacted] testified that employer stopped sharing pens at the safety meeting and a general entry for all employees was used to record attendance at the meetings.

12. Mr. A[Redacted] testified that the rough opening claimant was working on when he was injured is on the second level and is one story off the ground. Photos of the rough opening were entered into evidence at hearing and depict the rough opening being on the second floor above an area for parking consistent with the description presented by Mr. F[Redacted] in his testimony.

13. Mr. A[Redacted] testified as to the safety rail requirements pursuant to OSHA. Mr. A[Redacted] testified that the top level of the safety rail should be 42" from the floor, with a lower rail 21" from the floor. On cross examination, Mr. A[Redacted] testified that OSHA also requires toeboards be present. As noted by Mr. A[Redacted] on redirect examination, photos of the rough opening in question demonstrate that there are 2x6 boards at the base of the rough opening, as the rough opening is in an area where a window will be installed and does not go all the way down to the floor. The ALJ finds that the 2x6 boards at the bottom of the wall represent toeboards as required by the OSHA requirements.

14. Mr. A[Redacted] testified that there were multiple ladders owned by employer on the job site. Mr. A[Redacted] testified he knows that there were multiple ladders on site because he was the person who had purchased the ladders.

15. Mr. A[Redacted] testified on cross examination that claimant had performed no carpentry work to his knowledge before June 3, 2020. Mr. A[Redacted] testified that a person did not have to be a carpenter to install the safety rails. Mr. A[Redacted] testified that a vertical board was not installed on the safety rail, and if a vertical rail was installed, it would probably have increased the strength. Mr. A[Redacted] testified that not stepping on the safety rail is discussed at safety meetings. Mr. A[Redacted] testified he expects the employees to use common sense. Mr. A[Redacted] testified that the issue of stepping on the safety rail is not written down anywhere.

16. With regard to the ladders, Mr. A[Redacted] testified that the ladders owned by employer would have been marked with the initials BPC. Mr. A[Redacted] testified as to specific ladders that are owned by employer where the initials BPC cannot be seen on the photographs, including the ladder on Exhibit Z pages 268, 270 and 271. The ALJ further notes that the picture of the step ladder on Exhibit Z page 280 does contain the initials BPC.¹

¹ The ALJ notes that during the hearing there appeared to be some disagreement between what represented a step ladder versus a regular ladder. For purposes of the hearing, the ALJ considers a step ladder to be a ladder which has a self supporting A frame construction and is capable of standing without being leaned against a separate structure for support.

17. Claimant testified that on June 3, 2020, he started shoveling gravel in the morning. Claimant testified that at approximately 3:30 p.m. he was approached by Mr. F[Redacted] who told him he had forgotten about reinstalling safety rails on an upstairs window and asked claimant to reinstall the safety rails. Claimant testified Mr. F[Redacted] handed him about 20 nails but told claimant that if it was possible, claimant should reuse the old nails from when the safety rails were previously installed. Claimant testified he asked Mr. F[Redacted] for a hammer and Mr. F[Redacted] told him to borrow a hammer from another employee on the work site.

18. Claimant testified he found the old nails and put the boards back into the rough opening to reconstruct the safety rail. Claimant testified that he was instructed by Mr. F[Redacted] to put the nails in the exact same spot as that was the requirement for the height specifications. Claimant testified that in reconstructing the safety rail, there were not boards for vertical support beams. Claimant testified that he then reinstalled the safety rail using the old nails and not the new nails provided to him by Mr. F[Redacted]. Claimant testified he did this because he was instructed to use the old nails by Mr. F[Redacted].

19. Mr. F[Redacted] testified he did not know why claimant would reuse the nails to install the safety rail. Mr. F[Redacted] testified that he did not instruct claimant to reuse the nails and was not present when Mr. F[Redacted] re-installed the safety rail. Mr. F[Redacted] testified that there is not a written safety rule that prohibits an employee from stepping on a safety rail, but expects employees to use common sense. Mr. F[Redacted] testified that employees are instructed to make sure they are using the right tool for the job. With regard to the discrepancy in the evidence between whether claimant was instructed to reuse the old nails to replace the safety rail, the ALJ finds the testimony of Mr. F[Redacted] to be more credible than the testimony of claimant.

20. Claimant testified he then went to hang the plastic on the rough openings, however, he did not have a staple gun to hang the plastic. Claimant testified he eventually found a staple gun, but it was being used. Claimant testified he then cut and prepared the plastic while he waited for the other construction worker to finish with the staple gun.

21. Claimant testified that at approximately 4:32 p.m. he obtained the staple gun and was able to locate some staples with the help of a co-worker. Claimant testified that at 4:35 p.m. he ran into Mr. F[Redacted] at the bottom of the stairwell, two floors below the rough opening where claimant reinstalled the safety rail. Claimant testified Mr. F[Redacted] asked him if he was done with the task, to which claimant informed Mr. F[Redacted] that he had just received the staple gun and staples and was just beginning to install the plastic. Claimant testified that Mr. F[Redacted] responded by saying, "OK, we'll be waiting in the van." Claimant testified that he then proceeded upstairs and installed the plastic over two windows where there were extension ladders. Claimant testified this task took about five minutes. Claimant testified he then proceeded to another room where there was an extension ladder right next to the window and installed the plastic covering over this window, which took him about 3 minutes.

22. Claimant testified that at 4:43 p.m. he entered the room where he was injured and proceeded to staple the left side of the plastic to the board before he put his right foot on one of the 2x4 safety boards and his left hand against the wall to test to see if the board was secure. Claimant testified that the board seemed secure. Claimant transferred the staple gun from his left hand to his right hand to reach up and once he put pressure on the board, the board immediately gave way and claimant fell backwards and stumbled and felt a pain in his calf.

23. Claimant testified that just before stepping on the board, he looked out the window and saw the van to transfer the employees down to the parking area which was running and had several people in the van looking at their phones. Claimant testified he knew that the employees usually leave at 4:30 p.m. or 4:45 p.m. and they were already late. Claimant testified he was aware of 3 large extension ladders but believed that people in the van were waiting on him. Claimant testified that if Mr. F[Redacted] had informed him that he would drop off the employees and come back for him, he could have gone to obtain one of the extension ladders, but that would have taken him 20 minutes. Claimant's testimony that he was rushing to complete the job is consistent with the text message he sent to Mr. F[Redacted] following the injury.

24. Claimant testified that after he fell, Mr. F[Redacted] then informed claimant that he would take the other employees to the parking lot and then return for Mr. F[Redacted]. Claimant testified that if he had been told that Mr. F[Redacted] could return and pick him up, he would not have been rushed and could have gone to get the extension ladder. Claimant testified that by the time Mr. F[Redacted] told him he would come back to get him, he had already sustained the injury, so it was too late to go get the ladder. Claimant testified he was then able to complete the rest of his task even with a severed Achilles.

25. Mr. F[Redacted] testified that it was his understanding that claimant injured his ankle after he left to take the other employees to the parking lot and before he returned. Mr. F[Redacted] also testified that he did not recall having a conversation with claimant at 4:35 p.m. when claimant purportedly told Mr. F[Redacted] that he was just starting to hang the plastic.

26. Claimant testified that the presence of contractor ladders was irrelevant because it is the employer's responsibility to provide adequate ladders for its employees to complete their tasks.

27. Claimant testified that the safety rail that he reinstalled should have had 3 large vertical boards to make the safety rail more sturdy.

28. Respondents' filed a general admission of liability ("GAL") on June 18, 2020 admitting for temporary total disability benefits, but taking a 50% offset of the benefits due to an alleged safety rule violation.

29. Following claimant's injury, claimant was referred by employer to Dr. Kovacevich. Claimant initially saw Dr. Kovacevich on June 11, 2020. Dr. Kovacevich

noted claimant reported a history of having strained his right calf when he was standing on a 2x4 and the 2x4 gave way. Dr. Kovacevich noted claimant had an obvious defect consistent with an Achilles tendon injury. Claimant was referred to Dr. Elton, an orthopedist, and was instructed to proceed with a magnetic resonance image ("MRI"). Dr. Kovacevich took claimant off of work completely.

30. Claimant was examined by Dr. Elton on June 11, 2020. Dr. Elton noted a history of claimant balancing on a board at a construction site when the board slipped and claimant was forced into hyperdorsiflexion as it fell. Claimant reported he felt immediate pain and swelling and had an inability to raise up on his toes. Claimant underwent an MRI which demonstrated an Achilles tendon rupture and Dr. Elton recommended surgery.

31. Claimant underwent surgery under the auspices of Dr. Elton on June 16, 2020 consisting of a limited open right Achilles tendon repair. Claimant returned to Dr. Elton's office on June 29, 2020 and was evaluated by Physicians' Assistant ("PA") Breidenbach. PA Breidenbach removed claimant's sutures and provided claimant with a prescription for physical therapy. PA Breidenbach noted that claimant was requesting a note for a home gym which was provided. In an undated note signed by Dr. Elton, Dr. Elton recommends claimant use an at home gym system to keep claimant in shape so long as he is not bearing weight while participating in the exercises. Dr. Elton noted that due to COVID-19, claimant was limited with respects to his access to the gym.

32. Respondents obtained a physicians' advisor note from Dr. Hattem that opined that a home gym was not reasonable or necessary treatment for a lower extremity injury pursuant to Rule 17, Exhibit 6 of the Colorado Workers' Compensation Medical Treatment Guidelines.

33. Dr. Elton issued a second undated report again requesting a home gym for claimant noting that during claimant's recovery, it would be imperative that claimant maintain his physical fitness in order to supplement for the demands being placed on him during his recovery. Dr. Elton did not explain further what the demands being placed on claimant during his recovery would entail.

34. On July 6, 2020, respondents obtained a second physician advisory report from Dr. Raschbacher that opined that claimant should go to physical therapy for his Achilles tendon injury, but that there was no medical necessity for a home gym. Dr. Raschbacher also opined that the request for a home gym was not reasonable.

35. In response to a July 17, 2020 inquiry from Ms. Cook, a nurse case manager for insurer, Dr. Elton responded and noted that at the present time, it was not medically necessary for claimant to have a gym membership if claimant is attending physical therapy. Dr. Elton noted however, that it could assist in improving his stamina and help maintain physical fitness to better prepare claimant for his return to work demands. Dr. Elton further opined that it would be absolutely reasonable for claimant to have a gym membership in the future to assist in preparing claimant for his return to work demands.

36. Claimant was scheduled a follow up appointment with Dr. Kovacevich on August 3, 2020. Claimant was sent a letter advising him of the date and time of the appointment on July 23, 2020 by Mr. Grady, the adjuster assigned to claimant's case. Claimant and Dr. Kovacevich had a phone conference on July 29, 2020.

37. On July 30, 2020, Dr. Kovacevich contacted claimant via email and indicated that another physician would be handling claimant's care, including all follow-ups and determination of work restrictions and assigning maximum medical improvement ("MMI"), when appropriate.

38. Claimant returned to Dr. Elton on August 3, 2020. Dr. Elton noted that claimant was doing well and needed to continue to follow up with physical therapy for likely another three or four months and gradually increase his strengthening exercises. Dr. Elton also issued an undated note that indicated that he could not predict his exact date of MMI.

39. Dr. Elton issued a note dated August 24, 2020 that stated it had been brought to his attention that claimant no longer had an authorized treating physician for his workers' compensation claim. Dr. Elton expressed a willingness to continue to proceed with care as a specialist, but would not proceed with management of claimant's case. Dr. Elton noted that insurer would need to provide claimant with a list of approved authorized treating physicians to take over the management of the claim.

40. Claimant returned to Dr. Elton on September 21, 2020. Dr. Elton noted that he had a long conversation with claimant regarding claimant's concerns with regard to when he would be placed at MMI. Dr. Elton noted that claimant needed a Level II certified authorized treating physician who can help manage and answer all of those questions for him. Dr. Elton noted that he was happy to be his surgeon but that claimant's behavior had been somewhat irrational with regard to the demands of Dr. Elton's office. Dr. Elton inquired about whether claimant would agree to be treated by Dr. Zwerdinger. Dr. Elton noted that claimant reported he was not a big fan of Dr. Zwerdinger. Dr. Elton noted that claimant should continue with no more than light duty work at this point and opined that claimant would not be at MMI for his injury until 6 to 12 months after surgery.

41. Ms. Gotantas, claimant's physical therapist, issued a letter dated September 28, 2020 which noted that claimant would benefit from aquatic therapy. The letter also noted that claimant should continue to ride his stationary bike at home, until he is released to ride outside as weather permits. Ms. Gotantas noted that claimant was riding up to three hours per day. Ms. Gotantas opined that claimant did not require a special shoe to protect his Achilles while performing stationary bike spinning.

42. Mr. Grady, an adjuster for Pinnacol testified at hearing in this matter. Mr. Grady testified that when he tried to have claimant return to Dr. Kovacevich for the August 3, 2020 appointment, claimant was not happy about it. Mr. Grady testified that

claimant scheduled a phone conference with Dr. Kovacevich on July 29, 2020. Mr. Grady testified claimant then stated he only wanted to see Dr. Elton for his injury.

43. Mr. Grady testified that after receiving the August 24 note from Dr. Elton, he sent claimant a list of possible medical providers on August 27, 2020. The list of medical providers included Eagle Valley Medical Center, Vail Health Hospital / Occupational Health Clinic, Colorado Mountain Medical – Avon, and Dr. Zwerdinger. Mr. Grady testified that claimant did not select a physician from that list of providers. Mr. Grady testified that he then set a medical appointment for claimant with Dr. Zwerdinger that was scheduled for September 30, 2020. A letter was sent to claimant on September 17, 2020 informing him of the appointment.

44. Claimant testified at hearing that he did not attend the appointment with Dr. Zwerdinger. Claimant further testified that he would like Dr. Deveny in Glenwood Springs to be his authorized treating physician. Claimant testified that he believes the Dr. Deveny would be a good physician to treat his injury as she is a runner and he wants to get back to running ultramarathons. Claimant testified he did not know if Dr. Deveny is Level II accredited.

45. With regard to the issue of the safety rule violation, claimant testified at hearing that he used a ladder when putting up the first three plastic coverings over the rough openings. Claimant testified he did not use a ladder over the final opening because a ladder was not available and he was in a rush to complete the task because there was a van full of workers waiting for claimant to drive down to the parking lot. Claimant further testified that the safety rail that he stepped on failed to hold him in this case because he had been instructed to use the old nails instead of new nails by Mr. F[Redacted].

46. The ALJ credits the testimony of Mr. F[Redacted] over the testimony of claimant and finds that Mr. F[Redacted] did not instruct claimant to reinstall the safety rail using old nails. The ALJ further finds that claimant admitted using the safety rail in an inappropriate manner. Although he testified he used it in the inappropriate manner because he was trying to rush to get the task completed, the ALJ is not persuaded that claimant's actions were appropriate. Claimant testified that he used a ladder to install the previous plastic coverings but did not use a ladder on the final plastic covering because he was trying to complete his task quickly so other employees were not waiting for him. The ALJ finds that this constitutes a willful violation of a safety rule.

47. The ALJ credits the testimony of Mr. F[Redacted] that claimant was present for safety meetings involving fall protection, and ladder safety/step ladders while employed with employer. The ALJ notes that claimant's use of the safety rail as a way to reach up above to staple the plastic to the wall effectively negated the intended use of the safety rail. The safety rail is intended to keep a worker from falling from a height of higher than four feet above a lower level (as is noted in the fall protection information entered into evidence at hearing). Claimant placing himself above the safety rail not only runs the risk of the safety rail breaking, but also runs the risk of the employee falling out of the rough opening.

48. The ALJ notes that there were significant disputes at hearing regarding the existence and location of ladders on the job site. In addition, there are conflicts in the evidence as to who owned those ladders. However, the ALJ finds the testimony of Mr. A[Redacted] and Mr. F[Redacted] to be more credible and persuasive than the contrary testimony of claimant regarding the issue of whether employer had ladders available for claimant to use on the job site. The ALJ credits the testimony of Mr. F[Redacted] that there were ladders that were available for claimant to use on the floor where claimant's injury occurred.

49. The ALJ credits the testimony of Mr. F[Redacted] and Mr. A[Redacted] that a safety rule existed which would require claimant to use the right tool for the right job. This rule would require claimant to use a ladder to hang the plastic in this case. The ALJ therefore finds that claimant's use of the safety rail to elevate himself to be able to hang the plastic constitutes a violation of employer's safety rule. The ALJ notes that claimant testified he used a ladder to hang the three other plastic coverings and finds that his testimony that he was rushed to complete the job as his basis for using the safety rail instead of a ladder is further evidence of the willful nature of the safety rule violation and not the result of mere carelessness, negligence, forgetfulness, remissness, or oversight.

50. The ALJ finds that respondents have proven that it is more likely than not that claimant willfully violated a safety rule, and that violation of a safety rule led to claimant's injury, respondents are entitled to reduce claimant's non-medical benefits by 50% pursuant to the Colorado Workers' Compensation Act.

51. With regard to the issue of authorized treating physician, claimant was initially referred to Dr. Kovacevich following his injury. After Dr. Kovacevich indicated that he no longer wished to treat claimant for his work injury, claimant was returned to his surgeon, Dr. Elton. Dr. Elton noted that claimant would need to have a new authorized treating physician to opine on issues such as work restrictions and MMI.

52. The ALJ notes that claimant was presented with a list of four providers from whom he could choose a treating physician. At no point did claimant select any of the physicians identified by respondents. It was only at the hearing that requested the ALJ order that a physician (who was not on the list) be named as his treating physician. The ALJ finds that respondents properly designated a new treating physician in this case and finds that Dr. Zwerdinger is the authorized treating physician for claimant's workers' compensation case.

53. The ALJ finds that respondents timely provided claimant with a list of providers from which claimant could choose a new authorized provider after receiving notice that Dr. Kovacevich was no longer willing to treat claimant and Dr. Elton was not willing to assume the position of the designated authorized treating physician. After claimant failed to select a physician, respondents made an appointment for claimant with Dr. Zwerdinger. Claimant has now, through his testimony at hearing, indicated that he wishes to treat with Dr. Deveny.

54. The ALJ finds that respondents have acted appropriately in designating a new authorized provider after Dr. Kovacevich indicated he no longer wanted to be the treating physician in claimant's case. The ALJ finds that respondents have properly designated Dr. Zwerdinger as the treating physician in this case. The ALJ notes that Dr. Elton has indicated that claimant should have an authorized treating physician that is Level II accredited and has brought up with claimant Dr. Zwerdinger as a possibility of serving as the authorized treating physician. Claimant's failure to select a physician from the list of four providers that was provided to him on August 27, 2020 resulted in the respondents being forced to make an appointment with a physician from that list for claimant. The ALJ further notes that claimant has provided no credible explanation as to why he could not select one of the four providers offered by respondents on August 27, 2020 to assume the position as his designated authorized treating physician.

55. Claimant has sought an order requiring respondents to pay for a home gym, a gym membership, and biking shoes. The ALJ relies on the opinion of Dr. Elton in his response to the July 27, 2020 report which indicated that claimant would not need the gym membership while he is undergoing physical therapy. Dr. Elton has indicated that a gym membership may be warranted in the future, but not until after claimant has completed his physical therapy.

56. Therefore, the ALJ finds that claimant has failed to prove that it is more likely than not that a gym membership or a home gym are reasonable medical treatment necessary to cure and relieve claimant from the effects of the work injury.

57. With regard to the biking shoes, the ALJ notes that claimant's physical therapist is the only medical provider who has opined on the need for the biking shoes and indicated that claimant did not need a special shoe for riding his stationary bike. The ALJ finds that claimant has failed to establish that it is more likely than not that the biking shoes are reasonable medical treatment necessary to cure and relieve claimant from the effects of the work injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2010. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a

conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. Respondents argue that Claimant's injury resulted from a willful violation of a safety rule. Section 8-42-112(1)(b), C.R.S. permits imposition of a fifty percent reduction in compensation in cases of an injured worker's "willful failure to obey any reasonable rule" adopted by the employer for the employee's safety. The term "willful" connotes deliberate intent, and mere carelessness, negligence, forgetfulness, remissness or oversight does not satisfy the statutory standard. *Bennett Properties Co. v. Industrial Commission*, 165 Colo. 135, 437 P.2d 548 (1968).

4. The respondents bear the burden of proof to establish that the claimant's conduct was willful. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office*, 907 P.2d 715 (Colo. App. 1995). The question of whether the respondent carried the burden of proof was one of fact for determination by the ALJ. *City of Las Animas v. Maupin*, 804 P.2d 285 (Colo. App. 1990). The claimant's conduct is "willful" if he intentionally does the forbidden act, and it is not necessary for the respondent to prove that the claimant had the rule "in mind" and determined to break it. *Bennett Properties Co. v. Industrial Commission, supra; see also, Sayers v. American Janitorial Service, Inc.*, 162 Colo. 292, 425 P.2d 693 (1967) (willful misconduct may be established by showing a conscious indifference to the perpetration of a wrong, or a reckless disregard of the employee's duty to his employer). Moreover, there is no requirement that the respondent produce direct evidence of the claimant's state of mind. To the contrary, willful conduct may be inferred from circumstantial evidence including the frequency of warnings, the obviousness of the danger, and the extent to which it may be said that the claimant's actions were the result of deliberate conduct rather than carelessness or casual negligence. *Bennett Properties Co. v. Industrial Commission, supra; Industrial Commission v. Golden Cycle Corp.*, 126 Colo. 68, 246 P.2d 902 (1952). Indeed, it is a rare case where the claimant admits that her conduct was the product of a willful violation of the employer's rule.

5. As found, claimant injured his Achilles tendon when he stood on a safety rail as he attempted to staple plastic to the wall. As found, claimant's use of the safety rail as a device to elevate himself to reach the top of the window constitutes a willful violation of employer's safety rule that the claimant use the right tool for the right job, which would have been a step ladder. As found, claimant's admission that he used the safety rail to elevate himself because he felt rushed, demonstrates that claimant's violation of the safety rule was willful.

6. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury.

Section 8-42-101, C.R.S.; see *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). “Authorization” refers to the physician’s legal status to treat the injury at the respondents’ expense. *Popke v. Industrial claim Appeals Office*, 797 P.2d 677 (Colo. App. 1990) Pursuant to Section 8-43-404(5), C.R.S., Respondents are afforded the right, in the first instance, to select a physician to treat the industrial injury. Once respondents have exercised their right to select the treating physician, claimant may not change physicians without first obtaining permission from the insurer or an ALJ. See *Gianetto Oil Co. v. Industrial Claim Appeals Office*, 931 P.2d 570 (Colo. App. 1996). However, Section 8-43-404(5)(a)(I)(A) implicitly contemplates that the respondent will designate a physician who is willing to provide treatment. See *Ruybal v. University Health Sciences Center*, 768 P.2d 1259 (Colo. App. 1988). Therefore, if the physician selected by respondents refuses to treat the claimant for non-medical reasons, the respondents must designate a new treating physician in a timely manner, otherwise the right of selection of the authorized treating physician passes to the claimant, and the physician selected by the claimant is authorized. See *Ruybal v. University Health Sciences Center*, *supra*.

7. In this case, respondents properly designated Dr. Kovacevich as claimant’s treating physician. After Dr. Kovacevich advised respondents that he was no longer willing to treat claimant, and Dr. Elton advised respondents he did not wish to be the authorized treating physician for determination of work restrictions and MMI, respondents provided claimant with a new list of physicians to choose from. As found, claimant failed to select a physician from the list of providers that was offered to him. As found, respondents have now properly designated Dr. Zwerdinger as the authorized treating physician in this case.

8. As found, claimant has failed to prove by a preponderance of the evidence that his request for a gym pass or a home gym is reasonable medical treatment necessary to cure and relieve claimant from the effects of the work injury. As found, Dr. Elton opined in response to the July 17, 2020 inquiry from respondents that while claimant is receiving physical therapy, a gym membership or home gym equipment is not medically necessary at the present time.

9. As found, claimant has failed to prove by a preponderance of the evidence that biking shoes represent reasonable medical treatment necessary to cure and relieve claimant from the effects of the work injury. The ALJ credits the medical reports from Ms. Gotantas indicating that biking shoes were not necessary for claimant in reaching this decision.

ORDER

It is therefore ordered:

1. Claimant’s injury resulted from the intentional violation of a safety rule and respondents are entitled to take a 50% offset of non-medical benefits pursuant to Section 8-42-112(1)(b), C.R.S.

2. Dr. Zwerdinger is claimant's primary authorized treating physician.
3. Claimant's request for a gym membership and home gym are denied and dismissed without prejudice. Claimant's request for an Order requiring respondents to pay for biking shoes is denied and dismissed.

Dated: October 27, 2020



Keith E. Mottram
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

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

ISSUES

- 1) Has Claimant shown, by a preponderance of the evidence, that his low back and left lower extremity symptoms and condition is *causally related* to the January 15, 2020 work incident?
- 2) Has Claimant shown, by a preponderance of the evidence, that the lumbar epidural steroid injection is *reasonable, necessary, and related* to the January 15, 2020 work incident?

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

Background Information / Claimant's 2018 Back Injury

1. Claimant is employed for [Employer Name Redacted] (Employer), formerly [Employer Name Redacted]. Claimant has been employed for the respective companies for 30 years. Claimant's job title is a "roll-off driver". Claimant's job required him to drive a truck and position it next to a large metal dumpster/compressor. Claimant had to back the truck up to the dumpster, get out of the truck, and hook the truck to the dumpster. Claimant had to bend over and sometimes get on his knees to attach the dumpster.
2. In 2018, Claimant injured his lower back while working for Employer. The claim was admitted. Claimant underwent treatment with his ATPs, Dr. Cynthia Schafer at UCHealth and Dr. Paul Stanton at Colorado Springs Orthopedic Group for his injury. Claimant was diagnosed with two herniated disks at L4-L5 and L5-S1. Claimant underwent L4-L5 microdiscectomy surgery on October 15, 2018 by Dr. Paul Stanton. (Ex. 4, p. 58).
3. The records show that Claimant had a good recovery following surgery. (Ex. 2, pp. 19-21). Dr. Schafer released Claimant at maximum medical improvement on May 31, 2019. *Id* at 58. He received a 21% Whole Person impairment rating. At MMI, Claimant reported experiencing pain at 2/10. *Id.* at 61. Dr. Schafer did not assign any permanent work restrictions or maintenance medical care. *Id* at 62. However, when Claimant reached MMI, he continued to report residual symptoms including: numbness in his toes, restricted range of motion, and radiculopathy. *Id* at 62. Claimant did not seek medical treatment for his back between May 31, 2019, and January 15, 2020.

4. At hearing, Claimant testified that he returned to working for Employer full duty without restrictions. Claimant did not have trouble performing his job duties between May 2019 and January 14, 2020.

The 2020 Work Injury

5. On January 15, 2020, Claimant went to retrieve a large compressor filled with cardboard and plastics. The cardboard was significantly compressed, and was jammed in the container. Claimant had to manually loosen the cardboard by repeatedly pulling it out of the container. Claimant reported being in an awkward position as he pulled out the overstuffed cardboard. He had to bend/crouch down and hold open the (estimated 20+ lb.) overhead metal door with his left arm while he grabbed the cardboard with his right arm. Claimant had to exert significant force to yank out about 2 'yards' of jammed cardboard.
6. While doing this, Claimant testified that he developed a sudden sharp pain in his left shoulder and low back pain that radiated down his left leg. Claimant completed the task and notified the dispatcher that he was injured. Claimant was told that he needed to keep working because the Employer was short-staffed that day. Claimant continued working in pain for the rest of the day.
7. Claimant returned to work on January 16, 2020, requesting to go to a doctor. Claimant's supervisor asked him to work because the employer was short-staffed again. Claimant worked through the pain again that day. Claimant returned to his employer on January 17, 2020, requesting to go to a doctor. Claimant's supervisor took him to UCHealth.

Treatment by ATPs

8. Claimant then went to UCHealth on January 17, 2020. (Ex. 4, pp. 63-68). He was examined by PA Zoe Call. PA Call noted that Claimant injured his left shoulder pulling cardboard out of a compactor. Claimant underwent an x-ray of his left shoulder, tentatively diagnosed with a sprain, and was recommended anti-inflammatories. PA Call did not note that Claimant was experiencing low back pain. (At hearing, Claimant insisted that he told PA Call that he hurt his lower back during the January 17, 2020 office visit. However, he explained that he thought he was supposed to go to his primary care physician for his back injury).
9. Claimant returned to UCHealth on January 21, 2020, and was treated by his original ATP, Dr. Schafer. (Ex. 4, pp. 69-72). Dr. Schafer noted that Claimant is a patient well-known to her, due to his previous low back injury. *Id* at 69. Dr. Schafer documented that, in addition to Claimant's left shoulder injury:

He also notes that it was mentioned but not explored at the initial visit that his low back hurts more also. He is worried about that

since it persists and is also stronger pain because of his previous herniated disc and residual numbness and weakness in the left leg. *Id.* at 70.

Dr. Schafer referred Claimant to physical therapy for his left shoulder and lumbar spine. Dr. Schafer assigned temporary work restrictions of no lifting over 20 pounds, no commercial driving, and no work above waist level with left arm. *Id.* at 71.

10. On February 11, 2020, Claimant reported to Dr. Schafer that his low back pain and left calf burning had worsened. Dr. Schafer noted that Claimant had the same left calf/foot/toe numbness since his 10/20/2018 L5 microdiscectomy. Dr. Schafer noted that Claimant's lumbar sprain with increasing left calf cramping & burning "is related to this new injury, NOT the prior injury thus needs to be evaluated/imaging under this injury (though we will compare to prior MRIs)". *Id.* at 76. (emphasis added). Dr. Schafer ordered an MRI of Claimant's lumbar spine and left shoulder. *Id.*
11. Claimant underwent an MRI at Southwest Diagnostic on February 14, 2020. (Ex. 5, p. 112). The MRI revealed L4-L5 mild broad-based posterior disc bulge with facet hypertrophy causing mild bilateral neural foraminal narrowing on left greater than right; L5-S1 mild broad-based posterior disc bulge with facet hypertrophy causing mild right and marked left neural foraminal narrowing. *Id.* at 113. (During her deposition, Dr. Schafer explained that the MRI machines at Southwest Diagnostics are older and do not provide a good comparison to prior imaging).
12. On February 20, 2020, Claimant returned to Dr. Schafer. (Ex. 4, p. 79). Dr. Schafer noted that Claimant came in earlier than his scheduled appointment time, due to worsening symptoms in his back. Claimant appeared with an upper respiratory condition, and coughing is what was exacerbating his back pain.
13. Dr. Schafer opined that was unfortunate that Respondents scheduled Claimant's MRIs through Southwest diagnostics. *Id.* at 81-82. The MRI machines at Southwest diagnostics are much older than those at Colorado Springs Imaging, where Claimant had his initial, 2018 lumbar MRI completed. *Id.* Dr. Schafer explained that it will be difficult to compare the MRIs, because the 2018 and 2020 MRI images differ in quality. Dr. Schafer was not able to compare the actual MRI films due to quality variation. She noted that based on the MRI narrative report, it appears that Claimant may have progressive symptoms related to time more than injury, but could not be certain. *Id.* Dr. Schafer referred Claimant to Dr. Stanton for a consultation.
14. On March 24, 2020, Claimant returned to Dr. Stanton. (Ex. 2, p. 22). Dr. Stanton noted that Claimant was doing great following his lumbar discectomy surgery. He noted that Claimant experienced increased back and leg symptoms after pulling jammed cardboard out of a compactor. During this visit, Claimant did not report a "pop" in his back. Dr. Stanton noted that Claimant was currently experiencing left-

sided radicular pain in his buttock, posterior thigh, and cramping in his calf, and right-sided thigh pain that extended down into his knee.

15. Dr. Stanton noted that the February 2020, MRI report was not available to him. *Id.* at 23. He opined that imaging demonstrated advanced disc disease at L3-4, L4-5, and L5-S1 with the collapse of disc space and foraminal narrowing. *Id.* Dr. Stanton recommended Claimant undergo bilateral L4-5 transforaminal epidural steroid injection and a round of physical therapy. Dr. Stanton did not perform a causation/relatedness analysis in his treatment plan.

16. On March 31, 2020, Dr. Schafer conducted a telemedicine appointment with Claimant. (Ex. 4, p. 91). Claimant reported no change in his symptoms. *Id.* Dr. Schafer noted that there might be a delay for Claimant to get the epidural steroid injection due to COVID. Dr. Schafer issued an addendum documenting a conversation she had with Dr. Scott Primack. Dr. Schafer noted that:

[Dr. Primack] is concerned as to whether there is a larger disc causing a stenosis type scenario versus a sprain that is exacerbating the underlying symptoms. He finds a definite weakness and loss of reflex of the L5. Unfortunately, [Claimant] forgot to bring along the MRI discs for Dr. Primack to compare. He recommends seeing if we can get a radiologist to compare them. *He also agrees with my assessment that the quality of images is so poor from the ancient machines at Southwest Diagnostics that we may need to repeat the imaging to get a true evaluation.* *Id.* at 92. (emphasis added).

17. On April 6, 2020, Claimant was examined by Dr. Scott Primack. (Ex. 3, p. 26). Dr. Primack recommended a pulse dose of prednisone with a taper. *Id.* at 29. Dr. Primack noted an epidural steroid injection could be done, however, there are currently no pain management labs open due to COVID. Dr. Primack felt that the lumbar MRI needed to be compared to determine the difference between the 2018 and 2020 studies. Dr. Primack opined that Claimant may require a second surgery if he continues to have persistent weakness or profound pain in the left leg despite conservative treatment. *Id.*

18. On April 20, 2020, Claimant returned to Dr. Primack. (Ex. 3, p. 34). Dr. Primack noted that Claimant was not able to fill the prescribed prescriptions. He still did not have the MRI films to review. Claimant continued to report left lower extremity discomfort and back pain. Dr. Primack ordered an EMG/NCS. Dr. Primack noted that the EMG will help delineate the acuity of Claimant radiculopathy. He opined that Claimant was not able to progress in his injury due to issues regarding his claim. *Id.*

19. On April 22, 2020, Respondents sent a letter to Dr. Malinky, denying the bilateral transforaminal epidural steroid injection recommended by Dr. Primack. (Ex. 3, p.

42). Respondents indicated that an independent medical evaluation had been scheduled with Dr. Paz. *Id.*

20. On May 1, 2020, Dr. Schafer noted that the steroid medications prescribed by Dr. Primack were denied by Respondents. (Ex. 4, p. 95). However, Claimant had reported worsening symptoms in his legs. *Id.* Dr. Schafer noted that Dr. Primack recommended a bilateral EMG to establish a timeframe for nerve symptoms. *Id.* at 97. The recommended EMG was also denied by Respondents. Dr. Schafer agreed with Dr. Primack's recommendation for a bilateral EMG. Dr. Schafer also recommended that Claimant fill the denied prescriptions out of his own pocket. *Id.* Dr. Schafer placed a second order for an EMG.
21. On May 12, 2020, Claimant underwent an EMG and NCV study with Dr. Primack. (Ex. 3, p. 43). Dr. Primack concluded that "this is a complex case of acute/subacute findings on top of chronic changes. It is good to see that the patient will undergo a second opinion. Other options, aside from medication and physical therapy include a left L5-S1 transforaminal epidural steroid injection." *Id.*
22. On May 29, 2020, Dr. Schafer opined the EMG showed evidence of left S1 greater than L5 lumbar radiculopathy. (Ex. 4, p. 102). Dr. Schafer referred Claimant to Dr. Todd Palmer, a neurosurgeon. *Id.* at 104.

Dr. Paz IME

23. On June 15, 2020, Dr. F. Mark Paz performed an IME at Respondents' request. (Ex. A). Dr. Paz concluded that Claimant's low back pain with lower extremity symptoms are not causally related to the injury that occurred on January 15, 2020. Dr. Paz opined that the mechanism of injury is not consistent with causing an acute injury. He further opined that Claimant did not report low back pain during his initial consultation with UC Health. *Id.*

Second Request for Injections

24. On August 3, 2020, Dr. Primack submitted another request to Respondents for an L5-S1 epidural steroid injection. (Ex. 3, p. 52). Dr. Primack opined that it is reasonable to proceed with an L5-S1 epidural steroid injection. *Id.*

Dr. Rook IME

25. On August 3, 2020, Dr. Jack Rook performed an IME at the Claimant's request. (Ex. 1). Dr. Rook reviewed medical records related to Claimant's 2018 low back injury and 2020 low back injury to assess causation. Dr. Rook concluded that Claimant developed a new and distinct injury while at work on January 15, 2020, resulting in worsening low back pain and the onset of radiculopathy symptoms in both lower extremities.

26. Dr. Rook based his conclusion on the following factors:

- Claimant developed low back pain radiating down his left lower extremity while performing a physically demanding job on January 15, 2020;
- From a pathophysiological perspective, Claimant's body motions associated with pulling forces are known to place significant stress on low back spinal structures including muscles, discs, facet joints, and ligament/joint capsules;
- Claimant was able to perform his regular job duties without the need for physical restrictions before the January 15, 2020 injury;
- Claimant has not been able to return to his regular job since the January 15, 2020 injury;
- The lumbar discectomy surgery in 2018 was a success;
- The physicians that know Claimant best, Dr. Schafer and Dr. Stanton, both opine that Claimant's current increased low back pain that radiates into his lower extremities is related to the January 15, 2020 injury;
- Claimant's clinical objective examination has changed consistent with his complaints that are associated with the January 2020 injury;
- Claimant had an abnormal EMG indicating Claimant had an acute injury to his left L5 and S1 nerve roots;
- Claimant's physical examination demonstrated atrophy in his left calf, left extensor digitorum brevis, and absence of left ankle jerk.
Id at 12-13.

27. Dr. Rook opined that Claimant did not demonstrate exaggerated pain behaviors. Rather, Claimant's presentation is consistent with his objective abnormalities (MRI and EMG) and physical examination. *Id* at 14. Dr. Rook opined that he did not believe Dr. Paz's conclusions are compatible with Claimant's history and review of the medical records. *Id* at 16.

Hearing Testimony

28. Claimant testified at hearing. He stated that he was able to return to work without limitation after Dr. Schafer placed him at MMI in May 2019. Claimant testified that he was not having trouble performing his job duties until he injured his back and shoulder on January 15, 2020. Claimant explained that he told the physician assistant that his low back was hurting during his initial visit on January 17, 2020. He further explained that he thought that he was supposed to go to his primary care doctor for his low back based on his conversation with the physician assistant, since he felt like his back problems were pre-existing.

29. Dr. Paz testified at hearing consistent with his IME report. Dr. Paz based his opinion that Claimant did not injure his back on January 15, 2020, on his understanding of the mechanism of injury. Dr. Paz opined that the terms "disc extrusions and protrusions" found in the 2018 MRI report were pathological changes, indicating an acute injury, whereas the term "bulges" in the 2020 MRI

scan was degenerative and not traumatic. Despite his causation opinion, Dr. Paz agreed that an epidural steroid injection is *reasonable* to treat Claimant's low back injury.

30. Dr. Paz opined that the activity that Claimant was performing on January 15, 2020 would not be consistent with the mechanism of injury needed to cause or aggravate a disc or discs in the lumbar spine. He explained that the accepted cause of a herniated disc would include lifting a load, placing a load across the lumbar spine; or placing a load across the lumbar spine to partial flexion.
31. Dr. Paz opined that Claimant's pain behaviors seemed excessive during his physical examination. Dr. Paz explained that Claimant was unable to complete supine straight leg raise testing, but while in seated position he could achieve full extension across the right and left knee which was inconsistent. Also, Claimant had pain with simulated rotation of the lumbar spine which should not precipitate any symptoms. Dr. Paz testified that Claimant had three out of five Waddell signs which were nonphysiologic findings in low back injuries.
32. Dr. Paz opined that it was not medically probable that Claimant's low back condition was causally related to the January 15, 2020 work incident. This was because there were no contemporaneous symptoms documented; no lower extremity symptoms documented on the pain diagrams; no mechanism of injury which would contribute to causing or aggravating a preexisting pathology; and comparison of the MRI scans document degenerative changes and not traumatic changes. Initially, Dr. Paz opined that the epidural steroid injection was not reasonable, necessary, or related to the January 15, 2020 work incident. However, he later acknowledged that the proposed epidural steroid injection would in fact be *reasonable* to treat Claimant's back condition.
33. Selemaea Apineru testified at the hearing. Mr. Apineru is the operation supervisor for Employer. He testified that Claimant reported that he injured himself on January 15, 2020. However, he testified that Claimant only reported that he injured his shoulder, but not his back. Claimant agreed that he could continue working at this time. Mr. Apineru agreed that Claimant did not report having problems performing his job duties between May 2019 and the injury occurring on January 15, 2020.

Dr. Schafer's Deposition

34. Dr. Cynthia Shafer testified in a post-hearing deposition taken on September 23, 2020. Dr. Schafer is board certified in family medicine, with Level II accreditation. Dr. Schafer explained that she has served as Claimant's authorized treating physician for both his 2018 back injury and his 2020 back injury. Dr. Schafer testified that she released Claimant at MMI for his prior work injury in May 2019. She stated that Claimant was released to full duty work. She did not see Claimant again until January 21, 2020.

35. Dr. Schafer testified that Claimant reported having low back pain and lower extremity symptoms when she evaluated him on January 21, 2020. Dr. Schafer explained that Claimant reported the symptoms to the physician assistant Call, but the symptoms were not explored. Despite no notations by Claimant on his pain diagram at his initial visit with the PA, Dr. Schafer explained:

A In my HPI, on the date of service of 1-21-20, quote, He also notes that it is mentioned but not explored at the initial visit that his low back hurts more also. I already quoted this to – this was quoted previously when I spoke with [Attorney] Nicole [Gallerani]. (Transcript at 18).

36. When asked to explain further, she noted:

A Because he told me – Mr. Anderson is – knowing him for two years, he's a fairly concrete-thinking person. As so he thought, Well, it made his low back pain worse, and Ms. [PA Zoe] Call, he said wanted to focus on his shoulder. And he thought, Well, it's the low back pain, I had this previous injury so, okay, I'm just going to talk about the shoulder....So he thought that he needed to put it in a niche, that the back was all related to the previously (sic) injury and not the new injury. (Transcript at 21).

37. Dr. Schafer testified that Claimant's current symptoms are related to the new injury that occurred on January 15, 2020. Dr. Schafer credibly opined that the epidural steroid injections are reasonable, necessary, and related. She agreed with Dr. Rook's analysis in his IME report.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

1. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.
2. In accordance with §8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law, and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim*

Appeals Office, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. Assessing weight, credibility, and sufficiency of the evidence in Workers Compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The ALJ finds that both Claimant and Mr. Apineru testified sincerely, and to the best of their respective abilities. In resolving any conflict, the ALJ finds that Mr. Apineru did not hear Claimant complain of his back at the time they spoke; however, the ALJ also accepts Claimant's explanation for the delay in reporting his back issues.
4. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55, P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968). In this instance, the ALJ has heard oral testimony from one expert, Dr. Paz, but will also evaluate the IME report from Dr. Rook, and compare them, along with the deposition testimony from Dr. Schafer. The ALJ finds that all experts have provided sincere, yet contrasting, professionally rendered medical opinions. As such, the ALJ will determine which experts are more *persuasive*, as opposed to per se *credible*.

Medical Benefits, Generally

5. The Claimant is not entitled to medical care that is not *causally related* to his work-related injury or condition. As noted in *Bekkouche v. Riviera Electric, W.C. No. 4-514-998* (May 10, 2007), "A showing that the compensable injury caused the need for treatment is a threshold prerequisite to the further showing that treatment is reasonable and necessary." Where the relatedness, reasonableness or necessity of medical treatment is disputed, the Claimant has the burden to prove that the disputed treatment is *causally related* to the injury, and *reasonably*

necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc.*, W.C. No. 4-117-758 (ICAO April 7, 2003).

6. The Claimant has the burden to prove his entitlement to medical benefits by a preponderance of the evidence. §8-43-201, C.R.S. The Respondents are only liable for the medical treatment that is *reasonable and necessary* to cure and relieve the work-related injury. §8-42-101(1)(a), C.R.S.

Reasonable and Necessary

7. Based upon the evidence, the ALJ concludes that the proposed injections are *reasonable and necessary* to treat Claimant's back condition. This conclusion was essentially conceded even by Respondent's expert, Dr. Paz, during the hearing. This treatment comes recommended by Dr. Schafer, Dr. Stanton, and Dr. Primack, with no medical expert in opposition.

Causation

8. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. §8-41-301 (1)(c) C.R.S.; *Faulkner v Industrial Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000). The question of causation is generally one of fact for the determination by the ALJ. *Faulkner*, 12 P.3d at 846.
9. For an injury to be compensable under the Workers' Compensation Act, it must "arise out of" and "occur within the course and scope" of the employment. *Price v. Indus. Claim Appeals Off.*, 919 P.2d 207, 210, 210 (Colo. 1996); *Schepker v. Daewoo North*, W.C. No. 4-528-434 (ICAO April 22, 2003). An injury "arises out of" employment when the origins of the injury are sufficiently related to the conditions and circumstances under which the employee usually performs his or her job functions as part of the employee's services to the employer. See *Schepker, supra*. "In the course of" employment refers to the time, place, and circumstances of the injury.
10. The mere fact that a Claimant suffers from a pre-existing condition does not disqualify a claim for compensation or medical benefits if the work-related activities aggravated, accelerated, or combined with the preexisting condition to produce disability or a need for medical treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). Pain is a typical symptom from the aggravation of a preexisting condition, and the claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment-related activities and not the underlying preexisting condition. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949). The claimant must prove by a preponderance of the evidence that his symptoms were proximately caused by an industrial aggravation of a preexisting condition rather than simply the natural progression of the condition. *Melendez v. Weld County School District #6*, W.C. No. 4-775-869 (ICAO, October 2, 2009).

Causation / Relatedness of 2020 Work Injury

11. Claimant had a good recovery from his 2018 back injury. Dr. Stanton's records reflect that the surgery was a success. This is corroborated by Claimant. Dr. Schafer released Claimant at MMI in May 2019 without permanent restrictions. Although Claimant had residual symptoms at MMI and beyond (hence his 21% impairment rating) Claimant returned to work and was able to perform his job duties without limitation between May of 2019 through January 14, 2020. Claimant's mechanism of injury is consistent with the symptoms he is now experiencing. To the extent that Dr. Paz differs with Dr. Schafer and Dr. Rook in this regard, the ALJ finds Drs. Schafer, Primack, and Rook more persuasive.
12. Dr. Paz (and not entirely without reason) relies heavily on the timing of Claimant's belated reporting and documentation of his back symptoms in 2020. However, the ALJ does find Claimant's explanation therefor to be satisfactory – as does Dr. Schafer. The ALJ finds that Claimant did indeed suffer significant pain in his lumbar region shortly after the work incident, which was temporarily overshadowed by pain in the shoulder, and confusion about the process of reporting his back issues.
13. Of great significance is that Claimant has now had an abnormal EMG, indicating that he has an acute injury to his left side L5/S1 nerve roots. His clinically objective examination is now different as noted by Dr. Rook, and the ALJ finds it is due to this new work injury, and not merely from a natural degenerative process. Claimant no doubt went to work with a compromised lumbar region on January 15, 2020. However, he has now shown that, at a minimum, his work activities on that date aggravated his back to the point of becoming symptomatic. He now requires medical treatment to bring him back to (it is hoped) MMI. Hopefully the injections will do the trick, but he has waited long enough to find out. The ALJ finds that Claimant has shown that the need for the proposed injections is *causally related* to his work injury.

ORDER

It is therefore Ordered that:

1. Claimant's current lumbar condition is causally related to the 1/15/2020 work injury.
2. Respondents shall pay for all reasonable, necessary, and related medical treatment, to include the lumbar epidural steroid injections as recommended by his ATP.
3. Respondents shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.
4. All matters not determined herein are reserved for future determination.

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

DATED: October 28, 2020

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

Whether the claimant has overcome, by a preponderance of the evidence, the scheduled permanent impairment rating assessed by the Division sponsored independent medical examination (DIME) physician, Dr. Carlton Clinkscales.

FINDINGS OF FACT

1. The claimant worked for the employer for approximately 29 years. For many years, he worked as a cable splicer. This involved using hand tools to splice cables. The claimant was then promoted to the position of splicing supervisor. Although this was a supervisory position, the claimant continued actively working in the field.

2. On February 24, 2015, the claimant slipped on ice and fell. While falling, the claimant reached out with his right arm to catch himself. As a result, the claimant injured his right wrist.

3. Throughout much of his treatment, Dr. Bruce Lippman, Sr. was the claimant's authorized treating provider (ATP), with Glenwood Medical Associates.

4. On August 12, 2015, Dr. Michael Grillot performed the first of four surgeries to the claimant's right wrist. Dr. Gillot performed a right wrist arthroscopy with arthroscopic debridement of the radial triangular fibrocartilage complex (TFCC).

5. On July 1, 2016, Dr. Randall Viola performed surgery on the claimant's right wrist. That surgery included arthroscopy with TFCC radial sided debridement, distal radial ulnar joint open reduction and internal fixation with ulnar sided TFCC repair, ad open reduction and internal fixation of the distal radial ulnar joint with K wire fixation.

6. On August 12, 2016, Dr. Viola performed a right distal ulnar deep hardware removal.

7. On December 23, 2016 Dr. Viola performed a right wrist deep hardware removal.

8. On September 14, 2017, the claimant was seen by Dr. David Lorah for an impairment rating. At that time, Dr. Lorah determined that the claimant had reached maximum medical improvement (MMI). Dr. Lorah assessed a permanent impairment rating of two percent for the claimant's right upper extremity. With regard to ongoing medical treatment, Dr. Lorah opined that the claimant might need future treatment with Dr. Viola. He also noted that the claimant might need a new brace in the future. Finally, he recommended that the claimant continue his home exercise program.

9. On October 16, 2017, the claimant was seen by Dr. Lorah, who released the claimant to full duty with no work restrictions.

10. On October 30, 2017, the respondents filed a Final Admission of Liability (FAL). In that FAL, the MMI date of September 14, 2017 and the impairment rating assigned by Dr. Lorah were admitted. The respondents denied maintenance medical treatment.

11. On November 6, 2017, the respondents filed an amended¹ (FAL). The respondents again admitted for the MMI date of September 14, 2017 and the impairment rating assigned by Dr. Lorah. The respondents denied maintenance medical treatment.

12. On November 9, 2017, the claimant filed his Objection to Final Admission and requested a Division sponsored independent medical examination (DIME).

13. On December 3, 2018, the claimant attended the DIME with Dr. Carlton Clinkscales. In connection with the DIME, Dr. Clinkscales reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In his December 13, 2018 DIME report, Dr. Clinkscales listed the claimant's diagnoses as right wrist pain, right TFCC tear, right DRUJ instability post stabilization; right wrist pain following hardware removal. Dr. Clinkscales noted that as of October 16, 2017, the claimant was released to work full duty with no restrictions. Dr. Clinkscales assessed a permanent impairment rating of five percent for the claimant's right upper extremity.

14. Based upon the report of Dr. Clinkscales, on February 21, 2019, the respondents filed an Amended FAL. The respondents admitted for the date of MMI of September 14, 2017 and the scheduled impairment rating of five percent for the claimant's right upper extremity. Again, the respondents denied maintenance medical treatment.

15. On May 20, 2020, the claimant filed an Application for Hearing (AFH) that led to the current hearing. In that AFH, the claimant listed the issues to be addressed at hearing as overcoming the DIME. No other issues were endorsed for hearing.

16. The claimant testified that his current symptoms include pain, numbness, and tingling in his right wrist. In addition, he has issues with dropping things with his right hand. Although the claimant is right hand dominant, due to his right wrist symptoms, the claimant often uses his left hand or both hands to complete tasks.

17. The claimant argues that the ALJ should consider Dr. Clinkscales's opinions with regard to maintenance medical treatment, work restrictions, and permanent impairment rating.

¹ It appears that the reason the FAL was amended was to correct the date of maximum medical improvement.

18. The respondents argue that work restrictions, as determined by Dr. Clinkscales, would only be relevant in determining the claimant's entitlement to temporary or permanent disability benefits.

19. The ALJ agrees with the respondents and finds that the only issue properly before her is whether the claimant has overcome, by a preponderance of the evidence, the scheduled permanent impairment rating assessed by Dr. Clinkscales.

20. Here, Dr. Lorah assessed a permanent impairment rating of two percent, while the DIME physician, Dr. Clinkscales, assessed five percent. The ALJ notes that both of these impairment ratings are scheduled ratings for the claimant's right upper extremity. The ALJ finds that the accurate scheduled impairment rating for the claimant's right upper extremity is the higher rating of five percent, as assessed by Dr. Clinkscales.

CONCLUSIONS OF LAW

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

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

4. Section 8-42-107(8)(b)(III) and (c), C.R.S. provides that the DIME physician's finding of MMI and permanent medical impairment is binding unless overcome by clear and convincing evidence. Clear and convincing evidence is highly probable and free from substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it is highly probable that the DIME physician is incorrect. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). A fact or proposition has been proved by clear and convincing evidence if, considering all of the

evidence, the trier-of-fact finds it to be highly probable and free from substantial doubt. *Metro Moving & Storage, supra*. A mere difference of opinion between physicians fails to constitute error. See *Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-356 (March 22, 2000). The ALJ may consider a variety of factors in determining whether a DIME physician erred in his opinions including whether the DIME appropriately utilized the Medical Treatment Guidelines and the AMA Guides in his opinions.

5. However, the increased burden of proof required by the DIME procedures is not applicable to scheduled injuries. Section 8-42-107(8)(a), C.R.S. states that “when an injury results in permanent medical impairment not set forth in the schedule in subsection (2) of this section, the employee shall be limited to medical impairment benefits calculated as provided in this subsection (8).” Therefore, the procedures set forth in Section 8-42-107(8)(c), C.R.S., which provide that the DIME findings must be overcome by clear and convincing evidence, are applicable only to non-scheduled injuries.

6. The Court of Appeals has explained that scheduled and non-scheduled impairments are treated differently under the Act for purposes of determining permanent disability benefits. Specifically, the procedures of Section 8-42-107(8)(c), C.R.S. only apply to non-scheduled impairments. *Delaney v. Industrial Claim Appeals Office*, 30 P.3d 691, 693 (Colo. App. 2000); *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998); *Gagnon v. Westward Dough Operating CO. D/B/A Krispy Kreme* W.C. No. 4-971-646-03 (ICAO, Feb. 6, 2018). Claimant has the burden of showing the extent of his scheduled impairment by a preponderance of the evidence. *Burciaga v. AMB Janitorial Services, Inc. and Indemnity Care ESIS Inc.*, W.C. No. 4-777-882 (ICAO, Nov. 5, 2010); *Maestas v. American Furniture Warehouse and G.E. Young and Company*, W.C. No. 4-662-369 (ICAO, June 5, 2007).

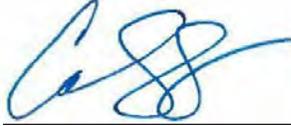
7. As found, the claimant has failed to overcome, by a preponderance of the evidence, the scheduled permanent impairment rating assessed by the DIME physician, Dr. Clinkscales.

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ORDER

It is therefore ordered that the accurate scheduled impairment rating for the claimant's right upper extremity is five percent, as assessed by Dr. Clinkscales.

Dated this 29th day of October 2020.



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

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

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-105-470-001**

ISSUE

1. Whether Respondents have established by a preponderance of the evidence that Claimant did not sustain a compensable work-related injury and may therefore withdraw the admissions of liability.
2. If Respondents fail to establish the above, whether Respondents have established by clear and convincing evidence, that the Division Independent Medical Examination opinion of John Bissell, M.D., regarding maximum medical improvement and whole person permanent partial disability impairment rating is incorrect.
3. Whether Respondents have established by a preponderance of the evidence that the Claimant fraudulently supplied false information upon which Respondents relied in filing their admission, entitling Respondents' to repayment of benefits.

FINDINGS OF FACT

1. Claimant is a 42-year-old male, who was working as a bus driver for Employer on February 27, 2019.
2. On February 27, 2019, at approximately 10:51 a.m., Claimant was seen in the Denver Health emergency department for complaints of neck pain, dizziness and numbness by Spencer Tomberg, M.D. Claimant reported a two-week history of posterior neck pain and stiffness, followed by right upper extremity and right lower extremity numbness the week prior to the examination. Claimant reported his neck stiffness had resolved, but he came into the emergency department because of the new numbness, which he described as a deep aching pain in the arm. Claimant reported he "slept wrong, fell asleep on a chair with his shoulder and arm propped up." Claimant reported limited range of motion, and trouble reaching to grab his seatbelt or scratch his head. Claimant also reported that he had a feeling of swelling or throbbing in his left fingers, but this had resolved. Claimant also reported episodes of imbalance occurring for the previous week. Dr. Tomberg opined that Claimant's clinical history and exam were most consistent with right shoulder impingement. Dr. Tomberg referred Claimant for physical therapy for right shoulder impingement and right lower back pain." (R.Ex. D).
3. Respondents called Blayre Stevens, a claims representative for Insurer's third-party administrator (TPA). Ms. Stevens testified that on March 18, 2019, Claimant described his injury to another adjuster as occurring after he was driving a bus for approximately six hours when he developed right shoulder pain that radiated down to his right arm and fingers. Claimant reported experiencing pain radiating down his right arm and fingers and that he called a supervisor who got the bus, and Claimant drove himself to Denver Health. Ms. Stevens testified that Insurer relied upon Claimant's description of

his injury and the March 15, 2019 report from Concentra when it filed a general admission of liability (GAL) on April 15, 2019. The adjuster to whom Claimant apparently provided his statement did not testify, and no written documents memorializing the conversation were offered or admitted into evidence. No evidence was offered regarding the circumstances or nature of Claimant's statement to the TPA, other than that it was a "conversation."

4. On March 15, 2019, Claimant saw Marie Mueller, N.P., at Concentra. Claimant reported he was driving and developed stiffening of his neck and right shoulder, began experiencing lightheadedness and pulled over. Claimant denied any trauma or injury. Claimant indicated he believed the source of his pain was reaching over his shoulder 30-35 times per day. Claimant reported his lightheadedness had resolved. Claimant indicated he had no previous injury to his neck or shoulder. Although Claimant reported working regular duty, he also reported he felt it was not safe to drive because he had pain lifting his arm.(R.Ex. E). Ms. Mueller recommended work restrictions to include lifting up to 10 lbs. occasionally, no driving company vehicle due to functional limitations, and no reaching above shoulders with affected extremity.

5. On physical examination of Claimant's right shoulder, Ms. Mueller found tenderness in the rhomboids, pain with all ranges of motion tested, and normal strength. On rotator cuff testing, she found a negative lift-off test. Cervical spine examination showed no tenderness, and full range of motion with pain on left-side bending, normal grip and normal reflexes. Ms. Mueller diagnosed claimant with a neck strain and right shoulder strain. Ms. Mueller prescribed ibuprofen and Tizanidine HCL and referred Claimant for physical therapy. (R.Ex. E).

6. Between March 18, 2019 and April 11, 2019, Claimant attended seven physical therapy appointments at Concentra. In total, Claimant attended twelve physical therapy appointments at Concentra between March 18, 2019 and May 1, 2019. At his initial appointment on March 18, 2019 Claimant reported that he did not experience a specific injury, and that the pain in his right shoulder was of a gradual onset. (R.Ex G).

7. On April 11, 2019, Claimant saw Ms. Mueller for a follow up appointment. Ms. Mueller reported no change in Claimant's condition. Claimant reported continuing to experience pain in his right trapezius. On examination of Claimant's right shoulder, Ms. Mueller noted tenderness in the trapezius muscle and in the superior shoulder, with pain on range of motion. On physical examination of Claimant's neck, Ms. Mueller noted tenderness in the "ulevel" cervical spine (muscular, C3, C4 and C5) and right trapezius muscle. Ms. Mueller also found pain in right-side bending of the cervical spine, and left rotation of cervical spine. Claimant had negative cervical spine instability and axial load testing, negative Spurling's maneuver and negative Valsalva test. Ms. Mueller noted that Claimant was approximately 25% of the way to meeting the physical requirements of his job. Ms. Mueller ordered an MRI of Claimant's right shoulder, and modified Claimant's work restrictions to allow claimant to return to work his entire shift, with no reaching above shoulder, behind shoulder or across his body with his right arm.

8. On April 19, 2019, Claimant filed a Worker's Claim for Compensation in which he indicated that he sustained an injury to his right shoulder as the result of "repetitive motion." (R.Ex. I).

9. On April 30, 2019, Claimant saw Ms. Mueller. Claimant reported feeling pain "deep" in his right shoulder joint. Ms. Mueller's physical examination of Claimant's right shoulder was unchanged from her April 19, 2019 examination. Ms. Mueller's physical examination of Claimant's cervical spine was unchanged from her April 11, 2019 examination. (R.Ex. E).

10. On May 8, 2019, Claimant had an MRI of his right shoulder performed at OpenSided MRI. The MRI was interpreted by Mark Howshar, M.D. Claimant reported a three-month history of shoulder pain with decreased range of motion, possibly the result of a repetitive motion injury. Dr. Howshar's interpreted the MRI as negative for a rotator cuff tear, and with subtle edematous changes within the distal clavicle. Dr. Howshar noted that the edematous changes were "nonspecific, but can be related to AC joint injury, acute or chronic. No biceps mechanism or labral pathology is identified." (R.Ex. H).

11. May 9, 2019, Claimant saw Jay Reinsma, M.D., at Concentra. Dr. Reinsma noted that he had discussed Claimant's case with physical therapy, "who hasn't really been able to locate any pathology." Claimant was insistent that he be released to perform his regular job duties. Dr. Reinsma noted that Claimant was at was at his functional goal, but not at the end of healing. Dr. Reinsma's assessment was neck strain. Dr. Reinsma recommended physical therapy to address impairment/functional loss and to expedite return to full activity. Dr. Reinsma noted that Claimant was released to return to regular duty as he had good function and "no evidence of pathology on MRI." On physical examination of Claimant's right shoulder, Dr. Reinsma noted tenderness with elevation, abduction and adduction, full range of motion with pain, and normal motor strength bilaterally. Claimant's right trapezius muscle was tender, and Claimant had full cervical range of motion, with pain on extension.(R.Ex. E).

12. On May 23, 2019, Claimant saw Ms. Mueller. At that time, Claimant reported that he was not able to lift, and that his shoulder felt the same as it did at his first visit. On physical examination of Claimant's right shoulder, Ms. Mueller noted full range of motion with pain, and normal muscle strength, bilaterally. Ms. Mueller diagnosed claimant with a right shoulder strain and neck strain. Ms. Mueller authorized Claimant to return to full work activity. Ms. Mueller ordered an MRI of Claimant's cervical spine. (R.Ex. E).

13. On June 20, 2019, Claimant had a cervical MRI at OpenSided MRI. Dr. Howshar interpreted the MRI as showing a protrusion of disc material primarily at C4-5 and C5-6, central/left paracentral in location causing canal and lateral recess narrowing, more on the left. No overt disc extrusion, compression or other fracture or subluxation.

14. On July 19, 2019, Claimant saw Ms. Mueller. On examination of Claimant's right shoulder, Ms. Mueller noted tenderness in the trapezius muscle, with normal palpation. Pain with active range of motion on forward flexion and abduction of the right shoulder,

and normal motor strength bilaterally. Ms. Mueller' examination of Claimant's cervical spine was normal, with the exception of pain on extension.

15. On June 27, 2019, Claimant saw Ms. Mueller after undergoing a cervical MRI. Ms. Mueller noted that the MRI revealed a protrusion of disc material, primarily at the C4-5 and C5-6 levels. The disc protrusion was central/left paracentral in location causing canal and lateral recess narrowing, more on the left. Ms. Mueller referred Claimant for a visit with a physiatrist physician. (R.Ex. E).

16. On July 19, 2020, Claimant saw Kathy McCranie, M.D., a physiatrist. At that time, Claimant indicated he was having pain in his right shoulder area, that he attributed to reaching over his shoulder when grabbing for his seatbelt multiple times per day. Dr. McCranie provided trigger point injections and a TENS unit. Dr. McCranie testified that trigger point injections were helpful to Claimant. Dr. McCranie also referred Claimant for massage therapy and acupuncture – treatments Claimant elected not to pursue.

17. On November 1, 2019, Claimant was seen at Concentra. The medical record was dictated by Ms. Mueller and co-signed by Dr. Reinsma. Ms. Mueller found Claimant's right shoulder to be normal in appearance, tender in the trapezius muscle, with a palpable trigger point in the right trapezius. Claimant continued to have pain with forward flexion and abduction. Ms. Mueller also found Claimant was able to internally rotate his shoulder to reach belt with pain. Claimant was placed at maximum medical improvement and assigned a 4% scheduled impairment rating for Claimant's right upper extremity. The impairment rating was based on an impairment assigned by Dr. McCranie on October 25, 2019. Dr. McCranie's medical record from October 25, 2019 is not included in the Court record, although Dr. McCranie's impairment rating worksheet is included with the November 1, 2019 Concentra record. (R.Ex. E).

18. Respondents filed a Final Admission of Liability on December 10, 2019, admitting for a 4% scheduled impairment for Claimant's right upper extremity and maintenance medical care in accordance with Dr. Reinsma's report of November 1, 2019. (R.Ex. J). Respondents paid Claimant medical benefits totaling \$7,624.68; temporary disability benefits in the amount of \$2,865.67; and permanent partial disability benefits in the amount of \$2,579.20.

19. Claimant objected to the FAL and requested a Division Independent Medical Examination (DIME). John Bissell, M.D., was selected to perform the DIME.

20. On March 19, 2020, John Bissell, M.D. examined Claimant and Claimant's medical records. Dr. Bissell's DIME report does not indicate the records he reviewed. Dr. Bissell's recitation of medical history indicates Claimant was seen at Denver Health on February 27, 2019, but it appears the information related to that date of treatment was derived from Ms. Mueller's March 15, 2019 report. Dr. Bissell's report does not include Claimant's description of the cause of his injury contained in the February 27, 2019 Denver Health report. The ALJ infers, based on the totality of the evidence, that the February 27, 2019 Denver Health emergency department record was not included in the records provided to Dr. Bissell. (R.Ex. A).

21. Claimant reported to Dr. Bissell that he sustained an injury on February 27, 2019 to his right shoulder/neck region. Claimant reported he was driving a bus and reached with his right and over his left shoulder to grab his seatbelt. Claimant reported in the process of reaching, he experienced a sudden onset of severe sharp pain in his right shoulder/neck region (upper mid-trapezius area). Dr. Bissell noted that Claimant reported to physical therapy that his right shoulder/neck pain had been of gradual onset with progressive worsening. Claimant reported to Dr. Bissell that initially he did not believe his injury was work-related, and initially began physical therapy under his private insurance. No records regarding such physical therapy were offered or admitted into evidence. (R.Ex. A).

22. Dr. Bissell's opinions regarding the relatedness of Claimant's injuries to his employment are difficult to ascertain. In separate sections of his report, Dr. Bissell opines that Claimant's injuries are both work-related and unrelated to his work.

23. First, Dr. Bissell's report lists as "Clinical Diagnoses" "Cervical sprain/strain – claim related; Cervical herniated disc with severe canal stenosis – claim related; and right trapezial pain, referred from neck – claim related." (R.Ex. A).

24. In the "Apportionment" section of his report, Dr. Bissell states "Normally I do not comment on causation when performing a DWC IME but in this case I will make an exception because it bears on the evaluation and treatment of this patient." Dr. Bissell then opined that Claimant's presentation and radiological studies were more consistent with Claimant's report to his Concentra physical therapist of a gradual onset of pain with progressive worsening, rather than the sudden onset of pain he described to Dr. Bissell. (R.Ex. A).

25. With respect to Claimant's right trapezial pain, in his "Clinical Diagnoses" Dr. Bissell listed "right trapezial pain, referred from neck – claim related." Dr. Bissell also stated that Claimant's right shoulder MRI showed nonspecific distal clavicle edematous change which would not explain why he has right upper trapezial pain. Dr. Bissell then stated, under "Regarding MMI" that "In the course and scope of his employment as a driver for RTD, the patient sustained an injury to his right upper quarter on February 27, 2019." Dr. Bissell also opined that Claimant's right trapezial pain "is actually referred pain due to his severe cervical stenosis and herniated disc." Later, Dr. Bissell opined that Claimant "sustained no ratable injury to his right shoulder as a result of the February 27, 2019 work injury." The ALJ concludes that Dr. Bissell, the DIME, determined that Claimant did not sustain a compensable injury to his right shoulder or trapezius area in the course of or arising from his employment, and that any issues Claimant was experiencing in his right shoulder/trapezius area were related to the disc herniation and canal stenosis in his cervical spine. (R.Ex. A).

26. With respect to Claimant's cervical disc herniation, Dr. Bissell's conclusions are similarly contradictory. Initially, Dr. Bissell diagnosed Claimant with "Cervical herniated disc with severe canal stenosis – claim related." Dr. Bissell indicated Claimant's cervical MRI demonstrates "severe central and left paracentral canal stenosis at C5-6." However, he also opined that there "was no specific injury on February 27, 20219 which would

explain the development of a large herniated disc occupying most of the patient's spinal canal, therefore it is my opinion this patient's right/neck shoulder condition did not occur as a result of a work injury and is not specifically work-related." (Emphasis added). Despite reaching this conclusion, Dr. Bissell provided an impairment rating for Claimant's cervical spine, a condition he specifically indicated was not work-related. Similarly, Dr. Bissell found that Claimant was not at MMI for his non-work-related cervical spine condition. (R.Ex. A). The ALJ concludes that Dr. Bissell's statement that Claimant did not sustain an injury that would explain the development of a large herniated disc is the best expression of his opinion, and that Dr. Bissell determined Claimant's cervical disc herniation and canal stenosis did not occur in the course of and arising out of his employment.

27. Dr. Bissell opined that Claimant was not at maximum medical improvement and provided a provisions permanent impairment rating related to Claimant's neck condition. Dr. Bissell assigned a 13% whole person impairment—6% for a specific cervical disorder, and 7% for cervical range of motion deficits. (R.Ex. A). Because he found Claimant did not sustain a work-related injury, Dr. Bissell's opinions on MMI and impairment ratings were essentially gratuitous.

28. Dr. Bissell opined that Claimant was in need of follow up care with his authorized treating physicians, diagnostic testing in the form of EMG/NCV testing, consideration of neuraxial spine injection, referral for spine surgical evaluation, right upper limb EMG/NCV testing and acromioclavicular injection of the right shoulder. (R.Ex. A). The "maintenance care" Dr. Bissell recommended is related to the injuries he found were not work-related, and thus non-binding on Respondents.

29. On June 11, 2020, Claimant underwent an independent medical examination at Respondents' request, performed by Lawrence Lesnak, D.O. Claimant reported that while he was preparing to drive his bus, while seated in the driver's seat, he reached across his body with his right arm for the seatbelt, and developed a sudden, acute stabbing pain in his right suprascapular and right lateral neck region. Dr. Lesnak reviewed Claimant's available medical records (not including the February 27, 2019 report from Denver Health emergency department) and performed a physical examination.

30. Dr. Lesnak concluded that, at the time of his evaluation, Claimant had intermittent complaints of right upper trapezius and suprascapular myofascial pain. Dr. Lesnak also concluded that there was no evidence of symptomatic cervical spine pathology or symptomatic right shoulder joint pathology. Dr. Lesnak noted that Claimant may have self-limited his range of motion due to fear of pain, rather than a true anatomic restriction of his right shoulder, and that he had full range of motion in his cervical spine in all planes, without reproduction of symptoms. Dr. Lesnak opined that Claimant is at maximum medical improvement, and that Claimant did not sustain a work-related injury.

31. On June 29, 2020, Dr. Lesnak issued an "IME Addendum" report, after being provided Claimant's February 27, 2020 records from Denver Health Medical Center. Dr. Lesnak opined that, based on the Denver Health records, Claimant was experiencing symptoms in his shoulder at least 1-2 weeks prior to February 27, 2019. Dr. Lesnak

opined that Claimant did not require any further medical care, medical evaluations, diagnostic testing, or interventional treatments.

32. Dr. Lesnak testified by deposition and was qualified as an expert in physical medicine (physiatry). Dr. Lesnak testified that he reviewed the Denver Health emergency department report from February 27, 2019. Dr. Lesnak testified it is “medically improbable” that the act of reaching for a seatbelt would cause a neck or shoulder strain. Dr. Lesnak also testified that based on his review of Claimant’s medical records, there was no evidence of a neck strain or specific shoulder strain based on the initial objective findings at Concentra on March 15, 2019. Dr. Lesnak testified it is “physiologically improbable” that the findings on Claimant’s shoulder MRI would be caused by Claimant reaching across his body to grab a seat belt. Similarly, Dr. Lesnak testified that it would be implausible that the act of reaching for a seatbelt would cause the Claimant’s cervical spine pathology or aggravate pre-existing pathology.

33. Dr. McCranie testified at hearing. Dr. McCranie testified she was provided a copy of the Claimant’s February 27, 2019 Denver Health emergency department report sometime after she last saw the Claimant in October 2019. Dr. McCranie testified that the mechanism of injury Claimant described to her was significantly different than that contained in the Denver Health emergency department record. Dr. McCranie testified that based on the Claimant’s report to Denver Health on February 27, 2019, Claimant did not sustain a work-related injury.

34. Claimant did not testify at hearing, and Claimant offered no testimony of any other witness.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers’ Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. See § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. See § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers’ compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers’ compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers’ Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id.* at 641. When determining credibility,

the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

WITHDRAWAL OF ADMISSION OF LIABILITY - COMPENSABILITY

When respondents attempt to modify an issue that previously has been determined by an admission, they bear the burden of proof for the modification. §8-43-201(1), C.R.S.; see also *Salisbury v. Prowers County School District*, W.C. No. 4-702-144 (ICAO, June 5, 2012); *Barker v. Poudre School District*, W.C. No. 4-750-735 (ICAO, July 8, 2011). Section 8-43-201(1), C.R.S., provides, in pertinent part, that “a party seeking to modify an issue determined by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification.” The amendment to §8-43-201(1), C.R.S. placed the burden on the respondents and made a withdrawal the procedural equivalent of a reopening. *Dunn v. St. Mary Corwin Hospital*, W.C. No. 4-754-838-01 (ICAO, Oct. 1, 2013). Respondents must, therefore, prove by a preponderance of the evidence that the Claimant did not suffer a compensable injury as defined under Colorado law. §8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979).

A compensable injury is one that arises out of the course and scope of employment with one's employer. §8-41-301(1)(b), C.R.S. (2006); see *City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991). There must be a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.*, 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *Enriquez v. Americold D/B/A Atlas Logistics*, W.C. No. 4-960-513-01, (ICAO, Oct. 2, 2015)

However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. See *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1995); *Atsepoyi v. Kohl's Department Stores*, W.C. No. 5-020-962-01, (ICAO, Oct. 30, 2017). The question of whether the requisite causal connection exists is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000). *Fuller v. Marilyn Hickey Ministries, Inc.*, W.C. No. 4-588-675, (ICAO, Sept. 1, 2006).

Respondents have established by a preponderance of the evidence that they are entitled to withdraw their December 10, 2019 Final Admission of Liability. On February 27, 2019, Claimant reported to the Denver Health emergency room and described a 1-2-week history of neck and shoulder pain that started after Claimant “slept wrong, fell asleep on a chair with his shoulder and arm propped up.” Although the Claimant was at work when his symptoms reached the point of seeking medical attention at Denver Health, and he reported to Denver Health that his symptoms were aggravated by reaching for his seatbelt, the evidence established it more likely than not that the Claimant’s injury did not arise out of his employment.

Based on medical records and Dr. McCranie’s testimony, Claimant’s health care providers accepted Claimant’s description of his injury occurring during work as the result of reaching for his seatbelt (either repetitively or suddenly on February 27, 2019). Although Claimant did disclose to his providers and Insurer that he went to Denver Health on February 27, 2019, the records from Denver Health were not obtained until some time after Dr. Bissell’s DIME was performed on March 19, 2020. After review of this information, Dr. McCranie revised her opinion and testified that Claimant’s injuries were not work related. The ALJ finds Dr. McCranie’s opinion that Claimant did not sustain a work-related injury credible. Similarly, Dr. Lesnak credibly testified that Claimant’s injuries were unlikely to result from reaching for his seatbelt, and the action of reaching for a seatbelt was unlikely to aggravate any preexisting condition.

Contrary to Claimant’s assertion, the ALJ does not find that Dr. Bissell found the Claimant’s injuries to be work-related. As found, Dr. Bissell’s report is internally inconsistent and his various statements regarding the relatedness of Claimant’s injuries were incompatible. Although Dr. Bissell stated that Claimant’s diagnoses were “claim related,” his analysis indicates that he found that Claimant did not sustain a work-related injury to his shoulder. Dr. Bissell found Claimant’s shoulder pain to be referred from his cervical disc herniation and canal stenosis. Dr. Bissell also specifically stated that “[t]here was no specific injury on February 27, 2019 which would explain the development of a large herniated disc occupying most of the patient’s spinal canal...” Dr. Bissell also opined that claimant’s C5-6 disc herniation was present at the time of his initial evaluation, which Dr. Bissell incorrectly believed to be March 15, 2019. Based on a totality of the evidence, the ALJ concludes that Dr. Bissell found the Claimant did not sustain an injury to his shoulder, neck or cervical spine arising out of or in the course of his employment.

Respondents have established by a preponderance of the evidence that the Claimant did not sustain a compensable injury, arising from and in the course of his employment. As such, Respondents may withdraw their GAL and FAL.

REPAYMENT OF BENEFITS FOR FRAUD

Respondents have not established by a preponderance of the evidence that Claimant committed fraud such that the ALJ may order repayment of benefits. An ALJ may permit an insurer to withdraw an admission of liability and order repayment of benefits paid under the admission if the claimant fraudulently supplied false information upon which the insurer relied in filing the admission § 8-43-303(4) C.R.S.; see also *Renz v. Larimer County School Dist. Poudre R-1*, 924 P.2d 1177 (Colo. App. 1996). Because admissions of liability may not ordinarily be withdrawn retroactively, § 8-43-201(1), C.R.S. provides that the party seeking the reopening bears the burden of proof by a preponderance of the evidence to establish the existence of fraud. See also *Salisbury v. Prowers County School District*, W.C. No. 4-702-144 (ICAO, June 5, 2012).

To establish fraud or material misrepresentation a party must prove the following:

- (1) A false representation of a material existing fact, or a representation as to a material fact with reckless disregard of its truth; or concealment of a material existing fact;
- (2) Knowledge on the part of one making the representation that it is false;
- (3) Ignorance on the part of the one to whom the representation is made, or the fact concealed, of the falsity of the representation or the existence of the fact;
- (4) Making of the representation or concealment of the fact with the intent that it be acted upon; [and]
- (5) Action based on the representation or concealment resulting in damage

See *In re Arczynski*, W.C. No. 4-156-147 (ICAO, Dec. 15, 2005); see also *Morrison v. Goodspeed*, 68 P.2d 458 (Colo. 1937). Where the evidence is subject to more than one interpretation, the existence of fraud is a factual determination for the ALJ. *In re Arczynski*, W.C. No. 4-156-147 (ICAO, Dec. 15, 2005).

The evidence in this case does not compel a finding that Claimant knowingly engaged in fraud. Ms. Stevens testified that Claimant reported to a different adjuster he developed right shoulder pain after driving his bus for roughly six hours, that he called a supervisor to get his bus and drove himself to Denver Health. This statement is not inconsistent with Claimant's report to Denver Health that he had neck stiffness previously from sleeping on a chair, but that his neck stiffness had resolved, and he came into the emergency department because of the new numbness, which he described as a deep aching pain in the arm.

The ALJ does not find that Claimant's statement to the TPA was a knowing false representation or a representation of a material fact with a reckless disregard for its truth. Nor can the ALJ conclude that Claimant knowingly concealed a material fact from the TPA. Claimant disclosed to the TPA and his health care providers that he went to Denver Health on February 27, 2019 for his injuries. The ALJ concludes that had the Claimant intended to conceal his report to Denver Health, he would not have disclosed to the TPA

or health care providers that he had sought treatment at Denver Health, as the information he reported to Denver Health was readily apparent from the Denver Health records.

Because neither party called the Claimant as a witness, there is no evidence in the record to establish that Claimant acted with the intent that his statement to the TPA be acted upon.

The ALJ finds that Respondents failed to establish the elements of fraud by a preponderance of the evidence.

OVERCOMING THE DIME ON MMI AND IMPAIRMENT

Because the ALJ has concluded that Claimant did not sustain a compensable work-related injury, the issues of whether Respondent has overcome Dr. Bissell's opinions on MMI and Impairment are moot.

ORDER

It is therefore ordered that:

1. Respondents request to withdraw its March 15, 2019 GAL and December 10, 2019 FAL is granted.
2. Respondents have failed to establish by a preponderance of the evidence that Claimant fraudulently supplied false information upon which Respondents relied in filing their admission. Respondents' request for an order requiring Claimant to repay benefits is denied.
3. The remaining issues are moot.
4. All matters not determined herein are reserved for future determination

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

review form at: <http://www.colorado.gov/dpa/oac/forms-WC.htm>.

DATED: October 29, 2020.



Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

Whether the claimant has demonstrated, by a preponderance of the evidence, that he is entitled to temporary total disability (TTD) benefits for the period of April 8, 2019 through May 12, 2020.

If it is determined that the claimant is entitled to TTD benefits, whether the respondents have demonstrated, by a preponderance of the evidence, that the claimant was responsible for termination of his employment with the employer, thereby terminating his entitlement to TTD benefits.

If it is determined that the claimant is entitled to TTD benefits, whether the respondents have demonstrated, by a preponderance of the evidence, that an intervening event occurred that was sufficient to sever the respondent's liability and terminate the claimant's TTD benefits.

The parties agree that the claimant received unemployment insurance benefits (UIB) during the period of May 3, 2019 through September 17, 2019. The parties stipulated that if the claimant is found to be eligible for TTD benefits, the respondents are entitled to an offset for the time the claimant received UIB. The ALJ approves and adopts this stipulation of the parties.

FINDINGS OF FACT

1. The claimant suffered an injury at work on April 4, 2019 while employed as Executive Chef. On that date, the claimant was at work performing his normal job duties and assisted one of his coworkers with dumping a large pot of boiled potatoes. During this process, the claimant was standing on a drain cover, and the drain cover moved. This resulted in the claimant's left foot slipping into the drain, causing his left knee to twist.

2. The claimant sought medical treatment in the emergency department (ED) with Vail Health on April 8, 2019, which was his day off. At that time, the claimant was provided crutches and a knee brace. In addition, he was given work restrictions that included no bending and no squatting.

3. Following the ED visit, the claimant reported to work for the employer, using crutches and a knee brace. Although the season had ended, there were meetings scheduled to discuss the next season. When the claimant arrived he informed the manager, Rafal K[Redacted], of his work restrictions.

4. The claimant testified that his last day of work was April 8, 2019. On that date, the claimant was informed that his services were no longer needed by the employer. The claimant believed he was performing well in his position, as evidenced by the planned

meetings to discuss the upcoming season. The claimant was told by the employer that termination of his employment was not related to his left knee injury.

5. Rafal K[Redacted], Managing Director of the employer's restaurant testified by deposition. Mr. K[Redacted] testified that on April 8, 2019, he and the company owner, Thomas Sullivan, informed the claimant that his employment was terminated. Mr. K[Redacted] also testified that it was the claimant's job performance that led to his job termination. Mr. K[Redacted] noted that the claimant did not meet the employer's standards and was unable to lead. In addition, the claimant was disruptive during meetings and his food did not meet the employer's standards. Mr. K[Redacted] further testified that the claimant was verbally counseled about the employer's concerns prior to April 8, 2019. Mr. K[Redacted] testified that if the claimant's employment had not ended, the employer would have been able to accommodate the claimant's work restrictions. Mr. K[Redacted] also testified that the claimant was not terminated because of his knee injury.

6. Subsequently, the claimant began treatment with Lucia London, CNP and Dr. Alysa Koval with Vail Health/Occupational Health. On May 3, 2019, Ms. London recommended physical therapy and referred the claimant to Vail Summit Orthopaedics for consultation.

7. On May 8, 2019, the claimant was seen at Vail Summit Orthopaedics by Jonathan Walker, PA-C. At that time, the claimant reported ongoing left knee pain. Mr. Walker recommended conservative treatment including physical therapy and a steroid injection. On that same date, Dr. William Sterett administered an intra-articular injection.

8. On May 31, 2019, the claimant returned to Dr. Sterett. At that time, Dr. Sterett recommended that the claimant undergo a left knee diagnostic arthroscopy, lysis of adhesion, with synovectomy. On June 3, 2019, a request for authorization of the recommended surgery was submitted to the insurer.

9. The respondents filed a General Admission of Liability (GAL) on June 27, 2019. However, as reported in the other medical records, it appears that the recommended left knee surgery was denied by the respondents.

10. The claimant was again seen by Dr. Sterett on August 21, 2019. At that time, Dr. Sterett noted that the claimant had significant pain relief from the prior steroid injection. Dr. Sterett again recommended that the claimant undergo surgical intervention involving a left diagnostic arthroscopy and synovectomy. On August 22, 2019, a request for authorization of the recommended surgery was submitted to the insurer.

11. On September 16, 2019, the claimant attended an independent medical examination (IME) with Dr. Lawrence Lesnak. Dr. Lesnak did not believe that the claimant was in need of any additional medical treatment, including further injections or surgery. Dr. Lesnak also opined that the claimant had reached maximum medical improvement (MMI). Based upon the opinions of Dr. Lesnak, the respondents denied authorization for the recommended surgery.

12. On November 7, 2019, the parties went to a hearing on the issue of whether the recommended left knee surgery was reasonable, necessary and related to the admitted work injury.

13. On January 7, 2020, the undersigned ALJ issued Findings of Fact, Conclusions of Law, and order in which it was determined that the recommended left knee surgery was not reasonable, necessary, and related to the claimant's work injury. Accordingly, the claimant's request for the surgery was denied and dismissed.

14. The claimant testified that during the month of January 2020, he worked for another employer, Blue Moose Pizza, working in the "front of house". The claimant also testified that during that employment he earned approximately \$2,000.00.

15. The claimant worked at Blue Moose Pizza until he was able to apply for and obtain medical coverage through Medicaid. Once he was covered by Medicaid, the claimant underwent the recommended left knee surgery on February 4, 2020. The cost of the surgery was paid for by Medicaid.

16. On May 1, 2020, the claimant was seen by Dr. Koval. On that date, Dr. Koval noted that the claimant could return to full duty on May 12, 2020.

17. On May 12, 2020, the claimant was seen by Ms. London who noted that following surgery the claimant's knee pain had resolved. On that date, Ms. London released the claimant to full duty work with no work restrictions.

18. The ALJ credits the medical records and the claimant's testimony and finds that the claimant has demonstrated that it is more likely than not that as a result of the work injury, he suffered a wage loss. The ALJ notes that the claimant was not provided any further work with the employer after the injury. In addition, the ALJ infers that with crutches, knee brace, and his work restrictions, the claimant would have been unable to perform his normal duties as an executive chef, had his employment continued. Therefore, the ALJ finds that the claimant was eligible for temporary total disability (TTD) benefits beginning April 8, 2019.

19. The ALJ credits the claimant's testimony over the conflicting testimony of Mr. K[Redacted], and finds that the respondent has failed to demonstrate that it is more likely than not that the claimant was responsible for the termination of his employment. The ALJ finds that the claimant was reasonable in his belief that he was meeting the employer's expectations. Therefore, the ALJ finds that the claimant did not engage in any volitional act, or exercise control over the termination of his employment.

20. The ALJ credits the medical records and the claimant's testimony and finds that the respondent has successfully demonstrated that it is more likely than not that the claimant's surgery on February 4, 2020 constitutes an intervening event severing the respondents' liability to pay TTD benefits from that date. The ALJ finds that any wage loss the claimant experienced following that surgery is not related to the claimant's April 4, 2019 work injury.

CONCLUSIONS OF LAW

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

2. The ALJ’s factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness’s testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

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

5. As found, the claimant has demonstrated, by a preponderance of the evidence, that he is entitled to TTD benefits beginning April 8, 2019. As found, the medical records and the claimant’s testimony are credible and persuasive.

6. Under the termination statutes in Section 8-42-105(4), C.R.S and Section 8-42-103(1)(g), C.R.S. a claimant who is responsible for his or her termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and wage loss. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1131 (Colo. App. 2008). The termination statutes provide that, in cases where an employee is responsible for her termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, W.C. No. 4-631-681 (ICAO, Apr. 24, 2006). A claimant does not act “volitionally” or exercise control over the circumstances leading to her termination if the effects of the injury prevent her from performing her assigned duties and cause the termination. *In re of Eskridge*, W.C. No. 4-651-260 (ICAO, Apr. 21, 2006). Therefore, to establish that Claimant was responsible for her termination, respondents must demonstrate by a preponderance of the evidence that Claimant committed a volitional act, or exercised some control over her termination under the totality of the circumstances. See *Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994). An employee is thus “responsible” if she precipitated the employment termination by a volitional act that she would reasonably expect to cause the loss of employment. *Patchek v. Dep’t of Public Safety*, W.C. No. 4-432-301 (ICAP, Sept. 27, 2001).

7. Violation of an employer’s policy does not necessarily establish the claimant acted volitionally with respect to a discharge from employment. *Gonzales v. Industrial Commission*, 740 P.2d 999 (Colo. 1987). An “incidental violation” is not enough to show that the claimant acted volitionally. *Starr v. Industrial Claim Appeals Office*, 224 P.3d 1056, 1065 (Colo. App. 2009). However, a claimant may act volitionally, and therefore be “responsible” for the purposes of the termination statute, if they are aware of what the employer requires and deliberately fails to perform accordingly. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008). This is true even if the claimant is not explicitly warned that failure to comply with the employer’s expectations may result in termination. See *Pabst v. Industrial Claim Appeals Office*, 833 P.2d 64 (Colo. App. 1992) (claimant disqualified from unemployment benefits after discharge for unsatisfactory performance when aware of expectations, even if not explicitly warned that job was in jeopardy). Ultimately, the question of whether the claimant was responsible for the termination is one of fact for determination by the ALJ. *Apex Transportation, Inc. v. Industrial Claim Appeals Office*, 321 P.3d 630, 632 (Colo. App. 2014).

8. As used in the termination statutes, the word “responsible” “does not refer to an employee's injury or injury-producing activity.” *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061, 1064 (Colo. App. 2002). Therefore, Colorado termination statute 8-42-105(4)(a) is inapplicable where an employer terminates an employee because of the employee's injury or injury-producing conduct. See *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129 (Colo. App. 2008); *Colorado Springs Disposal*, 58 P.3d at 1062. Of course, a separation from employment is not necessarily due to an injury simply because it occurs after the injury, and the injured employee need not be offered modified employment before discontinuation of benefits if they were responsible for their separation. See *Gilmore*, 187 P.3d 1129; *Ecke v. City of Walsenburg*, W.C. No. 5-002-020-02 (ICAO, May 5, 2017) (injury occurring one day before claimant’s previously-announced retirement did not cause claimant’s separation from employment).

or loss of wages). However, if the injury also leads to wage loss at a claimant's secondary employment, they are eligible for compensation for those wages, even if their separation from their primary employer was voluntary or for cause. *Id.*

9. A claimant who was "unable to do the work because of a mental, physical, or skills-based impairment," had been terminated for non-volitional conduct and was not "at fault" for the purposes of unemployment compensation. *Mesa County Pub. Library Dist. v. Industrial Claim Appeals Office*, 96, 399 P.3d 760, 766 (Colo. App. 2016), *aff'd*, 396 P.3d 1114 (Colo. 2017). The extent to which the claimant brought on her own mental and emotional impairment was irrelevant as "too attenuated from the cause of the separation." *Id.* However, where an employee treated pain from a work injury by ingesting morphine without a prescription, his "volitional act of ingesting the pain pill," rather than his work-related injury, caused his termination. *Apex Transportation, Inc. v. Industrial Claim Appeals Office*, 321 P.3d 630, 632 (Colo.App.2014).

10. As found, the respondents have failed to demonstrate, by a preponderance of the evidence, that the claimant was responsible for the termination of his employment. As found, the claimant was reasonable in his belief that he was meeting the employer's expectations and he did not engage in any volitional act, or exercise control over the termination of his employment. As found, the claimant's testimony is credible and persuasive.

11. If an intervening event triggers disability or need for medical treatment, then the causal connection between the original injury and the claimant's condition is severed. *See Post Printing & Publishing Co. v. Erickson*, 94 Colo. 382, 384, 30 P.2d 327, 328 (1934). Respondents are only liable for subsequent injuries which "flow proximately and naturally" from the compensable injury. *Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970).

12. As found, the respondents have demonstrated, by a preponderance of the evidence, that the claimant's surgery on February 4, 2020 constitutes an intervening event severing the respondents' liability to pay TTD benefits from that date. As found, the medical records and the claimant's testimony are credible and persuasive.

ORDER

It is therefore ordered:

1. The claimant is entitled to temporary total disability (TTD) benefits for the period of April 8, 2019 through and including February 3, 2020.

2. The respondents' are entitled to an offset for the time the claimant received unemployment insurance benefits.

3. All matters not determined here are reserved for future determination.

Dated this 29th day of October 2020.



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

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

ISSUES

The following issues were raised for consideration at hearing.

1. Whether the claim should be reopened for overpayment.
2. Whether the final admission dated February 13, 2019 is *void ab initio*.
3. If the claim is reopened, a reimbursement schedule for the overpayment.

STIPULATIONS OF THE PARTIES

The parties presented the following stipulation at hearing in resolution of all issues:

1. The claim should be reopened for overpayment only.
2. The final admission of liability dated February 13, 2019 is *void ab initio*.
3. There is an overpayment to claimant in the amount of \$12,320.30.
4. The parties have agreed to the following repayment schedule for claimant

to repay the overpayment:

- a. A lump sum of \$6320.30, which has been paid and received by respondents.
- b. The remaining \$6,000 to be paid at a rate of \$500 per month starting January 15, 2021 until that balance is paid.

5. Pursuant to C.R.S. § 8-43-304(2), benefits paid under this claim shall not be included in data used for rate making or individual employer rating or dividend calculations by any insurer or by Pinnacol Assurance.

In light of the stipulations, no findings of fact or conclusions of law are required by the ALJ. The parties instead seek an order approving their stipulations.

ORDER

The ALJ confirmed the agreement of all parties to the stipulations. The ALJ approves the stipulations and adopts the terms of the stipulations in this Order. It is therefore ordered that:

1. The claim is reopened for overpayment only.
2. The final admission of liability dated February 13, 2019 is *void ab initio*.
3. There is an overpayment to claimant in the amount of \$12,320.30.
4. Repayment of the overpayment shall be made by claimant in the following manner:
 - a. A lump sum of \$6320.30, which has been paid and received by respondents.
 - b. The remaining \$6,000 to be paid at a rate of \$500 per month starting January 15, 2021 until that balance is paid.
5. Pursuant to C.R.S. § 8-43-304(2), benefits paid under this claim shall not be included in data used for rate making or individual employer rating or dividend calculations by any insurer or by Pinnacol Assurance.

DATED: October 29, 2020



Steven R. Kabler
Administrative Law Judge
Office of Administrative Court
1525 Sherman Street, 4th Floor
Denver, CO 80202

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**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-122-373-002**

ISSUES

- Did Claimant prove entitlement to ongoing TTD benefits commencing October 25, 2019?

FINDINGS OF FACT

1. Claimant works for Employer as a sales associate in the plumbing department. He suffered an admitted low back injury on July 26, 2016 while emptying a mop bucket. He underwent extensive treatment, including an L4-5 laminotomy and discectomy on August 15, 2017. He was ultimately placed at MMI on December 13, 2018 by his ATP, Dr. Terrence Lakin, with a 28% whole person impairment. Dr. Lakin also assigned permanent work restrictions of:

No crawling, no ladder or stepstool use. May lift and carry sedentary-light level (15 lbs on occasion -up to 1/3 workday, 8 lbs lifting up to 2/3 workday)

2. Employer allowed Claimant to return to modified work after MMI. He coordinated regularly with the assistant store manager, Melanie, to ensure his assigned duties were consistent with his permanent restrictions.

3. Claimant suffered a new injury on October 24, 2019 when he bent over to pick up a faucet for a customer. He felt a sharp stabbing pain in his low back and pain radiating down his left leg. Claimant's direct supervisor was not at work that day, so he reported it to a different department manager.

4. The next day, October 25, Claimant returned to the store and reported the injury to his direct supervisor. Claimant was given a telephone number to call to initiate a workers' compensation claim, because claims were no longer taken at the store level. Claimant also reported the injury to Melanie that day. Melanie instructed Claimant to go home and "keep her in the loop" regarding the new injury and his work restrictions.

5. Claimant reported the injury by telephone as directed. There was a delay in receiving treatment, apparently due to confusion regarding whether the injury should be handled under the prior (2017) claim or as a new claim. Eventually, Respondent authorized a one-time evaluation with Dr. Lakin under the old claim.

6. Claimant saw Dr. Lakin on October 31, 2019. Dr. Lakin noted Claimant "had been doing fairly well with his lumbar pain" before the new injury and had "settled into" a manageable regimen with medication and light duty. Dr. Lakin noted Claimant's current pain was higher in his back than with the previous injury. Additionally, Claimant was having pain in his left leg, whereas his leg pain had previously been on the right side. Dr. Lakin opined, "this sounds like a new injury . . . I have concerns now that this is further DDD at higher dermatomal level of T12-L1." He ordered thoracic and lumbar MRIs and

referred Claimant to Dr. Castrejon, who had previously treated him in connection with the 2016 claim. Dr. Lakin also opined Claimant may require an electrodiagnostic study and additional injections. He concluded, "Since this is a one-time eval, I will not book a follow-up appointment. I do believe he needs to be seen for follow-up. But it makes sense to me that this would be a new injury. Worker's Compensation needs to advise on this and either open up [his] old case for follow-up or consider follow-up for this as a new case."

7. Regarding work restrictions, Dr. Lakin opined, "Seems that he is able to continue with his permanent work restrictions."

8. Respondent denied further evaluations or treatment under the old claim or a new claim.

9. In late November or early December 2019, Dr. Lakin authored a report requesting reconsideration of a "peer review" Respondent obtained from Dr. Ayer regarding the requested MRIs. Dr. Lakin opined, "Dr. Ayer may not appreciate that [Claimant] had lumbar discectomy, great recovery, then regressed significantly. It has been considered that there may have been some issues with persistent pain and radicular issues that his orthopedic spine surgeon indicated could be from some micro-motion irritating nerve combined with scar tissue/granulation tissue postoperatively. Dr. Ayer does not appreciate that [Claimant] sustained another bending over and lifting injury that occurred on October [24], 2019. [Claimant] now has symptoms at different levels and radicular symptoms at different levels."

10. On December 12, 2019, Dr. Lakin spoke with a second peer reviewer, Dr. Antonelli, regarding the MRIs and electrodiagnostic study. He stated "this needs to be determined by WC if this is a new injury vs exacerbation. [N]ew level T11-L1, additional radicular symptoms, flank and lateral/ant[erior] thigh. Past microdiscectomy was doing great and then regressed."

11. Claimant contacted Employer repeatedly about returning to work after his injury. He spoke with Melanie at least four times from November 2019 through February 2020. Each time he was told Employer was not comfortable bringing him back to work without a specific diagnosis regarding his new injury.

12. Although one could reasonably presume Claimant would be more limited after October 24, 2019 because of the new symptoms, there was no testimony or other persuasive evidence presented regarding his functional status. Accordingly, the ALJ accepts Dr. Lakin's assessment Claimant could have returned to light duty under his previous restrictions, had Employer allowed him to do so.

13. Respondent filed a General Admission of Liability (GAL) on September 9, 2020 for a new claim based on the October 24, 2019 accident. The GAL admitted for temporary partial disability (TPD) benefits commencing October 28, 2019. The GAL admitted for an AWW of \$768.40, which corresponds to a TTD rate of \$512.27.

14. Claimant proved entitlement to TTD benefits commencing October 25, 2019. Even if Claimant suffered no increased disability from the second injury, Employer's

refusal to allow him to return to work after the accident directly and proximately caused a total wage loss commencing October 25, 2019.

CONCLUSIONS OF LAW

A claimant is entitled to TTD benefits “in case of temporary total disability lasting more than three working days’ duration.” Section 8-42-105(1), C.R.S. As a general rule, the claimant must show the injury caused a disability, they left work because of the injury, and they missed more than three shifts. However, as will be discussed below, that formulation is subject to variation in appropriate cases.

There is no dispute Claimant has been off work since October 25, 2019. But Respondent argues Claimant is ineligible for TTD because his October 24, 2019 admitted injury caused no greater disability than existed immediately before the injury. Respondent’s argument is predicated on *City of Colorado Springs v. Industrial Claim Appeals Office*, 954 P.2d 637 (Colo. App. 1998). *City of Colorado Springs* held that claimants are not entitled to additional TTD benefits when their claim is reopened based on a worsening after MMI unless the worsened condition caused a “greater impact” on their “temporary work capability” than existed at the time of MMI.

Claimant argues *City of Colorado Springs* is inapplicable because he suffered a new injury which is being covered under a new claim. But based on the plain language in the decision, the ALJ sees no reason why the holding in *City of Colorado Springs* could not apply to Claimant’s case. The court specifically stated it was immaterial whether the second injury was “considered as a worsened condition or as a new injury.” The court essentially analyzed the issue as one of causation and determined a claimant could not receive additional TTD unless the worsened condition caused a greater impact on the claimant’s “temporary work capacity” than already existed. That concept can logically be applied to a new injury too if, as here, the claimant had a pre-existing disability at the time of the injury.

Regardless, given the unique circumstances presented by this case, two factors persuade the ALJ Claimant is entitled to TTD. First, Respondent already admitted liability for TPD benefits commencing October 28, 2019. By filing an admission of liability, the Respondent “admitted that the claimant has sustained the burden of proving entitlement to benefits.” *City of Brighton v. Rodriguez*, 318 P.3d 496, 507 (Colo. 2014). The threshold requirements for TPD benefits similar as for TTD, and the primary difference is the extent of the wage loss (partial versus total). Thus, Respondent conceded Claimant is eligible for temporary disability benefits, which conflicts with their current position the new injury caused no additional disability. Withdrawal of an admission is an affirmative defense on which the respondents have the burden of proof. See § 8-43-201(1) (“a party seeking to modify an issue determined by a general or final admission ... shall bear the burden of proof for any such modification.”). Here, withdrawal of the admission for TPD was neither pled, requested, nor tried. And it is inconsistent for Respondent to admit Claimant is entitled to TPD benefits while simultaneously arguing he is not eligible for TTD because the new injury did not cause any disability.

Second, and more important, the Court of Appeals recently clarified that a showing of “disability” is not an absolute prerequisite to a claim for temporary disability benefits if the work injury directly and proximately caused a wage loss. *Montoya v. Industrial Claim Appeals Office*, ___ P.3d ___, 17CA 0322 (Colo. App. 2018). The claimant in *Montoya* was an interior designer who was paid strictly on commission. She suffered back and shoulder injuries for which she received medical treatment. Although the claimant had no work restrictions and was able to perform her regular duties, she repeatedly missed work to attend medical appointments. Those absences hampered her ability to meet with current and potential, which caused her to lose substantial commissions. The ALJ was persuaded the injury had directly caused the claimant’s wage loss, and awarded TPD benefits despite the fact she had no restrictions and was otherwise able to perform her regular duties.

The ICAO reversed the ALJ on the theory that eligibility for temporary disability benefits requires the claimant to prove a “disability” in all cases. The Court of Appeals reversed the ICAO and held that “medical disability” is not a required element of a claim for temporary disability benefits. *Montoya* relied on a passage from *Larson’s* that the Supreme Court had previously cited in *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The *Montoya* court explained the concept of “compensable disability” is “a blend of two ingredients.” The first ingredient is “disability in the medical or physical sense,” whereas “the second ingredient is *de facto* inability to earn wages.” The court stated,

The two ingredients usually occur together; *but each may be found without the other*. a claimant may be, in a medical sense, utterly shattered and ruined, but may by sheer determination and ingenuity contrive to make a living. Conversely, a claimant may be able to work, in both the claimant’s and the doctor’s opinion, but awareness of the injury may lead employers to refuse employment. These two illustrations will expose at once *the error that results from an uncompromising preoccupation with either the medical or the actual wage-loss aspect of disability*. An absolute insistence on medical disability in the abstract would produce a denial of compensation in the latter case, although the wage loss is as real and as directly traceable to the injury as in any other instance. (Italics in original).

The court ultimately held that “although the concept of disability incorporates both ‘medical incapacity’ and ‘loss of wage earnings,’ a claimant need not prove both components to establish entitlement to disability benefits under the Act.” The Supreme Court denied *certiorari* in *Montoya* on May 29, 2018, which suggests the court does not perceive the holding to be conflict with prior case law.

The reasoning in *Montoya* is persuasive and applies equally well to Claimant’s case. The persuasive evidence shows Claimant suffered a wage loss as a direct and proximate result of the October 24 injury. Claimant is essentially that “latter case” to which the court referred, and he would suffer precisely the harm the court sought to avoid were the “disability” element slavishly applied to this situation. The Act should be interpreted in a manner as to avoid “absurd” results. *E.g., Lujan v. Life Care Centers*, 222 P.3d 970 (Colo. App. 2009). It would be nonsensical to hold that even though Employer sent

Claimant home because of the work-related injury, and subsequently refused to allow him to return to work because of the injury, he is not eligible for TTD because he theoretically could have worked had Employer allowed him to do so.¹ While it was within Employer's prerogative to keep Claimant off work until it received a clear diagnosis, it is not reasonable to deny Claimant compensation for the subsequent wage loss cause by Employer's decision.

ORDER

It is therefore ordered that:

1. Respondent shall pay Claimant TTD benefits at the weekly rate of \$512.27 per week commencing October 25, 2019 and continuing until terminated by law.
2. Respondent shall pay Claimant statutory interest of 8% per annum on all indemnity benefits not paid when due.
3. All issues not decided herein are reserved for future determination.

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

DATED: October 31, 2020

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

¹ The ICAO has previously held TTD must be reinstated for claimants who have increased restrictions after a worsening even if they were not working when the worsening occurred and therefore cannot prove any actual wage loss. *E.g., Friesz v. Wal-Mart Stores, Inc.*, W.C. No. 4-823-944-01 (July 26, 2012). It would be highly anomalous to allow some claimants to recover TTD for a theoretical or potential wage loss but deny Claimant compensation for his actual wage loss caused by the injury.

ISSUES

- Did Claimant prove his claim should be reopened for additional medical benefits based on a change of condition?

FINDINGS OF FACT

1. Claimant worked for Employer as a warehouse manager. He suffered an admitted injury to his right shoulder on June 18, 2015 while was moving a slab of granite with a forklift. The slab broke and a piece of falling granite struck him in the right upper arm/shoulder.

2. Claimant's received authorized treatment through Concentra. He was diagnosed with a shoulder strain and impingement.

3. A July 16, 2015 right shoulder MRI showed mild AC joint arthrosis with a type II acromion morphology. The rotator cuff tendons and muscles were normal, with no evidence of a rotator cuff tear or labral tears.

4. A second right shoulder MRI on January 19, 2016 was "unchanged" with "no demonstrated rotator cuff tear."

5. Claimant was treated by Dr. Wiley Jinkins, an orthopedic surgeon. Dr. Jinkins administered three cortisone injections in Claimant's right shoulder. Dr. Jinkins repeatedly opined Claimant was not a surgical candidate.

6. Dr. Jeffrey Jenks administered two cortisone injections to Claimant's right biceps tendon in September and October 2015. The injections were not helpful.

7. Claimant saw Dr. Robert Messenbaugh for an IME at Respondents' request on January 25, 2016. On examination, Dr. Messenbaugh noted full shoulder range of motion with "quite strong abduction and external rotation," and "quite superb" biceps and triceps extension. Claimant exhibited no tenderness to palpation of the long head of the biceps tendon. He had an area of tenderness over the proximal lateral aspect of the biceps muscle and underlying humerus bone. Dr. Messenbaugh diagnosed a deep-seated biceps muscle contusion and bone contusion about the proximal humerus.

8. Claimant saw Dr. Albert Hattem at Concentra on March 3, 2016. Dr. Hattem noted mild decreased range of motion with tenderness over the anterior shoulder. Impingement maneuvers were "slightly positive." Claimant was uninterested in additional cortisone injections and Dr. Hattem opined he was approaching MMI.

9. Dr. Hattem put Claimant at MMI on April 26, 2016. Examination of the shoulder showed tenderness over the anterior surface, decreased range of motion, and

positive impingement maneuvers. Dr. Hattem diagnosed right shoulder impingement and assigned a 10% upper extremity impairment based on range of motion deficits. He released Claimant to return to medium level work consistent with the results of a March 17, 2016 FCE.

10. On May 5, 2016, Respondents filed a Final Admission of Liability (FAL) based on Dr. Hattem's rating. The FAL denied medical benefits after MMI. Claimant did not object to the FAL, and the claim closed.

11. Claimant continued working full-time for Employer after his claim closed. Claimant also engaged in recreational activities including weightlifting.

12. Claimant's right shoulder became increasingly painful in 2019.

13. A right shoulder MRI on October 23, 2019 showed AC joint degenerative changes and a possible partial-thickness infraspinatus tendon tear. The radiologist saw no indication of biceps tendon pathology, labral tears, or tears to any other rotator cuff tendons.

14. Claimant had a repeat MRI on November 5, 2019, which was interpreted as essentially identical to the October 23 MRI.

15. Claimant saw Dr. Hannah Houck on November 18, 2019, who documented, "In the last few months the patient has developed worsening pain and weakness in the right shoulder. He has also noted some numbness in his arm if he moves his arm and certain directions. He was seen last month for the issue with Dr. Longfellow – x-rays and MRIs were ordered. The MRI shows a partial-thickness tear of the right infraspinatus muscle at the insertion site." On examination, Claimant was tender to palpation over the lower scapula, posterior upper arm, and the AC joint. He had decreased strength in major muscle groups of the right upper extremity (4/5), pain with external rotation of the right arm (infraspinatus test), and a painful empty can test. He could not perform the lift-off test because it hurt too much to put his hand behind his back.

16. Claimant saw Dr. Alex Romero, an orthopedic surgeon, on December 18, 2019. Physical examination showed tenderness to palpation over the impingement area, above the AC joint, and along the long head of the biceps tendon, and reduced range of motion. Supraspinatus provocative sign, Speed's test, external rotation stress test, and the belly press test all produced pain. Dr. Romero reviewed the MRI and noted edema in the AC joint and around the supraspinatus tendon, and a low-grade partial-thickness infraspinatus tendon tear. He concluded, "The patient has low-grade partial-thickness tear to his infraspinatus that may be age-related changes or secondary to previous injury. I think symptomatically he is developing of frozen shoulder." Dr. Romero administered an intra-articular and subacromial cortisone injections, which only helped for one day before symptoms returned.

17. Claimant saw Dr. Romero on January 8, 2020 for right elbow pain. Dr. Romero noted, "This has been ongoing for a couple of months but worst in the last three

weeks. He denies any injury.” There is no persuasive evidence linking the right elbow symptoms to the June 2015 work accident.

18. Dr. Romero performed right shoulder arthroscopic surgery on May 28, 2020. The preoperative diagnosis was “right shoulder adhesive capsulitis.” But under anesthesia, Dr. Romero was able to remove his right shoulder in all directions without limitation. Accordingly, Dr. Romero determined Claimant did not have adhesive capsulitis. Intraoperatively, he discovered a SLAP tear, a low-grade partial-thickness supraspinatus tear, severe subacromial and subdeltoid bursitis, and mild biceps tendinosis. He did not appreciate the infraspinatus tear suggested by the MRI. Dr. Romero debrided the rotator cuff, bursa, and SLAP tear, and performed a biceps tenodesis.

19. Dr. Messenbaugh performed a record review for Respondents on August 14, 2020. He also testified at hearing. Dr. Messenbaugh opined none of the pathology addressed by Dr. Romero was causally related to the June 2015 work accident. He noted Claimant had undergone two MRIs in 2015, neither of which showed a labral tear, rotator cuff tear, biceps pathology, or bursitis. He explained the pathology for which Claimant had surgery was not consistent with the original injury mechanism. He did not know exactly what caused the recent pathology in Claimant’s shoulder but was confident it was not related to the 2015 injury.

20. Dr. Messenbaugh’s opinions are credible and persuasive.

21. Claimant failed to prove the change of condition in his right shoulder since MMI reflects the natural progression of the original injury. The shoulder symptoms and pathology that prompted Claimant to seek treatment in 2019 and 2020 were not causally related to the June 2015 work injury.

CONCLUSIONS OF LAW

Section 8-43-303(1), C.R.S., provides that an award may be reopened on the grounds of “an error, a mistake, or a change in condition.” The party seeking to reopen has the burden of proving a basis for reopening by a preponderance of the evidence. Section 8-43-201(1); *Berg v. Industrial Claim Appeals Office*, 128 P.3d 270 (Colo. App. 2005); *Osborne v. Industrial Commission*, 725 P.2d 63 (Colo. App. 1986). A change in condition refers either to a change in the condition of the original compensable injury or to a change in the claimant's physical or mental condition that can be causally related to the original injury. *Heinicke v. Industrial Claim Appeals Office*, 197 P.3d 220 (Colo. App. 2008); *Chavez v. Industrial Commission*, 714 P.2d 1328 (Colo. App. 1985). If a claimant’s condition is shown to have changed, the ALJ should consider whether the change represents the natural progression of the industrial injury, or results from some other cause. *Goble v. Sam’s Wholesale Club*, W.C. No. 4-297-675 (May 3, 2001).

As found, Claimant failed to prove his worsened condition after MMI was causally related to the work accident. There is no persuasive medical or lay evidence connecting the worsened condition to the original injury. Dr. Messenbaugh’s analysis and opinions are credible and persuasive. The pathology that prompted Claimant to pursue treatment

in 2019 and ultimately lead to surgery did not exist while Claimant was receiving treatment for the 2015 work injury. Although Claimant's shoulder is clearly worse than when he was put at MMI, that worsening is not causally related to the work injury.

ORDER

It is therefore ordered that:

1. Claimant's request to reopen his workers' compensation claim is denied and dismissed.

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

DATED: November 2, 2020

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

- I. Have Respondents, by clear and convincing evidence, overcome the DIME opinion of Dr. Watson that Claimant is not at MMI?
- II. If the DIME opinion has been overcome on the issue of MMI, what is the appropriate Impairment Rating for Claimant's work injury?
- III. Is the ethanol embolization surgery as recommended by Dr. Yakes reasonable, necessary, and related to Claimant's work injury?
- IV. Is a CRPS evaluation, as recommended by Dr. Primack, reasonable, necessary, and related to Claimant's work injury?

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

The Work Injury / Claimant's Testimony

1. Claimant, now age 28, sustained an admitted injury to his left foot at work on November 8, 2018. (Ex. 1). At hearing, Claimant testified that he was working for Employer, cleaning up "the yard," by throwing away scrap material and filling up the "trash roll off." Claimant climbed on top of the trash roll-off and attempted to compact what was already there. When he was done, Claimant "hopped [his] body over the side of the trash roll off onto the ground." Claimant was working full-time as a roofer when this occurred.
2. Claimant explained, "Well, when I landed, I landed solid.... [I]t felt like I had, maybe, stepped on a nail or something like that. Just sharp, shooting pain instantly. So I sat down. I took my shoe off. I didn't notice any blood or anything like that, so I just went out about finishing my day of work." He testified that he was wearing regular construction boots with lug soles that tied above the ankles. He did not roll his ankle. The pain increased steadily overnight. Claimant then reported the incident, and was sent to Emergicare for treatment.
3. At hearing Claimant testified that, just a few days prior to the incident, he was able to carry two 80 pound sandbags up a ladder at the same time. After the incident, he attempted to climb a ladder in physical therapy, but the pain was 'too excruciating' and he had to stop. Claimant testified that his condition never seemed bad enough for him to justify seeking treatment for it until after it became severe and persistent, as opposed to rather moderate and sporadic. Claimant testified that he had mentioned the AVM to his

doctors in the past. His understanding was 'the doctor' told him that "it was [an] enlarged vein, and that I didn't have anything to worry about." Claimant testified that he never actually received *treatment* for his left foot prior to the work injury.

Treatment by a Series of ATPs

4. Claimant was first seen by Dr. Douglas Bradley at Emergicare on November 9, 2018. (Ex. 3, p. 32). Dr. Bradley noted, "Pt was jumping out of a roll off trailer and landed wrong on a large landscaping rock. Pt states he has to walk using the side of his foot or he has shooting pains like he is stepping on needles. Pt has swelling in his left foot. Pt states the majority of his pain is on the *bottom of his foot in the arch.*" *Id* (emphasis added).
5. Dr. Bradley's physical examination found moderate swelling of the left foot, decreased range of motion of the left foot, swelling of the left ankle, and decreased range of motion in the left ankle. *Id* at 34. Due to the symptoms, Dr. Bradley ordered x-rays of the foot. No fractures were noted. He was diagnosed with "sprain of unspecified ligament of the left ankle." (Ex R, pp. 229, 231). No restrictions were provided by Dr. Bradley at this encounter. *Id* at 233. Claimant's next scheduled appointment was November 17, 2018.
6. However, Claimant returned to Emergicare on November 13, 2018. (Ex. 3, pp. 36, 37). Claimant was seen by Dr. Lisa Baron, MD at this appointment. Claimant reported that the walking shoe he was previously given was helping with swelling, but that he was still having pain in his foot radiating up his calf. *Id.* at 37. Claimant reported that he thought he would be able to return to work; however, he quickly realized he could not tolerate much more than 10 minutes of weightbearing at a time. *Id.* His pain was reportedly "fairly focal" in the arch of the foot.
7. The physical examination noted "Focal swelling in arch of R[sic] foot." *Id.* at 38. Claimant had tenderness to palpation at the site of focal swelling in the arch of the left foot, but by now had a normal ankle exam. *Id.* He was prescribed crutches and medications, and told to wear his special shoes at all times. Claimant was restricted from walking more than 15 minutes per hour, no climbing, and no squatting. *Id.* at 38. He was scheduled to start physical therapy for his foot. Claimant requested, and was taken off work and has not returned to work since.
8. An MRI was performed of Claimant's left midfoot and forefoot on November 29, 2018 due to ongoing left foot pain after jumping "from a height and landing awkwardly on a rock." (Ex. 4, p. 41). The MRI showed a vascular malformation over the plantar aspect of the medial midfoot, within abductor hallucis and flexor hallucis longus muscles, extending into plantar subcutaneous tissues. Under *Impression*, it was noted:

Nerve root impingement would be uncommon with a pliable venous malformation, nonetheless, *correlation with symptomatology is requested*, as the malformation is closely apposed to branches of the medial plantar nerve. *Id* (emphasis added).

An MRI of the left ankle was also performed, to address the question of whether there was a low-grade interstitial partial tear, since it correlated with a point of tenderness. *Id.* at 43.

9. Claimant was then evaluated by Dr. Michael Sparr on January 23, 2019. (Ex. 5, pp. 45-48). Dr. Sparr notes in his first paragraph, "He [Claimant] has a history of vascular malformation in his left medial foot which has been present chronically. *He reports it has not caused a great deal of pain over the years.*" *Id.* at 45 (emphasis added). It was again documented that Claimant's symptoms were the result of him jumping about 5 to 6 feet from the rolloff trailer and landing on a sharp rock with his left plantar surface. *Id.*
10. Dr. Sparr's physical examination documented a moderately antalgic gait favoring the left lower extremity. Claimant was unable to walk on his toes. He was using a crutch. Claimant also had moderate swelling around the arteriovenous malformation ("AVM"). (Ex. 5, p. 47). In assessing for causality, Dr. Sparr opined, "This is admittedly a problem that has been present *chronically*. If he struck his plantar foot on a rock he may have had some *exacerbation* of pain from the vascular malformation." *Id.* at 47. (emphasis added). Dr. Sparr recommended a left tarsal tunnel injection and suggested that Dr. Leggett evaluate the malformation with an ultrasound while performing the injection. (Ex. N, p.137).
11. Claimant was evaluated by Orthopedist John R. Shank, on February 19, 2019. He provided a history of landing forcefully on his left foot and gave the following history, "The patient states that prior to this injury he had no significant issues with his foot. He notes plantar medial foot pain over the region of his plantar fascia and has developed a painful venous mass about his left foot which he says was not present prior to the injury." (Ex. L, p. 130).
12. Claimant's next appointment with Dr. Sparr was on March 13, 2019. (Ex. 5, pp. 49-50). Claimant had a minimal decrease in his foot pain since his past visit. *Id.* at 49. "He was noted to have a chronic vascular malformation over the medial foot. I felt the problem had been *exacerbated* by his work injury." *Id.* (emphasis added). Claimant had seen an orthopedist for his foot, Dr. Shank, who had referred Claimant to a vascular specialist. *Id.*
13. Claimant then went to the American Vein and Vascular Institute on July 23, 2019 for evaluation. (Ex. 6). The reported mechanism of injury was jumping off of the trash roll-off. *Id.* Claimant explained that the AVM was increasing in pain, and that it was interfering with his quality of life and activities of daily living. Claimant had not worked

since the incident. *Id.* Under discussion, Dr. Timothy Cawlfeld documented, “[Claimant] has an AVM in [his] left foot that is interfering with his daily activities and causing severe pain.” *Id.* at 55. Dr. Cawlfeld felt it was best to refer Claimant to a specialist in AVMs. *Id.* Claimant was referred to Dr. Wayne Yakes at the Vascular Malformation Center in Englewood, CO.

14. Claimant was first seen at Dr. Yakes’ clinic on October 16, 2019. (Ex. 7, pp. 64-66). Claimant again reported his inability to work since the date of the injury due to pain, edema, and neuropathy. *Id.* at 64. Under original presenting symptoms, it states, “Functional disability: yes, patient unable to work due to pain level.” *Id.* He was having persistent pain, numbness, tingling, and burning that was also affecting his sleep. *Id.* at 65. Dr. Yakes recommended Claimant undergo ethanol embolization to treat his AVM.
15. Dr. Yakes wrote a detailed letter on November 19, 2019, explaining why Claimant requires this particular surgery. (Ex. 7, p 69). He states in this letter that Claimant “did not have any symptoms prior to the injury of his foot in November of 2018.” *Id.* Dr. Yakes also noted that Claimant had been referred to him by Dr. Bradley, following an injury at work, but did not detail a causation analysis.
16. Dr. Yakes’ request for surgery was denied, and Claimant was subsequently placed at MMI on January 15, 2020. Claimant reported to Dr. Bradley on January 15, 2020 that he continued to have level 8 out of 10 pain and that the pain was so bad it was taking his breath away. (Ex. 1, p. 12). It is noted under *history of present illness* that the proposed AVM surgery had been denied.

DIME by Dr. Watson

17. Claimant then sought a DIME. This examination occurred with Dr. William Watson on May 5, 2020. (Ex. 8). Dr. Watson found Claimant to be ‘not at MMI’ and assigned a 15% provisional lower extremity rating. *Id.* at 71. Despite mentioning the chronic, pre-existing AVM in the medical record, Dr. Watson wrote under the prior injury history that “[Claimant] states this never gave him any difficulty until the injury of November 8, 2018.” *Id.* Dr. Watson also summarized the notes from Dr. Sparr where Claimant’s prior condition had been discussed.

He [Claimant] is noted to have *significant vascular malformation* within the medial foot. This is admittedly a problem. *It has been present chronically.* When he struck his plantar foot on the rock he may have had some *exacerbation* of pain from the vascular malformation. (Ex. C, p. 21) (emphasis added).

Dr. Watson again references Dr. Sparr’s notations from Claimant’s March 13, 2019 visit thusly:

He [Claimant] was noted to have a *chronic* vascular malformation at the medical(sic) foot. I felt his problem had been *exacerbated* by his work injury. *Id* at 22 (emphasis added).

18. Dr. Watson documented Claimant's pain to be 8 - 9 / 10 in the arch of his left foot. (Ex. 8, p. 73). Dr. Watson's documentation of Claimant's subjective history also states, "The examinee states that prior to this injury he had no pain on the bottom of his left foot." *Id.* at 81. Ultimately, Dr. Watson stated his rationale for the not at MMI determination was:

The examinee has no medical history of being ***treated*** for his arteriovenous malformation of the left foot. The pain started after he sustained a sharp blow to the undersurface of the foot. He states that following this the smaller lesion slowly became quite large and very painful. *Id.* at 83. (emphasis added).

Dr. Watson then quotes an article from a vascular surgeon, who noted:

Although AVMs are congenital lesions symptoms do not develop until the lesions are large enough to cause hemodynamic disturbance. Growth can be triggered by environmental factors such as activity, *trauma* and/or changes in the hormonal milieu as occurs during puberty and pregnancy. (See *also*, Ex. GG).

He then concludes:

I believe in this case, *although he had a preexisting condition*, the *proximate cause* of this work-related injury was the *trauma* which caused the AVM to be *symptomatic*. There is no previous history of visits to a physician for this lesion, disability or loss of work time. *Id* at 83. (emphasis added).

19. Dr. Watson then went on to recommend the embolization as recommended by Claimant's vascular surgeon (Dr. Yakes), and evaluation for CRPS.

20. Note: Respondent's Counsel represents to the ALJ that Exhibit E, exchanged by Respondents on August 14, 2020, was found within over 600 pages from Parkview Medical Center associated with low back and other treatment. Exhibit D was received by Respondents, on September 18, 2020. These records were not provided to the DIME. The ALJ accepts Respondents Counsel's offer of proof.

Dr. Primack recommends CRPS Testing

21. After the DIME's finding of "not at MMI," and pending Respondents' challenge thereto, treatment with authorized physicians resumed. Claimant was referred by Dr. Bradley to Dr. Scott Primack on July 13, 2020. (Ex. G). Dr. Primack noted, "I have only a small

component of his medical records.” Claimant denied any previous left foot problems. With the history provided to him, Dr. Primack recommended testing for CRPS. With the records he had, Dr. Primack could only say “the patient may very well have an AV malformation; however, the results of the MRI are not available for my review.” *Id* at 81. He indicated that he would do some research in reference to trauma and its relationship to an AV malformation. Dr. Primack also noted a very low index of physical functioning of his foot/ankle, and also noted that Claimant fell into the “Distressed Depressed category” for emotional resiliency. He recommended coping skills.

Claimant’s Pre-Injury Medical History

22. Claimant’s work incident occurred on November 8, 2018. There is a report from Pueblo Community Health Center (“PCHC”) dated February 3, 2017 that documents Claimant reported to the clinic with “left foot pain x 1 day.” (Ex. D, p. 32). Claimant initially reported soreness, but now reported “stabbing and throbbing” around the great toe on the distal portion of the foot. There was no redness or warmth. There was only mild swelling, and Claimant had not taken anything for the pain. *Id*. Physical exam documented that the foot had no swelling, and there was only mild tenderness to palpation from the mid foot to great toe, and full range of motion with mild pain. *Id*. Claimant was recommended compression and elevation, and referred to follow-up with podiatrist Dr. Jurewicz. *Id* at 33. However, the record is silent whether such follow-up visit actually occurred.
23. Claimant also had presented to Southern Colorado Clinic on May 22, 2017, but not for his left foot. The record reflects Claimant sought treatment for lower back pain he was having after moving a large boulder in his yard. (Ex. D, p. 35). Claimant’s lower back pain and left lower extremity symptoms at that time were “likely due to a lumbar HNP.” *Id*. Physical therapy was prescribed for Claimant’s lower back, but not for his foot.
24. As of October 10, 2017, Claimant was still undergoing treatment for his lower back; however, it was noted that he had a visible, palpable nodule on his left foot along with a “weird pain.” This was not treated by the physical therapist; Claimant was told merely to see his physician about the foot. *Id*. at 40. Claimant went to see his PCP and returned to physical therapy on November 2, 2017. *Id*. at 42. “[Claimant] also reports that his [left] foot does not hurt as much, informed his doctor, ‘he [Claimant’s doctor] said he is not concerned with this right now.’” *Id*. Claimant had to stop physical therapy for his back due to transportation and personal issues.
25. The Parkview Physical Therapy notes from June of 2018 address Claimant’s treatment for ongoing back issues related to the rock lifting incident. (Ex. E, p. 47). Per the outpatient therapy history form, Claimant was at therapy for his back pain that he had only been treating with Advil. *Id*. at 54. The pain diagram shows large, dark marks on Claimant’s lower back and left hip/groin region with an arrow pointing all the way down to Claimant’s left foot. The note from September 19, 2018 states that he does have

some tingling radiating from his left buttock to his foot, but that he is *able to work 8 hour days most days*, but would typically take one day a week off for his *low back pain*. *Id.* at 63. (emphasis added).

26. Claimant's primary care clinic is the Parkview Adult Medicine Clinic in Pueblo, CO. (Ex. 2, pp. 18-21). The notes from his PCP document that he presented on November 27, 2017 for "Follow up back pain." *Id.* at 18. It also noted that the tingling in the left lower extremity had resolved at that time. It is further noted on May 22, 2018 that the tingling in the left lower extremity had returned; however, this note is again in the context of treatment for Claimant's lower back pain. *Id.* at 15. It is also noted, "Current pain [average] around 4-6/10 with some paresthesia radiating down post left thigh *down to knee area*." Claimant received a diagnosis of low back pain with left sided sciatica, but no diagnosis related to the foot or treatment recommended for the foot. *Id.*
27. Claimant again saw his PCP on October 17, 2018 (Ex. 2, pp. 22-26). He presented for nausea and vomiting; again nothing to do with his foot. Physical exam documented a *normal gait*. *Id.* at 23. Neurological exam documented all extremities to be normal. Under review of symptoms, Claimant was not complaining of his left foot. *Id.* There is mention that Claimant had started a new job, and he was being excused from October 15, 2018 through October 19, 2018 due to his *illness*. *Id.* at 25.

Dr. Orgel's IME Record Review

28. Drs. David Orgel performed a records review IME. (Ex. 9, Ex. B). He did not examine Claimant. Dr. Orgel wrote a report dated June 29, 2020 after having reviewed medical records. Dr. Orgel notes that Claimant complained of left foot pain at his initial visits, and since his symptoms persisted after therapy, an MRI was ordered. (Ex. 9, p. 84). Dr. Orgel writes, "[Claimant] does admit that the abnormality has been present for some time, and in his discussion with Dr. Simpson ('He says he has noticed it there but it is more swollen') and Dr. Sparr ('He reports that it has not caused a great deal of pain over the years') he does indicate that the swelling and pain are longstanding." *Id.* at 87.
29. The prior AVM records were not discussed by Dr. Orgel in his initial written records review report. He concluded, "Mr. Rochester has a long-standing congenital malformation. He sustained a relatively minor ankle injury and began noticing increasing pain and swelling in his foot from his pre-existing condition." At hearing, Dr. Orgel testified and explained how AVMs develop. He testified that there is no indication in the medical literature that an AVM would improve without treatment. The natural history of this problem is that they can become symptomatic at any point. Once they are symptomatic, they tend to progress and become worse. They don't go away, and they don't disappear.
30. Dr. Orgel testified that 90% of a diagnosis is made by history, and that untrue statements regarding history affect the diagnosis. He then reviewed the prior AVM

records. Dr. Orgel testified that, based upon the prior AVM records, several of the present symptoms were present for several years without any instigating trauma. The records now available do not reflect an aggravation or acceleration at the time of the work injury. Claimant was on a trajectory that his AVM was becoming more painful. Comparing the measurements within Dr. Sparr's records and those of the physical therapist in October 2017, the physical description of the AVM did not change after the work incident of November 8, 2018.

31. Dr. Orgel acknowledges that Claimant did not fail to disclose his pre-existing condition. He concludes, "[B]ut for the work injury, *in my opinion*, [Claimant] would have presented with the same complaints because this is the natural history of that problem, with the AVM becoming progressively symptomatic." *Id.* (emphasis added).
32. Dr. Orgel testified at hearing consistently with his authored report. He testified that CRPS and AVMs have similar symptoms and presentations. The Division Guidelines indicate that CRPS evaluation is appropriate only when "No other diagnosis that better explains the signs and symptoms." In Claimant's case, the AVM better explains the signs and symptoms noted by Dr. Watson, Rook and Primack. The signs and symptoms leading those physicians to recommend CRPS testing were pre-existing and associated with the AVM: "stabbing" "throbbing" radiating pain, antalgic gait, episodes of cold sensation, numbness along the arch and into the great toe, and "weird pain" for three years prior to 2017.
33. Regarding impairment, Dr. Orgel agreed with Dr. Raschbacher. He noted that there was no objective evidence of a persistent ankle injury, and that there was no persistent ankle injury warranting a rating. (Ex. B, p. 17). The use of range of motion in the subtalar joint was not a correct method of rating for the work-related injury. The records show that the foot is the problem, not the ankle, and using the range of motion in the ankle would not be correct. It is measuring range of motion in the wrong place. He indicated that the medial plantar nerve neuropathy is tied to the AV malformation, and not related to the work injury. The prior records show this, with complaints of cold sensation in the foot recorded more than a year prior to the work incident. Dr. Orgel testified that no one has diagnosed a work-related nerve injury in the foot. There has not been work up or treatment for that complaint. Under those circumstances, it is not appropriate to provide a rating for that nerve damage.
34. However, when asked about the advisability of CRPS testing, Dr. Orgel stated:

Well, so it's understandable that - - why the two could get confused, because they do have a similar presentation. You know, the AV malformation, because of its vascular nature, it, you know, a different color than the rest of the skin. Because of, you know, the heightened amount of blood that's flowing through that area, there may be associated warmth and, you know, other things that - when you touch. We know already that he's quite tender there, and so that can be allodynia, perhaps. That's just

the nature of the – the AV malformation. And then the other – you know— there’s, sort of, the neurovascular – or the – I’m sorry, *the neuropathic complaints of numbness, et cetera, not necessarily related to his, you know, CRPS, but could be related to a medial plantar branch or other sort of neuropathy from pressure of the AV malformation on that nerve.* (Transcript, pp. 44, 45) (emphasis added).

35. When asked again if CRPS testing is reasonable, necessary, or related to the work injury, Dr. Orgel stated:

I would do other things first...if we assume the claim is accepted, I would probably have – I wouldn’t jump immediately into CRPS testing. I would probably do some other things, like the nerve block...or an EMG and things like that...CRPS is a tough nut to crack because some people say well, you really want to get rid of – let’s say you had CRPS. Well, you want to get rid of the instigating problem to help get rid of the CRPS. So it’s kind of, an – chick and egg kind of thing.

So I understand what you’re trying to say. *I would leave that more up his [Claimant’s] providers, how they want to approach it...so as long as ...his treating providers are aware of that, they can...do what they want to get to the bottom of the problem.* (Transcript, pp. 46-47) (emphasis added).

Dr. Ocel’s IME

36. Dr. Daniel Ocel authored a report from his independent medical examination dated July 27, 2020. (Ex. 10). He summarizes that the first visit note from November 9, 2018 documents shooting pain and moderate swelling of the left foot, along with pain and swelling of the ankle. *Id.* at 90. Claimant reported that his pain in his foot can shoot up to a 10 out of 10 level pain roughly 50% of the time, but he was at a 7 out of 10 during the examination. *Id.* at 94. Claimant reported that walking and standing both exacerbate his pain. *Id.* Dr. Ocel noted, “He has a significant amount of difficulty participating in the exam due to pain.” *Id.* Dr. Ocel diagnosed Claimant with an AVM of the left midfoot.

37. Dr. Ocel did not indicate that he had the prior AVM records. He concluded that the AVM was not aggravated by the work incident of November 8, 2020. He noted that if the impaction to the foot would have been deleterious to the AVM, i.e. prompting increasing size and pain, there would have been some clinical evidence at the initial examination. He noted none. He also stated, “In addition, from evaluation of the literature provided and further evaluation it is my understanding that trauma as an etiology of exacerbating the clinical findings of the ABM would result in significant edema about the region of the AVM and possible thrombosis of the venous structure causing pain. This is likewise not evidence[d] clinically nor on the MRI.” (Ex. A, p. 8). He also stated, “We must not discount the adverse effects of Mr. Rochester’s significant tobacco and marijuana use.

Nicotine has a significant effect on the endothelial lining of the blood vessels and can essentially make them less elastic. This may be an important factor in the assessment of the development of a painful and enlarging AVM.”

38. Dr. Ocel writes in his report that AVMs are typically congenital, though they *can be caused by trauma*, and that the AVM “may become symptomatic at any point throughout the patient’s life. *Id.* at 95. Dr. Ocel opined that the moderate findings on physical examination at the first visit on November 9, 2018 were “fairly benign” and that it was his “suspicion” there would have been some type of clinical evidence that the incident had been injurious to the AVM. *Id.* at 96. Dr. Ocel noted “The natural history of an AVM is that this entity *may* become larger over time and thus become more symptomatic.... *Thus the etiology for his pain is elusive.*” *Id.* (emphasis added). Dr. Ocel did not state that Claimant’s current AVM symptoms are clearly not related to the work incident.

Dr. Raschbacher’s Impairment Rating Critique

39. Dr. Jeffrey Raschbacher reviewed and discussed the provisional rating provided by Dr. Watson (*Ex. H*). Along with his opinion that the rated condition was not work related, he concluded that the substance of the rating was incorrect. He noted that the range of motion used in the rating was for range of motion at the ankle and hindfoot. He indicated that there was no clear medical basis for a finding that there should be range of motion impairment in this area. The AVM, which is the diagnosis used by the DIME, is in the arch of the foot. He also noted that there was no clear objective evidence of a nerve dysfunction. Without that, he noted it is not appropriate to rate the medical plantar branch nerve.

Dr. Rook’s IME

40. Claimant also underwent an IME with Dr. Jack Rook on August 19, 2020. (*Ex. 11*). Claimant reported the same mechanism of injury to Dr. Rook: “He climbed into the dumpster, whose walls were approximately 7 feet high, and he proceeded to tamp down the trash. He then jumped out of the dumpster.... He reports that he landed on both feet but that his left foot landed on a fairly large rock that was embedded in the dirt.” *Id.* at 98.
41. Claimant reported to Dr. Rook that he was having no issues with the foot before the incident while working as a roofer. He was able to do the heavy lifting, frequently over 100 pounds, and to climb ladders while holding 80 pound bags over each shoulder immediately prior to the work injury. *Id.* at 104. Dr. Rook states that Claimant “had never seen a doctor regarding his left foot,” {which is incorrect}. However, Claimant did in fact never have treatment for his left foot condition prior to the work injury. *Id.* at 105. Dr. Rook also relied heavily on the fact that Claimant had no disability associated with his foot prior to the work incident and was able to perform heavy, climbing work without restriction. *Id.* at 108. Dr. Rook, among other practitioners, opined that Claimant may

have complex regional pain syndrome (“CRPS”), and should undergo testing for the CRPS. *Id.* at 108-09.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers’ Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. §8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers’ compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. §8-43-201, C.R.S.

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

C. Assessing weight, credibility and sufficiency of evidence in a workers’ compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness’s testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). Claimant has not been a totally consistent and reliable medical historian throughout the process; however, the ALJ notes that Claimant is medically unsophisticated. As such, he will not be held to a standard of precision in order to find him to be credible in his hearing testimony in describing the progression of his symptoms. It is clear from the record that prior to the work incident as described,

Claimant's plantar symptoms would, unsurprisingly, ebb and flow to a degree. However, they accelerated dramatically once he landed on the rock in the ground.

D. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55, P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968). The ALJ finds that each expert has rendered their opinions to the best of their ability, based upon the information they were provided. The real issue here is one of *persuasiveness*.

E. Further, courts are to be "mindful that the Workmen's Compensation Act is to be liberally construed to effectuate its humanitarian purpose of assisting injured workers." *James v. Irrigation Motor and Pump Co.*, 503 P.2d 1025 (Colo. 1972).

Overcoming the DIME Opinion on MMI, Generally

F. The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, supra*; *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998); *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186, 189-190 (Colo. App. 2002); *Sholund v. John Elway Dodge Arapahoe*, W.C. No. 4-522-173 (ICAO October 22, 2004); *Kreps v. United Airlines*, W.C. Nos. 4-565-545 and 4-618-577 (ICAO January 13, 2005). The MMI determination requires the DIME physician to assess, as a matter of diagnosis, whether the various components of a claimant's medical condition are casually related to the injury. *Martinez v. ICAO*, No. 06CA2673 (Colo. App. July 26, 2007). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995) In other words, to overcome a DIME physician's opinion regarding the cause of a particular component of a claimant's overall medical impairment, MMI or the degree of whole person impairment, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be "unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc.*, W.C. No. 4-476-254 (ICAP, Oct. 4, 2001).

G. This enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appeals Office, supra*. Where the evidence is subject to conflicting inferences a mere difference of opinion between qualified medical experts does not necessarily rise to the level of clear and convincing evidence. Rather it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Oates v. Vortex Industries*, WC 4-712-812 (ICAO November 21, 2008).

H. As a matter of diagnosis the assessment of permanent medical impairment inherently requires the DIME physician to identify and evaluate all losses that result from the injury. *Mosley v. Industrial Claim Appeals Office*, 78 P.3d 1150 (Colo. App. 2003). Consequently, a DIME physician's finding that a causal relationship does or does not exist between an injury and a particular impairment must be overcome by clear and convincing evidence. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). The rating physician's determination concerning the cause or causes of impairment should include an assessment of data collected during a clinical evaluation and the mere existence of impairment does not create a presumption of contribution by a factor with which the impairment is often associated. *Wackenhut Corp. v. Industrial Claim Appeals Office*, 17 P.3d 202 (Colo. App. 2000).

Overcoming the DIME, as Applied.

I. The mere fact that a Claimant suffers from a pre-existing condition does not disqualify a claim for compensation or medical benefits if the work-related activities aggravated, accelerated, or combined with the pre-existing condition to produce disability or a need for medical treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). Pain is a typical symptom from the aggravation of a pre-existing condition, and the claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment-related activities and not the underlying pre-existing condition. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949). Moreover, an otherwise compensable injury does not cease to arise out of a worker's employment simply because it is partially attributable to the worker's pre-existing condition. See *Subsequent Injury Fund v. Thompson*, 793 P.2d 576, 579 (Colo. 1990); *Seifried v. Industrial Comm'n*, 736 P.2d 1262, 1263 (Colo. App, 1986) (“[I]f a disability were [ninety-five percent] attributable to a pre-existing, but stable, condition and [five-percent] attributable to an occupational injury, the resulting disability is still compensable if the injury has caused the dormant condition to become disabling.”)

J. Generally, the Claimant must prove by a preponderance of the evidence that his symptoms were proximately caused by an industrial aggravation of a pre-existing condition rather than simply the natural progression of the condition. *Melendez v. Weld County School District #6*, W.C. No. 4-775-869 (ICAO, October 2, 2009). However, in this instance Claimant has effectively persuaded the DIME physician that his current symptoms were proximately caused by the work injury, rather than the inevitable, natural progression of his AVM condition. Respondents must now overcome the DIME in this regard.

K. Dr. Ocel does not provide information or an opinion that amounts to clear error on the part of Dr. Watson. Dr. Ocel himself acknowledges that an AVM “may”, but not necessarily “will” get progressively worse. He stated that the etiology of Claimant's pain is elusive. Although Dr. Ocel is of the sincere and well-considered opinion that the AVM is not work related, and the work incident did not cause his need for treatment, his opinion is exactly that - his medical *opinion*, which differs from that of the DIME.

L. Respondents and Dr. Orgel heavily rely on the underlying premise that Dr. Watson's opinions are clearly wrong - because Dr. Watson was under the impression in his report that Claimant's foot was never symptomatic in the past. Even though Claimant's foot had been symptomatic to varying degrees in the past, the ALJ finds this is not sufficient grounds to establish Dr. Watson clearly erred. There is insufficient evidence that the DIME opinion would have changed had he knew Claimant had lower back issues with lower extremity radiculopathy, or that Claimant had spoken a doctor for his foot in the past. Had Respondents wished to strengthen their case with these after-acquired records, they could have asked for a Samms conference, or requested to depose the DIME physician. That would have been fair game, and then we would all know if this might have significantly mattered to the DIME. It is also clear from the DIME's own record review that he was fully aware of Claimant's pre-existing AVM, vis-à-vis his excerpts from Dr. Sparr's records. The ALJ finds that Dr. Watson was not entirely operating in the dark about the AVM in any event.

M. Claimant never did actually *treat* for his foot. He was able to perform a demanding roofing job, right up until he wasn't. There is no 'clear evidence' to establish Claimant's AVM was disabling to him at the time of the work injury, as it was not preventing him from performing his job that requires climbing ladders, an activity he can no longer perform. Respondents presented no evidence that Claimant was functionally limited prior to the work incident in a manner that would be considered disabling. There is also a lack of clear evidence that Claimant would have needed his current regimen of treatment for the foot, were it not for the work injury. This was a traumatic event, with documented trauma to the foot and ankle on examination the day after the incident, and again after that. Claimants' ankle got better on its own. Claimant's plantar pain has never subsided since the work injury. His previously-noted foot pain was sporadic at best, and was often described in the context of lower back treatment.

N. Respondents and Dr. Orgel heavily rely on the underlying premise that Dr. Watson's opinions are clearly wrong because Dr. Watson was under the impression in his report that Claimant's foot was never symptomatic in the past. Even though Claimant's foot had been symptomatic to some degree in the past, the ALJ finds this is not sufficient grounds to establish Dr. Watson clearly erred and that his opinion would have changed had he had full access to all medical records. Since that Claimant never did actually treat for his foot, and his foot was functioning up to the date of injury, Dr. Watson's opinion remains reliable. The ALJ finds that Respondents have failed to overcome the opinions of the DIME by clear and convincing evidence. Claimant is therefore found to be not at MMI and Claimant's current need for treatment for the AVM is causally related.

Medical Benefits, Generally

O. For a compensable injury, Respondents must provide all medical benefits that are reasonably necessary to cure and relieve the injury. C.R.S. § 8-42-101 (2020). Respondents are liable for reasonable and necessary medical treatment by a physician to whom a claimant has been referred by an authorized treating provider. *Rogers v. Industrial Commission*, 746 P.2d 565 (Colo. App. 1987). An aggravation of a pre-

existing condition is compensable. *State v. Richards*, 405 P.2d 675 (Colo. 1965). The question of whether there has been a permanent aggravation is one of fact for determination by an ALJ. *Monfort Inc. v. Rangel*, 867 P.2d 122 (Colo. App. 1993).

Medical Benefits, as Applied

P. No medical expert has articulated that the AVM surgery as proposed by Dr. Yakes is not reasonable and necessary. The ALJ now finds that Claimant has established by a preponderance of the evidence that the ethanol embolization procedure proposed by Dr. Yakes is reasonable, necessary, *and related* to the work injury. The evidence has already established that the work incident caused Claimant's asymptomatic to minimally symptomatic foot to require treatment. The ALJ credits Dr. Yakes' opinion as to why Claimant should have the procedure performed, both due to his rationale and his expertise on this particular and rare condition. Further, the ALJ finds Dr. Watson's rationale for also recommending this procedure more persuasive than opinions to the contrary.

Q. Dr. Primack, who is treating Claimant, has recommended CRPS evaluation. Dr. Watson has concurred. At hearing, Dr. Orgel concurred that CRPS evaluation might be warranted, but that at the end of the day, *he would defer to Claimant's treating providers*. The ALJ concurs, especially since Dr. Orgel has never met or treated Claimant. Claimant has also shown, by a preponderance of the evidence, that a CRPS evaluation is reasonable, necessary, and related to his work injury.

Overcoming the DIME's Impairment Rating

R. Respondents have presented credible evidence that the Impairment Rating methodology by the DIME physician is suspect. However, since Claimant is not at MMI, that issue is moot for now. Once Claimant receives all reasonable, necessary, and related medical treatment, it is hoped that his need for an Impairment Rating might be reduced.

ORDER

It is therefore Ordered that:

1. The DIME opinion on MMI has not been overcome. Claimant is not at MMI.
2. Respondents shall pay for all reasonable, necessary, and related medical treatment, including, but not limited to, the ethanol embolization surgery as recommended by Dr. Yakes, and a CRPS evaluation, as recommended by Dr. Primack.
3. Respondents shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.
4. All matters not determined herein are reserved for future determination.

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

DATED: November 3, 2020

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

- I. Whether Claimant is entitled to a general award of maintenance medical treatment.

FINDINGS OF FACT

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

1. Claimant sustained an admitted injury on February 22, 2018 as a result of a motor vehicle accident.
2. On the same day as the accident, Claimant presented to the emergency room. Her complaints at that time were left-sided neck pain and midline lower back pain. The assessment at that time was a "cervical and lumbar strain." (Ex. 6, p. 37.)
3. A General Admission of Liability was filed on March 16, 2018. (Ex. 1, Pg. 1).
4. On April 11, 2018, Claimant was seen by an occupational medical provider. At that time, Claimant was still complaining of left sided neck pain and back pain. (Ex. 6, p. 32.)
5. On or about April 18, 2018, Claimant started treating with Bradley Keeney, D.C. The record suggests Claimant saw him about five times during April and May 2018. In his notes, he states Claimant had preexisting back problems and migraines. He also noted that Claimant stated that while her back pain appears to have gone back to baseline, the frequency of her migraines had increased in frequency and pain levels. (Ex. 6, p. 38.)
6. On May 30, 2018, Claimant came under the care of Dr. Reichhardt. At this appointment, Claimant complained of pain in her left scapular area, neck pain, and lower back. Claimant also said that she felt like her neck pain was lowering her migraine thresholds. As a result, Dr. Reichhardt diagnosed Claimant with neck and periscapular pain, low back pain, and headaches. Based on his evaluation and assessment, he prescribed Topamax and discussed possible injections. (Ex. 6, p. 38.)
7. On June 12, 2018, Claimant returned to Dr. Reichhardt. At that appointment, Dr. Reichhardt explained that in some respects Claimant was better and in other she was worse. He also noted that he was unable to find a pain generator in relationship to her shoulder. But, based on ongoing symptoms, he continued Claimant on her current medication regimen, increased her Topamax, and considered repeating trigger point injections. (Ex. 6, p. 39.)

8. On September 13, 2018, Dr. Reichhardt referred Claimant to Dr. Josh Snyder, an orthopedic surgeon, for evaluation of her left shoulder. (Ex. 6, p. 40.)
9. On February 6, 2019, Claimant followed up with Dr. Sanders. Dr. Sanders' was also treating Claimant for her left shoulder, posterior neck pain and headaches for what he described as a "high-speed [motor vehicle accident] MVA." (Ex. 9, p.54.)
10. Based on Dr. Sanders' records, Claimant was being prescribed, and taking, several medications because of the injuries she sustained in the motor vehicle accident. The medications included:
 - Cyclobenzaprine (Flexeril),
 - Ibuprofen, and
 - Meloxicam (Mobic).

Dr. Sanders also noted he was treating her migraines, prophylactically, with medication. Those medications consisted of:

- Sumatriptan (Imitrex), and
- Topiramate (Topamax).

At the end of February 6, 2019 appointment, Dr. Sanders concluded that Claimant should continue on her current medication regimen, which consisted of the medications listed above.¹ He also noted that Claimant should follow up with Dr. Snyder, for a possible steroid injection, and with Dr. Reichhardt in "consultation." (Ex. 9, p. 54-56.)

11. On February 20, 2019, Claimant had a follow up appointment with Dr. Reichhardt. At this appointment, Dr. Reichhardt noted Claimant still had left shoulder pain, periscapular pain, neck pain, and headaches. He also noted she was waiting for approval for psychology treatment to be authorized.
12. On February 21, 2019, Dr. Steven Moe performed a Rule 16 records review. The purpose of his review was to determine whether the need for psychological treatment was reasonable, necessary, and related to the motor vehicle accident. Dr. Moe concluded that Claimant suffers from a somatic symptom disorder and a generalized anxiety disorder. He also concluded that both conditions preexisted the motor vehicle accident and the need for any psychological treatment was unrelated to the motor vehicle accident.
13. On March 5, 2019, Claimant followed up with Dr. Snyder. At that time, her pain had increased significantly. Upon examination, however, Dr. Snyder did not see any indication that Claimant would benefit from shoulder surgery. It was his opinion at that time that the majority of Claimant's symptoms were related to her

¹ Cyclobenzaprine (Flexeril), Ibuprofen, Meloxicam (Mobic), Sumatriptan (Imitrex), and Topiramate (Topamax).

whiplash injury to her neck. As a result, he did not think more diagnostic injections for her shoulder, such as those suggested by Dr. Reichhardt, were warranted.

14. On March 18, 2019, Dr. Reichhardt responded to a request asking whether Claimant required more treatment to reach MMI. Dr. Reichhardt said that the only treatment he would recommend, before placing Claimant at MMI, would be:
- A pain psychology evaluation, and
 - An independent home exercise program.

He also indicated that any other consultations could be provided as maintenance medical treatment. Thus, he anticipated Claimant would be at MMI in 8 weeks.

(Exhibit 6, p. 44.)

15. On September 25, 2019, Claimant returned to Dr. Reichhardt. As noted by Dr. Reichhardt, he had not seen Claimant since February 2019. At this appointment, Dr. Reichhardt noted that Claimant had obtained a new job at a bank and was working full time in their credit card department. Despite tolerating her work, Claimant still rated her pain at 7/10. Dr. Reichhardt also noted that Claimant tried to refill her prescriptions but was unable to get them filled because she needed a follow-up visit with her physician. As for her medications, he specifically noted that Claimant said the Meloxicam and the Topamax were the most helpful. Claimant, however, did not suggest the other medications were not being helpful. As result, all the medications that were being prescribed were helping to relieve Claimant from the effects of her work injury. (Ex. 4, p. 12-14.)
16. After evaluating Claimant, Dr. Reichhardt concluded that despite her ongoing pain complaints, Claimant had reached MMI as of September 25, 2019. His final diagnosis was "Left subacromial impingement and periscapular myofascial pain." Based on his assessment, he provided Claimant an impairment rating for her left shoulder. Based on Claimant's ongoing pain complaints, he recommended maintenance medical treatment for the next three years. He recommended maintenance treatment in the form of physician visits, coverage of medications, and any laboratory tests necessary to monitor for any side-effects of any medications being prescribed and taken by Claimant. He also referred Claimant back to Dr. Sanders for her medication management and refills. (Ex. 4, p. 12-14.)
17. Respondents filed an initial Final Admission dated November 6, 2019 which admitted for the permanent impairment rating provided by Dr. Reichhardt and medical maintenance benefits. (Ex. 2, Pg. 2).
18. Claimant timely objected to the Final Admission and requested a DIME.
19. Claimant underwent the DIME which was performed by Dr. Alicia Feldman on or about March 2, 2020. Dr. Feldman agreed with the date of maximum medical

improvement provided by Dr. Reichhardt but disagreed with rating Claimant's left shoulder. Dr. Feldman concluded Claimant suffered an injury to her cervical spine. Thus, rather than rate Claimant's left shoulder, she provided an impairment rating for Claimant's cervical spine. She also summarily concluded Claimant does not require maintenance medical treatment. On the other hand, she stated Claimant should treat her ongoing pain with over the counter NSAIDs. (Ex. D, pp. 17-37).

20. Respondents filed a final admission base on Dr. Feldman's DIME report admitting for the cervical spine impairment rating and denying maintenance medical benefits. (Exhibit B, pp. 2-8).
21. After the DIME, Dr. Reichhardt, responding to a letter asking about maintenance medical treatment, stated that he "would defer to Dr. Sanders as to whether or not any maintenance treatment at this time appears to be indicated as I discharged her from my care eleven months ago." (Ex. 5, Pg. 19).
22. Claimant testified that she would have followed up with Dr. Sanders, however; Respondents denied any follow up appointments.
23. Claimant testified that the prescription medications provided by Dr. Sanders helped control her symptoms and ability to function. Claimant testified that she currently has ongoing symptoms and would like to return to see Dr. Sanders for ongoing prescription management.
24. Gloria Montano is the adjuster for the Insurer on this claim. Ms. Montano testified at hearing. Since the filing of the final admission based on the opinions of Dr. Reichhardt, but before the final admission based on the opinions of Dr. Feldman, Ms. Montano received one inquiry from Dr. Sanders' office about claimant returning for evaluation. Ms. Montano testified that she granted this one authorization request, but that there was no subsequent billing information provided nor a follow-up evaluation report from Dr. Sanders. Circumstantially, during the time maintenance medical benefits were admitted, and then denied, Claimant did not obtain any treatment from Dr. Sanders.
25. The ALJ finds Claimant's statements to medical providers as well as her testimony to be credible and persuasive as it relates to her ongoing pain complaints associated with the work-related motor vehicle accident. The ALJ finds Claimant's statements and testimony to be credible for many reasons. First, although Claimant had pre-existing back problems and migraines, she openly advised her medical providers about the nature and extent of her prior back problems and migraines. Second, although Claimant first said she injured her back, she conceded early on in her case that her back returned to baseline at that time. As a result, the ALJ did not find any indication in the record that Claimant is trying to intentionally deceive her treating medical providers about the extent of her preexisting conditions and the extent of her symptoms that the work accident caused.

26. There is some evidence that Claimant has a somatic symptom disorder, generalized anxiety disorder, and a history of long-standing anxiety. And it may be true that those conditions are affecting Claimant's pain complaints. But only a medical provider – through the provision of medical treatment - can determine the extent and type of medical treatment necessary to maintain Claimant's condition and relieve her from the ongoing effects of her automobile accident. As a result, any underlying psychological condition does not negate Claimant's need for maintenance medical treatment.
27. Here, there is a disagreement between Dr. Reichhardt and Dr. Feldman about the anatomical location of Claimant's work injury. There is not, however, a disagreement between Dr. Reichhardt and Dr. Feldman about whether Claimant suffered a compensable work injury and whether Claimant still has pain. Here, both Dr. Reichhardt and Dr. Feldman agree that Claimant suffered a compensable injury that led to pain complaints, necessitated the need for medical treatment, and caused permanent impairment. Moreover, each treating physician here has been treating Claimant's pain with medication. And, except for the migraine medication, there is no indication any of the pain medications prescribed for Claimant could target Claimant's pain in only a specific body part. In other words, regardless of the precise anatomical location of the work injury, or injuries, the automobile accident caused Claimant's ongoing pain for which medical treatment is required to relieve and to maintain Claimant's MMI status.
28. The ALJ also credits Claimant's testimony that she would like to return to Dr. Sanders for medication management.
29. The ALJ also finds Dr. Reichhardt's opinion about the need for ongoing maintenance medical treatment to be credible and persuasive for the following reasons. Dr. Reichhardt was one of Claimant's authorized treating physicians. As an authorized treating physician, Dr. Reichhardt evaluated and treated Claimant on a long-term basis. This allowed Dr. Reichhardt to be in a better position to make maintenance medical treatment recommendations when placing Claimant at MMI based on his long-term evaluation and treatment of Claimant. Moreover, his opinion is bolstered by Dr. Feldman who acknowledged in her report that Claimant should take over the counter NSAIDs for her pain.
30. Claimant is in need of maintenance medical treatment to relieve her from the effects of her compensable work accident and to maintain MMI.

CONCLUSIONS OF LAW

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

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Claimant is entitled to a general award of maintenance medical treatment.

The need for medical treatment may extend beyond the point of MMI where the claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of her condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Hanna v. Print Expeditors Inc.*, 77 P.3d 863, 865 (Colo. App. 2003); *Hobirk v. Colorado Springs School District #11*, W.C. No. 4-835-556-01 (ICAO, Nov. 15, 2012). An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that the claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1999); *Hastings v. Excel Electric*, W. C. No. 4-471-818 (ICAO, May 16, 2002). The claimant must prove entitlement to *Grover* medical benefits by a preponderance of the evidence. *Lerner v. Wal-Mart Stores, Inc.*, 865 P.2d 915 (Colo. App. 1993); *Mitchem v. Donut Haus*, W.C. No. 4-785-078-03 (ICAO, Dec. 28, 2015). An award of *Grover* medical benefits should be general in nature. *Hanna v. Print Expeditors Inc.*, 77 P.3d 863 (Colo. App. 2003); *Anderson v. SOS Staffing Services*, W. C. No. 4-543-730, (ICAO, July 14, 2006).

A DIME physician's opinions concerning MMI and impairment carry presumptive weight pursuant to § 8-42-107(8)(b)(III), C.R.S.; see *Yeutter v. Industrial Claim Appeals Office*, No. 18CA0498 (Apr. 11, 2019) 2019 COA 53. The statute provides that "[t]he finding regarding [MMI] and permanent medical impairment of an independent medical examiner in a dispute arising under subparagraph (II) of this paragraph (b) may be overcome only by clear and convincing evidence." *Id.* Subparagraph (II) is limited to parties' disputes over "a determination by an authorized treating physician on the question of whether the injured worker has or has not reached [MMI]." § 8-42-107(8)(b)(II). "Nowhere in the statute is a DIME's opinion as to the cause of a claimant's injury similarly imbued with presumptive weight." See *Yeutter*, 2019 COA 53 ¶ 18. Accordingly, a DIME physician's opinion carries presumptive weight only with respect to MMI and impairment. *Id.* at ¶ 21. Therefore, Claimant's burden to establish her right to maintenance medical treatment is by a preponderance of the evidence.

Causation may be established entirely through circumstantial evidence. *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990). In fact, the finding of a compensable injury may be upheld where the exact medical cause of the injury remains shrouded in mystery, but the circumstantial evidence as a whole is sufficient to justify the inference that it was work-related. *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968). Medical evidence is neither required nor determinative of causation. Claimant's testimony, if credited, may alone constitute substantial evidence to support the ALJ's determination concerning the cause of the claimant's condition. See *Apache Corp. v. Industrial Commission*, 717 P.2d 1000 (Colo. App. 1986) (claimant's testimony was substantial evidence that his employment caused his heart attack); *Savio House v. Dennis*, 665 P.2d 141 (Colo.

App. 1983); see also *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997) (lay testimony sufficient to establish disability).

In this case, Claimant was involved in a motor vehicle accident. As a result of her compensable accident she suffered an injury that caused ongoing pain around her left shoulder, neck, or both. The accident also increased the frequency and intensity of her migraines.

The DIME physician's opinion about the location and type of injury has put into question the exact anatomical location – or locations – injured during the motor vehicle accident. But there is not a dispute about whether Claimant suffered a compensable injury that caused pain and necessitated the need for medical treatment in the first instance.

But, when Claimant was placed at MMI, her primary treating physician, Dr. Reichhardt, specifically prescribed "maintenance medical treatment in the form of follow up visits with a physician, coverage of medications, and any necessary laboratory tests to monitor for side effects of medication on an as needed basis over each of the next three years." Dr. Reichhardt also directed Claimant to follow up with Dr. Sanders for her maintenance medication refills.

The ALJ credits Dr. Reichhardt's conclusion that maintenance medical treatment was reasonable and necessary to relieve Claimant from the effects of her work injury when she was placed at MMI. The ALJ also credits the testimony of Claimant about her symptoms and that but for the denial of medical maintenance benefits, Claimant would have sought the recommended medical maintenance benefits to relieve her from the effects of her work injury. The ALJ also credits the testimony of Claimant that the prescription medication helps relieve her from the effects of her work injury. As a result, Claimant established by a preponderance of the evidence that she is entitled to a general award of maintenance medical treatment to relieve her from the effects of her work injury and to maintain MMI.

ORDER

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

1. Claimant is entitled to maintenance medical treatment.
2. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For

further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: <http://www.colorado.gov/dpa/oac/forms-WC.htm>.

DATED: November 4 , 2020.

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-125-074-001**

ISSUES

- Did Claimant prove he suffered a compensable injury on November 8, 2019?
If the claim is found compensable, the ALJ will address the following issues:
- Did Claimant prove entitlement to reasonably necessary medical treatment?
- Did the right to select a treating physician passed to claimant?
- Did Claimant prove entitlement to TTD benefits commencing November 13, 2019?
- Did Respondents prove Claimant was responsible for termination of his employment?

STIPULATIONS

The parties stipulated to an average weekly wage (AWW) of \$267.38 if the claim is compensable.

FINDINGS OF FACT

1. Claimant worked for Employer as a maintenance worker. He alleges a low back while moving a vending machine on November 8, 2019. Claimant and a co-worker, Jacob C[Redacted], travelled from Employer's hotel in Canon City to Colorado Springs to pick up the vending machine. After arriving at the destination, Claimant's, Mr. C[Redacted], and Employer's brother-in-law dollyed the vending machine out to the truck to be loaded. Claimant testified he was behind the machine pulling on the dolly as they loaded it into the bed of Mr. C[Redacted]'s pickup truck. Claimant testified he was in the truck bed when he lost control of the dolly and the vending machine fell on top of him. Claimant testified Mr. Jacob and Employer's brother-in-law walked away and left him under the vending machine. Claimant testified he pushed the vending machine off himself and "wiggled out" from underneath. Claimant testified he told Jacob "I think I messed my back up pretty bad from that" while they were tying down the machine.

2. Claimant and Mr. C[Redacted] drove back to Employer's hotel in Canon City to deliver the vending machine. Claimant testified he texted Justin K[Redacted], the hotel owner, on the drive back and reported he injured his back. Claimant testified he again reported the injury to Mr. K[Redacted] when they arrived at the hotel. Claimant testified he had bruises on both shoulders after the accident.

3. Mr. K[Redacted] denied Claimant reported an injury on November 8, 2019.

4. Claimant worked part of the next day, November 9. He testified he only worked one hour, but his timecard shows he worked three hours. Claimant testified Mr. K[Redacted] sent him home early because he could “barely shovel snow.” Mr. K[Redacted] confirmed Claimant worked on November 9, but testified Claimant said nothing about any back pain or injury.

5. Claimant did not return to work for Employer after November 9, 2019.

6. Claimant saw his PCP, Dr. Norman Macleod, on November 13, 2019 for severe back pain. Claimant reported the pain began “4 days ago” after a vending machine fell on him at work. Physical examination was largely benign with only lumbar spine tenderness and mild pain with lumbar range of motion. Claimant’s neck and mid back were normal. There was no indication of any bruises or conclusions on Claimant’s shoulders, chest, or any other part of his body. Dr. Macleod diagnosed lumbar degenerative disc disease. He ordered x-rays and prescribed muscle relaxers and NSAIDs.

7. Lumbar x-rays were performed on November 16, 2019. They showed multilevel degenerative changes, particularly at T12, L1, and L2. There was mild loss of height and anterior wedging at T12, which appeared “slightly more prominent” than on prior x-rays from 2016, but the radiologist opined it was “likely chronic given the endplate spurring at this level.” No other fracture or acute pathology was identified.

8. Claimant subsequently told several providers his back was injured when a vending machine fell on him, including a physical therapist, emergency room physicians, and IMEs.

9. Claimant was seen at the St. Thomas More Hospital emergency Department on December 3, 2019. He reported back pain after “a vending machine fell on him 3 weeks ago.” He reported numbness “at the top of his buttocks where the vending machine hit him.”

10. Claimant filed a Workers’ Claim for Compensation form on December 3, 2019. He reported the alleged injury to Employer that same day. Mr. K[Redacted] testified he knew nothing about any claimed injury moving the vending machine before December 3. Mr. K[Redacted] forwarded the claim information to Insurer for processing.

11. Mr. C[Redacted] completed a witness statement on December 11, 2019. He stated,

Me and [Claimant] left Motel 6 around 3:30 PM to head to Colorado Springs Day’s Inn motel to pick up a vending machine Me, [Claimant] and Justin’s brother-in-law loaded the machine in back of my pickup. We used the dolly to help us, and nobody got hurt. Then we strapped the machine down and headed back to Canon City. [Claimant] is now coming to me and just making up a bunch of lies, that he got hurt that night.

12. Mr. Jacob testified he and Mr. K[Redacted]'s brother-in-law lifted the dolly in the vending machine up and slid it in the back of the truck. Mr. C[Redacted] testified Claimant was standing on the ground next to the truck and "just holding" the dolly. Mr. C[Redacted] testified he laid the vending machine down and strapped it down, while Claimant stood in the ground next to the tailgate. Mr. C[Redacted] testified the vending machine did not fall. He disputed Claimant's testimony he had reported an injury from the activity with the vending machine. Mr. C[Redacted] testified Claimant left immediately after they arrived back at the hotel in Canon City. Mr. C[Redacted] testified Claimant said his back was hurting but did not say anything about why it hurt. Mr. C[Redacted] observed Claimant working on November 9 and testified "he seemed all fine." Mr. C[Redacted] currently works for a restaurant in Canon City and has no current affiliation with Employer.

13. Claimant sought treatment at the Parkview Medical Center emergency Department on December 16, 2019. He reported back pain, left leg weakness, numbness in his left leg and genitals, and episodic incontinence. He attributed the symptoms to the vending machine falling on him in mid-November. A lumbar MRI showed mild multilevel lumbar spondylosis, mild degenerative stenosis at L4-5 and L5-S1 with effacement of the lateral recesses contacting the dissenting right S1 nerve root, and degenerative multilevel foraminal stenosis. There is no persuasive evidence suggesting any of the pathology shown on the MRI was acute or recent.

14. Claimant had lumbar x-rays on January 13, 2020. The radiologist appreciated mild chronic compression fractures of T12 and L1 that were "unchanged from prior studies," including CT scans in June 2016.

15. Claimant had an IME with Dr. Allison Fall on April 1, 2020. Dr. Fall noted multiple inconsistencies between Claimant's statements and information documented in medical records. Claimant told Dr. Fall the vending machine fell and pinned him on the ground, not in the truck bed. He told Dr. Fall he worked "three to four more days" after the accident. She reviewed records showing Claimant sought treatment in emergency department for low back pain in June 2019. Claimant told Dr. Fall the ER physician performed an osteopathic adjustment that resolved his symptoms, but he saw Dr. Macleod two days later complaining of 6/10 back pain radiating to the right buttock and was excused from work. Claimant denied any prior low back symptoms before summer of 2019, but records show he had imaging studies on his back in 2016. Dr. Fall concluded "it is my opinion based on the inconsistencies between his initial symptoms and the current symptoms that his current symptoms are not causally related to an event that occurred on 11/08/19." She opined that if a vending machine did fall on Claimant as he described, he had most suffered a lumbar strain that healed without the need for ongoing treatment.

16. Claimant saw Dr. Timothy Hall for an IME at his counsel's request on June 10, 2020. Dr. Hall accepted Claimant's statement a 2,500-pound vending machine fell on him on November 8, 2019 and caused him to develop severe back pain. Accordingly, he considered the causation question "straightforward" and opined Claimant's low back and left leg symptoms were related to the alleged work accident.

17. Claimant's testimony was no more credible than Mr. K[Redacted]'s testimony.

18. There is no persuasive evidence Mr. Jacob is biased against Claimant or has any motivation to provide false testimony.

19. Claimant failed to prove he suffered a compensable injury on November 8, 2019. The preponderance of persuasive evidence does not show the alleged accident more likely than not occurred. Claimant's symptoms are at least as likely related to pre-existing multi-level degenerative changes in his lumbar and thoracic spines, without contribution from any alleged work accident.

CONCLUSIONS OF LAW

To receive compensation or medical benefits, a claimant must prove he is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo. App. 2001). The claimant must prove that an injury directly and proximately caused the condition for which benefits are sought by a preponderance of the evidence. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). A preponderance of the evidence is that which leads the trier-of-fact, after considering all the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case are not interpreted liberally in favor of either the claimant or the respondents. Section 8-43-201.

Claimant failed to prove he suffered compensable work-related injury on November 8, 2019. After considering the highly conflicting testimony of multiple witnesses, including Mr. C[Redacted] who has no apparent vested interest in the outcome, the ALJ is not persuaded the accident described by Claimant probably occurred. Although Claimant has told multiple medical providers he injured his back when a vending machine fell on him, the mere repetition of a story does not necessarily make it more persuasive. At the IME with Dr. Hall, Claimant estimated the vending machine weighed 2,500. He testified his Mr. Jacob and Mr. K[Redacted]'s brother-in-law walked away after the accident instead of helping him, so he pushed the vending machine up by himself and "wiggled out" from underneath. That scenario is implausible. Mr. C[Redacted] testified he lowered the vending machine and strapped it down while Claimant was standing on the ground next to the truck. Claimant testified he worked the next day and was sent home early because he could "barely shovel show." But Mr. C[Redacted] also saw Claimant working on November 9, and he did not appear hurt. Claimant sought no treatment until November 13, 2019, and the corresponding medical record documents no bruising, abrasions, or other visible evidence of trauma. Finally, Claimant has pre-existing degenerative disc disease which was sufficiently symptomatic to require treatment as recently as June 2019. He has chronic compression fractures at T12 and L1 that are "unchanged" since imaging studies in 2016. The back and leg symptoms for which

Claimant sought treatment on and after November 13, 2019 are probably related to his pre-existing condition without contribution from his work.

ORDER

It is therefore ordered that:

1. Claimant's claim for workers' compensation benefits is denied and dismissed.

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

DATED: November 4, 2020

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUE

1. Whether Respondents established by clear and convincing evidence that the Division Independent Medical Examination (DIME) opinion of Thomas Higginbotham, D.O., that Claimant is not at MMI as a result of the injury she sustained on September 2, 2017 is incorrect.

FINDINGS OF FACT

1. Claimant is a 50 -year-old female who sustained an admitted work-related injury to her left knee, and ankle on or about September 2, 2017, when she tripped while exiting a storage freezer. Claimant worked for Employer as a store manager in Employer's restaurant.
2. In 2001, Claimant underwent a left knee contralateral ACL reconstruction surgery performed by Rocci Trumper, M.D., and had previously undergone surgery on her left knee.
3. On November 29, 2017, Claimant's then-treating provider, Logan Jones, D.O., of Workwell, placed Claimant at maximum medical improvement (MMI). Dr. Jones opined that Claimant had no permanent injury and no permanent impairment. (EX. A). Dr. Jones testified that Claimant reported a mechanism of injury including tripping, falling forward, and landing on both knees. (Ex. E). Dr. Jones' opined that Claimant sustained a "minor fall" and diagnosed her with a left knee sprain, among other injuries. (Ex. A).
4. Claimant then underwent a Division Independent Medical Examination (DIME) performed by Thomas Higginbotham, D.O., on April 30, 2018. Dr. Higginbotham found Claimant was not at MMI and recommended further orthopedic assessment for causality, relatedness, and treatment. (Ex. D).
5. On October 22, 2018, Claimant underwent the recommended orthopedic evaluation with Michael Thornton, PA-C, who is supervised by Dr. Trumper. PA Thornton performed a physical examination and reviewed claimant's left knee MRI (performed on September 23, 2017). The left knee MRI was interpreted as showing tricompartmental degenerative changes with mild effusion. Anterior horn lateral meniscus tear, small cyclops lesion, and some evidence of small intra-articular loose body around the anterior horn of the lateral meniscus. After reviewing his findings with Dr. Trumper, PA Thornton concluded that Claimant appeared to have aggravation of primary osteoarthritis in her left knee. PA Thornton opined that Claimant' anterior horn lateral meniscus tear was associated with her "mechanism of injury." (The ALJ infers the "mechanism of injury" refers to Claimant's work-related injury). PA Thornton recommended continued conservative management, including corticosteroid injection, home exercise program and

physical therapy. PA Thornton performed a steroid injection on October 22, 2018. (Ex. C).

6. Claimant returned to PA Thornton on December 10, 2018, and reported the prior steroid injection provided significant relief for approximately one month, and that she then had recurrent pain. PA Thornton recommended a series hyaluronic acid (Hyalgan) injection, which Claimant received on January 16, 2019, January 21, 2019, and January 28, 2019. (Ex. C).

7. Claimant saw Dr. Trumper in follow up on March 6, 2019. Claimant reported that the Hyalgan injections seemed to be helping, until she fell on her left knee approximately one hour before her appointment with Dr. Trumper. Dr. Trumper opined that Claimant's primary left knee issue was primary osteoarthritis, which he indicated was exacerbated by her work injury. He noted her knee was structurally intact and recommended additional therapy. (Ex. C).

8. On April 10, 2019, Claimant returned to Dr. Trumper for evaluation. Dr. Trumper opined that Claimant's condition was an aggravation of her preexisting primary arthritis in her left knee. Claimant reported no significant problems prior to her injury. He recommended an MRI to determine possible co-morbidities and opined that if the MRI demonstrated primary arthritis and no other issues, Claimant's only option would be to consider knee replacement. (EX. C).

9. Claimant saw Dr. Trumper again on May 20, 2019. Dr. Trumper noted that Claimant's knee MRI showed tricompartmental osteoarthritis and a suggested a possible lateral meniscal tear. Claimant indicated she would consider a knee arthroscopy for management of her meniscal tear and a chondroplasty. (Ex. C).

10. On June 25, 2019, Dr. Trumper wrote a letter to Insurer requesting a total knee replacement for aggravation of a primary osteoarthritis from her work injury and indicated Claimant had not reached MMI. (Ex. D).

11. On August 9, 2019, Claimant underwent an independent medical exam at Respondents' request performed by Mark Failing, M.D. Dr. Failing conducted a physical examination and review of Claimant's pre- and post-injury medical records. In his report, Dr. Failing summarized records of Claimant's medical treatment from October 200, through June 2019. Dr. Failing's summary contains no mention of medical treatment to Claimant's left knee from July 2007 until December 2016. With respect to Claimant's knee, Dr. Failing opined "within a reasonable medical probability, that [Claimant] had exacerbation of pre-existing chondromalacia with no new tears of anterior cruciate segment." (Ex. B).

12. Dr. Failing noted that "If in fact [Claimant] did strike her knees, it could be sufficient to cause a permanent aggravation or acceleration of pre-existing disease, which can often be seen on an MRI in the early post-injury timeframe. The only treatment that can be attempted would be that of an arthroplasty if in fact the claimant has high-grade chondromalacia or arthritis." Dr. Failing further noted that "Unfortunately, with pre-

existing disease, sometimes it does not take a significant amount of force to create pathology, as the knee is 'set up' to begin having symptoms with injuries or forces that would not necessarily cause symptoms in a pristine and non-diseased and non-pathologic joint." Dr. Failinger also noted that Dr. Jones' conclusion on November 29, 2017, that Claimant sustained a "minor fall" was dubious given that there was nothing in the records to indicate it was a "minor fall." Dr. Failinger also noted that he would need to review Claimant's actual MRI films taken shortly after the accident to determine if Claimant were at MMI. In his recitation of the Claimant's medical records, Dr. Failinger characterized Claimant's September 23, 2017 MRI as: "the anterior cruciate ligament graft that had been placed was intact. Cyclopes lesion was noted. There was a joint effusion and degeneration of the anterior horn of the lateral meniscus and chondromalacia of the patellofemoral joint with Grade III changes in the trochlear groove. MCL scarring was noted. Lateral compartment moderate cartilage thinning was noted." (The September 23, 2017 MRI report was not offered or admitted into evidence and is not in the Court record). (Ex. B).

13. Sometime around the beginning of September 2019, Failinger issued an "addendum" to his August 9, 2019 report, after reviewing Claimant's MRI films from September 23, 2017 and comparing it to the April 26, 2019 film. Dr. Failinger opined that he would expect the Claimant's MRI film to reflect "pre-patellar swelling or edema in the soft tissues" to conclude that Claimant experienced a "likely acceleration of disease with a direct blow to the knee." Dr. Failinger indicated he found no swelling or edema on the September 23, 2017 MRI. Dr. Failinger concluded that Claimant's need for treatment would be due to ongoing degenerative changes rather than due to any new pathology or "severe contusion" or any direct blow to the knee which could have accelerated the Claimant's pre-existing chondromalacia" (Ex. B).

14. Dr. Failinger also testified by deposition. Dr. Failinger testified that in his review of the Claimant's MRI films he was looking for "evidence of forces that were involved that could have created new pathology." Based on his review of the MRI films., Dr. Failinger concluded that Claimant "did not take a direct blow to the knee, which could absolutely have caused acceleration of disease." Dr. Failinger also speculated that although he did not review any of Claimant's pre-injury MRI films, Claimant's left knee pathology would have appeared the same on pre-injury MRI. Dr. Failinger also testified that Claimant's left knee pathology was worse on the 2019 MRI, but he attributed this to natural progression of a pre-existing condition. Dr. Failinger opined that Claimant's need for surgery is not related to her work injury. (Ex. F).

15. On November 5, 2019, Claimant was seen by Lloyd Luke, M.D., of Workwell. Dr. Luke placed Claimant at MMI, recommending continuing medications, massage, and physical therapy. (Ex. A).

16. On February 11, 2020, Claimant was seen by Robert Watson, M.D., at Workwell. Dr. Watson agreed that Claimant was at MMI and assigned a permanent impairment rating. (Ex. A).

17. On March 23, 2020, Dr. Higginbotham performed a second DIME. Dr. Higginbotham reviewed Claimant's medical records dating to October 3, 2000, including reports from records from Dr. Trumper and the August 9, 2019 opinion of Dr. Failing. The index of records provided with Dr. Higginbotham's DIME report contains no records between July 2007 and December 2016. Dr. Higginbotham concluded the Claimant is not at MMI. Dr. Higginbotham opined that Claimant sustained a significant aggravation of her pre-existing arthritis of the left knee, and the treating orthopedist recommended a total knee arthroplasty. He indicated that absent Claimant's work-related injury, "it is purely speculative as to when [Claimant] would have needed a total knee arthroplasty," and a "total knee arthroplasty wasn't even in consideration prior to this WC injury claim." Dr. Higginbotham also noted that Claimant was working full-time as a restaurant manager prior to her injury and was not under active evaluation or treatment at the time of her injury. He concluded that Claimant was not at MMI "based on the significant affect upon her functionality and in need of a left total knee arthroplasty related to the significant aggravation of an osteoarthritis condition that without this injury, it is purely speculative as to whether she would have needed this procedure." (Ex. D).

18. In his pre-hearing deposition testimony, Dr. Jones testified that he would defer to Dr. Trumper regarding the Claimant's need for a knee meniscectomy or a total knee replacement. Dr. Jones also testified that he would defer to Dr. Trumper as to whether Claimant's need for a total knee replacement was related to her September 2017 work injury. (Ex. E).

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. See § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. See § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id.* at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness;

whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

OVERCOMING DIME ON MMI

Respondents are seeking a determination that Dr. Douthit's determination that Claimant was at MMI on July 13, 2020 was incorrect, and that Claimant was at MMI at an earlier date.

The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, *supra*. "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998); *Lafont v. WellBridge D/B/A Colorado Athletic Club* W.C. No. 4-914-378-02 (ICAO, June 25, 2015). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect, and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc.*, W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appeals Office*, *supra*.

The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.*, W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); see *Shultz v. Anheuser Busch, Inc.*, W.C. No. 4-380-560 (ICAO, Nov. 17, 2000). Rather it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Oates v. Vortex Industries*, WC 4-712-812 (ICAO, Nov. 21, 2008); *Licata v. Wholly Cannoli Café* W.C. No. 4-863-323-04 (ICAP, July 26, 2016).

MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." § 8-40-201(11.5), C.R.S. A DIME physician's finding that a party has or has not reached MMI is binding on the parties

unless overcome by clear and convincing evidence. § 8-42-107(8)(b)(III), C.R.S.; *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000); *Kamakele v. Boulder Toyota-Scion*, W.C. No. 4-732-992 (ICAO, Apr. 26, 2010).

MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office*, 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office*, 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007); *Powell v. Aurora Public Schools* W.C. No. 4-974-718-03 (ICAO, Mar. 15, 2017). A finding that the claimant needs additional medical treatment (including surgery) to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office*, 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office*, 794 P.2d 1090 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.*, W.C. No. 4-320-606 (ICAO, Mar. 2, 2000). Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining the claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Abeyta v. WW Construction Management*, W.C. No. 4-356-512 (ICAO, May 20, 2004). Thus, a DIME physician's findings concerning the diagnosis of a medical condition, the cause of that condition, and the need for specific treatments or diagnostic procedures to evaluate the condition are inherent elements of determining MMI.

Respondents have proven by clear and convincing evidence that

Respondents have failed to prove by clear and convincing evidence that Dr. Higginbotham's DIME opinion on MMI is incorrect. Dr. Higginbotham determined on March 23, 2020 that Claimant had not reached MMI due to ongoing symptoms, impaired function and need for surgery. Dr. Higginbotham and Dr. Trumper opined that Claimant sustained an aggravation of her pre-existing condition as a result of her work-related injury, and that surgical intervention may be necessary to relieve the effects of the Claimant's injury. Dr. Higginbotham and Dr. Trumper opined that Claimant is not at MMI. Dr. Jones testified that he would defer to Dr. Trumper's opinions on the need for surgery and whether the need was related to Claimant's work injury.

Respondents rely on Dr. Failinger's opinion that Claimant's September 2, 2017 fall did not result in "new pathology" to her left knee, and that her symptoms and need for surgery are the result of a natural progression of preexisting arthritis, rather than work-related, and therefore Claimant is at MMI. Dr. Failinger's opinion is based, primarily on his interpretation of Claimant's September 23, 2017 MRI. In his initial IME report, Dr. Failinger noted that evidence of injury can "often be seen on an MRI" early in the post-injury phase. Dr. Failinger opines, based on his interpretation of the MRI, that Claimant did not sustain a direct fall on her knees as she reported to multiple treating physicians because he did not interpret Claimant's MRI scan as demonstrating pre-patellar edema.

In essence, Dr. Failinger's opinion is that Claimant's work injury did not aggravate, accelerate, or combine with an existing condition to cause a need for additional medical treatment, and therefore she is at MMI. Dr. Failinger's opinion is based on his interpretation of Claimant's post-injury MRI films, without comparison to pre-injury imaging studies, which apparently do not exist. The ALJ does not credit Dr. Failinger's opinion as to what a pre-injury imaging study of Claimant's knee would likely show because this opinion is mere speculation.

The ALJ concludes that Dr. Failinger's opinion that Claimant is at MMI is a mere difference of opinion with those expressed by the DIME physician, Dr. Higginbotham, and Dr. Trumper. Respondents have not offered evidence that is unmistakable and free from serious doubt that Dr. Higginbotham's opinions regarding MMI are incorrect.

ORDER

It is therefore ordered that:

1. Respondents have failed to establish by clear and convincing evidence that Dr. Higginbotham's DIME opinion that Claimant is not at MMI is incorrect.
2. All matters not determined herein are reserved for future determination.

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



DATED: November 4, 2020.

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUE

Whether Claimant has demonstrated by a preponderance of the evidence that the following medical treatment requested by J. Tashof Bernton, M.D. is reasonable, necessary and causally related to his January 31, 2019 admitted industrial injury: (1) an autonomic testing battery with stress thermography; (2) a compound topical ointment with ketamine and tricyclics; and (3) three ketamine intravenous infusions.

FINDINGS OF FACT

1. On January 31, 2019 Claimant suffered an admitted industrial injury during the course and scope of his employment with Employer. Claimant specifically sustained a right wrist fracture.

2. On May 6, 2019 Claimant underwent a diagnostic assessment for Chronic Regional Pain Syndrome (CRPS) with J. Tashof Bernton, M.D. Claimant exhibited significant contractures in the index fingers of his right hand. Based on a positive autonomic testing battery and stress thermography, Dr. Bernton diagnosed Claimant with CRPS.

3. On November 5, 2019 Claimant visited Dr. Bernton for an evaluation. Dr. Bernton noted some minor CRPS findings in Claimant's left hand including the inability to make a fist and tremors. Claimant also reported symptoms into his lower extremities. However, Dr. Bernton remarked it was unclear whether Claimant's sensation of "pulling" in the lower extremities when walking had any relation to CRPS. Dr. Bernton explained that spreading of CRPS is noted in the clinical literature and Colorado Division of Workers' Compensation *Medical Treatment Guidelines (Guidelines)*. He remarked that CRPS most commonly spreads from one extremity to the contralateral extremity. However, CRPS can also spread from the upper to lower extremities.

4. Dr. Bernton testified that Claimant's lower extremity symptoms have become more pronounced over time. He thus recommended an autonomic testing battery and stress thermography of the lower extremities to confirm a CRPS diagnosis. He detailed that Claimant has exhibited symptoms including skin color changes, a loss of motion, atrophy and hyperalgesia in the lower extremities that suggests the spread of CRPS. However, because Insurer has denied an autonomic testing battery and stress thermography it is uncertain whether Claimant has true four-limb CRPS.

5. Dr. Bernton remarked that Claimant had undergone a sympathetic block and multiple medications without any relief. He thus recommended an intravenous ketamine infusion. Dr. Bernton noted that ketamine is an "NMDA Receptor Antagonist." However, he acknowledged the *Guidelines* reflect that "ketamine is 'not recommended' for CRPS because of the lack of documentation of long-term efficacy and potential side effect." He asserted that Claimant has advancing CRPS likely involving at least two

extremities. Although Dr. Bernton acknowledged that a spinal cord stimulator was an alternative treatment, he recommended a trial of ketamine because the spinal cord stimulator poses greater risks. He specified that an indwelling electromechanical device such as a spinal cord stimulator that requires surgery in an individual with CRPS has considerably more risks than the trial of an intravenous medication. Dr. Bernton commented that ketamine infusions are not a “first line” treatment for CRPS. However, he remarked that there are cases in which ketamine infusion treatment is both reasonable and necessary.

6. On December 10, 2019 Diana Hussain, M.D. performed a Peer Review of Dr. Bernton’s request for ketamine infusions. Dr. Hussain summarized that Claimant had reported continued pain and discomfort in the right upper extremity. A physical examination with Dr. Bernton revealed Claimant “had CRPS present with discoloration, hyperesthesia, and a loss of range of motion in both the digits and the wrist.” Dr. Bernton thus recommended a ketamine infusion. However, Dr. Hussain referenced the *Guidelines* and noted that ketamine is “not recommended for treatment of CRPS.” Rule 17, Exhibit 7 of the *Guidelines* specifically provides that “[s]tudies have not shown any functional improvements in patients with CRPS treated with ketamine infusions.” Furthermore, Dr. Hussain noted that the *Guidelines* provide “ketamine is not recommended since there are less harmful therapies available.” She remarked that the side effects mentioned in the *Guidelines* occur in 12% of patients. Specifically, the reactions range from “pleasant dream-like states to delirium accompanied by irrational behavior, cognitive impairment and cystitis, drug-induced liver damage, respiratory depression, apnea, and laryngospasm.” Furthermore, Dr. Bernton failed to provide the rationale for a ketamine infusion as opposed to other available treatments for Claimant’s symptoms. Finally, there were no “exceptional factors” justifying a deviation from the *Guidelines*. Dr. Hussain therefore recommended the denial of Dr. Bernton’s request.

7. On January 17, 2020 Steven Arsht, M.D. also conducted a Peer Review of Dr. Bernton’s request for ketamine infusions. Dr. Arsht reviewed Claimant’s medical records and noted that there were “no exceptional factors” to support Dr. Bernton’s request “as an outlier” to the recommendations in the *Guidelines*. He explained that “formulations of ketamine hydrochloride have been FDA approved for injection as the sole anesthetic agent for diagnostic and surgical procedures that do not require skeletal muscle relaxation.” Dr. Arsht further remarked that “[s]tudies have not shown any functional improvements in patients with CRPS treated with ketamine infusions.” He thus recommended the denial of Dr. Bernton’s request.

8. Dr. Bernton also requested authorization for a topical analgesic compound in the form of a cream to treat Claimant’s CRPS symptoms. Ketamine and amitriptyline are the primary and secondary ingredients in the compound. He noted that Claimant is suffering extreme pain as his disease progresses. Dr. Bernton remarked that the topical cream would decrease Claimant’s skin sensitivity while reducing burning and hyperalgesia. He explained that the compounding of medications is not simply for the convenience of including multiple medications in one tube.

9. On February 13, 2020 Siva Ayyar, M.D. performed a Peer Review of Dr. Bernton’s request for the topical analgesic compound to treat Claimant’s CRPS. Dr.

Ayyar noted that ketamine is the primary ingredient in the requested compound. Referring to the portion of the *Guidelines* addressing CRPS, Dr. Ayyar remarked that “ketamine and related drugs are not recommended owing to the fact that studies have not shown any functional improvements in claimants with complex regional pain syndrome (CRPS).” Moreover, Dr. Ayyar commented that the section of the *Guidelines* addressing Chronic Pain Disorders “reiterates that ketamine “is not recommended for neuropathic pain.” Dr. Ayyar summarized that “both ketamine and amitriptyline, the primary and secondary ingredients in the compound, are not recommended for topical compound formulation purposes.” Accordingly, Dr. Ayyar recommended the denial of Dr. Bernton’s request for the topical analgesic compound.

10. Claimant has demonstrated that it is more probably true than not that the autonomic testing battery with stress thermography recommended by Dr. Bernton is reasonable, necessary and causally related to his admitted industrial injuries. Initially, on January 31, 2019 Claimant suffered an admitted right wrist fracture while working for Employer. By May 6, 2019 Dr. Bernton diagnosed Claimant with CRPS in his right upper extremity. On November 5, 2019 Dr. Bernton noted some minor CRPS findings in Claimant’s left hand. Claimant also reported symptoms into his lower extremities. However, Dr. Bernton remarked it was unclear whether Claimant’s sensation of “pulling” in the lower extremities when walking had any relation to CRPS. He explained that spreading of CRPS is noted in the clinical literature and *Guidelines*. Dr. Bernton remarked that CRPS most commonly spreads from one extremity to the contralateral extremity but can also spread from the upper to lower extremities.

11. Dr. Bernton testified that Claimant’s lower extremity symptoms have become more pronounced over time. He thus recommended an autonomic testing battery and stress thermography of the lower extremities to confirm a CRPS diagnosis. He detailed that Claimant has exhibited symptoms including skin color changes, a loss of motion, atrophy and hyperalgesia in the lower extremities that suggests the spreading of CRPS. However, because Insurer denied an autonomic testing battery and stress thermography, Dr. Bernton was uncertain whether Claimant has true four-limb CRPS. The medical records and persuasive testimony of Dr. Bernton reflect that Claimant’s CRPS symptoms may have spread from his right upper extremity into his left upper extremity and lower extremities. An autonomic testing battery and stress thermography would confirm or eliminate a CRPS diagnosis for all four of Claimant’s extremities. Therefore, the requested testing is a reasonable and necessary diagnostic and treatment modality. Accordingly, Claimant’s request for an autonomic testing battery and stress thermography is granted.

12. Claimant has failed to demonstrate that it is more probably true than not that the compound topical ointment recommended by Dr. Bernton is reasonable, necessary and causally related to his admitted industrial injury. Dr. Bernton requested authorization for a topical analgesic compound in the form of a cream to treat Claimant’s CRPS symptoms. Ketamine and amitriptyline are the primary and secondary ingredients in the compound. He noted that Claimant is suffering extreme pain as his disease progresses. Dr. Bernton remarked that the topical cream would decrease Claimant’s skin sensitivity while reducing burning and hyperalgesia. He explained that the

compounding of medications is not simply for the convenience of including multiple medications in one tube.

13. In contrast, Dr. Ayyar recommended the denial of Dr. Bernton's request for the topical analgesic compound. Dr. Ayyar noted that ketamine is the primary ingredient in the requested compound. Referring to the portion of the *Guidelines* addressing CRPS, Dr. Ayyar noted that ketamine and related drugs are not recommended for treatment of CRPS because studies have not shown any functional improvement. Moreover, Dr. Ayyar commented that the section of the *Guidelines* addressing Chronic Pain Disorders provides that "ketamine is not recommended for neuropathic pain." Dr. Ayyar summarized that "both ketamine and amitriptyline, the primary and secondary ingredients in the compound, are not recommended for topical compound formulation purposes." In fact, the Chronic Pain section of Rule 17 in the *Guidelines* specifically provides that "neither 2% topical amitriptyline nor 1% topical ketamine reduces neuropathic pain syndromes." Although the *Guidelines* specifically acknowledge that "it is physiologically possible that topical tricyclics and a higher dose of ketamine could have some effect on neuropathic pain" other less expensive topicals and compounds should be tried prior to using more expensive compounds. Despite Dr. Bernton's opinion, the persuasive direction in the *Guidelines* and the opinion of Dr. Ayyar suggest that it is speculative whether the requested compound will reduce Claimant's neuropathic pain. Claimant has thus failed to demonstrate that the compound topical ointment recommended by Dr. Bernton is reasonable, necessary and causally related to his admitted industrial injuries. Accordingly, Claimant's request for the compound topical ointment is denied and dismissed.

14. Claimant has failed to prove that it is more probably true than not that the ketamine infusions recommended by Dr. Bernton are reasonable, necessary and causally related to his admitted industrial injury. Initially, Dr. Bernton recommended ketamine infusions based on Claimant's advancing CRPS. Although Dr. Bernton acknowledged that a spinal cord stimulator was an alternative treatment, he recommended a trial of ketamine because the spinal cord stimulator poses greater risks. He specified that an indwelling electromechanical device such as a spinal cord stimulator that requires surgery in an individual with CRPS has considerably more risks than the trial of an intravenous medication. Dr. Bernton commented that ketamine infusions are not a "first line" treatment for CRPS. However, he remarked that there are cases in which ketamine infusion treatment is both reasonable and necessary.

15. In contrast, Dr. Hussain referenced the *Guidelines* and noted that ketamine is "not recommended for treatment of CRPS. Rule 17, Exhibit 7 of the *Guidelines* specifically provides that "[s]tudies have not shown any functional improvements in patients with CRPS treated with ketamine infusions." Furthermore, Dr. Hussain noted that the *Guidelines* provide "ketamine is not recommended since there are less harmful therapies available." She remarked that the side effects mentioned in the *Guidelines* occur in 12% of patients. Furthermore, Dr. Bernton failed to provide the rationale for a ketamine infusion as opposed to other available treatments for Claimant's symptoms. Finally, there were no "exceptional factors" justifying a deviation from the *Guidelines*. Dr. Hussain therefore recommended the denial of Dr. Bernton's request. Similarly, Dr. Arshat reviewed Claimant's medical records and noted that there were "no

exceptional factors” to support Dr. Bernton’s request “as an outlier” to the recommendations in the *Guidelines*. He further remarked that “[s]tudies have not shown any functional improvements in patients with CRPS treated with ketamine infusions.” He thus also recommended the denial of Dr. Bernton’s request.

16. The CRPS section of Rule 17 in the *Guidelines* addresses the treatment of CRPS with ketamine infusions. The *Guidelines* specifically provide that “[s]tudies have not shown any functional improvements in patients with CRPS treated with ketamine infusions.” Because the potential harm of ketamine infusions outweighs evidence of limited short-term benefit in patients with CRPS, the *Guidelines* do not recommend ketamine infusions. Furthermore, the *Guidelines* note that “[l]ess harmful therapies with longer term effects are available.” Based on the persuasive direction in the *Guidelines* and the opinions of Drs. Hussain and Arsht, Claimant has failed to demonstrate that the ketamine infusions recommended by Dr. Bernton are reasonable, necessary and causally related to his admitted industrial injuries. Accordingly, Claimant’s request for ketamine infusions is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the “Workers’ Compensation Act of Colorado” (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers’ Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers’ Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers’ Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge’s factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. See *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A pre-existing condition or susceptibility to injury does not disqualify a claim if the

employment aggravates, accelerates or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). The claimant bears the burden of demonstrating a causal connection between his industrial injuries and the need for additional medical treatment. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997).

5. The mere occurrence of a compensable injury does not require the ALJ to find that all subsequent medical treatment was caused by the industrial injury. *In re McIntyre*, W.C. 4-805-040 (ICAO, July 2, 2010). Instead, the range of compensable consequences of an industrial injury is limited to those that flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006).

Autonomic Testing Battery and Stress Thermography

6. As found, Claimant has demonstrated by a preponderance of the evidence that the autonomic testing battery with stress thermography recommended by Dr. Bernton is reasonable, necessary and causally related to his admitted industrial injuries. Initially, on January 31, 2019 Claimant suffered an admitted right wrist fracture while working for Employer. By May 6, 2019 Dr. Bernton diagnosed Claimant with CRPS in his right upper extremity. On November 5, 2019 Dr. Bernton noted some minor CRPS findings in Claimant's left hand. Claimant also reported symptoms into his lower extremities. However, Dr. Bernton remarked it was unclear whether Claimant's sensation of "pulling" in the lower extremities when walking had any relation to CRPS. He explained that spreading of CRPS is noted in the clinical literature and *Guidelines*. Dr. Bernton remarked that CRPS most commonly spreads from one extremity to the contralateral extremity but can also spread from the upper to lower extremities.

7. As found, Dr. Bernton testified that Claimant's lower extremity symptoms have become more pronounced over time. He thus recommended an autonomic testing battery and stress thermography of the lower extremities to confirm a CRPS diagnosis. He detailed that Claimant has exhibited symptoms including skin color changes, a loss of motion, atrophy and hyperalgesia in the lower extremities that suggests the spreading of CRPS. However, because Insurer denied an autonomic testing battery and stress thermography, Dr. Bernton was uncertain whether Claimant has true four-limb CRPS. The medical records and persuasive testimony of Dr. Bernton reflect that Claimant's CRPS symptoms may have spread from his right upper extremity into his left upper extremity and lower extremities. An autonomic testing battery and stress thermography would confirm or eliminate a CRPS diagnosis for all four of Claimant's extremities. Therefore, the requested testing is a reasonable and necessary diagnostic and treatment modality. Accordingly, Claimant's request for an autonomic testing battery and stress thermography is granted.

Compound Topical Ointment

8. It is appropriate for an ALJ to consider the *Guidelines* in determining whether a certain medical treatment is reasonable and necessary for a claimant's condition. *Deets v. Multimedia Audio Visual*, W.C. No. 4-327-591 (ICAO, Mar. 18, 2005); see *Eldi v. Montgomery Ward*, W.C. No. 3-757-021 (ICAO, Oct. 30, 1998) (noting that the *Guidelines* are a reasonable source for identifying the diagnostic criteria). The *Guidelines* are regarded as accepted professional standards for care under the Workers' Compensation Act. *Rook v. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005). Nevertheless, the *Guidelines* expressly acknowledge that deviation is permissible.

9. The *Guidelines* provide, in relevant part, that "medications should be clearly linked to improvement of function, not just pain control." WCRP 17, Exhibit 9 (H)(6). Furthermore, the *Guidelines*, specify that, "examples of routine functions include the ability to perform work tasks, drive safely, pay bills or perform math operations, remain alert and upright for 10 hours per day, or participate in normal family and social activities." WCRP 17, Exhibit 9(H)(6).

10. The Chronic Pain section of Rule 17 in the *Guidelines* addresses the treatment of CRPS with topical medications. The *Guidelines* specify in relevant part:

Topical medications, such as the combination of ketamine and amitriptyline, have been proposed as an alternative treatment for neuropathic disorders including CRPS. A study using a 10% concentration showed no signs of systemic absorption. This low-quality study demonstrated decreased allodynia at 30 minutes for some CRPS patients. However, as of the time of this guideline writing, neither tricyclic nor ketamine topicals are FDA approved for topical use in neuropathic pain. Furthermore, there is good evidence that neither 2% topical amitriptyline nor 1% topical ketamine reduces neuropathic pain syndromes. Despite the lack of evidence, it is physiologically possible that topical tricyclics and a higher dose of ketamine could have some effect on neuropathic pain. Other less expensive topicals and compounds, including over-the-counter, should be trialed before more expensive compounds are ordered. The use of topical tricyclics and/or ketamine should be limited to patients with neuritic and/or sympathetically mediated pain with documented supporting objective findings such as allodynia and/or hyperalgesia.

WCRP 17, Exhibit 9 G(10)(k).

11. As found, Claimant has failed to demonstrate by a preponderance of the evidence that the compound topical ointment recommended by Dr. Bernton is reasonable, necessary and causally related to his admitted industrial injury. Dr. Bernton requested authorization for a topical analgesic compound in the form of a cream to treat Claimant's CRPS symptoms. Ketamine and amitriptyline are the primary and secondary ingredients in the compound. He noted that Claimant is suffering extreme pain as his disease progresses. Dr. Bernton remarked that the topical cream would decrease Claimant's skin sensitivity while reducing burning and hyperalgesia. He explained that

the compounding of medications is not simply for the convenience of including multiple medications in one tube.

12. As found, In contrast, Dr. Ayyar recommended the denial of Dr. Bernton's request for the topical analgesic compound. Dr. Ayyar noted that ketamine is the primary ingredient in the requested compound. Referring to the portion of the *Guidelines* addressing CRPS, Dr. Ayyar noted that ketamine and related drugs are not recommended for treatment of CRPS because studies have not shown any functional improvement. Moreover, Dr. Ayyar commented that the section of the *Guidelines* addressing Chronic Pain Disorders provides that "ketamine is not recommended for neuropathic pain." Dr. Ayyar summarized that "both ketamine and amitriptyline, the primary and secondary ingredients in the compound, are not recommended for topical compound formulation purposes." In fact, the Chronic Pain section of Rule 17 in the *Guidelines* specifically provides that "neither 2% topical amitriptyline nor 1% topical ketamine reduces neuropathic pain syndromes." Although the *Guidelines* specifically acknowledge that "it is physiologically possible that topical tricyclics and a higher dose of ketamine could have some effect on neuropathic pain" other less expensive topicals and compounds should be tried prior to using more expensive compounds. Despite Dr. Bernton's opinion, the persuasive direction in the *Guidelines* and the opinion of Dr. Ayyar suggest that it is speculative whether the requested compound will reduce Claimant's neuropathic pain. Claimant has thus failed to demonstrate that the compound topical ointment recommended by Dr. Bernton is reasonable, necessary and causally related to his admitted industrial injuries. Accordingly, Claimant's request for the compound topical ointment is denied and dismissed.

Intravenous Ketamine Infusions

13. The CRPS section of Rule 17 in the *Guidelines* specifically addresses the treatment of CRPS with ketamine infusions. The *Guidelines* provide in relevant part:

There is some evidence that in CRPS I patients, low dose daily infusions of ketamine can provide pain relief compared to placebo. The relief, however, faded within a few weeks. Studies have not shown any functional improvements in patients with CRPS treated with ketamine infusions. Because their potential harm, as described below, outweighs evidence of limited short-term benefit in patients with CRPS, NMDA receptor antagonists are not recommended. Less harmful therapies with longer term effects are available.

...

Due to the potential harm and limited short-term benefit in patients with CRPS, ketamine NMDA receptor antagonists are **not recommended** since less harmful therapies are available.

...

If ketamine is being considered for a CRPS patient who has been refractory to other treatments, there must be a complete discussion with the patient regarding lack of evidence for treatment, the possible side effects and the unknown long term side effects of repeat treatment.

WCRP, Exhibit 7 H(8)(c).

14. As found, Claimant has failed to prove by a preponderance of the evidence that the ketamine infusions recommended by Dr. Bernton are reasonable, necessary and causally related to his admitted industrial injury. Initially, Dr. Bernton recommended ketamine infusions based on Claimant's advancing CRPS. Although Dr. Bernton acknowledged that a spinal cord stimulator was an alternative treatment, he recommended a trial of ketamine because the spinal cord stimulator poses greater risks. He specified that an indwelling electromechanical device such as a spinal cord stimulator that requires surgery in an individual with CRPS has considerably more risks than the trial of an intravenous medication. Dr. Bernton commented that ketamine infusions are not a "first line" treatment for CRPS. However, he remarked that there are cases in which ketamine infusion treatment is both reasonable and necessary.

15. As found, in contrast, Dr. Hussain referenced the *Guidelines* and noted that ketamine is "not recommended for treatment of CRPS. Rule 17, Exhibit 7 of the *Guidelines* specifically provides that "[s]tudies have not shown any functional improvements in patients with CRPS treated with ketamine infusions." Furthermore, Dr. Hussain noted that the *Guidelines* provide "ketamine is not recommended since there are less harmful therapies available." She remarked that the side effects mentioned in the *Guidelines* occur in 12% of patients. Furthermore, Dr. Bernton failed to provide the rationale for a ketamine infusion as opposed to other available treatments for Claimant's symptoms. Finally, there were no "exceptional factors" justifying a deviation from the *Guidelines*. Dr. Hussain therefore recommended the denial of Dr. Bernton's request. Similarly, Dr. Arsht reviewed Claimant's medical records and noted that there were "no exceptional factors" to support Dr. Bernton's request "as an outlier" to the recommendations in the *Guidelines*. He further remarked that "[s]tudies have not shown any functional improvements in patients with CRPS treated with ketamine infusions." He thus also recommended the denial of Dr. Bernton's request.

16. As found, the CRPS section of Rule 17 in the *Guidelines* addresses the treatment of CRPS with ketamine infusions. The *Guidelines* specifically provide that "[s]tudies have not shown any functional improvements in patients with CRPS treated with ketamine infusions." Because the potential harm of ketamine infusions outweighs evidence of limited short-term benefit in patients with CRPS, the *Guidelines* do not recommend ketamine infusions. Furthermore, the *Guidelines* note that "[l]ess harmful therapies with longer term effects are available." Based on the persuasive direction in the *Guidelines* and the opinions of Drs. Hussain and Arsht, Claimant has failed to demonstrate that the ketamine infusions recommended by Dr. Bernton are reasonable, necessary and causally related to his admitted industrial injuries. Accordingly, Claimant's request for ketamine infusions is denied and dismissed.

ORDER

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

1. Claimant's request for an autonomic testing battery with stress thermography as proposed by Dr. Bernton is granted.
2. Claimant's request for a compound topical ointment as recommended by Dr. Bernton is denied and dismissed.
3. Claimant's request for ketamine infusions as proposed by Dr. Bernton is denied and dismissed.
4. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at <http://www.colorado.gov/dpa/oac/forms-WC.htm>.*

DATED: November 6, 2020.

DIGITAL SIGNATURE:


Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- I. Has Claimant, by a preponderance of the evidence, shown that the lumbar revision surgery as proposed by Dr. Rauzzino is reasonable, necessary, and causally related to her 12/17/2019 work injury?

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

Background

1. Claimant, age 55, is employed as a special education para teacher at [Employer Name Redacted]. Claimant has worked for Respondent in the same role since April 2000. At hearing, Claimant testified her job duties have included helping special ed students with calming, with academics, and supervising safety.

Claimant undergoes Lumbar Fusion before the Work Injury

2. Prior to the date of injury, Claimant was treating pain in her back. On January 8, 2019, she was seen by her personal physician, David Bird, MD, after she strained her back while trying yoga. Dr. Bird noted Claimant should continue using Meloxicam to treat her pain at that time. (Ex. A, p. 4).
3. A January 30, 2019 MRI of the lumbar spine revealed subtle degenerative anterolisthesis of the L3 level and retrolisthesis of the L5 level, moderate spinal stenosis at the L3-L4 level, mild to moderate spinal stenosis at the L4-L5 level, and degenerative disc disease with a small right bulge at the L5-S1 level. *Id.* Claimant was diagnosed with a degenerative condition of the lumbar spine, which caused her to lose her lumbar lordosis. (Rauzzino depo. p. 15).
4. After Claimant's symptoms continued without relief, she underwent a four-level fusion procedure that included (1) L2-L3, L3-L4 anterior spinal discectomy and arthrodesis; (2) L2-L3, L3-L4 insertion of intervertebral biomechanical device; and (3) L2-L3, L3-L4 allograft. The surgery was performed by Paul Stanton, DO, on May 31, 2019. (Ex. E, p. 105).

Post-Surgical Treatment

5. After the procedure, Claimant continued to be prescribed Meloxicam 15 mg daily. On September 25, 2019, Dr. Bird discontinued the Meloxicam prescription, and switched Claimant to a Celebrex 200 mg twice per day prescription. (Ex. D, p. 103).

6. At hearing, Claimant elaborated on her actual usage of any NSAIDs. She indicated that she stopped taking the Meloxicam (which had been prescribed for arthritis by Dr. Bird), and other drugs, prior to the fusion, upon medical advice. While her prescriptions were *filled* (by Dr. Bird), she did not actually *use* the Meloxicam until September, 2019, after which the Meloxicam was changed on a trial basis with Celebrex. That was then changed to Ibuprofen 600mg in October, but she never took Meloxicam or Celebrex at the same time as the Ibuprofen.
7. Claimant had also developed right arm pain, eventually leading to numbness and tingling in the right arm. She was therefore prescribed ibuprofen, 600 mg, three times per day. At her November 8, 2019 appointment with Dr. Bird, Claimant was recommended to continue taking ibuprofen at this dosage. Dr. Bird's file noted that Claimant was still prescribed Meloxicam 15 mg once per day, but does not reflect if this was actually discussed with Claimant. (Ex. D, p. 101).
8. At hearing, Claimant testified that she was in a brace for six weeks following her fusion, followed by physical therapy. Her progress went well. Her symptoms and pain level had become much more tolerable and she had increased her activity levels, including returning to the gym, walking, hiking, swimming, biking, and yard work.

The Work Injury

9. On December 17, 2019, Claimant attempted to control a special education student who was observed to be combative and "not cooperating." She estimated the student to be about 70 pounds. At that time, there was also a substitute teacher, Mary H[Redacted], in the room. Claimant and Ms. H[Redacted] attempted to coax Claimant out from behind a chair. He was "screaming, banging his fists and feet against the wall and the recliner." (Transcript, p. 17).
10. The student then climbed under a computer desk where computer cords were hanging, and tried to put a cord around his neck. Claimant felt there was no time to await help; instead, she felt she had to act right then. She climbed under the desk and removed him, hoping he would calm down. Instead he proceeded to the other side of the desk and grabbed a cord again.
11. When asked how long it lasted, Claimant explained:

A This was – altogether this was a few minutes. I mean, this went really fast. There was not time to think, you know. We were just trying to help him. She was – the other person in the room, the substitute, she was trying to loosen his fingers on the grip of the cord of the [computer] tower. I climbed again from the back underneath the desk and moved him again and pulled him out and then lifted him up, and then we moved him to the middle of the room.

And when I let him go, I felt some really strange pain in the back, was really, really difficult to breathe and then my shoulder as well, and

then I actually said to her that I had surgery in the back previous in the summer and I shouldn't have done that. (Transcript, p. 19).

12. Claimant testified she immediately felt pain in her low back; "...it felt like something just went wrong in there right away."

Post Work Injury Treatment

13. Claimant testified that she did not seek immediate medical assistance, hoping she would get better with icing and rest. She did file a report at once with Employer, within a half-hour. When her symptoms did not improve, on December 19, 2019, Claimant then sought medical care. Claimant had an initial appointment at CCOM with Edith Reichert, FNP-BC. Ms. Reichert noted Claimant's current prescribed medications included Meloxicam, Spironolactone, and Tylenol. (Ex. C, p. 95).
14. Claimant was also referred for x-rays of the right shoulder, cervical, and lumbar spine. Ms. Reichert prescribed Flexeril 10 mg to be taken at bedtime. *Id* at 96.
15. An x-ray of the lumbosacral spine was taken the same day, revealing slight lucency about the left L4 level, as well as a sacral pedicular screw that was indicative of some degree of loosening. (Ex. B, p. 19).
16. The physical examination documents "Lumbar spine-no deformity, no edema, no ecchymosis, no spinal pain, full flexion, extension, bilat[eral] side flex and rotational twist with paraspinal discomfort on palp and movement, Bilat[eral] straight leg negative, normal gait, normal sensation, normal motor function, (Ex. C pp. 95-96) The diagnosis at that time was "sprain of the lumbar ligaments" *Id*.
17. On December 31, 2019, Claimant returned to see Dr. Bird. Dr. Bird noted that although she had undergone the May 31, 2019 surgery with Dr. Stanton, she had been referred to see Dr. Stanton's partner, Dr. Bee, for injuries related to the workplace incident. X-rays had revealed issues with the screws in the lumbar spine that were used in the May 2019 fusion procedure. (Ex. 1, p. 3).

Claimant is referred to Dr. Rauzzino

18. Claimant was never actually seen by Dr. Bee. Instead of being seen by Dr. Bee, Claimant was referred by the Risk Management department of Respondent to Michael Rauzzino, M.D. on February 17, 2020. X-rays were reviewed at this appointment.
19. Claimant was seen by her ATP, Thomas Centi, M.D. at CCOM on February 26, 2020. Dr. Centi noted Claimant had undergone a neurosurgical evaluation, with a subsequent CT scan being ordered to evaluate the screw alignment. Claimant was listed to have Meloxicam, among other medications, as a current medication. (Ex. C, p. 64).

20. Claimant returned to see Dr. Rauzzino on March 3, 2020. Dr. Rauzzino noted it appeared Dr. Stanton had performed a unilateral approach during the May 2019 procedure, placing pedicle screws only on one side of the lumbar spine. (Ex. 1, p. 5). Dr. Rauzzino initially noted on 3/3/2020 it was possible that the screw had broken over time, or that it had broken as a result of the December 17, 2019 workplace incident and acute onset of pain. *Id.*

21. Dr. Rauzzino opined he suspected the pedicle screws at the L5 and S1 levels were loose. Therefore, he did not believe there was adequate fusion. Further, he suspected there was pseudarthrosis, or nonunion, at the L5-S1 level, as well as a broken screw. According to the records, Claimant was still prescribed Meloxicam at that time. *Id.*

Deposition of Dr. Rauzzino

22. Dr. Rauzzino was also deposed, post-hearing, on 9/21/2020. When asked if a broken screw (such as Claimant has) can cause pain, he replied:

A A broken screw can cause pain in and of itself, but it's also indicative of other problems as well.

When asked what other problems, he noted:

A If the screw is broken, that means the hardware that was placed to provide stability to allow the bones to he'll [sic "heal"] has been compromised, and it's not likely the fusion will go on to heal with the screw broken and the instrumentation not effective anymore. (Rauzzino Depo, pp. 21-22).

Dr. Rauzzino was also asked about pseudarthrosis. He elaborated:

A ...And that it may take a full year for a fusion to occur. So it might be premature to call it a pseudarthrosis in the absence of a broken screw in the sense that if you did an operation on somebody's back to fuse their spine and you took a CAT scan of your back a week later and the bones weren't fused, *you wouldn't call that a pseudarthrosis because the fusion hasn't had time to fully heal.*

In this case for Ms. Young, she was less than a year out from the surgery. And with the broken screw, it meant she no longer had the ability to try to continue to heal at the fusion at the lowermost level. *It took away her ability to do that.* (Rauzzino Depo, p. 22) (emphasis added).

23. Dr. Rauzzino felt that the screw broke as a result of the occupational injury. He elaborated:

A I think if one looks at the case or claim from Ms. Young, it's very clear that as of September, she was having no pain or very minimal pain, she was doing very well. She had this large surgery and had gone back to work and was doing well.

And there was no documentation that I was afforded that between the last time she saw Dr. Stanton in September of 2019 and at the time of the occupational injury in December 2019, I was not provided any records that she was having increasing back pain or needed additional treatment or x-rays. So she was doing very well clinically.

And after the work-related of the occupational injury she sustained with the special needs kid, she had immediate onset of back pain that did not get better, was not relievable. And that's the same point at which the broken screw was noted.

24. Dr. Rauzzino acknowledged there was no 'objective evidence' to support a finding that the screw had become minimally displaced in December 2019. He also had no criticism of Dr. Stanton's unilateral-sided fusion technique, noting that this was a legitimate school of thought, depending on how the surgeon is trained.

Continued Consultation with Dr. Rauzzino

25. On March 27, 2020, Claimant underwent an MRI of the lumbar spine, which was compared to the (pre-surgical) MRI taken on January 30, 2019. The MRI revealed post-surgical changes, with anterior and posterior fusion. However, there was mild foraminal stenosis bilaterally at the L4-L5 and L5-S1 levels. (Ex. B, p. 15).
26. Claimant returned to Dr. Rauzzino on April 20, 2020. He again noted there was pseudarthrosis (nonunion) at the L5-S1 level, broken screws at the anterior interbody cage into the sacrum, and a loose screw near the S1 level, also consistent with pseudarthrosis. Dr. Rauzzino opined Claimant's pain had become worse, which he noted was also consistent with pseudarthrosis. (Ex. 1, p. 7).
27. On April 21, 2020, Dr. Rauzzino submitted a request for authorization for a L3-S1 revision procedure. (Ex. 1, p. 13). This was denied, following the IME with Dr. Castro.

Dr. Castro's IME

28. Respondent retained Andrew Castro, M.D. to perform an independent medical examination ("IME") of Claimant, pursuant to rule 16. The IME took place on June 8, 2020. Dr. Castro prepared a written report, and was also deposed on September 25, 2020.
29. On the day of the IME, Dr. Castro noted Claimant was still using a Meloxicam compound cream, spironolactone, Flexeril, and using a lidocaine patch. (Ex. A, p. 3).

30. In his review of the medical records leading up to the date of injury, Dr. Castro noted the escalation in the dosage of anti-inflammatories as well as a, “not yet fused back.” *Id* at 8. (emphasis added).
31. In his IME report, Dr. Castro noted that anti-inflammatory medications have been shown and proven to limit bony fusion – the exact purpose of the May 31, 2019 procedure. Dr. Castro concluded that the increase in these medications contributed to Claimant developing pseudarthrosis. *Id* at 12.

Dr. Rauzzino’s written Response

32. Dr. Rauzzino then responded to Dr. Castro’s IME in a letter dated July 22, 2020. (Ex. 1, p. 2). He notes that he and Dr. Castro differ on the causality of Claimant’s current predicament. He notes that he had read Claimant’s imaging studies directly. He stated that there was no basis to say that the screw was broken before “the fall” (*Note: Claimant does not describe a fall in her testimony regarding her mechanism of injury), but there was a basis to say it was broken afterwards, due to Claimant’s increased symptomology. Claimant may well have been developing a nonunion, but she was doing well prior to the work injury. He noted: “Once the screw has failed, there is no chance for the patient to develop union as she no longer has hardware fixating it”. *Id*.

Dr. Castro’s Deposition

33. Dr. Castro was also deposed on September 25, 2020. He was offered and accepted as a medical expert in orthopedic surgery with education, training and experience in examining, diagnosing and treating patients with low back complaints like Claimant. He also performs lumbar fusions.
34. Dr. Castro testified the medications taken by Claimant were a direct inhibitor of bone healing.
35. Dr. Castro testified, consistent with his IME report, that Claimant had instrumentation placed unilaterally at the May 31, 2019 lumbar procedure. There had been no attempt to perform a posterolateral fusion to neutralize the posterior column of the lumbar spine. Because of this, he opined, Claimant developed the nonunion.
36. Dr. Castro agreed with Dr. Rauzzino that Claimant does require surgical intervention, specifically the revision surgery. However, Dr. Castro opined and testified the need for the surgery was not caused by the December 17, 2019 workplace incident.
37. Dr. Castro based his opinion on the fact that at the time of the workplace incident, Claimant was not even one year out from the May 31, 2019 lumbar fusion. Further, her ongoing use of high doses of anti-inflammatories had contributed to the lumbar nonunion. *Note: While Dr. Castro performed a detailed records review, including what and when NSAIDs were prescribed, the record never reflects if he ever *asked* Claimant if she *discontinued* using them for any intervals of time, pre or post-surgery.

38. Dr. Castro opined the December 2019 workplace incident did not carry any increased stress along the lumbar spine than any other type of daily forces that Claimant regularly experienced. Specifically, the lumbar forces applied across the spine on the date of injury were not likely greater than any other situation in her normal daily life, and did not impart any increased forces that would have caused the injury.
39. Dr. Castro noted Claimant been going to the gym on a regular basis prior to the date of injury, which had also in part increased loads on the lumbar spine, particularly at the high stressed L5-S1 junction. Dr. Castro was of the opinion the lumbar nonunion was likely already taking place on the date of injury. He explained that the same amount of lifting, bending, going to the gym, and other daily life activities would have resulted in a similar outcome.
40. Dr. Castro concluded the inadequate fixation and lack of a posterolateral fusion had resulted in the lumbar nonunion, causing the need for further surgical intervention. He did acknowledge that there was no way to know if the workplace incident of 12/17/2019 was the deciding incident that ultimately broke the screw, although he did opine that when the hardware fails, such failure was not 'catastrophic'. He also acknowledged that he had never reviewed the imaging films of Claimant's back, only the written reports. He did not feel that viewing the films was necessary to render an opinion.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

1. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.
2. In accordance with §8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law, and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. Assessing weight, credibility, and sufficiency of the evidence in Workers Compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). Taken as whole, both in hearing testimony, and in reporting symptoms to numerous medical providers, the ALJ finds Claimant to be sincere in what she has reported, even if not entirely consistent. The ALJ notes that Claimant did her best in threading the prescription needle to address her varied maladies, and accepts her explanation that while her ongoing prescriptions may have continued on paper (and thus carried through on subsequent reports), she suspended them upon medical advice when told to do so. Such is not an uncommon occurrence.
4. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55, P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968). In this instance, the ALJ has reviewed, as is not uncommon, conflicting theories from Drs. Rauzzino and Castro on *why* Claimant is now currently situated. The ALJ finds both to be sincere and highly-credentialed, and to have rendered their opinions to the best of their professional abilities. Both are *credible*; the ALJ must find who is more *persuasive*, in light of all the evidence.

Medical Benefits, Generally

5. The Claimant is not entitled to medical care that is not *causally related* to his work-related injury or condition. As noted in *Bekkouche v. Riviera Electric*, W.C. No. 4-514-998 (May 10, 2007), "A showing that the compensable injury caused the need for treatment is a threshold prerequisite to the further showing that treatment is reasonable and necessary." Where the relatedness, reasonableness or necessity of medical treatment is disputed, the Claimant has the burden to prove, by a preponderance of the evidence, that the disputed treatment is *causally related* to the injury, and *reasonably necessary* to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc.*, W.C. No. 4-117-758 (ICAO April 7, 2003).

6. The Claimant has the burden to prove his entitlement to medical benefits by a preponderance of the evidence. §8-43-201, C.R.S. The Respondents are only liable for the medical treatment that is *reasonable and necessary* to cure and relieve the work-related injury. §8-42-101(1)(a), C.R.S.

Reasonable and Necessary

7. This is not disputed. Claimant has a loose screw in her back, and also a broken one – at least. She currently suffers from a nonunion of her fusion, with no prospect of this being rectified at any point, until the hardware is placed properly to allow the union to occur over time. While bilateral affixation makes intuitive sense, this is best left to the attending surgeon to determine. The ALJ finds that the surgery as proposed by Dr. Rauzzino to be reasonable and necessary to cure Claimant of the nonunion, and the loose hardware in her lumbar spine that she currently suffers from.

Causally Related to the Work Injury

8. Dr. Castro opines that the unilateral affixation used by Dr. Stanton was a poor choice; Dr. Rauzzino does not share that view. It does not matter now- maybe it was a bad choice, and maybe it wasn't, but *Claimant's back was the one she brought into work on December 17, 2019 – and it was not a perfect back*, at that. Much has also been made of Claimant's usage – vs temporary discontinuation – of NSAIDs preceding and following her fusion surgery. The ALJ accepts Claimant's version of those events (after all, Claimant worked hard otherwise to assure a good result –PT, exercise, etc.). But what if Respondents' accusation is correct after all? For that matter, what if Claimant followed medical advice (it is noted, for example, she is a non-smoker) but, through no fault of her own, just congenitally occupies the outer edge of the bell curve; i.e., is just a slow healer? (Dr. Castro was thinking a 3 to 6-month union window, Dr. Rauzzino thought she might need up to a year). Even controlling all environmental factors, individuals respond differently to surgery. Would that mean her slow-healing condition (be it congenital or NSAID-induced) is therefore the proximate cause of the broken screws? Or did the screws break prematurely, thus rendering further healing a nullity? Either way one looks at it, it is again noted that *Claimant* (whether just a slow healer, or covert NSAID-taker) *brought a highly imperfect back into work on 12/17/2019*.
9. The mere fact that a claimant suffers from a pre-existing condition does not disqualify a claim for compensation or medical benefits if the work-related activities aggravated, accelerated, or combined with the pre-existing condition to produce disability or a need for medical treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). Pain is a typical symptom from the aggravation of a pre-existing condition, and the claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment-related activities and not the underlying pre-existing condition. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949). The claimant must prove by a

preponderance of the evidence that his symptoms were proximately caused by an industrial aggravation of a pre-existing condition rather than simply the natural progression of the condition. *Melendez v. Weld County School District #6*, W.C. No. 4-775-869 (ICAO, October 2, 2009).

10. Claimant was thrust into a no-win situation when this student became unruly. She had to act as she did. The average special ed para educator might well have only suffered a back strain in wrestling with him, but Claimant brought her still-healing back into work with her that day. She became symptomatic at once – and has remained similarly symptomatic ever since. She will remain so until her symptoms are alleviated with a revision surgery. It is duly noted that correlation does not equal causation, but the ALJ finds Dr. Rauzzino to be more persuasive than Dr. Castro on this issue. The ALJ does not accept the proposition that Claimant had essentially an equal chance of breaking a screw simply by going about her daily activities.
11. Claimant never was symptomatic until the injury, for which she was then assigned an ATP and later a neurosurgeon. Before then, Claimant liked to swim, bike, garden, and work out. She did not have any interest in fighting down a few weight classes in the UFC. Controlling this unruly student was no ordinary event. It was...wait for it...the straw that broke the camel's back, and the ALJ so finds. Perhaps indeed due to her slow healing, one or more screws become dislodged during this incident, thus rendering the supporting hardware incapable of doing its job. Her back was no longer stable. Claimant has shown, by a preponderance of the evidence, that her need for revision surgery is *causally related* to her work injury.

ORDER

It is therefore Ordered that:

1. Respondents shall pay for the lumbar revision surgery as proposed by Dr. Rauzzino.
2. Respondents shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.
3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory

reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: <http://www.colorado.gov/dpa/oac/forms-WC.htm>. In addition, it is recommended that you send a copy of your Petition to Review to the Colorado Springs OAC via email at oac-csp@state.co.us.

DATED: November 6, 2020

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

- Did Claimant prove an anterior cervical discectomy and fusion (ACDF) recommended by Dr. Michael Rauzzino is reasonably necessary and causally related to her admitted industrial injury?

FINDINGS OF FACT

1. Claimant works for Employer as a Treaty Compliance Specialist. She suffered admitted injuries on July 24, 2017 when she slipped on a wet floor while walking into the restroom.

2. Claimant testified she went “up in the air” and landed on her right hip. She testified her shoulder struck the wall, which “bounced” her backward and caused her to strike her neck on the bathroom door as it was closing. She then hit her head on the floor. She testified she injured her right hip, right shoulder, neck, and left calf in the accident.

3. There is no dispute Claimant injured her right hip and right shoulder in the accident. Respondents have provided extensive treatment, including a right total hip arthroplasty on November 19, 2018 and a right shoulder surgery on June 28, 2019. The current dispute relates to surgery on Claimant’s neck.

4. Claimant testified, “the [neck] pain itself has not gotten worse [since the accident], the pain has continued to be the same. It’s like a red-hot poker somebody is sticking down inside my neck.” She also described “pins and needles” radiating from her neck into both hands since the accident. She testified the numbness and weakness in her hands has gotten progressively worse since the accident. She recounted a recent incident where she grabbed a hot soldering iron and did not realize it had burned her until she looked down and saw the blister. Claimant testified she had never experienced similar symptoms before the July 24 accident.

5. Contrary to her testimony, Claimant was treated for neck pain and arm symptoms in 2016. A December 8, 2016 progress note from her primary care provider FNP Laura McMahon states Claimant “has been having neck pain x3 months. Has worsened and now she is having pain down arms. Complains of numbness and tingling to both arms. Has tried tramadol for discomfort without relief. Has decreased ROM to neck secondary to pain. Initially thought she strained her neck but it’s not improving.” Physical examination showed cervical paravertebral tenderness to palpation. Ms. McMahon ordered a C-spine x-ray and prescribed Valium for neck pain. At the time, Claimant was already taking cyclobenzaprine, Tramadol and Ultracet for low back pain, and yet the neck pain was bad enough to cause her to seek additional treatment.

6. The x-ray was performed on December 9, 2016. It showed mild reversal of the cervical lordosis and mild multilevel degenerative changes.

7. At her next visit with Ms. McMahon on February 3, 2017, Claimant said the Valium was “helping” her neck pain but “she is still having the pain and thinks that when her blood pressure is higher she has more pain.” Physical examination again showed cervical paravertebral tenderness to palpation.

8. At hearing, Claimant disputed the medical records and claimed the pain was actually “between my shoulder blades” instead of her neck.

9. After the July 24, 2017 work accident on July 24, 2017, Claimant drove herself to the Parkview Medical Center emergency room. She stated she landed on her right hip and was wedged between the stall. She described severe, sharp, throbbing right hip pain radiating across her hip and down her leg. She reported a history of sciatica on the left side, a previous L5 sacrum injury, and cervical disc degeneration. There is no mention of any neck pain or upper extremity symptoms. Dr. Alexis Bencze examined Claimant’s low back and lower extremities, but not her neck. Claimant underwent hip and pelvic x-rays and a lumbar MRI, but no imaging of her neck was ordered. Claimant testified she was icing her neck at the ER and a nurse pointed out a red spot on the back of her neck for the door struck her. The emergency room records do not corroborate her testimony and there is no mention of any red spot on her neck, neck pain, or neck injury. Claimant was given pain medication and a lidocaine patch, referred for physical therapy, and discharged.

10. Claimant saw Dane Farnworth, MPT, for a physical therapy evaluation on August 9, 2017. Claimant reported she slipped on a wet floor at work and landed on her back and hip. She described “constant” 6/10 low back pain radiating down the back of her leg to her feet and toes, and pain in the anterior hip/groin. Ms. Farnworth diagnosed “lumbar pain with leg pain,” and recommended six weeks of therapy and exercise. The report makes no mention of any neck symptoms or problems.

11. Respondents referred Claimant to Dr. Terrence Lakin for authorized treatment. At her initial visit on September 14, 2017, claimant reported she slipped and fell on her right hip and became wedged between the stall. She had a sharp pain in her back radiating down her leg. She had attended physical therapy on Dr. Bencze’s recommendation. Claimant stated, “last week while doing planks she had a pop in her lower back and since then has been having numbness and tingling with bilateral upper extremities and cervical pain and numbness.” Dr. Lakin noted she “lightly struck her head but jolted her neck . . . She reports continued lumbar and right hip pain, left medial knee pain, and now for one week cervical neck and bilateral upper arm paresthesias.” Examination of the neck showed slightly reduced range of motion, midline tenderness to palpation, and muscle spasms in the paracervical musculature and bilateral trapezius muscles. Dr. Lakin opined, “I am concerned about this onset of cervical pain and tightness and upper arm bilateral paresthesias that began one week ago after a pop in her lower back.” He ordered a cervical MRI and referred Claimant to Dr. Michael Sparr.

12. The cervical MRI was completed on October 10, 2017. The radiologist interpreted it as showing a herniated disc at C4-5 with mild canal stenosis, a C5-6 disc extrusion contacting the spinal cord, and a disc bulge at C6-7. He saw no cord compression and no significant bone marrow edema.

13. Claimant saw Dr. Sparr on October 20, 2017. She described falling on her right hip and “also recalls straining her neck awkwardly during the fall.” Claimant recalled having moderate hip and knee pain and “mild neck pain initially following the injury.” Dr. Sparr further noted, “In late August while she was traveling in Washington DC, she reports feeling a pop in her low back and developed extreme neck pain. She reports that she had difficulty even turning her neck. She developed symptoms of numbness and tingling in her right lateral arm.” Physical examination showed increased muscle tension in the right posterior and lateral cervical musculature. She was very tender to palpation over the right trapezius, posterior scalenes, levator scapula, and cervical paraspinals from C5-T1. Spurling’s maneuver was positive on the right. Dr. Sparr opined, “the patient developed severe right cervical pain and upper extremity symptoms after feeling a pop in her low back while in Washington DC perhaps three weeks after the injury. At this point she presents with a right C5-C6 disc herniation and extrusion which is likely the greatest cause of her symptoms. She appears to have C6 radiculopathy.” He recommended a steroid burst and an electrodiagnostic study.

14. Dr. Sparr performed a right upper extremity electrodiagnostic study on November 6, 2017. It was normal, with no evidence of cervical radiculopathy. He opined, “although the patient does not seem to have radiculopathy, she may certainly be irritating the C6 nerve within her neck. This has not caused obvious damage on electrodiagnostic study. The patient seems to have profound cervical and parascapular myofasciitis. I think she will respond well to a combination of trigger point injections, chiropractic treatment, and massage.”

15. Claimant saw Dr. Robert Graham for chiropractic evaluation on November 9, 2017. Dr. Graham noted Claimant “slipped and fell onto her right low back/hip and wedging her leg underneath the stall. She apparently hurt her neck and right shoulder as well; however, we are only authorized to treat and evaluate her lumbar spine and pelvis. . . . [S]he did start physical therapy. She felt a pop in her low back, which caused her cervical spine to start hurting.”

16. Dr. Stephen Scheper performed a cervical epidural steroid injection (ESI) on December 29, 2017.

17. Claimant saw Dr. James Bee on January 8, 2018 for a surgical consultation. She stated she slipped on a wet floor and injured her right hip and right shoulder. She also stated the accident caused her to “whip my head back,” and the closing door hit the back of her neck. She described weakness and “clumsiness” in her arms and hands. Claimant told Dr. Bee she received no benefit from the cervical ESI administered by Dr. Scheper, or from prior trigger point injections. Her pain diagram shows pain and numbness throughout both arms, which Dr. Bee described as “nondermatomal.” On examination, Spurling’s maneuver to the left caused some left-sided neck pain but no

radiating arm symptoms. Spurling's maneuver on the right caused some left-sided neck tightness. Motor strength was 5/5 throughout the bilateral upper extremities. Sensation was intact and equal bilaterally. Flexion-extension x-rays of the cervical spine obtained in the office showed no instability. Dr. Bee reviewed the cervical MRI images and noted a mild central disc bulge at C5-6 which "does touch the right C6 nerve root but does not deflect it." He saw no evidence of cord compression, cord signal change, or ligamentous injury. Dr. Bee diagnosed mild C5-6 disc degeneration, nondermatomal distribution numbness, and neck pain. He concluded,

I was able to go over her x-rays, her MRI, as well as her treatment options. Although she does have a subtle disc bulge at the C5-6 level, I am not seeing a "disc extrusion causing significant stenosis." Her lack of benefit with an epidural steroid injection in the cervical spine certainly points away from something I can make predictably better with surgery. Her nondermatomal distribution numbness is certainly nothing that I think can be improved upon with an anterior cervical discectomy and fusion.

18. Dr. Bee recommended Claimant continue with Dr. Sparr and Scheper for non-surgical treatments.

19. On March 7, 2018, Dr. Sparr opined Claimant's neck pain was "related to a combination of disc herniation/extrusion, facet joint dysfunction and arthralgias, [and] profound myofasciitis." There is no persuasive evidence Dr. Sparr reviewed the MRI images, and the ALJ finds his diagnosis of a "disc herniation/extrusion" is based on the radiologist's report.

20. Claimant had a repeat cervical ESI on July 25, 2018. This time, she reported temporary benefit, including diminished neck pain, and numbness/tingling in her upper extremities. She also reported similar temporary benefit from a cervical ESI on October 30, 2018.

21. A repeat cervical MRI on January 10, 2020 showed mild degenerative disk bulging at C5-6 resulting in moderate spinal stenosis without cord compression, and bilateral foraminal stenosis. It also showed mild facet arthropathy and uncovertebral hypertrophy from C2-3 through C5-6. The radiologist compared the MRI to a cervical MRI from November 2013, which suggests Claimant's pre-existing neck problems significantly predated the PCP records from December 2016.

22. Dr. Sparr performed a repeat electrodiagnostic study on January 17, 2020. It was normal, with no evidence of cervical radiculopathy, brachial plexopathy, or other neuropathy. Dr. Sparr indicated he discussed the results with Claimant.

23. Claimant saw Dr. Rauzzino on January 20, 2020 for a second opinion regarding surgery. She described chronic neck pain with pins and needles in her hands and arms since the work accident. She was having increasing difficulty performing keyboarding. Upper extremity strength was normal bilaterally except 4+/5 weakness in the hand grip and pinch grip. She had "subjective" decreased sensation in her hands.

Claimant told Dr. Rauzzino the recent EMG showed cervical radiculopathy, despite having discussed the normal results with Dr. Sparr three days earlier. Dr. Rauzzino opined Claimant had exhausted conservative treatment and “a definitive fix would likely involve surgery.” Claimant wanted to proceed with surgery. Dr. Rauzzino considered a disc replacement but thought a C5-6 ACDF was probably the best choice. He ordered flexion-extension x-rays and a cervical CT scan to help make that determination.

24. The CT scan and x-rays were completed on February 7, 2020. The x-rays showed no instability. The CT showed multilevel degenerative changes, but no canal or foraminal stenosis. After reviewing the imaging, Dr. Rauzzino opined, “given the amount of degenerative disc disease, foraminal disease, and facet disease posteriorly, I think she would be better off with a single level anterior cervical discectomy and fusion as opposed to disc replacement. I think this would give her the best chance of a good functional outcome.”

25. On March 17, 2020, Dr. Sparr responded to an inquiry from Claimant’s counsel regarding the proposed surgery. Dr. Sparr stated Claimant’s diagnosis was “cervical radiculopathy due to advanced foraminal stenosis as well as cervical spinal stenosis.” Regarding causation, he opined, “while there are degenerative findings in her cervical spine, these did not cause pain or require treatment until after the 7/24/2017 industrial injury.” Accordingly, he opined the injury aggravated, accelerated, or brought about the need for the surgery. He opined that the surgery was reasonably necessary because Claimant had failed conservative treatment.

26. Dr. Rauzzino responded to questions from Claimant’s counsel in a letter dated April 20, 2020. He diagnosed C5-6 cervical myelopathy, radiculopathy, and central and foraminal stenosis. He opined,

The workplace injury aggravated/accelerated/brought about the need for the requested cervical fusion. In this situation, even though [Claimant] had pre-existing degenerative disc disease of C5-C6, it was asymptomatic and there was no guarantee that it would have become symptomatic in her lifetime. After a well-documented injury and a mechanism consistent with causing injury to the cervical spine, she developed of the immediate onset of new clinical symptoms for which there is no documentation of having existed previously. Were it not for the fall, she would not have become symptomatic and would not have required treatment. The symptoms developed in an appropriate temporal relationship after the fall; they are consistent with the radiographic findings as well as with the mechanism of injury. While some people have degenerative disc disease that progresses over time, others do not. There is no guarantee that the pre-existing degenerative disc disease of C5-C6 would have progressed to the patient needing surgery in her lifetime. In fact, the C5-C6 degenerative disc disease made her more prone to potential injury because the spinal cord and nerves started with less room to begin with when [Claimant] fell and struck her head and neck.

27. Claimant saw Dr. Jack Rook for an IME at her counsel's request on May 1, 2020. Claimant told Dr. Rook her right shoulder struck the wall as she was falling which caused her head and neck to bend laterally "in an acute whiplash like fashion." She said the bathroom door struck the back of her neck, and "she then fell further and her head struck the floor causing an additional whiplash movement of her head and neck." Claimant stated the physical therapist had instructed her to perform planks as core strengthening for her back pain. She told Dr. Rook she experienced an acute sharp pain "in her neck" while performing planks that required her to immediately terminate the exercise and lie flat on the floor. She told Dr. Rook she was already experiencing "significant" neck pain before the planking incident. She also reported persistent upper extremity paresthesias, weakness, and decreased dexterity. Claimant told Dr. Rook "she has never received any treatment for a cervical condition prior to this injury." Dr. Rook opined even though Claimant may have had some pre-existing cervical arthritis, she was asymptomatic before the fall and probably would not have become symptomatic but for the fall. He agreed with Dr. Rauzzino the C5-6 ACDF was reasonably necessary.

28. On June 1, 2020, Dr. Eric Young opined the proposed surgery was reasonably necessary and related to the work accident. He relied on the belief Claimant's pre-existing degenerative disc disease was "not problematic" before the accident.

29. Dr. Rauzzino testified via deposition on June 29, 2020. He opined the purpose of the surgery is to alleviate pressure on the spinal cord and nerve roots, and also to "stabilize" Claimant's spine. He opined Claimant's spinal cord and nerves may become permanently damaged from prolonged compression if she does not have the surgery. He opined Claimant has maximized any benefit from conservative care and no other treatment options are likely to improve her neck issues short of surgery. Dr. Rauzzino pointed to the disc extrusion referenced in the October 10, 2017 MRI report as providing objective evidence of an acute injury to Claimant's cervical spine. He opined, "once the disc fails and there is an extrusion, while some of the disc material can desiccate or dry up and get smaller, the disc can develop advanced degeneration due to the injury, and that's what occurred in this situation." Dr. Rauzzino relied on the October 10, 2017 MRI report rather than personally reviewing the images. He had reviewed medical records supplied by the parties before the deposition, including preinjury records from Claimant's PCP. Dr. Rauzzino acknowledged Claimant was not "asymptomatic" before the injury as stated in his narrative report but maintained his opinion the surgery was work-related because Claimant was "much more symptomatic" after the accident. He opined the surgery was due to an acceleration or exacerbation of Claimant's degenerative disc disease at C5-6 and not the natural progression of her underlying condition.

30. Dr. Brian Reiss performed an IME for Respondents on July 22, 2020. When asked about a previous history of neck pain or treatment, she said she had some neck soreness "now and then," but it was more between her shoulder blades. She denied prior upper extremity symptoms, which Dr. Reiss noted was inconsistent with the PCP records from December 2016. Dr. Reiss reviewed the October 10, 2017 cervical MRI images and opined the only significant finding at C5-6 was a central and right-sided small bulge/high-intensity zone touching the cord. He thought the foramina looked open with only mild or at most moderate narrowing. There was also a small bulge at C4-5. This interpretation of

the MRI closely tracks Dr. Bee's impression. Dr. Reiss also reviewed the x-ray images from January 2018 and February 2020, and the February 7, 2020 CT images. He opined the imaging findings are not significant enough to cause myelopathy or radiculopathy. He further opined the findings are probably chronic and predated the work injury. He opined it was unlikely a single level ACDF would be beneficial, especially considering the multilevel degenerative changes, chronic pre-existing neck complaints, and reported subjective sensory changes in a nondermatomal "glove distribution." Regarding the planking incident, Claimant told Dr. Reiss she felt a pop in her neck and developed severe neck pain. Dr. Reiss reviewed the multiple medical records in which Claimant said the pop was in her low back, not her neck. He could not see how a pop in the low back would plausibly lead to neck pain. Dr. Reiss concluded the proposed surgery is neither reasonably necessary nor causally related to the work accident.

31. Dr. Reiss testified at hearing consistent with his report. He opined the degeneration in Claimant's cervical spine is relatively mild and the imaging studies show no spinal cord or nerve root compression to account for her symptoms. He agreed with Dr. Bee the reported widespread upper extremity numbness is not consistent with radiculopathy affecting a specific nerve root. He also agreed with Dr. Bee that a C5-6 ACDF is unlikely to provide significant benefit. He disagreed with Dr. Rauzzino's diagnosis of cervical myelopathy. Dr. Reiss' examination was not consistent with myelopathy. Claimant had no hyperreflexia. She demonstrated very illegible handwriting and a smooth signature. He discerned almost no weakness in his examination. He conceded Claimant may have strained her neck and developed some myofascial pain but opined that would not, and did not, exacerbate or accelerate the pre-existing degenerative changes. He opined there is no clearly identified pain generator in Claimant's cervical spine that will respond to surgery. He referenced Dr. Staudenmayer's November 2017 psychological evaluation that showed somatization of stress and likely amplification of symptoms. He considered the psychological evaluation a contraindication to surgery.

32. Dr. Reiss' and Dr. Bee's opinions regarding the causal relationship and reasonable necessity of the proposed surgery are credible and more persuasive than the contrary opinions in the record.

33. Claimant failed to prove the C5-6 ACDF recommended by Dr. Rauzzino is reasonably needed to cure and relieve the effects of her work-related injury. Although Claimant probably suffered a soft tissue injury to her neck because of the work accident, she failed to prove the accident aggravated, accelerated, or combined with her underlying pre-existing degenerative condition to cause a need for a C5-6 ACDF.

CONCLUSIONS OF LAW

The respondents are liable for medical treatment reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101. The mere occurrence of a compensable injury does not compel the ALJ to approve all requested treatment. Even if the respondents admit liability and pay for some treatment, they retain the right to dispute the reasonable necessity or relatedness of any other treatment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). Where the respondents dispute the claimant's

entitlement to medical benefits, the claimant must prove the treatment is reasonably necessary and causally related to the industrial accident. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). The claimant must prove entitlement to medical benefits by a preponderance of the evidence. *Page v. Clark*, 592 P.2d 792 (Colo. 1979).

The existence of a pre-existing condition does not preclude a claim for medical benefits if an industrial injury aggravates, accelerates, or combines with the pre-existing condition to produce the need for medical treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). But the mere fact a pre-existing condition becomes more painful after an accident does not necessarily establish a causal nexus. The ultimate question is whether the need for treatment was proximately caused by an industrial aggravation or merely the direct and natural consequence of the pre-existing condition. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Carlson v. Joslins Dry Goods Company*, W.C. No. 4-177-843 (March 31, 2000).

As found, Claimant failed to prove the proposed C5-6 ACDF is reasonably needed to cure and relieve the effects of her work-related injury. There are simply too many inconsistencies in the record to give Claimant's testimony significant weight. The description of the accident has changed and become more dramatic over time. Despite Claimant's testimony she experienced "red-hot poker" pain in her neck since the accident, there is no mention of neck problems in the initial ER records or the initial PT report. Claimant told Dr. Lakin the neck pain and upper extremity paresthesias "began" while doing plank exercises. Claimant told at least three providers she felt a pop in her low back while doing planks, which caused her to develop severe neck pain. But she later told Dr. Rook, Dr. Rauzzino, and Dr. Reiss the pop was in her neck. Claimant's description to Dr. Lakin of "lightly" striking her head changed to "whipping" her head and neck at the appointment with Dr. Bee and then became two episodes of "acute whiplash" at the IME with Dr. Rook. What was initially described to Dr. Sparr as "mild" post-accident neck pain changed to "significant" pain at Dr. Rook's IME and "red-hot poker" pain at the hearing. Dr. Staudenmayer documented probable somatization and "amplification" of symptoms. Claimant repeatedly denied pre-injury neck pain or upper extremity symptoms, which is refuted by records from her PCP. Claimant's lack of candor regarding her pre-existing neck and upper extremity issues detracts from her overall credibility. It also undermines the opinions of Dr. Sparr, Dr. Rauzzino, Dr. Young, and Dr. Rook, all of whom relied at least in part on the mistaken belief Claimant was asymptomatic before the work accident. Although Dr. Rauzzino modified his opinion during the deposition after being presented with pre-injury medical records, the shifting nature of his opinion reduces its persuasiveness. Additionally, Dr. Rauzzino's theory Claimant suffered an acute work-related disc extrusion that compromised the integrity of the C5-6 disc is incorrect. Dr. Bee and Dr. Reiss persuasively explained the reference to a disc extrusion reflects a misreading on the radiologist's part.

Additionally, the ALJ agrees with Dr. Bee and Dr. Reiss the proposed surgery will not likely provide significant benefit. There is no persuasive evidence of any structural abnormality or other pathology in Claimant's neck that will respond to surgery. Claimant

has consistently described a nondermatomal pattern of pain, numbness, and weakness that cannot be remedied with C5-6 ACDF.

ORDER

It is therefore ordered that:

1. Claimant's request for a C5-6 ACDF recommended by Dr. Rauzzino is denied and dismissed.
2. All issues not decided herein are reserved for future determination.

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

DATED: November 7, 2020

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-041-219-002**

ISSUES

- I. Whether Claimant proved by a preponderance of the evidence that her upper extremity rating should be converted to a whole person impairment rating.
- II. Whether Claimant proved by a preponderance of the evidence that she is entitled to disfigurement benefits, and if so, how much.

FINDINGS OF FACT

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

1. Claimant was employed by [Employer Redacted] on April 28, 2016 when she sustained an admitted injury to her right shoulder when lifting a garbage can to dump it into a dumpster with a coworker who lifted the can too high and too fast causing an injury to Claimant's right shoulder. (Respondent J #243-255)
2. Respondents then sought to withdraw the original admissions of liability following a recommendation for a second right shoulder surgery by Dr. Hsin. Following a hearing in May 2018, Respondents' motion to withdraw their admissions of liability based on the medical opinions of Dr. Timothy O'Brien that Claimant did not sustain an injury to her right shoulder was denied. (Respondent J #256-267)
3. Claimant has been employed by Employer since 2012 as a production worker. Claimant remains employed by Respondent working in a different capacity than the one she was working at the time of her injury. At the time of her injury her job involved working on a molding machine that required the loading and unloading of parts onto pallets. Claimant's current job involves her working part of the day on the molding machine and the rest of the day inspecting parts on a table. (Respondent I #236)
4. Claimant underwent right shoulder surgery in February 2017 with Dr. Fitzgibbons for a complex tear of the biceps tendon that was greater than 50% and a 30% partial undersurface supraspinatus rotator cuff tear. (Claimant 4 #153) Dr. Fitzgibbons performed a right shoulder arthroscopy with extensive debridement, and repair to superior labral tear/undersurface partial thickness supraspinatus rotator cuff tear, biceps tenotomy, and tenodesis.
5. Claimant testified that she had three small arthroscopic scars on her shoulder and one in her armpit that is hardly visible as a result of her surgery of February 9, 2017. (Claimant 9 # 1-2)
6. Claimant testified that the first surgery helped with the terrible pain she was having in the front part of shoulder, but after the first surgery she developed new problems in the

back and top of the shoulder. Before her work injury Claimant had no previous problems with her right shoulder.

7. Claimant had a second surgery on February 18, 2019. Post-surgical medical notes and diagnostic testing document a "Mumford procedure" or resection arthroplasty of the distal clavicle. (Claimant 8 #227)
8. Because Claimant's right distal clavicle was surgically resected, she has undergone an invasive procedure that permanently changed her body part and has thus suffered a derangement of her right distal clavicle.
9. Claimant testified that following the second surgery she had a large scar on the top of her shoulder and in the same three holes that were made for the first surgery.
10. Claimant testified that she currently has pain in the right shoulder that is worse on the top of the shoulder and in the back of her shoulder along the shoulder blade area on the right side. Claimant complains of ongoing problems using her shoulders together, and in her back between the shoulder blades that goes up into her neck area. Claimant feels a "ball" that is located between her body and her neck. Sometimes the pain will run up the side of her neck/head especially when she is working with her head in a flexed position.
11. Claimant's current job position on the bench involves working with her neck in a flexed position. Claimant acknowledged that her current job for employer is lighter, but does cause her problems. A job demands assessment was performed on July 8, 2019 to address safe work levels post-surgery at the recommendation of her physician at Workwell. (Respondent I #236)
12. Dr. Cazden placed Claimant at MMI on July 19, 2019 and provided a permanent impairment rating of 22% of the right upper extremity as measured at the shoulder based on 13% loss of range of motion at the shoulder and 10% for a surgical distal clavicle resection. This rating would convert to 13% whole person. (Claimant 3 #151)
13. Dr. Cazden recommended permanent work restrictions following a functional capacity evaluation which included limitation of lifting greater than 14 pounds from floor to knuckle and 5 pounds from knuckle to shoulder and shoulder to overhead of 1.5 pounds. He recommended no repetitive reaching above axillary arm height with both arms, and that Claimant should avoid incline of the neck greater than 10 degrees with avoidance of static posture. He recommended that Claimant be allowed to stretch her shoulder and neck every 10 minutes as needed. (Claimant 3 #149) The restrictions issued by Dr. Cazden, which are based on the functional capacity evaluation, supports Claimant's contention that she has functional impairment that is beyond the arm at the shoulder.
14. Claimant advised the job site examiner that after she relocated and was provided with a new job position that she has problems with her cervical spine "locking" and left shoulder problems, upper trapezius, periscapular and ocular migraine headaches. A recommendation was made for an alternative workstation to allow Claimant to perform the modified duty job of the visual inspection of parts at the inspection table. A recommendation was made for an adjustable tilted height workstation and anti-fatigue mat, and installation of a forearm pad to reduce repetitive shoulder external rotation and

reduce cervical flex associated with compensatory upper thoracic flexion. (Respondent I #239)

15. Respondents were dissatisfied with Dr. Cazden's impairment rating and requested a Division IME. (Respondent J #274)
16. A Division IME (DIME) was performed by Dr. Robert Mack on October 16, 2019. (Claimant 7) As part of the evaluation, Dr. Mack performed a physical evaluation to assist in providing a current diagnosis. As part of his evaluation, Dr. Mack performed and noted positive tests on the empty and full can sign which are used to assess the supraspinatus muscles/tendon injured in this claim. Dr. Mack also noted a positive cross arm impingement test on the right which is a test for acromioclavicular arthritic pain also present on MRI and surgically repaired as part of this claim.¹
17. Based on his examination, Dr. Mack provided an impairment rating of 20% of the right arm as measured at the shoulder based on loss of range of motion of 11% of the right shoulder and 10% of the upper extremity for the distal clavicle resection. These combined to 20% of the right arm as measured at the shoulder which convert to 12% whole person. (Claimant 1 # 13 & 15)
18. Dr. Mack, a board certified orthopedic surgeon, provided a diagnosis of 1) tendinitis of the supraspinatus tendon, right shoulder 2) Degenerative arthritis of the right acromioclavicular joint, status post distal clavicle resection 3) Biceps tendinitis, right shoulder, status post tenotomy and tenodesis 4) Labral tear, right shoulder, status post repair.
19. Respondents admitted for the scheduled 20% impairment rating as measured at the shoulder. (Claimant 1 & 2)
20. Claimant testified that her ongoing right shoulder pain interferes with sleep. Pain causes her to wake up. Claimant has difficulties with activities of daily living which include problems with putting on her shirts, she has pain lifting overhead and pulling a shirt on. Claimant has problems combing, washing, and styling her hair, this includes showering bathing and drying off. She cannot wash her back.
21. Claimant does cook, shop and clean but takes breaks as necessary and limits lifting to 10 lbs. if possible. Claimant lifts up to 27 lbs. at work when boxes are completed. A recommendation was made that she be allowed to roll the completed boxes to the pallet rather than carry them. (Respondent I #238) Claimant testified that when she does lift, she tries to use both arms and tries to keep her arms close to her body.
22. Claimant testified that she has changed the way she does laundry by hanging a few clothes at a time in the closet. She drives mostly with one arm because reaching out in front of her body with her right arm causes pain in the middle of her back between her shoulder blades.
23. Claimant currently takes medications for her work injury of cyclobenzaprine (muscle relaxant) and meloxicam for pain relief and to help with sleep.

¹ Hearing testimony of Dr. Raschbacher regarding relevancy of the positive test findings.

24. Claimant was evaluated by Dr. John Raschbacher at the request of Respondents on February 14, 2020. (Respondent A) Dr. Raschbacher believed that Claimant's neck should not be included accepted as part of the claim and if it were accepted there is no basis for permanent impairment of the neck nor for a conversion of any shoulder impairment to whole person. He believed that Claimant was not entitled to an additional 10% for the distal clavicle resection as it is not required, and Claimant misrepresented her physical condition based on his review of surveillance videos.
25. A majority of Dr. Raschbacher's opinions rely on review of surveillance conducted on July 7 and July 10, 2019.
26. Before her injury Claimant had worked for employer for 8 years and continues to work as of the date of hearing. Claimant advised Dr. Raschbacher that she was working, and portions of the surveillance appear to follow Claimant to and from work. Claimant also advised Dr. Raschbacher that she cooks, cleans, shops, and works full time (modified duty). Those are the activities that she was performing in the video surveillance. Thus, the ALJ does not find that there is credible and persuasive evidence that Claimant exceeded any of the work restrictions provided by her doctor.
27. Moreover, the ALJ does not interpret Claimant's work restrictions to represent the maximum at which she can lift before exhibiting outward signs of pain and discomfort. Instead, the ALJ interprets Claimant's work restrictions to represent the recommended maximum she can lift without risk of reinjury. As a result, even if Claimant were exceeding her restrictions in the surveillance video when lifting the box of groceries, such evidence would merely show Claimant lifting more than recommended. It would not negate the fact that she had a work injury, she underwent two surgeries, and that she has functional impairment as a result of her work injury that is not on the schedule of injuries.
28. Moreover, Dr. Raschbacher testified that Claimant said she cannot wear a bra because of her shoulder pain and that she appeared to be wearing one in the surveillance. However, a review of the medical records merely states Claimant suggested that her bra strap causes her pain - not that it causes her pain and prevents her from wearing one. In the end, the ALJ does not find Dr. Raschbacher's opinions and testimony to be credible or persuasive.
29. Claimant was evaluated by Dr. John Hughes on August 3, 2020 (Claimant #8) at the request of her attorney. Dr. Hughes concluded that Claimant sustained losses of function that were proximal to her right glenohumeral joint. Dr. Hughes noted that there were findings in the medical records after Claimant's second surgery documenting tenderness in the interscapular area and pain between her shoulders. There were physician notes of reduced cervical range of motion with tightness, pain, tenderness, and spasm of the medial trapezius and cervical paraspinal musculature. Dr. Hughes noted that permanent work restrictions included restrictions in cervical flexion, stretch breaks, and avoidance of static posture. Dr. Hughes was of the opinion that these are descriptions of functional effects that extend into the thoracic and cervical spine areas of her body. Dr. Hughes described these as the persistence of cervicothoracic dyskinesia with losses of cervical ranges of motion and function. Dr. Hughes after reviewing the surveillance did not find any inconsistencies between what he observed on the

surveillance video dated July 7 & 10, 2019 and what he observed during his evaluation of Claimant on August 3, 2020. Dr. Hughes' opinions are supported by the medical record and align with Claimant's treating physicians and the DIME physician. As a result, the ALJ finds Dr. Hughes' opinions to be credible and persuasive.

30. Claimant's date of birth is February 9, 1967, on July 19, 2019, the date of MMI Claimant was 52 years old.
31. Here, there is credible and persuasive medical documentation of Claimant's functional impairment extending beyond the loss of the use of her arm at the shoulder into the structures of her body including her trapezius, cervical and thoracic back area. (Claimant 8 #230) All of the health care providers and examiners documented pain and tenderness of and in the trapezius, deltoid, cervical, thoracic and parascapular musculature on the body (Massage therapy notes Workwell 3-18-19; 3-18-19; 3-21-19; 4-8-19; 4-18-2019;4-23-19; 4-30-19; 6-13-19); "objective: tension for bilateral parascapula, cervical spine right upper extremity" (Claimant's Exhibit 3, #113-115 &122-124 & 128 & 142); Dr. Cazden's referral for massage therapy for up to 4 sessions for cervical muscle spasm (Claimant's Exhibit 3, #117); Dr. Cazden's prescription for cyclobenzaprine (muscle relaxant) for neck stiffness and headache pain, and therapy focused on neck and upper back symptoms. (Claimant's Exhibit 3, #126)
32. Moreover, Dr. Cazden (Claimant's authorized treating physician) provided work related restrictions that limit Claimant's ability to flex at the neck, sustain static postures and require stretching during the workday. The job site evaluation confirmed these problems and recommended job site modifications to account for these losses. Claimant has experienced pain, limitation, and physical problems as a result of injury that are not on the schedule of injuries that include her ability to sleep, ocular headaches, and limitations of her cervical range of motion.
33. Other physicians have documented physical findings that are not on the schedule of injuries but are on the body. For example, Dr. Mack observed "rigid dorsal kyphosis" with local tenderness to palpation as well as reduced flexion and extension of the cervical spine at 40 and 50 degrees. (Claimant's Exhibit 7, #221) Dr. Hughes assessed Claimant with "persistence of cervicothoracic dyskinesia with losses of cervical spine ranges of motion and function." (Claimant's Exhibit 8, #230) Even Dr. Raschbacher noted tenderness to palpation at the right deltoid muscle and at the medial scapular areas and diffusely about the neck. (Respondent's Exhibit A, #10)
34. The ALJ finds Claimant's statements to her medical providers and medical examiners to be credible and persuasive. The ALJ also finds Claimant's testimony to be credible and persuasive. The Claimant's statements and testimony is found credible for several reasons. First, Claimant's has undergone two surgeries because of her work injury. Second, Claimant's pain complaints and functional impairments are found to be consistent with the diagnoses provided by her treating providers, the DIME physician, Dr. Hughes, and the surgeries she has undergone. Third, the surveillance video does not establish Claimant is misrepresenting her symptoms and functional impairments. The record establishes that although Claimant was provided work restrictions, she continues to work, shop for groceries, and perform various activities of daily living. The injury has merely impaired her ability to engage in those activities as she did before the

work injury, but it has not precluded her from engaging in those activities. In the end, the surveillance video merely shows Claimant engaging in the exact activities she has openly admitted to performing and consistent with her functional impairments.

35. Because of her work injury, Claimant has functional impairment that is not fully enumerated on the schedule of injuries involving the loss of an arm at the shoulder. Thus, Claimant's work injury has resulted in functional impairment that is off the schedule.
36. Based on Claimant's testimony and the records submitted at hearing, Claimant underwent two surgeries to her right shoulder. Those surgeries caused visible disfigurement to her body consisting of three arthroscopic surgical port scars on her right shoulder and one larger surgical scar, which is about 1 inch long, at the end of her right clavicle.

CONCLUSIONS OF LAW

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

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or

improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Claimant proved by a preponderance of the evidence that her upper extremity rating should be converted to a whole person impairment rating.

a) Whether Claimant's upper extremity rating should be converted to a whole person impairment rating.

The ALJ is the finder of fact on the question of whether the Claimant sustained a "loss of an arm" within the meaning of schedule of disabilities in §8-42-107(2)(a), C.R.S., or a whole person rating under §8-42-107(8)(c), C.R.S. *Strauch v. PSL Swedish Healthcare System*, 917 P. 2d 366, 369 (Colo. App. 1996). In resolving this question, the ALJ must determine the situs of the Claimant's "functional impairment," and the situs of the functional impairment is not necessarily the site of the injury itself. *Langton v. Rocky Mountain Health Care Corp.*, 937 P.2d 883, 884 (Colo. App. 1996); *Strauch at 368-369*. In this case, Claimant's situs of impairment is proximal to the glenohumeral joint or on the body. Claimant's distal clavicle repair was on the body. Dr. Raschbacher testified that the supraspinatus tendon, which was surgically repaired (2-9-2017), is a small muscle of the upper back that is one of the four rotator cuff muscles that runs along the scapula of the shoulder blade. The situs of the injury was again to a structure located on the body, not in the arm.

Injury is the manifestation in part or parts of the body which been impaired or disabled as a result of the industrial accident. *Mountain City Meat v. ICAO*, 904 P.2d 1333 (Colo. App. 1995). The part of the body that sustains the ultimate loss is not necessarily the particular part of the body where the injury occurred. *McKinley v. Bronco Billy's*, 903 P.2d 1239, 1242 (Colo. App. 1995). When evaluating functional impairment the ALJ shall look at the alteration of the claimant's functional abilities by medical means and by non-medical means, as well as the claimant's capacity to meet personal, social, and occupational demands. *Askew v. Industrial Claim Appeals Office*, 927 P.2d 1333, 1337 (Colo. 1996).

Here, there is medical documentation of Claimant's functional impairment extending beyond the loss of the use of her arm at the shoulder into the structures of her body including her trapezius, cervical and thoracic back area. (Claimant's Exhibit 8 #230) All of the health care providers and examiners documented pain and tenderness of and in the trapezius, deltoid, cervical, thoracic and parascapular musculature on the body (Massage therapy notes Workwell 3-18-19; 3-18-19; 3-21-19; 4-8-19; 4-18-2019; 4-23-19; 4-30-19; 6-13-19); "objective: tension for bilateral parascapula, cervical spine right upper extremity" (Claimant's Exhibit 3, #113-115 & 122-124 & 128 & 142); Dr. Cazden's referral for massage therapy for up to 4 sessions for cervical muscle spasm (Claimant's Exhibit 3, #117); Dr. Cazden's prescription for cyclobenzaprine (muscle relaxant) for neck stiffness and headache pain, and therapy focused on neck and upper back symptoms. (Claimant's Exhibit 3, #126)

Dr. Cazden (Claimant's authorized treating physician) has provided work related restrictions that limit her ability to flex at the neck, sustain static postures and require stretching during the workday. The job site evaluation confirmed these problems and recommended job site modifications to account for these losses. Claimant has experienced pain, limitation, and physical problems as a result of injury that are not on the schedule of injuries that include her ability to sleep, ocular headaches, and limitations of her cervical range of motion.

Other physicians have documented physical findings that are not on the schedule of injuries but are on the body. Dr. Mack observed "rigid dorsal kyphosis" with local tenderness to palpation as well as reduced flexion and extension of the cervical spine at 40 and 50 degrees. (Claimant's Exhibit 7, #221) Dr. Hughes assessed Claimant with "persistence of cervicothoracic dyskinesia with losses of cervical spine ranges of motion and function." (Claimant's Exhibit 8, #230) Even Dr. Raschbacher noted tenderness to palpation at the right deltoid muscle and at the medial scapular areas and diffusely about the neck. (Respondent's Exhibit A, 10)

The ALJ is the finder of fact as to whether an injury is on the schedule. *Langton* at 884; *Mountain City Meat Co. v. Oqueda*, 919 P.2d 246 (Colo. 1996). When pain and discomfort from the situs of the injury affects the function of other body parts, it is not a scheduled injury. *Langton* at 884-885. A claimant who suffers an injury not enumerated in § 8-42-107(2) is entitled to whole person impairment benefits under § 8-42-107(8), C.R.S. 2009, see § 8-42-107(1)(b), C.R.S. 2009; *Warthen v. Industrial Claim Appeals Office*, 100 P.3d 581 (Colo. App. 2004).

More weight is given to the opinions of Drs. Cazden, Mack, and Hughes than the opinions of Dr. Raschbacher, (Respondents' retained medical expert) who contends that Claimant's presentation to physicians is not accurate in terms of her functional abilities and level of symptomatology. To credit Dr. Raschbacher's opinion the ALJ would have to ignore objective evidence on MRI of damage to Claimant's rotator cuff and surgical repairs made to damaged structures including tears to tendons that do not repair themselves over time, and a completely retracted biceps muscle (MRI 10-12-18). Claimant's ongoing shoulder problems were confirmed by testing performed by the DIME doctor, Dr. Mack, who noted positive tests on the empty and full can sign which are used to assess the supraspinatus muscles/tendon injured in this claim. Dr. Mack also noted a positive cross arm impingement test on the right which is a test for acromioclavicular arthritic pain also present on MRI and surgically repaired as part of this claim.

A majority of Dr. Raschbacher's opinions rely on review of surveillance conducted on July 7 and July 10, 2019. Before her injury Claimant had worked for employer for 8 years and continues to work as of the date of hearing. Claimant advised Dr. Raschbacher that she was working, and portions of the surveillance appear to follow Claimant to and from work. Claimant also advised Dr. Raschbacher that she cooks, cleans, shops, and works full time (modified duty). Those are the activities that she was performing in the video surveillance. There is a lack of credible and persuasive evidence that Claimant exceeded any of the work restrictions provided by her doctor. The surveillance does show Claimant carrying a large box of groceries. Even so, the weight of the box is unknown. Moreover, even if Claimant did violate her work

restrictions on occasion, the violation of a work restriction does not automatically negate the underlying injury and the functional impairment caused by the injury. Lastly, Dr. Hughes after reviewing the surveillance did not find any inconsistencies between what he observed on the surveillance video dated July 7 & 10, 2019 and what he observed during his evaluation of Claimant on August 3, 2020.

Functional impairment is a question of fact for the administrative law judge to determine that is separate and distinct from a physician's rating of a physical impairment. *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366 (Colo. App 1996). A "functional impairment" is not only assessed by medical means, instead it involves an overall assessment of the effect the injury had on the Claimant's ability to function in terms of movement and in the performance of activities at work and daily living. *Askew v. Industrial Claim Appeals Office*, 927 P.2d 1333, 1337 (Colo. 1996) (citing to the AMA guides).

Claimant established by a preponderance of the evidence that the loss of function in this case extends beyond the loss of the use of the arm at shoulder to Claimant's periscapular area, neck, and thoracic area of her body. Claimant established that she has functional impairments that limit her ability to perform activities of daily living as well as ocular headaches and permanent work restrictions involving structures not on the schedule of injuries. As a result, Claimant is entitled to a whole person impairment rating.

b) Whether Claimant is entitled to the distal clavicle rating provided by both the ATP and DIME doctor in this claim.

Respondents admitted for the scheduled impairment rating provided by the DIME doctor at the arm as measured at the shoulder which included 10% for the surgical distal clavicle repair. Dr. Raschbacher, however, believes that the 10% rating for the surgical distal clavicle repair should not be included.

When a party seeks to challenge a scheduled impairment rating, the party must show by a preponderance of the evidence that the scheduled rating is incorrect. See *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo.App. 1998) (the Division Independent Medical Examination Procedures of § 8-42-107(8) (c), only apply to non-scheduled impairments). Whether a scheduled rating is incorrect is a question of fact for the ALJ.

However, once the ALJ finds the Claimant has functional impairment to the whole person, Respondents must overcome the DIME physician's rating by clear and convincing evidence. *Warthen v. Industrial Claim Appeals Office*, 100 P.3d 581 (Colo. App. 2004). See also *Eacker v. True Value Hardware*, W.C. 4-661-379, (Feb. 15, 2007.)

According to the Division of Workers Compensation Desk Aide #11, Impairment Rating Tips,

2. Impairment Rating for Workers Who Have Undergone an Invasive Treatment Procedure: The rating physician should keep in mind the AMA Guides, 3rd Edition (rev.) definition for impairment: "The loss of, loss of use of, or derangement of

any body part, system, or function.” Given this definition, one may assume any patient who has undergone an invasive procedure that has permanently changed any body part has suffered a derangement.

Assuming this is the definition of impairment, because Claimant’s distal clavicle was surgically resected, she has undergone an invasive procedure that permanently changed her body part and has thus suffered a derangement of the part and is entitled to an impairment rating.

The impairment rating tips also provide under the shoulder surgery section guidance that “providers may assign up to 10% upper extremity impairment for distal clavicular resection/excision.” Both Dr. Cazden (Claimant’s authorized treating physician) and Dr. Mack, the DIME physician, properly provided this impairment rating. Respondents have failed to prove that the impairment rating provided for the distal clavicle rating was incorrect.

Dr. Raschbacher believed that the surgical repair of the distal clavicle was not that extensive, it was not mandatory, and the surveillance video showed she was doing much better than she presented on examination.

The ALJ finds and concludes that Respondents failed to establish - even by a preponderance of the evidence - that the Division Examiner erred in providing Claimant the additional rating for the surgical repair of the distal clavicle in addition to the impairment for the loss of range of motion at the shoulder. Claimant is therefore entitled to the combined upper extremity rating of 20% of the upper extremity as measured at the shoulder which converts to 12% whole person. As a result, Claimant is entitled to an impairment rating of 12% of the whole person.

II. Whether Claimant proved by a preponderance of the evidence that she is entitled to disfigurement benefits, and if so, how much.

Section 8-42-108(1), C.R.S. permits an ALJ to award disfigurement benefits up to a maximum of \$4,000 if the claimant is "seriously, permanently disfigured about the head, face or parts of the body normally exposed to public view. . . ." The ALJ may award up to \$8,000 for "extensive body scars" and other conditions expressly provided for in § 8-42-108(2), C.R.S. These awards are subject to annual adjustment by the Director of the Division of Workers' Compensation pursuant to §8-42-108(3), C.R.S.

Based on Claimant’s testimony and the records submitted at hearing, the two surgeries she underwent caused visible disfigurement to her body consisting of three arthroscopic surgical port scars on her shoulder and one larger surgical scar, which is about 1 inch long, at the end of her clavicle.

As a result, Claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles Claimant to additional compensation pursuant to Section 8-42-108 (1), C.R.S. As a result, the ALJ awards Claimant \$1,500.00 in disfigurement benefits.

ORDER

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

1. Respondents shall pay Claimant permanent partial disability benefits based on a 12% whole person impairment rating.
2. Respondents shall pay Claimant \$1,500.00 in disfigurement benefits. Respondents shall be given credit for any amount previously paid for disfigurement in connection with this claim.
3. Issues not expressly decided herein are reserved to the parties for future determination.

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

DATED: November 9, 2020

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- I. Whether Claimant established by a preponderance of the evidence that her 41% scheduled impairment rating should be converted to a 25% whole person rating.
- II. Whether Claimant has proven by a preponderance of the evidence that she is entitled to ongoing maintenance medical care for the effects of her April 27, 2016 work injury.
- III. Whether Claimant is entitled to disfigurement benefits, and if so, how much.

STIPULATIONS / CONCESSIONS / RESERVATIONS

- Respondents conceded in their proposed Order that Claimant is entitled to a general award of maintenance medical benefits.
- The parties agreed to reserve the issue of disfigurement benefits.

FINDINGS OF FACT

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

1. Claimant was employed with Employer as a cook at the University of Denver cafeteria.
2. On April 27, 2016, Claimant, who is right hand dominant, suffered an admitted injury when she slipped and fell and severely injured her right shoulder. (Cl. Ex. 1, Bates 7.)
3. Claimant saw Dr. Michael Hewitt, who noted that X-rays suggested a large rotator cuff tear in Claimant's right shoulder. (Cl. Ex. 6, Bates 123). An MRI was performed, which revealed a large full thickness rotator cuff tear. (Cl. Ex. 6, Bates 126.)
4. Claimant was seen by Dr. Nathan Faulkner, an orthopedic surgeon, who recommended a right reverse shoulder arthroplasty. (Cl. Ex 4, Bates 93.)
5. In March 2018, Claimant underwent a right reverse shoulder arthroplasty, which was performed by Dr. Faulkner. (Cl. Ex 3, Bates 22.)
6. In April 2018, shortly after her surgery, Claimant came under the care of Matthew Lugliani, M.D. At her initial visit with Dr. Lugliani, Claimant rated her pain at 7/10 and it encompassed the anterior, posterior, and superior aspect of her shoulder. In essence, it encompassed her entire shoulder girdle. Based on her condition,

Dr. Lugliani prescribed physical therapy, various medications, and home health care since Claimant lived alone. (Cl. Ex. 3, Bates 23.)

7. After Claimant progressed through physical therapy and pool therapy, Dr. Lugliani determined Claimant was approaching MMI. As a result, he had Claimant undergo a Functional Capacity Evaluation.
8. On April 3, 2019, Claimant underwent a Modified Functional Capacity Evaluation (FCE). Claimant's chief complaints and symptoms during the FCE included:
 - Right upper quadrant tightness and soreness,
 - Right shoulder pain, and
 - Right axilla pain.
9. The ALJ finds that Claimant's right upper quadrant encompasses the right upper quadrant of her torso. The ALJ also finds that Claimant's complaints of tightness, soreness, and pain in her axilla – underarm - encompasses the arm at the shoulder, the shoulder, and the torso. After the FCE, Claimant had increased chest pain. The ALJ finds that the right upper quadrant tightness and soreness and right axilla pain signifies functional impairment beyond Claimant's right upper extremity.
10. On April 8, 2019, after the FCE, Claimant returned to Dr. Lugliani. It was noted that Claimant overexerted herself at the FCE. As result, the FCE caused Claimant to suffer a temporary setback. For that reason, Dr. Lugliani did not place Claimant at MMI at this appointment. Instead, he prescribed baclofen and meloxicam to treat Claimant's increased pain complaints.
11. On April 29, 2019, Claimant returned to Dr. Lugliani. At this appointment, he placed Claimant at MMI and provided an impairment rating. Other than performing range of motion measurements, there is no indication Dr. Lugliani performed a thorough physical examination. He did, however, provide Claimant permanent restrictions. The restrictions allowed Claimant to lift up to 25-pounds – but only if she was lifting close to her body. That said, Dr. Lugliani went on to greatly restrict Claimant's use of her right shoulder and arm. These other restrictions included:
 - No reaching above shoulder height.
 - No reaching away from the body.
12. As a result, Claimant's injury precluded her from using her entire right shoulder and arm above shoulder height. The injury also precluded Claimant from using her entire right shoulder and arm to reach away from her body. Thus, the ALJ finds these restrictions are evidence of functional impairment beyond Claimant's arm at the shoulder.
13. Dr. Lugliani assigned a 17% upper extremity rating and a 10% whole person rating. As to maintenance medical treatment, Dr. Lugliani recommended follow-up appointments with Dr. Faulkner, a gym membership, and massage therapy. (Cl. Ex. 3, 84-88).

14. The record contains very few treatment notes from Dr. Lugliani. But, except for the notes from his initial visit, his treatment notes about Claimant that are in the record are cryptic and sparse. They show he failed to obtain and document in much detail Claimant's ongoing symptoms and functional impairments at each follow-up appointment. His treatment notes also fail to establish that he performed and documented a thorough physical examination of Claimant at each follow up appointment. In the end, his treatment notes look like an amalgamation of various data fields, from who knows where and when, merged into an electronic medical record. Thus, his records do not reveal he performed and documented a comprehensive evaluation and assessment of Claimant's condition at each visit. As a result, the fact that his treatment notes do not consistently document ongoing functional impairment beyond Claimant's right upper extremity at the shoulder does not mean that Claimant does not have functional impairment beyond her arm at the shoulder. It merely means Dr. Lugliani did not assess and document the extent of Claimant's functional impairments beyond the arm at the shoulder while treating Claimant.
15. On September 17, 2019, Claimant underwent a Division IME. The DIME was performed by Dr. John Tyler. Dr. Tyler was asked to evaluate Claimant's right shoulder as well as her cervical, thoracic, and lumbar spine.
16. In his report, Claimant described the following symptoms and functional limitations regarding her activities of daily living based on her work injury:

[Claimant] informs me that she lives by herself and has some difficulty with personal hygiene as she is only able to use her left arm for bathing and self-cleaning. She has difficulty putting on coats. She is able to do her own meal preparation and basic household chores and is becoming more left-hand dominant now because she is so restricted in mobility and strength with the right upper extremity.

(Cl. Ex. 2, Bates 17.)
17. Dr. Tyler also observed Claimant and performed a physical examination. Based on his observation, Dr. Tyler noted that Claimant demonstrated a lot of pain behaviors during his evaluation. These included Claimant keeping her right arm in a guarded position with it internally rotated at the shoulder, flexed at the elbow to 90 degrees and pronated at the forearm. He did not, however, suggest that her pain behaviors contradicted her underlying injury, functional impairments, and his findings during the DIME.
18. He noted Claimant had a slight anterior shoulder displacement on the right secondary to structural tightness within the right pectoralis minor – which is on the torso – and it was extremely taught on palpation. He also noted inferolateral deviation of the right scapula – which is also on the torso - when compared with the left. In addition, he also found atrophy within the supraspinatus muscle on the right as compared to the left.

19. After evaluating Claimant and reviewing her medical records, his clinical diagnoses associated with the work injury included:

- Status post right reversed total shoulder arthroplasty.
- Right complete rotator cuff tears of the supraspinatus and infraspinatus.
- Short head tendon rupture of the right biceps.
- Myofascial pain pathology syndrome primarily in the pectoralis minor.

20. Dr. Tyler agreed Claimant was at MMI. He provided Claimant an impairment rating under the AMA Guides. Based on the AMA Guides, and his examination of Claimant, he provided Claimant a 41% right upper extremity impairment rating, which converts to a 25% whole person impairment rating. He did not, however, provide any ratable impairment to Claimant's cervical, thoracic, and lumbar spine. He did, however, assess Claimant as also suffering from myofascial pain pathology syndrome primarily in the pectoralis minor. He also noted Claimant had glenohumeral pain, which was superolateral, anterior, and posterior, in the range of 3-7/10 with an average of 5/10. As a result, Dr. Tyler's findings demonstrate functional impairment that is beyond the arm at the shoulder.

21. Dr. Gary Zuehlsdorff performed an independent medical evaluation (IME) on August 21, 2020. In his report, Dr. Zuehlsdorff noted that Claimant had limited use of her arm and shoulder as well as pain throughout her shoulder. He also noted that Claimant had significant functional deficits because of her shoulder injury and resulting surgery. In the pain diagram, it is documented Claimant had symptoms in her right shoulder, neck, and upper back. (See Cl. Ex. 1.)

22. In his report, Dr. Zuehlsdorff noted Claimant's functional limitations. As explained in his report, Claimant said her functional ability to perform many tasks requiring the use of her right arm and shoulder has been reduced by 50%. The functional limitations incurred by Claimant included:

- Reaching.
- Pushing.
- Pulling.
- Carrying.
- Overhead reaching.
- Extending her arm.
- Flexing her arm.
- Ability to pick things up.
- Gripping.
- Turning knobs.
- Chronically bad sleep due to pain waking her up.

(Cl. Ex. 1, Bates 8.)

23. Dr. Zuehlsdorff concluded that the effects of Claimant's injury have caused symptoms and limitations extending to Claimant's entire body. (See Cl. Ex. 1.)
24. Dr. Zuehlsdorff also noted Claimant's right arm exhibited atrophy and wasting. The ALJ concludes the atrophy and wasting noted by Dr. Zuehlsdorff and Dr. Tyler of Claimant's right arm and shoulder supports, and is consistent with, Claimant's claimed functional impairments.
25. Dr. Zuehlsdorff also noted Claimant continues to alternate ibuprofen and aspirin on a daily basis to help manage her pain. (Cl. Ex. 1, Bates 8.)
26. In the end, Dr. Zuehlsdorff concluded that Claimant's ultimate outcome - functional impairment - based on her injury and shoulder replacement stem from the severity of Claimant's initial injury and the delays she endured in obtaining medical treatment and the surgery. Dr. Zuehlsdorff stated:

Given the severity of the injury ultimately documented by the total shoulder arthroplasty, in my opinion, at least in part, resulted from the multiple delays that the patient received have more probably than not led to a worse outcome than would have been present if the case had moved along expeditiously. Nonetheless, the patient has significant lack in her ability to perform ADLs as documented above. This, therefore, affects her whole body ability to perform basic daily activities.

(Cl. Ex. 1, Bates 9.)

27. As part of her evaluation with Dr. Zuehlsdorff, Claimant completed a Pain Diagram. Claimant documented pain around her entire shoulder girdle and the pain extended onto her torso. (Cl. Ex. 1, Bates 10.) The pain diagram follows Dr. Zuehlsdorff's report and testimony related to Claimant's injury and the functional impairment caused by her injury and subsequent surgery.
28. On medical maintenance care, Dr. Zuehlsdorff concluded that, given the scope of the reverse shoulder arthroplasty, Claimant would need continued physical therapy and follow-up appointments with Dr. Faulkner. (Cl. Ex. 1, Bates 8-11).
29. The ALJ finds Claimant's statements and presentation to her medical providers, Independent Medical Examiners, and testimony to be credible and persuasive as for the extent of her disability and functional impairment that flows from her work injury. Claimant is found credible because her representations have been consistent throughout her claim. Moreover, Claimant's functional limitations involving her right shoulder and areas of her torso are supported by the medical opinions and records of various medical providers and independent examiners. Plus, the degree of her functional impairment is also supported by the muscle wasting documented by Drs. Tyler and Zuehlsdorff.
30. The ALJ also finds Dr. Zuehlsdorff's opinions about the extent of Claimant's injuries and functional limitations and impairments to be credible and persuasive.

The ALJ finds his opinions to be credible and persuasive for many reasons. First, Dr. Zuehlsdorff performed a very thorough evaluation which is shown by his detailed report. Second, his report and his opinions are consistent with – and supported by - the underlying medical record. Third, his findings are consistent with other physicians who evaluated Claimant, such as Dr. Tyler, where both doctors identified atrophy involving Claimant’s right upper extremity.

31. The ALJ finds Claimant has functional impairment that extends beyond her right upper extremity that is not enumerated on the schedule. The functional impairments include Claimant’s inability to fully use her shoulder and muscles in her right upper quadrant on her torso to perform various activities of daily living. The functional impairment is evidenced by Claimant’s inability to work above shoulder height, inability to perform personal hygiene activities with her right arm such as bathing and cleaning herself after going to the bathroom, and difficulties getting dressed.
32. Claimant also has additional pain and dysfunction that extends onto her torso and involves her neck, upper back, and pectoralis minor muscle. It is the functional impairment of these body parts which are not enumerated on the schedule which prevents Claimant from using her shoulder to move her arm above shoulder height and away from her body and perform activities of daily living – including work – which requires her to use her shoulder and move her arm above shoulder height and away from her body.
33. The pain in Claimant’s shoulder also impairs Claimant’s ability to sleep and is an additional functional impairment which is not enumerated on the schedule.
34. Based on her injury, Claimant has suffered functional impairment beyond her arm at the shoulder. Thus, Claimant has suffered functional impairment that is not enumerated on the schedule.
35. Pursuant to Respondents’ concession in their proposed order, Claimant is entitled to a general award of maintenance medical benefits.

CONCLUSIONS OF LAW

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

General Provisions

The purpose of the Workers’ Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers’ compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers’ compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Claimant established by a preponderance of the evidence that her 41% scheduled impairment rating should be converted to a 25% whole person rating.

Section 8-42-107(1)(a), C.R.S. limits medical impairment benefits to those provided in §8-42-107(2), C.R.S. when a claimant's injury is one enumerated in the schedule of impairments. The schedule includes the loss of the "arm at the shoulder." See §8-42-107(2)(a), C.R.S. However, the "shoulder" is not listed in the schedule of impairments. See *Bolin v. Wacholtz*, W.C. No. 4-240-315 (ICAo, June 11, 1998).

When an injury results in a permanent medical impairment not set forth on a schedule of impairments, an employee is entitled to medical impairment benefits paid as a whole person. See §8-42-107(8)(c), C.R.S.

Because §8-42-107(2)(a), C.R.S. does not define a "shoulder" injury, the dispositive issue is whether a claimant has sustained a functional impairment to a portion of the body listed on the schedule of impairments. See *Strauch v. PSL Swedish Healthcare*, 917 P.2d 366, 368 (Colo. App. 1996). Whether a claimant has suffered the loss of an arm at the shoulder under §8-42-107(2)(a), C.R.S., or a whole person medical impairment compensable under §8-42-107(8)(c), C.R.S., is determined on a case-by-case basis. See *DeLaney v. Industrial Claim Appeals Office*, 30 P.3d 691, 693 (Colo. App. 2000).

The Judge must thus determine the situs of a claimant's "functional impairment." *Velasquez v. UPS*, W.C. No. 4-573-459 (ICAo Apr. 13, 2006). The situs of the

functional impairment is not necessarily the site of the injury. See *In re Hamrick*, W.C. No. 4-868-996-01 (ICAO, Feb. 1, 2016); *In re Zimdars*, W.C. No. 4-922-066-04 (ICAO, Feb. 4, 2015). Pain and discomfort that limit a claimant's ability to use a portion of the body is considered functional impairment for purposes of determining whether an injury is off the schedule of impairments. *In re Johnson –Wood*, W.C. No. 4-536-198 (ICAO, June 20, 2005); *Vargas v. Excel Corp.*, W.C. 4-551-161 (ICAO, Apr. 21, 2005). However, the mere presence of pain in a portion of the body beyond the schedule does not require a finding that the pain represents a functional impairment. *Lovett v. Big Lots*, WC 4-657-285 (ICAO, Nov. 16, 2007); *O'Connell v. Don's Masonry*, W.C. 4-609-719 (ICAO, Dec. 28, 2006).

The ALJ credits Claimant's testimony that she experiences pain and physical limitations in her right arm and shoulder that migrated into the right side of her neck and upper back. The ALJ is also persuaded by the diagnoses provided by the DIME physician which includes myofascial pain pathology syndrome primarily in the pectoralis minor – which is on the torso - and further supports a finding of functional impairment extending to Claimant's torso and throughout the entire shoulder girdle. Based on Claimant's injury and her subsequent surgery, she cannot use her right shoulder to move her arm above shoulder level and work with her right arm over shoulder level or away from her body. Claimant's injury has also led to Claimant being unable to wash herself and take care of her bathroom needs with her right shoulder, arm, and hand. In addition, the pain in her shoulder functionally impairs her sleep.

Dr. Zuehlsdorff persuasively testified that these symptoms stem from Claimant's work injury and subsequent surgery. Respondents failed to offer credible and persuasive evidence to rebut Claimant's contention that her functional impairments are not enumerated on the schedule.

As a result, the ALJ finds and concludes Claimant established by a preponderance of the evidence that she has suffered functional impairment beyond her arm at the shoulder. Claimant has therefore established that she has suffered functional impairment that is not on the schedule. Thus, the ALJ finds that the 41% right upper extremity impairment rating assigned by Dr. Tyler should be converted to a 25% whole person rating.

ORDER

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

1. Claimant's 41% scheduled rating for her right shoulder is converted to a 25% whole person rating.
2. Respondents shall pay Claimant permanent partial disability benefits based on a 25% whole person rating. Respondents shall, however, be entitled to a credit for any previously admitted or paid permanent partial disability benefits.
3. Claimant is awarded maintenance medical benefits.

4. Disfigurement benefits are reserved by the parties for future determination.
5. All other issues not determined herein are reserved for future determination.

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

DATED: November 11, 2020

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-116-209-002**

ISSUE

1. Whether Respondents have established by a preponderance of the evidence that Claimant did not sustain a compensable injury arising out of and in the course of his employment, entitling Respondents to withdraw its admissions of liability.
2. If Claimant sustained a compensable injury, whether Respondent established by clear and convincing evidence that the Division Independent Medical Examination (DIME) opinions of John Douthit M.D., that Claimant reached maximum medical improvement (MMI) on July 13, 2020 is incorrect.
3. If Claimant sustained a compensable injury, whether Claimant has established by a preponderance of the evidence entitlement to temporary total disability benefits from November 1, 2019 through July 13, 2020?

FINDINGS OF FACT

1. Claimant is a 53-year-old male who worked for Employer as a truck driver/delivery person, delivering packages to Employer's stores. Claimant began his employment with Employer in early August 2019 and worked approximately 13 days prior to August 26, 2019.
2. Claimant testified that he worked 13 consecutive days prior to August 26, 2019, working approximately 14 hours per day. Claimant testified his job required him to handle hundreds of packages each day. Claimant testified he woke up on August 26, 2019 and was experiencing pain and numbness in his hands and feet.
3. On August 26, 2019, Claimant was seen at North Suburban Medical Center where he was examined by Christopher Geddes, M.D. Claimant reported a history of chronic neck pain, taking methadone daily. Claimant presented with complaints of numbness. Claimant reported being struck in the head with a plastic pallet and two days later waking with numbness and tingling to "bilateral extremities." On physical examination, Dr. Geddes noted "mild swelling to the dorsal aspect of right hand, mildly swollen right forearm compared to left, with mild tenderness." Claimant reported he had been off work for a long period of time and recently returned to work "doing heavy labor." Claimant was diagnosed with tendonitis and paresthesia. (Ex. 1).
4. On August 29, 2019, Claimant saw his primary care provider, Matthew Brett, M.D., at Salud Family Health Center. Claimant reported visiting the emergency room three days earlier with complaints of tingling in his hands and feet. Claimant reported the tingling in his hands and feet was starting to resolve. Dr. Brett's assessment was paresthesia.

5. Following his injury, Claimant was provided a list of four providers by Employer. Initially, Claimant initially selected SCLH Medical Group Front Range as his authorized treating provider.

6. On September 6, 2019, Claimant was seen by Grant Robbins, PA-C at SCLH Medical Group Front Range. Claimant reported bilateral hand numbness/tingling and bilateral toe numbness/tingling over the past two weeks. Claimant reported working for 13 consecutive days when he began experiencing pain and swelling in his bilateral arms and legs. Claimant reported his symptoms had improved, but not resolved. Claimant was referred for physical therapy and instructed to follow up with Dean Prok, M.D. PA Robbins concluded based on the provided history and mechanism of injury, that Claimant's diagnosis was more likely than not work-related. (Ex. 2).

7. On September 9, 2019, Claimant saw Dr. Prok at SCLH Medical Group. Claimant reported tingling and numbness in both hands and feet. Claimant did not report a specific mechanism of injury and reported his symptoms had gradually improved. Dr. Prok stated he was not able to connect Claimant's bilateral hand, finger, and foot pain with a work-related event. Dr. Prok recommended that Claimant see his personal physician for work-up and management of his symptoms. Dr. Prok recommended no further care for a work-related injury because he did not attribute Claimant's complaints to a work-related injury. Dr. Prok released Claimant from care at maximum medical improvement without restriction, impairment, or medical maintenance. (Ex. B).

8. On September 25, 2019, Claimant saw Dr. Brett for medication refills for pre-existing chronic pain. Claimant reported difficulty with numbness in his fingertips, which Claimant attributed to overuse that caused arm and wrist pain. Claimant reported experiencing residual numbness to his fingers, right hand worse than left. Dr. Brett prescribed gabapentin for Claimant's paresthesia. Dr. Brett did not express an opinion on the cause of Claimant's finger numbness or assign any work restrictions. (Ex. F).

9. After seeing Dr. Prok, Claimant elected to change authorized treating physicians to Ericson Tentori, D.O., after consultation with Respondents. On October 3, 2019, Claimant saw Dr. Tentori, at Injury Care Associate, and Dr. Tentori became Claimant's authorized treating provider ("ATP"). Claimant reported he had worked 13 consecutive 14-hour days. At the end of 13 days, Claimant reported he woke the following day with significant discomfort and swelling in his hands and feet. Claimant reported to Dr. Tentori that he had not had a good exchange with Dr. Prok, and that Dr. Prok determined Claimant's complaints were not work-related. Claimant returned to Dr. Tentori on October 4, 2019 and reported his feet paresthesias were resolved and his finger paresthesias were improving. Claimant reported he wished to return to work, but not to a position requiring repetitive gripping or grasping. Claimant reported his gabapentin prescription was for pre-existing "nerve damage" related to his shoulders. Dr. Tentori's examination of Claimant hands demonstrated no swelling, discoloration, or atrophy. Dr. Tentori reviewed partial copies of Claimant's medical records from August 26, 2019 (Dr. Geddes); September 6, 2019 and September 9, 2019 (SCLH). (Ex. C).

10. Dr. Tentori was not able to make a causation determination without further records. However, he did agree that Claimant should temporarily restrict his activities, but that the restrictions should not be considered work-related, as no causation determination had been made. (Ex. C).

11. On October 14, 2019, Claimant returned to Dr. Tentori, describing ongoing paresthesias affecting his bilateral fingertips, primarily in medial nerve distribution, but steadily improving. Claimant provided Dr. Tentori with a note from Dr. Brett indicating that Claimant had not had tendinitis or carpal tunnel syndrome during the previous 2 ½ years, and other records. Dr. Tentori noted Claimant had not previously disclosed his history of chronic pain and use of methadone. Dr. Tentori opined it was medically probable that Claimant developed some generalized inflammation-musculoskeletal strain and/or tendinitis affecting his upper extremities, but it was doubtful Claimant had carpal tunnel syndrome. Dr. Tentori's medical record indicates Claimant's objective findings were consistent with work-related injuries. (The ALJ infers that this statement is a reference to Claimant's upper extremity paresthesias). Dr. Tentori determined Claimant was not at MMI but anticipated he would be at MMI in four weeks. Dr. Tentori authorized Claimant to return to modified duty on October 14, 2019, with restrictions to include limit repetitive grip/grasp with hands. (Ex. C).

12. On October 31, 2019, Claimant returned to Dr. Tentori. Dr. Tentori doubted Claimant developed significant pathology related to his short course of employment, and that at worst, the described mechanism of injury may have led to tendinitis/inflammation affecting his hands. Dr. Tentori indicated Claimant's condition may require a short course of conservative treatment (i.e., physical therapy), which Claimant had initiated. Dr. Tentori placed Claimant at MMI and determined that Claimant had no work restrictions related to his work-related injury, and no permanent impairment. Dr. Tentori stated the following: "I am able to state that he no longer requires activity restrictions associated with this particular work injury. But it appears to me that he requires activity restrictions secondary to his chronic pain that requires use of various medications including methadone AND any current restrictions for his nonwork related chronic pain will need to be addressed by the patient's private health care provider," and Claimant "requires activity restrictions unrelated to this work injury in order to address his chronic pain complaints and use of methadone." Dr. Tentori indicated that maintenance care, in the form of physical therapy that had already been initiated would be appropriate. (Ex. C).

13. On November 19, 2019 and December 27, 2019, Claimant saw Dr. Brett. Dr. Brett noted that Claimant requested a referral for physical therapy for carpal tunnel syndrome. Dr. Brett included carpal tunnel syndrome of the right wrist within his assessment, although the medical records from November 19, 2019 and December 27, 2019 do not document any examination or testing of Claimant's right wrist. Dr. Brett provided Claimant with a referral to physical therapy for carpal tunnel syndrome on November 19, 2019. Dr. Brett advised Claimant to avoid repetitive motion that he had been doing but did not recommend any specific work restrictions. (Ex. F).

14. On January 24, 2020, Claimant saw Dr. Brett. Dr. Brett noted Claimant "remains stable with tough situation with cervical spine [pathology] and radicular symptoms.

[Claimant] is to be treat[ed] for [carpal tunnel syndrome] as well through disability claim. Continue physical therapy. Awaiting neurosurgery referral.” (Ex. F).

15. On February 11, 2020, Claimant was seen by Itay Melamed, M.D., of Advanced Brain and Spine. Claimant reported a history of chronic neck and back pain, including a 2005 motor vehicle accident which resulted in a possibly syrinx. Claimant reported pain in his arms and attributed it to shoulder and carpal tunnel issues. Claimant reported numbness in all fingers and toes. Claimant reported he was previously diagnosed with carpal tunnel and that a visit with a neurologist was pending. Dr. Melamed opined it was possible that Claimant’s pain was due to degenerative changes in his spine. Dr. Melamed prescribed Claimant Lyrica for nerve pain and discussed the possibility of injections. (Ex. 3).

16. Between October 18, 2019 and February 18, 2020, Claimant received physical therapy from two different physical therapy clinics. The stated diagnosis in physical therapy records was bilateral carpal tunnel syndrome. (Exs. 11, 12, and K).

17. On February 25, 2020, Claimant saw John Douthit, M.D., for a Division Independent Medical Examination (DIME). Dr. Douthit indicated that the “pertinent medical issue” of the DIME was to determine the cause of Claimant’s hand numbness and inability to resume work. Dr. Douthit examined Claimant’s hands and noted no swelling or atrophy. Percussion of Claimant’s forearm produced symptoms that were “non physiological.” Other tests, including carpal tunnel tests were characterized as “unreliable.” Dr. Douthit’s diagnosis was bilateral hand pain, possible bilateral carpal tunnel syndrome, and possible symptoms from syrinx of the spinal cord. Dr. Douthit concluded that Claimant was not at MMI. He found Claimant’s medical history was “murky” and recommended Claimant have nerve conduction studies to determine if his symptoms correlated with carpal tunnel syndrome, and additional medical records were needed to determine causation. He further opined that “if nerve conduction studies are normal, he will be at MMI without impairment.” Dr. Douthit noted that Claimant should have no further therapy until a diagnosis is established. Dr. Douthit noted that Claimant could work but should not do repetitive heavy lifting. (Ex. A).

18. On April 15, 2020, Claimant was seen by Christian Updike, M.D., at Injury Care Associates. Claimant reported ““overdoing it” grasping thousands of boxes to deliver over two weeks. Claimant reported his pain was worsening. Dr. Updike noted the case was to be reopened according to the DIME recommendations and referred the Claimant for EMG testing and neurologic consult, as recommended by Dr. Douthit. (Ex. C).

19. On May 7, 2020, Claimant consulted with Dr. Brett for a telehealth visit. Dr. Brett performed no examination, and his record does not mention Claimant’s upper extremity symptoms, other than to state “pt is dealing with carpal tunnel and shoulder issues as well as neck pathology.” Dr. Brett did not recommend work restrictions. (Ex. F).

20. On May 14, 2020, Claimant saw Samuel Chan, M.D., to undergo EMG and NCV testing and neurologic consult. Dr. Chan’s examination of Claimant’s wrists demonstrated range of motion within normal limits and negative Tinel’s testing. Dr. Chan performed

EMG (electromyographic) and NCV (nerve conduction velocity) studies. The studies were normal and did not reveal any significant neuropathic lesions. Dr. Chan diagnosed Claimant with pain in both hands and myalgia. Dr. Chan discussed Claimant's case with Dr. Tentori. He opined that, if agreed by Dr. Tentori, the Claimant should be placed at MMI without permanent impairment rating or work restrictions. (Ex. D).

21. Also, on May 14, 2020, Claimant returned to Dr. Tentori. Dr. Tentori spoke with Dr. Chan, who indicated Claimant possibly had "subclinical carpal syndrome", but the diagnosis would not be related to Claimant's employment. Dr. Tentori opined that Claimant was at MMI with no permanent impairment, no indication for maintenance care or treatment, and that any work restrictions would not be related to Claimant's work-related activities. (Ex. C).

22. On July 13, 2020, Dr. Douthit performed a follow-up DIME. Dr. Douthit reviewed additional records since Claimant's initial DIME examination on February 25, 2020, including Dr. Chan's records of EMG and nerve conduction studies. Dr. Douthit noted that the EMG and NCV studies performed by Dr. Chan were normal. Dr. Douthit diagnosed Claimant with bilateral hand pain without objective findings and with normal EMG and nerve conduction studies. He placed Claimant at MMI as of July 13, 2020. He also found no objective physical findings on which to base and impairment rating and found Claimant to have no permanent impairment. Dr. Douthit recommended no further therapy for maintenance care. (Ex. A).

23. The parties stipulated that Respondents paid Claimant temporary disability benefits from August 26, 2019 through October 31, 2019. Respondents have not paid Claimant temporary disability benefits since October 31, 2019, based on Dr. Tentori's October 31, 2019 determination that Claimant has no work restrictions related to his work-related injury.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. See § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. See § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App.

2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id.* at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Comm'n*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

WITHDRAWAL OF ADMISSION OF LIABILITY - COMPENSABILITY

When respondents attempt to modify an issue that previously has been determined by an admission, they bear the burden of proof for the modification. §8-43-201(1), C.R.S.; see also *Salisbury v. Prowers County School District*, W.C. No. 4-702-144 (ICAO, June 5, 2012); *Barker v. Poudre School District*, W.C. No. 4-750-735 (ICAO, July 8, 2011). Section 8-43-201(1), C.R.S., provides, in pertinent part, that “a party seeking to modify an issue determined by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification.” The amendment to §8-43-201(1), C.R.S. placed the burden on the respondents and made a withdrawal the procedural equivalent of a reopening. *Dunn v. St. Mary Corwin Hospital*, W.C. No. 4-754-838-01 (ICAO, Oct. 1, 2013). Respondents must, therefore, prove by a preponderance of the evidence that the Claimant did not suffer a compensable injury as defined under Colorado law. §8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979).

A compensable injury is one that arises out of the course and scope of employment with one's employer. §8-41-301(1)(b), C.R.S. (2006); see *City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlanda*, 811 P.2d 379, 383 (Colo. 1991). There must be a causal nexus

between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.*, 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *Enriquez v. Americold D/B/A Atlas Logistics*, W.C. No. 4-960-513-01, (ICAO, Oct. 2, 2015)

However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. See *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1995); *Atsepoyi v. Kohl's Department Stores*, W.C. No. 5-020-962-01, (ICAO, Oct. 30, 2017). The question of whether the requisite causal connection exists is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000). *Fuller v. Marilyn Hickey Ministries, Inc.*, W.C. No. 4-588-675, (ICAO, Sept. 1, 2006).

Respondents have failed to establish by a preponderance of the evidence that Claimant did not sustain a compensable injury arising out of and in the course of his employment. Claimant testified that after 13 consecutive days of work, he woke on August 26, 2019 with symptoms in his hands and feet. Claimant presented that day to the emergency department at North Suburban Medical Center where he was examined by Dr. Geddes. Dr. Geddes' examination of the Claimant demonstrated objective findings consistent with the paresthesias Claimant reported experiencing. Specifically, Dr. Geddes noted "mild swelling to the dorsal aspect of right hand, mildly swollen right forearm compared to left, with mild tenderness." Although, Dr. Geddes did not diagnose Claimant with carpal tunnel syndrome, as Claimant reported to other health care providers, Dr. Geddes did diagnose Claimant with tendonitis and paresthesia. PA Robbins, who saw Claimant on September 6, 2019, also concluded that Claimant's hand symptoms were work-related. Similarly, although Dr. Tentori was skeptical that Claimant could develop carpal tunnel syndrome over a thirteen-day period, he did determine that Claimant's hand symptoms were consistent with work-related injuries. With the exception of Dr. Prok, no other physician stated definitively that Claimant's hand symptoms were not work-related. The ALJ finds it more likely than not that Claimant sustained an injury to his bilateral hands, (i.e., tendonitis and paresthesia, but not carpal tunnel syndrome) in the course of and arising out of his employment.

The ALJ finds that Respondents have not proven by a preponderance of the evidence that Claimant's hand/finger numbness did not arise out the course and scope of Claimant's employment with Employer.

OVERCOMING DIME ON MMI

The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v.*

Industrial Claim Appeals Office, supra. “Clear and convincing evidence” is evidence that demonstrates that it is “highly probable” the DIME physician's MMI determination is incorrect. See e.g., *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998); *Lafont v. WellBridge D/B/A Colorado Athletic Club* W.C. No. 4-914-378-02 (ICAO, June 25, 2015). In other words, to overcome a DIME physician's opinion, “there must be evidence establishing that the DIME physician's determination is incorrect, and this evidence must be unmistakable and free from serious or substantial doubt.” *Adams v. Sealy, Inc.*, W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appeals Office, supra*.

The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.*, W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); see *Shultz v. Anheuser Busch, Inc.*, W.C. No. 4-380-560 (ICAO, Nov. 17, 2000). Rather it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Oates v. Vortex Industries*, WC 4-712-812 (ICAO, Nov. 21, 2008); *Licata v. Wholly Cannoli Café* W.C. No. 4-863-323-04 (ICAP, July 26, 2016).

MMI exists at the point in time when “any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition.” § 8-40-201(11.5), C.R.S. A DIME physician's finding that a party has or has not reached MMI is binding on the parties unless overcome by clear and convincing evidence. § 8-42-107(8)(b)(III), C.R.S.; *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000); *Kamakele v. Boulder Toyota-Scion*, W.C. No. 4-732-992 (ICAO, Apr. 26, 2010).

MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office*, 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office*, 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007); *Powell v. Aurora Public Schools*, W.C. No. 4-974-718-03 (ICAO, Mar. 15, 2017). A finding that the claimant needs additional medical treatment (including surgery) to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office*, 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office*, 794 P.2d 1090 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.*, W.C. No. 4-320-606 (ICAO, Mar. 2, 2000). Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining the claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. See *In Re Villela*, W.C. No. 4-400-281 (ICAP, Feb. 1, 2001). Thus, a DIME physician's findings concerning the diagnosis of a medical condition, the cause of that condition, and the need for specific treatments or

diagnostic procedures to evaluate the condition are inherent elements of determining MMI.

Respondents have not established by clear and convincing evidence that Dr. Douthit's DIME opinion that Claimant did not reach MMI until July 13, 2020 is incorrect. In his February 25, 2020 DIME Report, Dr. Douthit opined Claimant was not at MMI, because nerve conduction studies were needed to determine if Claimant had carpal tunnel syndrome. Implicit in Dr. Douthit's recommendation for additional diagnostic studies is the determination that such studies offered a reasonable prospect for defining Claimant's condition and, potentially, suggesting further treatment. The ALJ finds that Dr. Douthit's recommendation that nerve conduction studies be performed was reasonable and appropriate. The EMG studies were performed on May 14, 2020 and were normal. In his July 13, 2020 DIME report, Dr. Douthit placed Claimant at MMI, without restrictions or an impairment rating.

Respondents did not present evidence that was unmistakable and free from serious or substantial doubt that Dr. Douthit's MMI determination was incorrect. Although Dr. Tentori placed Claimant at MMI on October 31, 2019, he did not opine that Dr. Douthit's opinion was incorrect. No evidence was offered at hearing directly contradicting Dr. Douthit's opinion on this matter. The ALJ finds that Respondents failed to meet their burden of establishing by clear and convincing evidence that Dr. Douthit's opinion was incorrect.

Entitlement To TTD Benefits

To prove entitlement to Temporary Total Disability (TTD) benefits, Claimant must prove his industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office*, 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage-earning capacity as demonstrated by Claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999).

The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) TTD benefits ordinarily continue until terminated by the occurrence of one of the criteria listed in § 8-42-105 (3), C.R.S. These events include: 1) the employee reaching MMI; 2) the employee returning to regular or modified employment; 3) the attending physician releasing the employee to return to regular employment; or 4) the employee is released to return to modified employment and the employer makes a written offer for such, but the employee fails to begin such

employment. *Bestway Concrete & TIG Ins. v. Industrial Claim Appeals*, 984 P.2d 680 (Colo. App. 1999).

“The statute provides that the opinion of the attending physician carries conclusive effect with respect to a claimant's ability to perform regular employment. However, one attending physician's release to work is not conclusive of the issue if multiple attending physicians render conflicting opinions.” *Bestway Concrete & TIG Ins*, supra, citing *Burns v. Robinson Dairy, Inc.*, 911 P.2d 661 (Colo. App. 1995). The term “attending physician” as used in § 8-42-105(3), C.R.S., refers to a physician within the chain of authorization who assumes care of the claimant. *Popke v. Industrial Claim Appeals Office*, 944 P.2d 677 (Colo. App. 1997).

Claimant has failed to establish by a preponderance of the evidence that Claimant continued to be subject to work restrictions that were related to his work-related injury after October 31, 2019. As of October 31, 2019, Claimant's ATP was Dr. Tentori. In his report of October 31, 2019, Dr. Tentori stated that Claimant “no longer requires activity restrictions associated with this particular work injury.” Although Dr. Tentori did indicate that he was not able to release Claimant to unrestricted work activities, this was because he opined Claimant “requires activity restrictions unrelated to this work injury in order to address his chronic pain complaints and use of methadone. Any ongoing activity restrictions will need to be addressed by the patient's private health care provider.” The ALJ finds Dr. Tentori's opinion on this issue credible and persuasive. Neither Dr. Brett nor Dr. Douthit were “attending physicians” within the meaning of the Workers' Compensation Act, and therefore there are no conflicting opinions among attending physicians, which would render Dr. Tentori's conclusive.

To the extent Claimant was restricted from work activities after October 31, 2019, those restrictions arose from conditions that did not arise out of Claimant's course of Employment with Employer. The ALJ, therefore, finds that Claimant failed to establish that Claimant is entitled to TTD benefits after October 31, 2019.

ORDER

It is therefore ordered that:

1. Respondents are not entitled to withdraw their admissions of liability.
2. Claimant reached maximum medical improvement on July 13, 2020.
3. Claimant is not entitled to temporary total disability benefits after October 31, 2019.
4. All matters not determined herein are reserved for future determination.

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

DATED: November 12, 2020.



Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

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| STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 222 South 6th Street, Suite 414, Grand Junction, CO 81501 | <input type="checkbox"/> COURT USE ONLY <input type="checkbox"/> |
| In the Matter of the Workers' Compensation Claim of: [Redacted] Claimant, vs. [Redacted] Employer, and SELF INSURED Insurer, Respondents. | |
| CASE NUMBER: WC 5-072-588-002 | |
| FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER | |

On November 12, 2020, a telephone hearing was held in this matter in Grand Junction, Colorado before Administrative Law Judge Cassandra M. Sidanycz. The claimant did not appear at hearing. The respondent was represented by [Redacted], Esq. The hearing was digitally recorded from 1:00 p.m. to 1:35 p.m. The respondent's exhibits A through GG were admitted into evidence.

In this order, [Redacted] will be referred to as "the claimant" and [Redacted] will be referred to as "the employer" or as "the respondent". Also in this order, "the ALJ" refers to the Administrative Law Judge; "C.R.S." Colorado Revised Statutes; "OACRP" refers to the Office of Administrative Courts Rules of Procedure, 1 CCR 104-1; and "WCRP" refers to Workers' Compensation Rules of Procedure, 7 CCR 1101-3.

ISSUES

The only issue for hearing was whether the claimant demonstrated, by a preponderance of the evidence, that she had suffered a change in condition to warrant the reopening of a workers' compensation claim related to an admitted injury that occurred on March 5, 2018.

PROCEDURAL MATTERS

1. This matter was set for hearing pursuant to the claimant's July 8, 2020 Application for Hearing. At that time, the claimant was represented by attorney, Bethiah Beale Crane.

2. Following a prehearing conference before PAL John Sandberg, a Notice of Hearing was sent to the parties on September 2, 2020 indicating that the hearing would take place on November 12, 2020 at 1:00 p.m. via telephone with an ALJ with the Grand

Junction location of the Office of Administrative Courts (OAC). At that time the claimant continued to be represented by Ms. [Redacted]. The Notice of Hearing was emailed to Ms. [Redacted]'s email address of record.

3. On September 17, 2020, the OAC received a copy an order from the Division of Workers' Compensation in which Ms. [Redacted]'s Motion to Withdraw as the claimant's attorney was granted. The ALJ notes that Ms. [Redacted] filed her Motion to Withdraw on August 27, 2020. However, she did not file that motion with the OAC. Therefore, it was proper for the OAC to provide notice of hearing to Ms. [Redacted] on the claimant's behalf on September 2, 2020.

4. On September 25, 2020, the claimant appeared pro se at a prehearing conference before PALJ John Sandberg. At that time, PALJ Sandberg ordered that the hearing on November 12, 2020 would proceed as scheduled.

5. The claimant appeared pro se at a prehearing conference on October 15, 2020 before PALJ Laura Broniak. At that time, it was noted that a hearing was scheduled in this matter on November 12, 2020.

6. In addition, the claimant had another hearing before the ALJ on Monday, November 9, 2020 regarding two other cases (WC 5-075-911 and WC 5-024-075). At the November 9, 2020 hearing, it was discussed that a hearing was scheduled for Thursday, November 12, 2020.

7. On November 12, 2020, the Grand Junction OAC received a letter from the claimant requesting copies of the recordings for "the full day hearing on 11-9-2020 and the half day [h]earing on 11-12-2020".

8. At the time of the hearing on November 12, 2020, the ALJ called the claimant at her telephone number of record.¹ The claimant did not answer her phone, and the ALJ left her a voicemail with instructions to contact the Grand Junction OAC. The ALJ made three attempts to reach the claimant in this manner. The ALJ's attempts to reach the claimant were unsuccessful.²

9. The ALJ determined that the claimant had failed to appear. On the record, the ALJ reviewed factors listed in OACRP 23 and determined that the hearing would proceed without the claimant.

10. Counsel for the respondent made an oral Motion for Summary Judgment, as the claimant had failed to appear and failed to present any evidence or testimony. The ALJ took the respondent's Motion under advisement and now issues this order.

¹ The ALJ notes that this is the same telephone number that was used by the ALJ to successfully reach the claimant for the November 9, 2020 hearing.

² All attempts to reach the claimant on November 12, 2020 were made a part of the record via the digital hearing recording.

FINDINGS OF FACT

1. The claimant suffered an injury at work on March 5, 2018. This injury was to her right fifth toe. The respondent admitted liability for this injury.
2. The claimant was placed at maximum medical improvement (MMI) on April 12, 2018, with no permanent impairment and no maintenance medical treatment.
3. On May 14, 2018, the respondent filed a Final Admission of Liability (FAL) admitting for the MMI date of April 12, 2018, and no permanent impairment.
4. The claimant did not object to the FAL.
5. On March 2, 2020, the claimant filed her Opposed Petition to Reopen and listed the reason for reopening as “[c]hange in medical condition”.
6. The medical records attached to the claimant’s Opposed Petition to Reopen reflect medical treatment from March 5, 2018 through July 13, 2018.
7. The claimant did not appear at hearing.
8. There is no persuasive evidence in the record to support a finding that the claimant suffered a change in her condition and/or a worsening of her condition to warrant reopening her claim.

CONCLUSIONS OF LAW

1. The purpose of the “Workers’ Compensation Act of Colorado” is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers’ Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S.
2. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probable than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers’ Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers’ Compensation case is decided on its merits. Section 8-43-201, *supra*.
3. The ALJ’s factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).
4. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness’s testimony and actions; the

reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

5. Section 8-43-303(1) provides that “any award” may be reopened within six years after the date of injury “on the ground of fraud, an overpayment, an error, mistake, or a change in condition.” Reopening for “mistake” can be based on a mistake of law or fact. *Renz v. Larimer County School District Poudre R-1*, 924 P.2d 1177 (Colo. App. 1996). A claimant may request reopening on the grounds of error or mistake even if the claim was previously denied and dismissed. *E.g.*, *Standard Metals Corporation v. Gallegos*, 781 P.2d 142 (Colo. App. 1989); see also *Amin v. Schneider National Carriers*, W.C. No. 4-81-225-06 (November 9, 2017). The ALJ has wide discretion to determine whether an error or mistake has occurred that justifies reopening the claim. *Berg v. Industrial Claim Appeals Office*, 128 P.3d 270 (Colo. App. 2005); *Travelers Ins. Co. v. Industrial Commission*, 646 P.2d 399 (Colo. 1981).

6. A change in condition refers to “a change in the condition of the original compensable injury or to a change in the claimant’s physical or mental condition which can be causally connected to the original compensable injury.” *Heinicke v. Industrial Claim Appeals Office*, 197 P.3d 222 (Colo. App. 2008). The ALJ is not required to reopen a claim based upon a worsened condition whenever an authorized treating physician finds increased impairment following MMI. *Id.* The party attempting to reopen an issue or claim shall bear the burden of proof as to any issues sought to be reopened. Section 8-43-303(4), C.R.S.

7. As found, the claimant has failed to demonstrate by a preponderance of the evidence that her condition has changed and/or worsened.

ORDER

It is therefore ordered the claimant’s request to reopen her claim related to a March 5, 2018 date of injury is denied and dismissed.

Dated this 16th day of November 2020.



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

- I. Have Respondents, by clear and convincing evidence, overcome the DIME opinion of Dr. Castrejon regarding MMI?
- II. If Claimant is not at MMI, has he shown, by a preponderance of the evidence, that the care recommended by Dr. Castrejon is reasonable, necessary, and related to his admitted work injury?
- III. If Claimant is at MMI, what is the appropriate impairment rating?

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

The Work Injury / Subsequent Treatment

- 1) On August 7, 2019, Claimant sustained an admitted injury to his lumbar spine, and medical benefits were provided. (Ex. A). One or more loose pilasters had slid sideways down a wall adjacent to where Claimant was bent over working, striking him in the lower back.
- 2) On August 9, 2019, Claimant was seen at UC Health, with complaints of pain and tightness in his low back accompanied by left leg pain. The first note, under "Reason for Visit," reads that Claimant was laying on the floor working and a large piece of loose plastic fell onto his low back; The second note, under "HPI" (History of Present Illness), reads "patient states that several pilasters fell onto his lower back while he was laying 'supine' on the floor." {The ALJ notes it is highly doubtful that Claimant used the actual word 'supine', or even understood its meaning. Claimant's body positioning, detailed further herein, was not 'supine', and something early on got lost in translation}.
- 3) Physical exam revealed decreased range of motion, tenderness and abrasion over L4. Claimant was prescribed medication and given work restrictions of no lifting, carrying, pushing/pulling over 25 pounds. In addition, Claimant was restricted from crawling and squatting. (Ex. 1).
- 4) On August 15, 2019, Claimant returned to UCHealth to see Dr. Walter Larimore, M.D. Claimant still reported left greater than right low back pain, radiating to his left buttock, with numbness and tingling down to the anterior lateral calf. The mechanism of injury was a pilaster falling onto Claimant's lower back while he was laying 'supine' on the floor. Dr. Larimore opined that the method of injury is consistent with

a work-related injury.

- 5) Physical examination revealed tenderness and an abrasion on the low back along with surrounding bruising. A pain diagram shows an oval area of bruising extending leftward from the midline of the low back toward the left buttock. Dr. Larimore's diagnoses were lumbar contusion and abrasion, with exacerbation of pre-existing, non-work related lumbosacral degenerative disease. (Ex. 1, pp. 10-12)
- 6) Claimant returned to Dr. Larimore on September 5, 2019. Claimant reported to be 75-80% better. Physical examination revealed decreased range of motion with tenderness at the L3-5 levels bilaterally. Dr. Larimore restarted ibuprofen 800 mg three times daily and advised Claimant to continue to use Robaxin nightly. Claimant advised Dr. Larimore that he is tolerating his current work restrictions, but his employer has cut back on his work assignments, and so he would like a trial period with no work restrictions. (Ex. 1, pp. 21-22). Dr. Larimore stated that Claimant was to follow up with him in four weeks, after which he expected to close the case. (Ex. F, p. 50).
- 7) After his appointment with Dr. Larimore on September 5, 2019, Claimant was referred to to Fyzical Therapy and Balance Center to start his PT program. The initial examination indicated a history of "door jams" falling onto Claimant's back when he was crouched down. Claimant described an achiness over the lower back more so on the left, and knottiness. The pain location was in the left lower back, radiating intermittently into the posterior lower left extremity. (Ex. 2, pp. 45-46).
- 8) On September 10, 2019 Claimant reported to his physical therapist that he feels someone is poking him in the back with a stick. The therapist noted that Claimant is a little sore today as he had to carry some things up three flights of stairs. Claimant reported having less sciatic pain. (Ex. 20. P. 50)
- 9) On September 13, 2019 the PT note reflects Claimant was reporting intermittent pain in his back which was more a 'tingling' pain as opposed to a 'stabbing' pain. (Ex. 2, p. 52).
- 10)The PT notes for September 17, 19, and 23, 2019 reflect that Claimant was experiencing sciatic pain on the left, with some tingling down the left leg. (Ex. 2, pp. 52-61).
- 11)Claimant continued with PT. The notes for October 1 and October 3, 2019 indicate that Claimant's back pain was increasing. On the October 3, 2019 visit, Claimant advised the physical therapist that his back hurts worse when at work, or if he has to sit for too long. (Ex. 2, pp. 63-65).
- 12)On October 3, 2019, Claimant was also evaluated by Jayme Eatough, P.A.C. Claimant told PA Eatough that he was still experiencing sciatica and that his "pain still hasn't completely gone back to normal." Claimant reported feeling that there are

knots in his back. Furthermore, Claimant still reported feeling numbness and tingling in his entire left leg, and felt like someone is poking him in one specific spot.

- 13) Claimant also asked P.A. Eatough about seeing a pain management doctor, as he had a previous injury where he underwent Novocain injections and chiropractic which helped work out some of the knots. The PA notes do not indicate what body part sustained a previous injury. Ultimately, P.A. Eatough discussed the case with Dr. Bisgard, and opined that Claimant is not at MMI, since Claimant was still having numbness and tingling in his leg. (Ex. 1, pp. 25-26).
- 14) On October 8, 2019 Claimant returned to PT, with complaints of increased tightness. Claimant advised the physical therapist that stretching usually helps relieve the pain, but not on a consistent basis. (Ex. 2, p. 67).
- 15) On October 10, 2019 Claimant returned to Dr. Larimore. Claimant felt he had plateaued at 75% due to persistent left lower back pain that radiates to the left buttock and down the fifth lumbar dermatome. Under MOI, Claimant reported that “[a] pilaster (10-15#) fell onto his lower back....” Dr. Larimore noted that he discussed with Claimant that he sustained a lumbar contusion and abrasion with possible exacerbation of his pre-existing non-work-related degenerative disc disease. This note indicates that Claimant told Dr. Larimore that he had a prior neck injury for which he had injection therapy from a physiatrist, which was helpful. Dr. Larimore opined that massage therapy, coupled with chiropractic treatment four times weekly should be attempted as a final step. On this date, Dr. Larimore transferred care to Dr. Nicholas Kurz for ongoing care if needed (Ex. 1, p. 30).
- 16) Claimant attended PT on October 17, 22, 24, 30, and November 5, and 7, 2019. A review of these notes reflect that Claimant continued to experience back pain, with sciatica on the left side radiating down the left leg. (Ex. 2, pp. 70, 72, 75, 78, 80, 82).

Claimant Referred to Dr. Kurz

- 17) Claimant was first evaluated by Dr. Nicholas Kurz, DO, on November 8, 2019. Dr. Kurz’s note reflects a history of Claimant kneeling when another employee leaned a plastic pilaster against a wall. It then slid sideways, striking Claimant on his left lower back, resulting in a contusion and abrasion. Dr. Kurz wrote that Claimant’s symptoms, including his sciatica, have improved; however, on occasion, he gets tightness in the left lower leg.
- 18) Prior medical history was positive for, a chronic neck condition resulting from a motor vehicle accident. Physical examination revealed a previous abrasion at left side of lower back around L4, that is well healed and non-tender. The rest of the physical exam was normal. Dr. Kurz specifically noted that “no abnormal pain behaviors were observed....” Dr. Kurz diagnosed mild acute lumbar contusions around L4, with a superficial abrasion on chronic congenital v. degenerative pre-existing lumbar L5-S1 moderate disc space narrowing.

- 19) At this initial visit, Dr. Kurz opined that Claimant was at MMI, with no impairment. Dr. Kurz indicated that Claimant has returned to his “pre DOI objective functional baseline” and any ongoing problems are related to his congenital v. degenerative finding in the lumbar spine. Dr. Kurz felt any further care for his lumbar spine should be treated outside the workers’ compensation system. (Ex. 3, pp. 86-90).
- 20) Based on Dr. Kurz’s report, Respondents filed a Final Admission of Liability (“FAL”) on December 4, 2019, admitting to a zero percent impairment. (Ex. 6). Claimant then timely requested a DIME.

DIME by Dr. Castrejon

- 21) On March 5, 2020, Claimant underwent this DIME by Dr. Miguel Castrejon, M.D. In the DIME report, Claimant gave a history of crouching down in a corner, when a pilaster struck him in the lower back. Claimant initially reported that the pilaster was made of solid plastic weighing 50 pounds, measuring 7 inches wide, 1 inch thick, and 7 feet tall. Dr. Castrejon reviewed the notes of the various providers who treated Claimant.
- 22) Physical examination revealed pelvic obliquity with an apparent leg length discrepancy-right greater than left. Palpitation produced tenderness over the left greater than right paralumbar musculature and midline L4-S1. Tenderness was found along the lower lumbar facets on the left. There was also left greater than right sacroiliac joint tenderness and SI joint stressing and left SI pain with SI joint stressed. Sitting straight leg raising (SSLR) was considered mildly positive on the left, with tight hamstring with report of pain into the left lower buttock and upper hamstring.
- 23) Dr. Castrejon in his DIME report wrote that lumbar X-rays revealed the presence of pre-existing degenerative disc disease at L5-S1, which was not caused by the injury but was asymptomatic and non-disabling prior to the current work injury. Based on his evaluation, Dr. Castrejon’s clinical diagnoses were lumbar spine contusion, lumbar musculo-ligamentous strain/ sprain with left SI joint involvement, left lower limb radiculitis, rule out HNP L5-S1, and mild myofascial pain in the left lumbar musculature. (Ex. 5).
- 24) Dr. Castrejon opined in his report that Claimant was not at MMI, and needed additional care, to include a lumbar MRI and flexion-extension x-rays of the lumbar spine. In addition, Dr. Castrejon recommended Claimant undergo electrodiagnostic testing of the left lower limb and lumbar paraspinal muscles. Additional treatment recommendations include spinal injections (epidural v. sacroiliac) and specialist consultation if needed. In support of his opinion, Dr. Castrejon felt that the mechanism of injury of a direct blow on the back by a 50-pound pilaster fit Claimant’s clinical presentation.

25) Dr. Castrejon noted that Claimant had no issues working in construction prior to this injury. He also noted that Claimant's degenerative disc disease was asymptomatic until the work injury. Furthermore, he noted that Claimant's physical exam findings were indicative of mild nerve root mediated pain and for sacroiliac mediated pain which correlates with Claimant's complaints of left leg pain with numbness and tingling. *Id* at 112-113.

26) Using the AMA Guides to the Evaluation of Permanent Impairment, Third Edition (Revised) ("AMA GUIDES"), Dr. Castrejon assigned Claimant a combined impairment rating of 11% of the whole person for his lumbar spine broken down as follows: There was 7% whole person impairment, using Table 53(II)(C). He measured range of motion deficits equating to a 4% WP impairment. *Id* at 113.

Re-evaluation by Dr. Kurz / Further Treatment

27) On May 29, 2020, Claimant returned to Dr. Kurz for re-evaluation. Claimant repeated a similar mechanism of injury. However, Dr. Kurz's note indicates Claimant was unsure of the exact weight and size of the pilaster. However, this same report also indicates that the pilaster weighed between 50 to 80 pounds. Dr. Kurz's record reveals that Claimant's sciatic pain was improved, but he still gets knots in his lower back.

28) Physical examination revealed full range of motion in the lumbar spine seated, and SSLR of greater than 90 degrees bilaterally was negative. Musculoskeletal and neurological exams were opined to be normal. Dr. Kurz noted that Claimant exhibited no abnormal pain behaviors. Dr. Kurz's clinical diagnoses were the same as that noted in his November 8, 2019 report. *Id* at 117-119.

29) Based on the May 29, 2020 evaluation, Dr. Kurz again opined that Claimant was at MMI as of November 8, 2019, and needed no further care. In support of his opinion, Dr. Kurz wrote that MMI is inclusive of three components: employability, possible need for medical maintenance which is considered to be reasonable and necessary to sustain the patient at MMI. Impairment is defined as a loss, a loss of use or derangement of any body part, organ system, or organ function. Dr. Kurz wrote that, because Claimant is working full duty without restrictions and is not requiring any medical care, Claimant meets the definition of MMI. Furthermore, Dr. Kurz felt the mechanism of injury as gleaned from Claimant's history and various medical records is minimal, and not likely to have caused structural damage to a 'muscular' male. Dr. Kurz felt Claimant did not sustain any permanent impairment as a result of the work injury. *Id* at 119-120.

30) Regarding Dr. Castrejon's DIME report, Dr. Kurz opined Dr. Castrejon had an incorrect impression of the mechanism of injury due to the weight of the pilaster(s) involved. Dr. Kurz reiterated that by September 5, 2019 Claimant was 75-80% better without having any active PT. Dr. Kurz wrote that Claimant's prior whiplash type injuries for which he treated with Dr. John Tyler for two to three years, coupled with

the degenerative changes as found on lumbar X-rays led him to conclude that Claimant's present ongoing problems are similar to what he had back in 2003 through 2006, and are not related to the more recent work injury. *Id* at 120-122.

- 31) On June 11, 2020, Dr. Timothy Sandell performed electrodiagnostic studies as recommended by Dr. Castrejon. According to Dr. Sandell, the EMG examination identified abnormalities suggestive of a left S1 radiculopathy. (Ex. 4, pp 126-127).
- 32) An MRI of the lumbar spine was also done on August 7, 2019. According to the radiologist, there was a left sided disc protrusion at **L5-L6**, with crowding of the left S1 nerve root, and lateral recess and potential intermittent left S1 nerve impingement. (Ex. O). {Medical records indicate that Claimant congenitally has one extra lumbar vertebra, noted herein to be **L6**}.
- 33) On July 15, 2020, Dr. Kurz issued an addendum to his prior reports. In this report, Dr. Kurz notes the results of the recent EMG and MRI. He opines that these studies show no acute findings at the level of the abrasion site. Dr. Kurz again wrote that Claimant remains at MMI, with no impairment, or need for further medical care. (Ex. P).

Michael Swearingen's Deposition

- 34) Michael Swearingen, a co-worker of Claimant, testified via deposition, taken on July 31, 2020. Mr. Swearingen had taken a cell phone video of Claimant on a job site. He also testified on the specifications of the pilaster that he believes was the one that fell on Claimant's back. He described the pilaster as being 80" x 4" x 1", weighing 10 pounds. Mr. Swearingen did not know the exact date the video was taken, but it was in the middle of November, 2019. Mr. Swearingen conceded that he was hired after Claimant was injured, and did not witness Claimant's injury. Mr. Swearingen also testified that he can't tell how tall the pilaster is that is depicted in the photo which was submitted in Respondents' Exhibit Q.
- 35) The cell phone video (Ex. S, via thumb drive) has been reviewed by the ALJ. [The video is dated 7/28/2020 at 3:57 pm., presumably the date of data transfer]. The entire video is approximately 10 seconds long, depicting Claimant walking away from the camera in a parking lot, apparently unaware of being filmed. Claimant appears to be in no distress, with no gait disturbance, while carrying one, perhaps more, large, flat cardboard boxes, contents unknown-if any. They are balanced overhead in his right hand, much like a waiter carrying a food tray. Additionally, there is some brief banter between the videographer and another person. The words are mostly unintelligible; in any event, the ALJ will disregard the commentary as being hearsay additions to an otherwise admissible video.

Claimant Testifies at Hearing

- 36) Claimant testified at hearing. He testified that on the morning of the work injury he

was told by a supervisor to mark out and lay out the pilasters on the floor. While doing so, Claimant crouched down on his elbows with forearms on the ground using a pencil to mark the layout. While marking the layout in this fashion, the left side of Claimant's body was very close to the wall with his left foot and knee actually touching it. According to Claimant, at the same time he was working on marking the layout, Jason Moore, Claimant's co-employee, was stacking some pilasters behind where he was working. These pilasters were stacked upright about four inches away from the wall at the bottom and stacked vertically one on top of the other.

- 37) Claimant testified that he saw two pilasters that were stacked. As he crouched down, Mr. Moore was putting a third one up against the wall but Claimant was not sure if this third pilaster was set on top of the other two. The pilasters were stacked approximately six feet from Claimant's feet when he was crouched down. Within a few moments after getting on the ground, at least two, and perhaps three, pilasters slid down the slick tile wall toward Claimant. They struck him in his lower back on the left side, leaving a small cut. There was some bruising as well. Claimant testified that after the incident he observed three pilasters on the ground.
- 38) Claimant described the pilasters that struck him as being made of dense plastic, eighty-four inches tall, 1 inch thick, four inches wide, with an estimated weight of around eighteen pounds each. Claimant came up with the estimated weight by looking it up online.
- 39) Claimant acknowledged that the medical records are inconsistent with the number of pilasters that fell on him. However, Claimant testified that in relating the history to his health care providers, he was referring to the single pilaster which cut his back.
- 40) Claimant testified about the care he had under Dr. Larimore and Dr. Kurz. He testified that while he was actively treating, he would get better, but his symptoms would later return. He testified that when Dr. Kurz placed him at MMI on November 8, 2019 he was feeling better, but he told Dr. Kurz he would wake up from sciatic pain.
- 41) Claimant further testified that when he saw Dr. Castrejon, his low back was stiff. He was having sciatic pain in his buttocks down his thigh into his calf. Claimant continues to have sciatic type symptoms, which are exacerbated by riding his bike, as well as sitting and standing for an extended period. Regarding the video taken of him by Mr. Swearingen, Claimant testified that he was carrying four to five empty boxes weighing at most a total of ten pounds.
- 42) Claimant was involved in an automobile accident in 2003. As a result, Claimant sustained injuries to his back and neck. According to Claimant, the injuries to his neck were greater than those to his low back. Claimant treated with Dr. John Tyler, and received care to include injections, chiropractic, and massage. Claimant testified that after completion of his care under Dr. Tyler in 2006, he has had no low back problems since. He has had no issues performing his job duties which involved

construction type work.

43) Claimant returned back to full duty work after his visit with Dr. Larimore but was terminated from Employer in December 2019. After his termination Claimant did some light construction type work such as patching a roof leak, minor painting, drywall patching, repairing doors, wallpaper removal, and floor repairs. Claimant testified that due to his sciatica, he has turned down bigger construction type jobs.

Dr. Kurz Testifies via Deposition

44) Dr. Nicholas Kurz, D.O. testified as an expert in family and occupational medicine. Dr. Kurz testified consistent with his reports of November 8, 2019, May 29, 2020, and July 15, 2020. Dr. Kurz felt that Claimant sustained minor injuries consisting of an abrasion, and some back pain as a result of a pilaster falling on his low back. However, Dr. Kurz testified that the mechanism of injury as described by Claimant is not consistent with any of the findings noted on X-rays, the MRI, Dr. Sandell's electrodiagnostic studies, or Claimant's ongoing sciatic symptom complex.

45) Dr. Kurz felt that the medical records were inconsistent regarding both the number and weight of the pilasters that fell on Claimant. Dr. Kurz explained that if it was one pilaster-weighing 10-13 pounds-that hit Claimant, then the abrasion, bruising, and any soft tissue damage would be expected to heal within a few weeks. Dr. Kurz opined that Claimant has fully healed, due to no objective findings on physical examination.

46) Dr. Kurz testified he reviewed the MRI and Dr. Sandell's electrodiagnostic studies, and did not believe they revealed any abnormalities related to Claimant's work injury. He said that there were no findings at the L4 level-where the abrasion-was that would correlate with his sciatic complaints. Rather, the sciatic complaints were more consistent with the findings at L5-S1 levels, taking into account Claimant's congenital abnormality of having an L-6 disc.

47) Regarding electrodiagnostic testing, Dr. Kurz said that the testing was "actually normal." Dr. Kurz stated that Dr. Sandell did some "extra tests" that may be suggestive of some issues, but none of which correlated with the physical examination, findings, X-rays, or MRI.

48) Dr. Kurz conceded that he does not know exactly how many pilasters hit Claimant's low back, or how they were stacked. He does not know exactly how far the pilasters fell before they impacted Claimant's back. He agreed that the diagram reflecting the bruising on Claimant's back goes from a little above the beltline down into the L5-S1 level and sacrum. Dr. Kurz summarized his disagreement with Dr. Castrejon's DIME opinion:

A So what we have here is a low back contusion. The mechanism is fairly straightforward. It was the same mechanism that

was described to Dr. Castrejon on his DIME, although, *Dr. Castrejon's DIME, in my opinion is invalid*. He had the mechanism wrong. He had the weight wrong. He had the history wrong. He had the patient's work history with his employer wrong. He has – obviously has issues with both myself and Dr. Larimore.....(Castrejon depo, p. 78) (emphasis added).

- 49) Dr. Kurz testified that history is a very important factor in helping determine etiology. He agreed that it is important to find out when symptoms first started, whether or not there some sort of trauma involved, and if there were prior symptoms in the same part of the body that is in question. He admitted he had not reviewed any medical records which reflect Claimant was having low back pain or pain down the left leg in the five years prior to the 2019 work injury. Dr. Kurz agreed that it is common that as a person ages, degenerative changes will occur in the lumbar spine, but these changes can be asymptomatic.

Dr. Castrejon Testifies via Deposition

- 50) The DIME physician, Miguel Castrejon, M.D. testified as an expert in the field of physical medicine and rehabilitation. Dr. Castrejon outlined the various histories reflected in the medical records regarding the number and weight of pilasters that hit Claimant. He indicated that even if it were two pilasters, each weighing 10 pounds, that hit Claimant's back, it would not alter his opinion. Dr. Castrejon went on to state that the combined weight of two pilasters each weighing ten pounds falling in a five to six-foot arc would augment his opinion regarding the cause of Claimant's low back problems. He further elaborated:

AAnd taking into consideration, when this gentleman saw me, he indicated he was essentially in a crouched position, getting as close as he could to a corner where he was working. So if one considers the amount of intradiscal pressure that the disc is subjected to, in an individual who is in a crouched, flexed position, it's about 400 times that of what one would expect if one were laying back in, let's say, a recliner or a chair. So that lets me know there is the mechanism of injury. The impact, the positioning that he was in, could lead to a significant injury. (Castrejon depo, pp. 15-16).

- 51) Dr. Castrejon described the end result of this mechanism of injury thusly:

Aif there was enough pressure subjected by the disc and the nerve root structures where there is some form of disc protrusion or violation of the annulus, either by what we, quote, term a bulge or a protrusion or even an extrusion of even just an inflammatory process or even an annular tear where there is leakage of the proteoglycans within the disc that then cause an acidic reaction on the nerve. In all those cases, *you will experience nerve root irritation that will lead to a*

radiculitis or referred pain in a dermatomal distribution, which is a specific nerve root distribution. (Castrejon depo, p. 16) (emphasis added).

In his opinion, this is what happened to Claimant.

52) In support of his opinion, Dr. Castrejon stated that the bruising shown in the pain diagram from August 15, 2019 overlaps the sacroiliac joint. To thereby imply that the L4 area—where the abrasion is—the only area that could be injured by the falling pilasters does not make medical sense. An event to a specific area does not preclude symptoms in any other area, especially in Claimant, who had pre-existing degenerative changes in his lumbar spine. This makes his back more susceptible to injury.

53) Dr. Castrejon, is trained to perform, and actually does perform, electrodiagnostic tests. His review of Dr. Sandell's raw data confirmed that Claimant has a mild left S1 radiculopathy. Dr. Castrejon further testified that the findings on the EMG are consistent with Claimant's symptoms, and the findings on MRI. Dr. Castrejon explained that Claimant's symptoms of pain, numbness, and tingling extending down the leg to the lateral calf and lateral aspect of the foot actually confirmed Dr. Sandell's findings. He elaborated:

A ...the presentation of this individual from the initial presentation was that of an S1 radiculopathy. The comments that were offered by Dr. Larimore and the physician assistants that initially treated his case were all consistent in terms of the description and in terms of their concern. The findings on the MRI that was performed after the EMG, is consistent with the EMG. The fibrillation potentials, positive shock waves that are seen on this study, tell me that *there is a process of denervation-reinnervation, which can be a chronic process that can last six months to a year and possibly even more.* All depend – we all depend upon what structure has been injured, the length of the structure away from the plexus where it originates. Those are all lengths that we look at. But, in general, *the data is all very consistent with his presentation.* (Castrejon depo, pp. 23-24) (emphasis added).

54) Dr. Castrejon stated that the MRI revealed that at L5-L6, there is a left sided disc protrusion, with crowding of the left S1 nerve root and lateral recess. This potentially impinges the left S1 nerve root on an intermittent basis. Claimant's symptoms, therefore, can wax and wane, depending upon his activity level

55) Based on the MRI, the EMG, the medical history, and all of the other information obtained, Dr. Castrejon opined that Claimant is not at MMI. Claimant needs additional care, to include a left S1 nerve root block, and additional physical therapy. This should include core strengthening, instruction in a home exercise program, and treatment directed toward his S1 abnormalities.

56) Dr. Castrejon testified, consistent with his DIME report, that he calculated Claimant's impairment by using Table 53 to obtain an impairment of 7% of the whole person and then using range of motion to obtain 4% whole person impairment. Combining these two gives Claimant an 11% whole person impairment. Dr. Castrejon opined that for the 7% table 53 impairment, it is necessary to have six months of medically documented pain and rigidity. Dr. Castrejon said that in Claimant's situation, this criterion has been met.

57) Dr. Castrejon pointed out that Claimant was experiencing pain and rigidity when he examined him. On November 7, 2019 the physical therapist documented trigger points, which occur when a muscle has been subject to some sort of injury or stress. Dr. Castrejon testified that the range of motion testing was valid.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. §8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. §8-43-201, C.R.S.

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

C. Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the

witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The ALJ finds that Claimant was a reasonably consistent medical historian to his medical providers, and to the two IMEs. Further, his hearing testimony is reasonably consistent, and credible. While it is likely that the pilasters weighed closer to 10 pounds apiece (rather than 50 as earlier reported), it is apparent that at least two, possibly three struck Claimant. Depending upon the angle of contact, it could feel more like 50.

D. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55, P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968). The ALJ finds that each expert has rendered their opinions to the best of their ability, based upon the information they were provided. The real issue here is one of *persuasiveness*.

E. Further, courts are to be "mindful that the Workmen's Compensation Act is to be liberally construed to effectuate its humanitarian purpose of assisting injured workers." *James v. Irrigation Motor and Pump Co.*, 503 P.2d 1025 (Colo. 1972).

Overcoming the DIME Opinion on MMI, Generally

F. The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, *supra*; *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998); *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186, 189-190 (Colo. App. 2002); *Sholund v. John Elway Dodge Arapahoe*, W.C. No. 4-522-173 (ICAO October 22, 2004); *Kreps v. United Airlines*, W.C. Nos. 4-565-545 and 4-618-577 (ICAO January 13, 2005). The MMI determination requires the DIME physician to assess, as a matter of diagnosis, whether the various components of a claimant's medical condition are casually related to the injury. *Martinez v. ICAO*, No. 06CA2673 (Colo. App. July 26, 2007). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995) In other words, to overcome a DIME physician's opinion regarding the cause of a particular component of a claimant's overall medical impairment, MMI or the degree of whole person impairment, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be "unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc.*, W.C. No. 4-476-254 (ICAP, Oct. 4, 2001).

G. This enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appeals Office, supra*. Where the evidence is subject to conflicting inferences a mere difference of opinion between qualified medical experts does not necessarily rise to the level of clear and convincing evidence. Rather it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Oates v. Vortex Industries*, WC 4-712-812 (ICAO November 21, 2008).

H. As a matter of diagnosis the assessment of permanent medical impairment inherently requires the DIME physician to identify and evaluate all losses that result from the injury. *Mosley v. Industrial Claim Appeals Office*, 78 P.3d 1150 (Colo. App. 2003). Consequently, a DIME physician's finding that a causal relationship does or does not exist between an injury and a particular impairment must be overcome by clear and convincing evidence. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). The rating physician's determination concerning the cause or causes of impairment should include an assessment of data collected during a clinical evaluation and the mere existence of impairment does not create a presumption of contribution by a factor with which the impairment is often associated. *Wackenhut Corp. v. Industrial Claim Appeals Office*, 17 P.3d 202 (Colo. App. 2000).

Overcoming the DIME, as Applied.

I. The mere fact that a Claimant suffers from a pre-existing condition does not disqualify a claim for compensation or medical benefits if the work-related activities aggravated, accelerated, or combined with the pre-existing condition to produce disability or a need for medical treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). Pain is a typical symptom from the aggravation of a pre-existing condition, and the claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment-related activities and not the underlying pre-existing condition. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949). Moreover, an otherwise compensable injury does not cease to arise out of a worker's employment simply because it is partially attributable to the worker's pre-existing condition. See *Subsequent Injury Fund v. Thompson*, 793 P.2d 576, 579 (Colo. 1990); *Seifried v. Industrial Comm'n*, 736 P.2d 1262, 1263 (Colo. App, 1986) (“[I]f a disability were [ninety-five percent] attributable to a pre-existing, but stable, condition and [five-percent] attributable to an occupational injury, the resulting disability is still compensable if the injury has caused the dormant condition to become disabling.”)

J. Generally, the Claimant must prove by a preponderance of the evidence that his symptoms were proximately caused by an industrial aggravation of a pre-existing condition rather than simply the natural progression of the condition. *Melendez v. Weld County School District #6*, W.C. No. 4-775-869 (ICAO, October 2, 2009). However, in this instance Claimant has effectively persuaded the DIME physician that his current symptoms were proximately caused by the work injury, rather than the

inevitable, natural progression of his compression fractures. It is effectively now Respondent's burden to overcome this causation analysis. In this instance, if the compression fractures have been aggravated to the point of becoming symptomatic, then a nexus has been established. However, that is not the gravamen of Dr. Castrejon's findings.

K. Dr. Kurz does not provide information or an opinion that amounts to clear error on the part of Dr. Castrejon. Dr. Kurz himself acknowledges that Claimant did not display radicular symptoms until this injury. It was also not inevitable that Claimant's pre-existing compression fractures would get progressively worse to the point of being symptomatic. Dr. Kurz is of the sincere and well-considered opinion that Claimant's symptomology, if any, is not work related, and the work incident did not cause his need for treatment. He also opines that Claimant's reported symptoms do not correlate with the anatomical findings. In the end, his opinion is exactly that - his medical *opinion*, which differs from that of the DIME. He effectively acknowledged this during his deposition.

L. Respondents and Dr. Kurz heavily rely on the underlying premise that Dr. Castrejon's opinions are clearly wrong - because Dr. Castrejon got certain details wrong. Dr. Castrejon cleared that up in his deposition, by stating that a 10-lb pilaster would not change his analysis. Dr. Castrejon has record support from the EMG and MRI findings, and correlated them to Claimant's symptomology. Those results are, in fact, objective evidence in support, and Dr. Castrejon has greater credentials in administering EMGs than does Dr. Kurz. He explained why Claimant's symptoms might wax and wane, depending upon activity levels. Neurological damage can be confounding at times, but Dr. Castrejon provides a satisfactory analysis. In the end, Dr. Castrejon's opinion on MMI has not been shown to be highly probably incorrect.

M. While questions might remain regarding Dr. Castrejon's placement of Claimant onto Table 53(2)(C), such placement was provisional. No further impairment rating critique is needed at this point, as the ALJ finds that Respondents have not overcome the DIME opinion on MMI. Claimant requires more treatment to reach MMI, at which time that issue might be revisited.

Medical Benefits

N. Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School District #11*, W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012). Our courts have held that in order for a service to be considered a "medical benefit" it must be provided as medical or nursing treatment, or incidental to obtaining such treatment. *Country Squires Kennels v. Tarshis*, 899 P.2d 362 (Colo. App. 1995). A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the claimant's physical needs.

Bellone v. Industrial Claim Appeals Office, 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines, Inc.*, W.C. No. 4-517-537, (ICAO, May 31, 2006). A service is incidental to the provision of treatment if it enables the claimant to obtain treatment, or if it is a minor concomitant of necessary medical treatment. *Country Squires Kennels v. Tarshis*, 899 P.2d 362 (Colo. App. 1995); *Karim al Subhi v. King Soopers, Inc.*, W.C. No. 4-597-590, (ICAO. July 11, 2012). The determination of whether services are medically necessary, or incidental to obtaining such service, is a question of fact for the ALJ. *Bellone v. Industrial Claim Appeals Office*, 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines, Inc.*, W.C. No. 4-517-537, (ICAO, May 31, 2006).

O.' In this instance, the ALJ finds that Claimant has shown that the treatment recommendations by Dr. Castrejon in his DIME report are reasonable, necessary, and related to his work injury. Such treatment should include, but not be limited to, a left SI nerve root block, and additional physical therapy. This should include core strengthening, instruction in a home exercise program, and treatment directed toward his SI abnormalities.

ORDER

It is therefore Ordered that:

1. Respondents have not overcome the DIME of Dr. Castrejon. Claimant is not at MMI.
2. Respondents shall pay for all reasonable and necessary medical treatment to being Claimant to MMI, including, but not limited to, the treatment recommended by Dr. Castrejon.
3. Respondents shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.
4. All matters not determined herein are reserved for future determination.

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

petition to review form at: <http://www.colorado.gov/dpa/oac/forms-WC.htm>. In addition, it is recommended that you send a copy of your Petition to Review to the Colorado Springs OAC via email at oac-csp@state.co.us.

DATED: November 16, 2020

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION WC NOS. 5-100-666-002 & 5-104-120-003**

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that he suffered a compensable lower back injury on November 1, 2018 and aggravated his lower back condition on January 16, 2019 during the course and scope of his employment with Employer.

2. Whether Claimant has established by a preponderance of the evidence that he is entitled to reasonable, necessary and causally related medical treatment for his lower back injury.

3. Whether Claimant has proven by a preponderance of the evidence that Respondents failed to timely provide a list of at least four designated physicians in compliance with §8-43-404(5)(a)(I)(A), C.R.S. and he is thus permitted to select a treating physician.

4. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive Temporary Partial Disability (TPD) benefits and Temporary Total Disability (TTD) benefits for the period November 1, 2018 until terminated by statute.

FINDINGS OF FACT

1. Claimant is a 43-year old male who worked for Employer as a Chef. His job duties required him to stand for approximately 12-14 hours each day for five to seven days per week.

2. On October 10, 2018 Claimant visited Chiropractor Christopher Keirnan, D.C. for an examination. Claimant primarily reported stabbing lower back pain. He remarked that the pain reached a 10/10 level and radiated down both legs. Claimant reported that he had suffered lower back pain on and off every two months for about 10 years. He specifically remarked that the pain felt like he had "been stabbed and took his breath away." Claimant had attempted a back brace, a posture brace, stretching and Ibuprofen.

3. Dr. Keirnan testified at the hearing in this matter about his October 10, 2018 examination of Claimant. He remarked that Claimant demonstrated an antalgic lean to the right during a posture analysis. Dr. Keirnan explained that misalignment can be caused by a pinched nerve that requires the patient to lean in order to relieve pressure. Range of motion testing revealed limited mobility. Dr. Keirnan commented that Claimant's lower back symptoms were the biggest concern and his radiating back pain did not occur from any specific incident. He diagnosed Claimant with sciatica or a

form of pinched nerve. Dr. Keirnan recommended 13 follow up visits. He also suggested treatment with an orthopedist because of the severity of Claimant's complaints.

4. Claimant testified that on November 1, 2019 he suffered a lower back injury while performing his job duties for Employer. He specifically remarked that, while lifting a case of chicken from a walk-in refrigerator, he twisted to the right and immediately experienced lower back pain.

5. Claimant explained that he reported his lower back injury to immediate supervisor Executive Chef Cameron L[Redacted]. In a text message to Mr. L[Redacted] on the evening of Friday, November 2, 2018 Claimant specifically stated "I must have pulled something in my back putting the truck order away the other day. So I'm gonna get it looked at Monday." Mr. L[Redacted] responded shortly after receiving the message by stating "[h]eard let me know."

6. On the afternoon of Monday, November 5, 2018 Claimant sent Mr. L[Redacted] another text message inquiring whether he should report to work on the following day. Mr. L[Redacted] responded that Claimant should take the day off so he could arrange modified job duties.

7. On November 5, 2018 Claimant visited Kaiser Permanente and reported lower back pain. Claimant specifically noted the acute onset of lower back pain radiating into his right leg more than the left. He remarked that he had "some intermittent back pain in the past but woke with more severe pain last Friday." Claimant did not identify any specific, acute event that triggered his lower back symptoms. Scott Goodall, M.D. diagnosed lower back and bilateral leg pain. He prescribed Flexeril and physical therapy.

8. On January 20, 2019 Claimant visited UC Health and saw Elaine M. Reno, M.D. in the Emergency Department. Claimant reported dull back pain for 2-3 months that radiated from his upper back to left leg. He noted his back pain had been worsening for three days with muscle spasms and difficulty walking. Dr. Reno diagnosed Claimant with chronic and acute left-sided lower back pain with left-sided sciatica. Claimant did not identify any specific event that triggered his lower back symptoms.

9. On January 21, 2019 Claimant authored an e-mail to Mr. L[Redacted] regarding requested medical information. Claimant explained that when he left work after Tuesday, January 15, 2019 he was in significant pain and could not stand on the following day. He specifically stated that his "spine has now been damaged to the point where I am no longer physically able to walk. I will be speaking to surgeons today to examine the damage to my spine. I wanted to avoid surgery but now that I am almost completely paralyzed on my left side there may be no other option."

10. On January 25, 2019 Claimant returned to UC Health for an examination. He visited Allison M. Wolfe, M.D. and Christopher Ryan Caruso, M.D. for chronic lower back pain. Claimant reported he first noticed his pain in October 2018 and saw a chiropractor. A physical examination revealed symptoms of center back tightness

towards the right side. Claimant also exhibited hip and lower back tenderness with left leg dysfunction. Drs. Wolfe and Caruso recommended a lumbar spine MRI.

11. A January 28, 2019 lumbar spine MRI revealed degenerative changes without significant spinal stenosis or evidence of nerve root impingement. There was also a L4-5 disc bulge.

12. On January 29, 2019 Claimant authored an email regarding his chronic lower back pain. He specified "I would like to know if this falls under a worker's comp claim or is this short term disability since I was required to work with no modified work duty for those 2 months, which may have caused this injury to progress." Claimant remarked that he had notified management during the week of October 10, 2018 and disclosed the results of his chiropractor visit from the prior day. He also commented that he had an appointment in early November with Kaiser "because my pain had become greater than before." Employer's Case Advisor Steven B[Redacted] from Human Resources responded to Claimant's e-mail. He recommended contacting the leave of absence department about short-term disability. Mr. B[Redacted] also advised contacting Insurer about the possibility of Workers' Compensation benefits, but "given this was a preexisting injury, the claim may not be approved."

13. On January 31, 2019 Claimant visited Marshall B. Emig, M.D. at UC Health for an evaluation. Dr. Emig noted Claimant had the insidious onset of lower back and left hip pain in October 2018. The majority of Claimant's pain was in his hip region. After conducting a physical examination and reviewing Claimant's lumbar MRI results, Dr. Emig diagnosed him with Ankylosing Spondylitis (AS) of the lumbosacral region and chronic bilateral SI joint pain. He specified that the MRI revealed synovitis, edema and erosive changes of the SI joints that was suggestive of spondyloarthropathy such as AS.

14. On January 31, 2019 Mr. B[Redacted] authored an e-mail to Claimant about whether he had provided documentation from his physician regarding modified duty employment. Claimant responded that he had supplied the information to Mr. L[Redacted]. He specified that Mr. L[Redacted] "spoke to HR about it. It would have been first week of Nov. Today I was finally given information and contacts for short term disability."

15. On February 25, 2019 Claimant returned to Dr. Caruso to review his lumbar MRI results. Dr. Caruso noted the findings were concerning for conditions consistent with AS including bilateral sacroiliitis, synovitis and erosive changes. Claimant remarked he had not experienced any issues with his left leg for the previous two weeks but it takes 15-20 minutes for him to get out of bed in the morning.

16. On March 1, 2019 Claimant again visited UC Health for an examination. Claimant's AS symptoms had improved after four weeks of using NSAIDs. Matthew J. Moles, M.D. referred Claimant to rheumatology to co-manage his disease and recommended Etanercept (Enbrel). Claimant received an Enbrel injection on March 16, 2019.

17. On March 16, 2019 Claimant visited Kristine A. Kuhn, M.D., PhD. at the UC Health Rheumatology Clinic for an examination. On his rheumatology questionnaire Claimant noted that his shooting hip pain began in October 2018 and he has morning stiffness that lasts for two hours. Claimant reported increased back pain from October to November 2018. In addressing Claimant's mechanism of injury, Dr. Kuhn noted Claimant "comes with back pain and new diagnosis of AS that started in October." Claimant also awakened on January 16, 2019 in extreme pain and was unable to move his left leg. Claimant commented that it takes him about 90-120 minutes to "really get going" in the morning. On physical examination, Claimant had no tenderness in the lower back but exhibited tenderness in the SI joints. Dr. Kuhn recommended physical therapy for Claimant's AS condition.

18. On April 22, 2019 Claimant drafted an e-mail to Employer's District Manager Kylene O[Redacted]. Claimant stated he notified management the week of October 10, 2018 of his condition and produced the results of his chiropractic visit. In a follow-up May 15, 2019 e-mail to management Claimant stated he had repeatedly tried to educate Employer on his AS condition, but it has "fallen on deaf ears" and he would appreciate understanding of his condition.

19. On August 21, 2019 Claimant returned to Dr. Emig for an evaluation. Dr. Emig stated Claimant has AS that causes acute sacroiliitis with sclerotic change and acute edema as demonstrated on x-ray and MRI. There was no diagnosis of a symptomatic disc herniation or disc bulge. Dr. Emig noted Claimant has suffered severe lower back pelvic region pain since October 2018 that has not resolved with the use of Enbrel. He recommended bilateral SI joint injections.

20. On November 1, 2019 Dr. Caruso noted Claimant was concerned about the L4-5 disc bulge on the MRI. Dr. Caruso explained the MRI demonstrated no significant nerve impingement and he did not feel it was playing a role in Claimant's presentation. He remarked that Claimant's symptoms were consistent with an acute AS flare. Dr. Caruso commented that Enbrel improves Claimant's shooting lower back pain symptoms and recommended additional Enbrel treatment.

21. On November 21, 2019 Claimant visited Jeffrey Wunder, M.D, for an independent medical examination. Claimant denied any prior history of lower back pain. After reviewing Claimant's medical records and performing a physical examination, Dr. Wunder diagnosed Claimant with AS and long-standing back pain. Dr. Wunder noted AS is an autoimmune disease that causes inflammation of the bony structures of the spine. He remarked that "I have no evidence that a work-related injury ever occurred."

22. On July 10, 2020 Dr. Wunder issued an Addendum Report. Dr. Wunder explained that AS is a progressive congenital condition with no known cause. He noted that the symptoms are often mild and intermittent. They increase in severity with age. Dr. Wunder commented that Claimant also had associated conditions consisting of uveitis, iritis and plantar fasciitis. He remarked that the preceding conditions "commonly occur with [AS]. There is little doubt, therefore, that he has active ongoing [AS]."

23. Dr. Wunder recounted that Claimant visited Chiropractor Dr. Kiernan on October 10, 2018 and provided a detailed history of chronic lower back pain with an acute episode. Claimant notably reported a pain rating of 10/10 on the date. Dr. Wunder remarked that Claimant's verbal history was simply inconsistent with the medical records. Claimant told Dr. Wunder that he had no history of lower back pain, but the medical records described intermittent lower back pain for approximately 10 years. Claimant also reported that he had never woken up with a severe episode of lower back pain. The report was inconsistent with the November 2018 records of Dr. Goodall. Moreover, Claimant did not mention a work-related mechanism of injury to Dr. Goodall. Finally, Dr. Wunder noted that on January 25, 2019 Claimant saw Dr. Caruso for an evaluation of chronic lower back pain. Claimant again did not mention a work-related mechanism of injury. Instead, Claimant described the onset of symptoms in October 2018 "which would correlate with the report of Dr. Keirnan."

24. Dr. Wunder also remarked that "there is no evidence that [Claimant's] disc bulge was acute or related to lifting." He detailed that there was no surrounding inflammation or edema. Furthermore, there was no evidence that Claimant experienced any neurogenic pain. Moreover, the MRI did not reveal the compromise of any neurological structures and physical examinations over time did not show any neurological abnormalities.

25. On April 14, 2020 Claimant's counsel wrote to Dr. Kuhn inquiring whether Claimant's lower back disc herniation was the result of the work injury or from his AS. Dr. Kuhn's office responded by stating they were only treating Claimant for AS. Subsequently, Dr. Kuhn stated on July 27, 2020 that AS has different clinical factors than a herniated disc. However, Dr. Kuhn conceded she was only qualified to address Claimant's AS condition.

26. On August 5, 2020 the parties conducted the pre-hearing evidentiary deposition of Dr. Wunder. Dr. Wunder maintained that Claimant did not suffer a herniated disc while working for Employer and instead attributed his continuing lower back symptoms to AS. He explained that AS is associated with the genetic marker HLA-B27, causes chronic and gradually worsening inflammation of the spine and typically affects the SI joints. The pain starts as intermittent and becomes more frequent and severe over time. The pain is worse in the morning or with extended periods of inactivity. AS progresses to affect other parts of the body and can cause uveitis, iritis and plantar fasciitis. It is an autoimmune condition with a destructive inflammatory response. Dr. Wunder remarked that the condition has no causal relation to acute trauma, but the pain presentation can be confused with an acute back injury.

27. Dr. Wunder disagreed with the treating physicians that Claimant had a separate pain generator from a disc herniation based on the MRI. The imaging only revealed a minor disc bulge at L4-5, a minor L5-S1 disc protrusion and normal age-related findings. Furthermore, the medical records revealed that there were no consistent neurological findings on physical examination by Drs. Caruso or Emig. Dr. Kuhn's examinations also did not document any neurological findings. Finally, there was no evidence that Claimant's pain originated from the L4-5 disc bulge.

28. Ms. O[Redacted] testified at the hearing in this matter. She remarked that Claimant took several days off work in September or October 2018 after he was hit by a car. She noted that Claimant often complained of back issues prior to the November 1, 2018 lifting incident. Ms. O[Redacted] commented that Claimant's November 2, 2018 text message stating he overdid it and planned on visiting a provider was not filed as a Workers' Compensation claim because he had been complaining about his back pain for some time. Employer advised Claimant to take care of himself and provide updates. Ms. O[Redacted] commented that it was not until January 2019 that she learned Claimant had alleged an acute work injury.

29. On September 8, 2020 the parties conducted the post-hearing evidentiary deposition of Dr. Caruso. Dr. Caruso noted he is a third-year resident in Internal Medicine at the University of Colorado School of Medicine. The only medical records he reviewed were from Dr. Kuhn. He did not review any pre-injury records. Dr. Caruso explained that when he initially saw Claimant on January 25, 2020 his biggest concern was the left greater than right leg weakness. He noted that determining how Claimant's symptoms arose was not critical because "a story can be helpful at times, but in most cases it more leads you astray." Nevertheless, Dr. Caruso concluded that, within a reasonable degree of medical certainty, Claimant's lumbar disc bulges were not related to his AS condition. Instead, the disc bulges were caused by a work injury. He explained that Claimant's AS condition and lumbar injury were separate diagnoses. Nevertheless, Dr. Caruso remarked that it was medically possible that an individual could have overlapping symptoms from the two diagnoses of AS and bulging discs.

30. Dr. Caruso testified that Claimant was diagnosed with AS based on his MRI imaging. He agreed the L4-5 disc bulge did not show nerve compression. Dr. Caruso remarked that Claimant wanted a work up for his disc bulge because of persistent lower back pain. Claimant associated his symptoms with his disc bulge and not with his AS. However, Dr. Caruso had no opinion on the cause of Claimant's L4-5 disc bulge and could not state that his ongoing lower back pain was more consistent with an L4-5 bulge than AS. He acknowledged that Claimant's referred lower back pain began 13 years ago and is thus consistent with the presentation of AS. Dr. Caruso also remarked that a lack of rotation or mobility in the spine to start the morning is associated with AS and not a disc bulge. Regarding Claimant's presentation to chiropractor Dr. Keirnan in October 2018, he stated that 10/10 radiating lower back pain can be consistent with sciatica, a pinched nerve from a disc bulge or AS.

31. Claimant has failed to demonstrate that it is more probably true than not that he suffered a compensable lower back injury on November 1, 2018 and aggravated his lower back condition on January 16, 2019 during the course and scope of his employment with Employer. Initially, Claimant contends that while working for Employer on November 1, 2018 he suffered a lower back injury while lifting a case of chicken from a walk-in refrigerator. Claimant asserts that he aggravated his lower back symptoms while performing his job duties on January 16, 2019. However, Claimant's history of lower back pain, the medical records and the persuasive opinion of Dr. Wunder demonstrate that he did not likely suffer lower back injuries at work on November 1, 2018 and January 16, 2019. Instead, it is more likely than not that Claimant's lower back

symptoms are attributable to his AS condition that was documented for years prior to his alleged industrial injuries.

32. The medical records, Employer records and Claimant's e-mails suggest that Claimant did not suffer a lower back injury at work on November 1, 2018 or an aggravation on January 16, 2019. Initially, on October 10, 2018 Claimant visited Chiropractor Dr. Keirnan for an examination. Claimant primarily reported stabbing lower back pain. He remarked that the pain reached a 10/10 level and radiated down both legs. Claimant reported that he had suffered lower back pain on and off every two months for about 10 years. The records subsequent to the November 1, 2018 lifting incident are also not consistent with an acute lifting injury at work that caused a symptomatic disc bulge. Specifically, Claimant's first medical visit to Kaiser on November 5, 2018 did not document any history of a lifting injury. In fact, none of Claimant's initial visits with five different providers documented any lifting accident. Furthermore, on January 20, 2019 Claimant visited UC Health and reported dull back pain for 2-3 months that radiated from his upper back to left leg. Dr. Reno diagnosed Claimant with chronic and acute left-sided lower back pain with left-sided sciatica. Claimant did not identify any specific event that triggered his lower back symptoms. On a January 25, 2019 return to UC Health Claimant reported he first noticed his pain in October 2018 and saw a chiropractor. The preceding records suggest that Claimant suffered chronic lower back pain without an acute injury or aggravation as a result of his work activities for Employer.

33. Claimant's e-mails to Employer outlined his difficulties with his AS condition but did not document any lifting incidents at work. Specifically, on January 21, 2019 Claimant authored an e-mail to Mr. L[Redacted]. He explained that his "spine has now been damaged to the point where I am no longer physically able to walk. I will be speaking to surgeons today to examine the damage to my spine. I wanted to avoid surgery but now that I am almost completely paralyzed on my left side there may be no other option." On January 29, 2019 Claimant authored an e-mail to Employer regarding his chronic lower back pain. He remarked that he had notified management during the week of October 10, 2018 and disclosed the results of his chiropractor visit from the prior day. He also commented that he had an appointment in early November with Kaiser "because my pain had become greater than before." On April 22, 2019 Claimant drafted an e-mail to Ms. O[Redacted] and again stated he notified management the week of October 10, 2018 of his condition and presented the results of his chiropractic visit. In a follow-up May 15, 2019 e-mail Claimant commented he had repeatedly tried to educate Employer on his AS condition, but it has "fallen on deaf ears" and he would appreciate understanding of his condition. The preceding e-mails reflect Claimant's awareness of his chronic lower back symptoms, but do not suggest he suffered an injury or aggravation to his condition while performing his job duties for Employer. Finally, Ms. O[Redacted] remarked that Claimant took several days off work in September or October 2018 after he was hit by a car. She noted that Claimant often complained of back issues prior to the November 1, 2018 lifting incident. Ms. O[Redacted] commented that Claimant's November 2, 2018 text message stating he overdid it and planned to visit a provider was not filed as a Workers' Compensation claim because he had been complaining about his back pain for some time.

34. Dr. Wunder persuasively maintained that Claimant did not suffer an acute herniated disc while working for Employer and instead attributed his continuing lower back symptoms to AS. He explained that AS is associated with the genetic marker HLA-B27, causes chronic and gradually worsening inflammation of the spine and typically affects the SI joints. Dr. Wunder commented that Claimant also had other conditions consisting of uveitis, iritis and plantar fasciitis. He remarked that the preceding conditions “commonly occur with [AS].” He also noted that “there is no evidence that [Claimant’s] disc bulge was acute or related to lifting.” Dr. Wunder detailed that there was no surrounding inflammation or edema. Furthermore, there was no evidence that Claimant experienced any neurogenic pain. The MRI did not reveal the compromise of any neurological structures. The imaging only revealed a minor disc bulge at L4-5, a minor L5-S1 disc protrusion and normal age-related findings. Furthermore, the medical records revealed that there were no consistent neurologic findings on physical examination by Drs. Caruso or Emig. Dr. Kuhn’s examinations also did not document any neurological findings. Finally, Dr. Wunder noted there was no evidence that Claimant’s pain originated from the disc bulge.

35. In contrast, Dr. Caruso concluded that, within a reasonable degree of medical certainty, Claimant’s lumbar disc bulges were not related to his AS condition. Instead, the disc bulges were caused by a work injury. He explained that Claimant’s AS condition and lumbar injury were separate diagnoses. However, Dr. Caruso acknowledged that Claimant’s referred lower back pain began 13 years ago and is thus consistent with the presentation of AS. He also remarked that a lack of rotation or mobility in the spine to start the morning is associated with AS and not a disc bulge. Notably, the only medical records Dr. Caruso reviewed were from Dr. Kuhn. He did not review any pre-injury records. Finally, at his January 25, 2019 visit with Dr. Caruso Claimant did not mention a work-related mechanism of injury. As Dr. Wunder explained, Claimant described the onset of symptoms as October 2018 to Dr. Caruso “which would correlate with the report of Dr. Keirnan.”

36. The record reveals that the most likely explanation for Claimant’s ongoing back issues is his AS autoimmune condition. Claimant’s history of 10 years of intermittent back pain followed by a worsening beginning in early October 2018 with 10/10 radiating lower back pain, is consistent with Dr. Keirnan’s October 10, 2018 record and the movement of AS into the SI joints. Claimant’s medically documented presentation throughout the records was consistent with AS. His back symptoms were more severe in the morning after a night of sleep and improved with movement throughout the day. His radiating lower back symptoms improved with AS medication Enbrel. Claimant’s MRI and physical examinations with treating physicians were consistent with AS. He reported back issues to Employer well before any November lifting incident and requested understanding of the difficulties he was having with his AS condition in e-mails. Based on Claimant’s history of lower back pain, the medical records and the persuasive opinion of Dr. Wunder, Claimant did not likely suffer lower back injuries at work on November 1, 2018 and January 16, 2019. Accordingly, Claimant’s request for Workers’ Compensation benefits is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the “Workers’ Compensation Act of Colorado” (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers’ Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers’ Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers’ Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge’s factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. See *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson*, W.C. No. 4-589-645 (ICAO, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.*, 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner*, 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). *Soto-Carrion v. C & T Plumbing, Inc.*, W.C. No. 4-650-711 (ICAO, Feb. 15, 2007); *David Mailand v. PSC Industrial Outsourcing LP*, W.C. No. 4-898-391-01, (ICAO, Aug. 25, 2014).

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. See *Cotts v. Exempla, Inc.*, W.C. No. 4-606-563 (ICAO, Aug. 18, 2005). Rather, the symptoms could represent the “logical and recurrent consequence” of the pre-existing condition. See *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAO, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs*, W.C. No. 4-745-712 (ICAO, Oct. 27, 2008), simply because a claimant’s symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that “correlation is not causation,” and merely because a coincidental correlation exists between the claimant’s work and his symptoms does not mean there is a causal connection between the claimant’s injury and work activities.

7. The provision of medical care based on a claimant’s report of symptoms does not establish an injury but only demonstrates that the claimant claimed an injury. *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020). Moreover, a referral for medical care may be made so that the respondent would not forfeit its right to select the medical providers if the claim is later deemed compensable. *Id.* Because a physician provides diagnostic testing, treatment, and work restrictions based on a claimant’s reported symptoms does not mandate that the claimant suffered a compensable injury. *Fay v. East Penn manufacturing Co., Inc.*, W.C. No. 5-108-430-001 (ICAO, Apr. 24, 2020); cf. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337, 1339 (Colo. App. 1997) (“right to workers’ compensation benefits, including medical payments, arises only when an injured employee initially establishes, by a preponderance of the evidence, that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment”). While scientific evidence is not dispositive of compensability, the ALJ may consider and rely on medical opinions regarding the lack of a scientific theory supporting compensability when making a determination. *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983); *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020).

8. As found, Claimant has failed to demonstrate by a preponderance of the evidence that he suffered a compensable lower back injury on November 1, 2018 and aggravated his lower back condition on January 16, 2019 during the course and scope of his employment with Employer. Initially, Claimant contends that while working for Employer on November 1, 2018 he suffered a lower back injury while lifting a case of chicken from a walk-in refrigerator. Claimant asserts that he aggravated his lower back symptoms while performing his job duties on January 16, 2019. However, Claimant’s history of lower back pain, the medical records and the persuasive opinion of Dr. Wunder demonstrate that he did not likely suffer lower back injuries at work on November 1, 2018 and January 16, 2019. Instead, it is more likely than not that Claimant’s lower back symptoms are attributable to his AS condition that was documented for years prior to his alleged industrial injuries.

9. As found, the medical records, Employer records and Claimant’s e-mails suggest that Claimant did not suffer a lower back injury at work on November 1, 2018 or an aggravation on January 16, 2019. Initially, on October 10, 2018 Claimant visited

Chiropractor Dr. Keirnan for an examination. Claimant primarily reported stabbing lower back pain. He remarked that the pain reached a 10/10 level and radiated down both legs. Claimant reported that he had suffered lower back pain on and off every two months for about 10 years. The records subsequent to the November 1, 2018 lifting incident are also not consistent with an acute lifting injury at work that caused a symptomatic disc bulge. Specifically, Claimant's first medical visit to Kaiser on November 5, 2018 did not document any history of a lifting injury. In fact, none of Claimant's initial visits with five different providers documented any lifting accident. Furthermore, on January 20, 2019 Claimant visited UC Health and reported dull back pain for 2-3 months that radiated from his upper back to left leg. Dr. Reno diagnosed Claimant with chronic and acute left-sided lower back pain with left-sided sciatica. Claimant did not identify any specific event that triggered his lower back symptoms. On a January 25, 2019 return to UC Health Claimant reported he first noticed his pain in October 2018 and saw a chiropractor. The preceding records suggest that Claimant suffered chronic lower back pain without an acute injury or aggravation as a result of his work activities for Employer.

10. As found, Claimant's e-mails to Employer outlined his difficulties with his AS condition but did not document any lifting incidents at work. Specifically, on January 21, 2019 Claimant authored an e-mail to Mr. L[Redacted]. He explained that his "spine has now been damaged to the point where I am no longer physically able to walk. I will be speaking to surgeons today to examine the damage to my spine. I wanted to avoid surgery but now that I am almost completely paralyzed on my left side there may be no other option." On January 29, 2019 Claimant authored an e-mail to Employer regarding his chronic lower back pain. He remarked that he had notified management during the week of October 10, 2018 and disclosed the results of his chiropractor visit from the prior day. He also commented that he had an appointment in early November with Kaiser "because my pain had become greater than before." On April 22, 2019 Claimant drafted an e-mail to Ms. O[Redacted] and again stated he notified management the week of October 10, 2018 of his condition and presented the results of his chiropractic visit. In a follow-up May 15, 2019 e-mail Claimant commented he had repeatedly tried to educate Employer on his AS condition, but it has "fallen on deaf ears" and he would appreciate understanding of his condition. The preceding e-mails reflect Claimant's awareness of his chronic lower back symptoms, but do not suggest he suffered an injury or aggravation to his condition while performing his job duties for Employer. Finally, Ms. O[Redacted] remarked that Claimant took several days off work in September or October 2018 after he was hit by a car. She noted that Claimant often complained of back issues prior to the November 1, 2018 lifting incident. Ms. O[Redacted] commented that Claimant's November 2, 2018 text message stating he overdid it and planned to visit a provider was not filed as a Workers' Compensation claim because he had been complaining about his back pain for some time.

11. As found, Dr. Wunder persuasively maintained that Claimant did not suffer an acute herniated disc while working for Employer and instead attributed his continuing lower back symptoms to AS. He explained that AS is associated with the genetic marker HLA-B27, causes chronic and gradually worsening inflammation of the spine and typically affects the SI joints. Dr. Wunder commented that Claimant also had other

conditions consisting of uveitis, iritis and plantar fasciitis. He remarked that the preceding conditions “commonly occur with [AS].” He also noted that “there is no evidence that [Claimant’s] disc bulge was acute or related to lifting.” Dr. Wunder detailed that there was no surrounding inflammation or edema. Furthermore, there was no evidence that Claimant experienced any neurogenic pain. The MRI did not reveal the compromise of any neurological structures. The imaging only revealed a minor disc bulge at L4-5, a minor L5-S1 disc protrusion and normal age-related findings. Furthermore, the medical records revealed that there were no consistent neurologic findings on physical examination by Drs. Caruso or Emig. Dr. Kuhn’s examinations also did not document any neurological findings. Finally, Dr. Wunder noted there was no evidence that Claimant’s pain originated from the disc bulge.

12. As found, in contrast, Dr. Caruso concluded that, within a reasonable degree of medical certainty, Claimant’s lumbar disc bulges were not related to his AS condition. Instead, the disc bulges were caused by a work injury. He explained that Claimant’s AS condition and lumbar injury were separate diagnoses. However, Dr. Caruso acknowledged that Claimant’s referred lower back pain began 13 years ago and is thus consistent with the presentation of AS. He also remarked that a lack of rotation or mobility in the spine to start the morning is associated with AS and not a disc bulge. Notably, the only medical records Dr. Caruso reviewed were from Dr. Kuhn. He did not review any pre-injury records. Finally, at his January 25, 2019 visit with Dr. Caruso Claimant did not mention a work-related mechanism of injury. As Dr. Wunder explained, Claimant described the onset of symptoms as October 2018 to Dr. Caruso “which would correlate with the report of Dr. Keirnan.”

13. As found, the record reveals that the most likely explanation for Claimant’s ongoing back issues is his AS autoimmune condition. Claimant’s history of 10 years of intermittent back pain followed by a worsening beginning in early October 2018 with 10/10 radiating lower back pain, is consistent with Dr. Keirnan’s October 10, 2018 record and the movement of AS into the SI joints. Claimant’s medically documented presentation throughout the records was consistent with AS. His back symptoms were more severe in the morning after a night of sleep and improved with movement throughout the day. His radiating lower back symptoms improved with AS medication Enbrel. Claimant’s MRI and physical examinations with treating physicians were consistent with AS. He reported back issues to Employer well before any November lifting incident and requested understanding of the difficulties he was having with his AS condition in e-mails. Based on Claimant’s history of lower back pain, the medical records and the persuasive opinion of Dr. Wunder, Claimant did not likely suffer lower back injuries at work on November 1, 2018 and January 16, 2019. Accordingly, Claimant’s request for Workers’ Compensation benefits is denied and dismissed.

ORDER

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

Claimant’s request for Workers’ Compensation benefits is denied and dismissed.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at <http://www.colorado.gov/dpa/oac/forms-WC.htm>.*

DATED: November 17, 2020.

DIGITAL SIGNATURE:


Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- I. Did Respondents timely deny the SI fusion surgery as proposed by Dr. Barker?
- II. If not, is the proposed surgery deemed authorized by operation of law?
- III. If not deemed authorized by operation of law, is the proposed surgery reasonable, necessary, and related to Claimant's admitted work injury?

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

Claimant's Prior Admitted Claim

1. Claimant had a prior workers' compensation to his lumbar spine with a date of injury of February 3, 2016, insurance claim No. 001834016426-WC-01, W.C. No. 5-008-600. Claimant received an L5-S1 fusion, and reached MMI in 2018. This claim currently remains open for post-MMI maintenance care.

The Work Injury at Issue / Treatment by ATPs

2. Claimant served as a cashier for Employer, and has served in that capacity on and off for 5 or 6 years. He sustained a new, compensable work-injury to his lumbar spine on December 18, 2019 when a rolling chair slid from underneath him as he was trying to sit down.
3. Claimant presented to Lincoln County Hospital on December 23, 2019. Brianna Fox, M.D., noted the 2016 injury and fusion, and that Claimant was under the care of Dr. Bissell for chronic pain. She noted, "Today, he reports that he was at work on 12/18 and he works as a cashier sitting down. He reports that the rolling chair rolled and moved away when he went to sit down and he ended up landing on his tailbone. He states that since then he has had pain 7 out of 10 and his chronic pain has been exacerbated. He reports that he has pain that shoots up and shoots down his left leg, he reports that he has this pain at baseline, but it is much worse than baseline." (Ex.4, p. 52).
4. Dr. Fox issued work restrictions and prescribed medications. An x-ray of the lumbar spine was compared to one performed September 14, 2017. It showed, "There are postoperative changes from remote L5/S1 fusion. Vertebral alignment is normal. There has been interval loss of intervertebral disc height at L4/L5. There is lumbar facet degenerative change. No fracture is evident. Soft tissues

are unremarkable.” (Ex. 4, p. 54). Dr. Fox referred Claimant return to Dr. John Barker, who treated him for the 2016 injury.

5. X-rays of claimant’s lumbar spine were taken on March 5, 2020. The x-rays showed a solid fusion at L5-S1 with no osseous fractures, wedge compression fractures and some degenerative changes at L4-5. (Ex. D, p. 30).
6. Claimant saw Dr. Barker on March 5, 2020. Dr. Barker reported,

Evidently a rolling chair slid out from under him and he suffered an axial load to his lumbar spine. He had baseline back pain that he said was about a 7 out of 10 before the injury. Since the injury, his back pain is now a 9 out of 10. He is also developed [sic] new onset left leg pain that radiates down the left buttock, left posterior lateral thigh, left leg stops at the mid calf area. He did not have the left leg pain before the fall in December, 2019. (Ex. 3, p. 33).

Dr. Barker noted the prior fusion was “solid,” but raised the possibility of a L4-5 disc injury. He recommended a MRI. *Id* at 34.

7. Jean T[Redacted] is the insurance adjuster assigned to the December 18, 2019 injury. She is employed by Gallagher Bassett Services, the third party administrator for Insurer, Safety National Casualty Corporation. She filed a General Admission of Liability on behalf of Insurer on March 24, 2020. (Ex. 5, p. 66).
8. On March 27, 2020, Dr. Barker reviewed Claimant’s MRI. He stated, “The MRI showed a solid fusion at L5-S1 with no residual stenosis. The L4-5 and L3-4 levels are normal. There is no disc desiccation, there are no disc herniations and there is no stenosis...I told him that there is no surgery needed and there is no damage to his adjacent levels. I think his fall exacerbated his pre-existing chronic pain. This hopefully will calm down with time and therapy.” (Ex. D, p. 24).
9. On May 13, 2020, Dr. Barker reported he spoke with Claimant on the phone and reviewed the MRI findings. Dr. Barker doubted he was dealing with a L5-S1 pseudoarthrosis and noted, “Since the pain is more in the left lumbosacral it may be actually an SI joint issue and not a spine issue. I told him I would order a left SI joint injection at Lincoln Community Hospital. If that gives him relief then we will have firmed up the diagnosis. If it gives him no relief then I may try an L4-L5 facet injection.” (Ex. 3, p. 40).
10. On July 29, 2020, Dr. Barker reported,

Christopher returns and he is still having more and more pain in his left lumbosacral region. He had a left SI joint injection on June 25 and that gave him about a week’s worth of partial relief. It helped his pain but did not completely resolve it. His pain has now

returned to baseline and it is quite severe. He is ambulating with a cane.” *Id* at 47.

11. Dr. Barker noted an antalgic gait favoring the left side, as well as a positive Faber test on the left. Dr. Barker elaborated,

The patient’s most recent injury appears to have flared up his left SI joint. He had temporary relief from his SI joint injection. He is still having problems with activities of daily living secondary to his pain. We talked about a second injection versus operative intervention. Because he got such limited long-term relief with his SI joint injection he is interested in surgical intervention. We will try to proceed with a left SI joint fusion....Patient voiced understanding and would like to proceed with operative intervention. *Id*.

Original, Incorrect Request for Surgery by Dr. Barker

12. On August 11, 2020, Dr. Barker’s office faxed a request for authorization to perform surgery to Eugino A[Redacted] at fax No. 866-509-8358 under the claim number No. 001834016426. [erroneously, for the 2016 claim]. (Ex. D, p. 14).
13. This 8/11/2020 request for authorization was also sent to the incorrect fax number and adjuster.
14. Jean T[Redacted] is the correct and current adjuster for the 12/18/2019 claim. Ms. T[Redacted]’s fax number is 303-796-9498. The insurer’s claim number for this claim is 001834-020313-WC-01. *Id*.
15. Ms. Jean T[Redacted] became aware of this requested surgery while reviewing medical records from another treatment provider.
16. Ms. T[Redacted] had contacted Dr. Barker’s office prior to the request for authorization to correct the claim number and adjuster information, as Dr. Barker’s office had been submitting medical bills and requests under the incorrect claim number and adjuster. (Ex. F p. 59). Ms. T[Redacted] then contacted Dr. Barker’s office in order to obtain the request for authorization for surgery. (Ex. C, p. 11; Ex. F, p. 60).

Revised Request for Surgery by Dr. Barker

17. Dr. Barker’s office then faxed the request for authorization to Jean T[Redacted] on August 20, 2020. The fax sheet documented the proper corrections to the claim number and fax number for Ms. T[Redacted]. (Ex. D, p. 14).
18. At the top of the request for authorization, the fax confirms it went through on August 20, 2020. *Id*.
19. A fax to Gallagher Bassett goes through a computer system process. The fax goes to a central location. The faxes are then scanned and attached to each adjuster’s email inbox. (Ex. F, p. 58).

20. Per the adjuster notes (and Ms. T[Redacted]'s testimony, *infra*), Ms. T[Redacted] did not personally receive the request for authorization until August 21, 2020. (Ex. F, pp. 57-58; Ex. C pg. 12).

21. Ms. T[Redacted] testified via deposition on October 12, 2020. Pertinent passages read as follows:

Q. And did Dr. Barker recommend a surgery?

A. Yes.

Q. And did you receive a written request for authorization for this surgery?

A. Yes, I did receive a written request for the surgery.

Q. Can you walk me through the timeline of when you became aware of the surgery request to when you received it?

A. Yes. I received it and became aware of the request for surgery on August 21st, 2020.

Q. Did you have to contact Dr. Barker's office regarding this request for surgery?

A. I had seen from another office that Christopher said he was going to have surgery, and I hadn't received a request, so I contacted Dr. Barker's office.

Q. And did you request a copy of the request for authorization?

A. I did.

Q. And did he fax this information to you?

A. Yes, the surgery request was faxed.

Q. And what date did you receive that fax?

A. On August 21st, 2020.

Q. So on the request for authorization, it documents at the top that it says August 20th as the sent date. What is the procedure with Gallagher Bassett and their faxes? Or when they come in, what happens with them?

A. So any fax that is sent to Gallagher Bassett Denver office, there is one fax number. It goes to a central fax location. And the Gallagher Bassett employees at that location then scan those faxes and attach them into each adjuster/resolution manager's e-mails.

Q. And regarding the fax you received from Dr. Barker, is the e-mail you received with this fax dated August 21st, 2020?

A. I don't have the fax pulled up. I just know it was placed into my in-box for me to see and into the claim file on August 21st, 2020.

Q. What did you do following receipt of the request for authorization?

A. I did a referral for Rule 16 review of the surgical request.

Q. And what was your due date with your understanding of the Rule 16?

A. My understanding was that we had seven business days from receipt of the request. *And since I received it on the 21st, my understanding was that I had until September 1st to provide that response to the doctor.*

Q. And was the surgery denied on September 1st, 2020?

A. Correct. (Jean T[Redacted] depo tr. pp. 5-7) (emphasis added).

22. This internal fax procedure was later confirmed:

Q. Okay. So if I understand your testimony, when Dr. Barker's office faxed that authorization for surgery -- request for authorization for surgery on August 20, it was faxed to Gallagher Bassett on August 20 but didn't actually make it to your in-box until the 21st. Is that accurate?

A. That is correct. (Jean T[Redacted] depo tr. p. 14).

23. Ms. T[Redacted] received the Rule 16-7 medical record review from Dr. Brown on September 1, 2020. Respondents' Ex. C, pg. 13.

24. Respondents' Counsel sent Dr. Barker a letter denying the requested lumbar fusion on September 1, 2020. Respondents' Ex. a, pgs. 3-4.

Dr. Brown performs Rule 16-7 Review

25. Dr. Neil Brown performed the W.C.R.P. 16-7 medical record review at the request of Respondents. The report was issued on August 28, 2020. Respondents' (Ex. E pp. 38-40).

26. After review of Claimant's medical records, Dr. Brown diagnosed Claimant with, "Left-sided lumbosacral radiculopathy: pain generator not well established." *Id* at 40.

27. Dr. Brown also testified at hearing. He stated that Claimant's presentation was not necessarily consistent with sacroiliitis. This was because it was atypical for a person to report radiating pain past the knee. This was more likely to be an S1 nerve root irritation. Dr. Brown noted Dr. Barker likely originally noticed this because he had recommended an epidural steroid injection on March 27, 2020, but this was never performed.

28. Dr. Brown testified that epidural steroid injections assist in establishing a pain generator. Dr. Brown testified Claimant had not complained of sacroiliac joint tenderness, which is inconsistent with sacroiliitis.

29. Dr. Brown testified there are five recommended tests during an examination to assist in diagnosing sacroiliitis. In order to have a firm diagnosis of sacroiliitis, at least three of these five tests should be positive. Dr. Brown testified Claimant did not have three documented positive tests. Additionally, in order to recommend a fusion, the guidelines require six months of failed conservative treatment. Dr. Brown testified claimant did not have six months of failed conservative care. Dr. Brown concluded Claimant did not meet the criteria to be diagnosed with sacroiliitis.

30. Dr. Brown concluded, "He has not had any epidural steroid treatment to see if that would be a potential cause of his symptoms...Likewise, he has no documented tenderness over the left sacroiliac joint which would be necessary to be consistent with left-sided sacroiliitis...The diagnosis for sacroiliitis has not been well established...As a consequence, I would not recommend a left-sided sacroiliac joint fusion at this time. I would recommend further conservative management with therapy and I would recommend a pain management consultation for potential injection procedures for possible sacroiliitis...EMG and nerve conduction studies may help in the diagnosis of the radicular symptoms." *Id.*

31. Dr. Brown opined that Claimant did not meet the requirements to undergo a fusion per the Colorado Medical Treatment Guidelines, and was not reasonably necessary to the December 18, 2019 work injury.

Stephanie Moore Testifies at Hearing

32. Stephanie Moore of Dr. Barker's office, Rocky Mountain Spine Clinic, testified at the hearing. She is Dr. Barker's medical assistant, and her job duties include submitting requests for authorization of surgery.
33. Ms. Moore testified about the request for authorization of surgery she submitted on August 11, 2020. She testified that Claimant's Exhibit 1, p. 3 is the fax cover sheet for that request, and p. 2 is the confirmation sheet that shows the fax was transmitted at 2:09 p.m. on August 11, 2020. She testified that 23 pages of Claimant's office notes accompanied the August 11 fax. Those pages are stamped at the top right of each sheet beginning with "P.2" on Exhibit page 3. Ms. Moore testified that Exhibit 1 pages 4-25 were faxed with the cover sheet dated August 11, 2020. As noted on the fax cover sheet, Ms. Moore confirmed surgery was at that time originally scheduled for August 28, 2020.
34. Ms. Moore testified she originally understood the addressee of the fax, Eugino A[Redacted], was the adjuster handling Claimant's 2019 case. She testified she received no response from Mr. A[Redacted], but did receive a phone call from a different adjuster named Jean T[Redacted] on August 20, 2020. Ms. Moore testified Ms. T[Redacted] stated she was the adjuster on the 2019 case, and gave Ms. Moore the correct claim number and the fax number to use for submitting the authorization request.
35. Referring to Claimant's Exhibit 1, p. 2, Ms. Moore testified she resubmitted the authorization request on August 20, 2020, at 12:17 p.m. [Part of the "Aug. 20" date stamp is obscured by a "sent to opposing counsel" stamp; however, Ms. Moore testified she reviewed the original in her computer file and it lists August 20 as the date of transmission. Respondents concur that this fax was submitted on August 20, 2020].
36. Ms. Moore testified Claimant's Exhibit 1, p. 2 was the fax cover sheet, and all pages behind it (in Exhibit 1) accompanied the fax. She testified this fax number is the one Ms. T[Redacted] gave to her. [The ALJ notes the claim number on this fax cover sheet matches the claim number in the General Admission dated March 24, 2020]. As confirmed in the fax cover sheet, there was a new surgery date of September 11, 2020. Ms. Moore explained this surgery date was moved back again in order to give Ms. T[Redacted] more time to review the request for surgical authorization.
37. Ms. Moore testified that on September 1, 2020, she received a written denial of the request for surgical authorization. She identified it as Claimant's Exhibit 2. Ms. Moore confirmed that in light of the denial, the recommended surgery has still not occurred.

Claimant Testifies at Hearing

38. Claimant testified at hearing. He described the mechanism of injury, and the pain he felt upon impact. He testified that prior to the present injury, he experienced chronic pain in his low back, but managed it with medications and was able to continue working for Employer. He testified he experienced new symptoms as a result of the fall. He described the pain as “white hot,” “stabbing,” and “completely constant.” He explained the pain is now in the left side of his low back, whereas before it was just in the “low back,” presumably the center of his back. Claimant testified he “absolutely” wants to have the SI fusion surgery because “any sort of pain relief is better than none.”
39. Claimant testified he did not undergo any therapy. He stated he did not feel like it would help and would exacerbate his pain. Claimant testified he did not undergo any epidural steroid injections, facet injections, an EMG or a psychological evaluation. Claimant testified additional injections were offered, but he declined and wanted to proceed to surgery.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers’ Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. §8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers’ compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. §8-43-201, C.R.S.

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

C. Assessing weight, credibility and sufficiency of evidence in a workers’ compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and

draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

D. Claimant is not a pivotal player in this case. Nonetheless, the ALJ finds that he provided accurate symptomology to his medical providers throughout the process, and testified sincerely and credibly at hearing. Ms. Moore testified sincerely and accurately at hearing. The ALJ likewise finds that Ms. T[Redacted] testified thoroughly, sincerely, and credibly during her deposition. In the final analysis, the outcome of this case does not rest upon weighing the relative credibility of the witnesses; rather, this is a matter of legal analysis.

E. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55, P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968). The ALJ finds that Dr. Brown has rendered his opinions based upon sound medicine, and has testified sincerely, credibly, and consistently with his written opinions. However, for reasons outlined *infra*, the ALJ will not arrive at the point of addressing the merits of Dr. Brown's Rule 16-7 review.

F. Further, courts are to be "mindful that the Workmen's Compensation Act is to be liberally construed to effectuate its humanitarian purpose of assisting injured workers." *James v. Irrigation Motor and Pump Co.*, 503 P.2d 1025 (Colo. 1972). To that end, the ALJ notes that to adopt Respondents' interpretation of Rule 16-7 would serve to defeat the above stated humanitarian purpose, by unduly delaying medical care, due solely to certain bureaucratic, intramural inefficiencies, or even outright mistakes. When an ATP makes a request for treatment on behalf of an injured worker, expectations are that such request will be either timely granted, or timely denied. A Claimant may thereby contemplate his next step in the process. Interpretation of such strictures weighs heavily in favor of Claimants.

W.C.R.P. 16-7 Text

G. W.C.R.P. 16-7 "Denial of a request for prior authorization" provides;

(A) If an ATP requests prior authorization and indicates in writing, including reasoning and relevant documentation, that he or she believes the requested treatment is related to the admitted workers' compensation claim, the insurer cannot deny solely for relatedness without a medical opinion as required by section 16-7(B). The medical review, IME report, or report from an ATP that

addresses the relatedness of the requested treatment to the admitted claim may precede the prior authorization request, unless the requesting physician presents new evidence as to why this treatment is now related.

(B) The payer may deny a request for prior authorization for medical or non-medical reasons. Examples of non-medical reasons are listed in section 16-11(B)(1). If the payer is denying a request for prior authorization for medical reasons, the payer shall, within seven (7) business days of the completed request:

- (1) Have all the submitted documentation under section 16-6(E) reviewed by a “physician provider” as defined in section 16-3(A)(1)(a), who holds a license and is in the same or similar specialty as would typically manage the medical condition, procedures, or treatment under review. The physician providers performing this review shall be Level I or Level II accredited. In addition, a clinical pharmacist (Pharm.D.) as defined by section 16-3(A)(1)(b)(xvi) may review prior authorization requests for medications without having received Level I or Level II accreditation.
- (2) After reviewing all the submitted documentation and other documentation referenced in the prior authorization request and available to the payer, the reviewing provider may call the requesting provider to expedite communication and processing of prior authorization requests. However, the written denial or approval still needs to be **completed** within the seven (7) business days specified under this section.
- (3) Furnish the provider and the parties with a written denial that sets forth the following information:
 - (a) An explanation of the specific medical reasons for the denial, including the name and professional credentials of the person performing the medical review and a copy of the medical reviewer's opinion.
 - (b) The specific cite from the Medical Treatment Guidelines, when applicable;
 - (c) Identification of the information deemed most likely to influence the reconsideration of the denial when applicable; and
 - (d) Documentation of response to the provider and parties. (Emphasis added).

WCRP 16-7, as Applied

H. W.C.R.P. 16-7 refers to a “payer.” That term is defined in W.C.R.P. 16-2(P) as: “...an insurer, self-insured employer, or **designated agent(s)** responsible for payment of medical expenses. Use of agents, including but not limited to Preferred Provider Organizations (PPO) networks, bill review companies, Third Party Administrators (TPAs), and case management companies, **shall not relieve** the self-insured employer or insurer from their legal responsibilities for compliance with these Rules.” (emphasis added).

I. The GAL filed on March 24, 2020 indicates it was filed by “Safety National Casualty Corp. c/o Gallagher Bassett Services.” Ms. T[Redacted] of Gallagher Bassett Services testified she is a “Senior Resolution Manager” and is handling Claimant’s claims. The ALJ concludes Gallagher Bassett Services is the third party administrator (“TPA”) for Safety National Casualty Corporation. **Gallagher Bassett Services** is, therefore, the “**payer**” for purposes of W.C.R.P. 16-7, and the ALJ so finds.

J. Respondents argue that since she was the adjuster specifically assigned to the case, Ms. T[Redacted] - and *only* Ms. T[Redacted] - can assume the role of “payer”. The ALJ cannot concur. To adopt this interpretation would not only nullify the concept of *respondeat superior*, it would turn the entire concept of *agency* on its ear. In effect, any third party administrator – such as here – could avoid the strictures of Rule 16-7 by simply allowing its individual agents to take vacations, or extended medical leave, or even retire, and have Rule 16-7 requests remain in their personal inbox for...how long exactly? For that matter, Insurers could simply chronically understaff, knowing they get a free pass until such time as the assigned agent actually gets his/her personal hands on the request. This cannot be what the Rule contemplates.

K. The ALJ hastens to add here, however, that Ms. T[Redacted] acted in good faith in her own interpretation of her obligations. She testified sincerely, and consistently therewith. The additional irony here is that Claimant’s ATP (through his own agents) erroneously submitted the original Rule 16-7 request. Ms. T[Redacted] actually played a salutary role in cleaning up that mess. There is no evidence of bad faith on the part of Respondents in this instance, nor does the ALJ so infer. Respondents are not morally *culpable*; they are merely *liable*.

L. Whether there might *ever* be a case that might excuse the strict deadlines imposed by Rule 16-7 [widespread civil unrest, natural disaster, acts of terror, sabotage, or the like], this is not such a case. Ms. T[Redacted]’s obligation was to comply with Rule 16-7 upon receipt *by Gallagher Bassett* (on August 20), and not when she pulled it out of her inbox the next day. Even after getting it a day late, due to Respondents’ own internal procedural inefficiencies, she had time to comply. Her Response was due August 31, 2020. Instead, she mistakenly thought she had an extra day to deny this claim, and she then denied it for medical reasons on September 1, 2020.

The Remedy

M. W.C.R.P. 16-7(E) provides that; “Failure of the payer to timely comply in full with section 16-7(A), (B), or (C) **shall be deemed** authorization for payment of the requested treatment *unless* the payer has scheduled an independent medical examination (IME) and notified the requesting provider of the IME within the time prescribed for responding set forth in section 16-7(B)...” (emphasis added). Respondents failed to file an appropriate response within the 7-day window. The ALJ finds and concludes, as a matter of law, that the request for SI fusion surgery by Dr. Barker is deemed authorized.

Medical Benefits

N. Under different circumstances, the ALJ would weigh the merits of Dr. Barkers’ request against Dr. Brown’s Rule 16 analysis. Perhaps the pain generator has not been identified adequately. Conservative measures might prove to be the better choice. Claimant might not be happy with the end result of the surgery; he might even be worse off. However, Claimant has the procedural kill shot here, and he wants this surgery. The surgery has been deemed authorized by operation of law, and Claimant may now proceed with it.

ORDER

It is therefore Ordered that:

1. The left SI joint fusion surgery recommended by Dr. Barker is authorized. Respondents shall pay for the surgery, along with all reasonable and necessary post-surgical treatment.
2. Respondents shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.
3. All matters not determined herein are reserved for future determination.

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

petition to review form at: <http://www.colorado.gov/dpa/oac/forms-WC.htm>. *In addition, it is recommended that you send a copy of your Petition to Review to the Colorado Springs OAC via email at oac-csp@state.co.us.*

DATED: November 17, 2020

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUE

1. Whether Claimant was an "employee" of Employer within the meaning of § 8-40-202 (a)(2), C.R.S., on July 7, 2020.

FINDINGS OF FACT

1. Claimant is a 21-year-old man who was injured when he fell from a roof while on a sales appointment for Employer on or about July 7, 2020. Employer is a home improvement company that sells roofs, windows, and other home improvement services.
2. On July 10, 2020, Claimant's father sent a letter for Employer advising Employer that Claimant had been injured while performing a roof inspection as part of a sales call for Employer. Claimant's father requested that Employer file a Workers' Compensation claim with Insurer. (Ex. 1).
3. On July 31, 2020, Respondents filed a Notice of Contest in which it asserted Claimant's injuries were "not work-related" and that Claimant is an independent contractor. (Ex. B).

"The 3508 Direct Seller Agreement"

4. On September 9, 2019, Claimant participated in an interview with representatives of Employer. At the conclusion of the interview, Employer presented Claimant signed a contract with Employer and various other documents.
5. On September 9, 2019, Claimant signed a "3508¹ Direct Seller Agreement" with Employer ("3509 Agreement"). Respondents' documentation alternatively refers to Claimant's position as a "Direct Seller" and "Sales Representative." Under the 3508 Agreement, Claimant agreed to "solicit prospective customers for the purchase of [Employer] products and services." (Ex. C).
6. The 3508 Agreement includes the following "Termination" provisions:

Section 4. Termination of this Agreement. (A) Services provided for under this Agreement may be terminated AT WILL by either Company or Direct Seller. (B) Notwithstanding the foregoing, this Agreement shall automatically terminate upon the occurrence of any of the following events: (i) the adjudication of bankruptcy, the insolvency, or cessation of the business of Company, (ii) the commission of an act of misfeasance or malfeasance by Direct Seller, (iii) the breach of any provision of this Agreement by Direct Seller, or (iv) the death of Direct Seller. (C) Upon

¹ "3508" is a reference to Internal Revenue Code § 3508.

termination or expiration of this Agreement for any reason, Direct Seller understands that any and all commissions payable to him at that time will be paid, as reasonably possible, in accordance with Company's next scheduled payroll after the job is fully installed and completed.

(Ex. C, § 4)

7. The 3508 Agreement provides:

Direct Seller agrees and understands that by virtue of Internal Revenue Code §3508, Direct Seller shall be considered a direct seller and shall not be treated as an employee of Company with respect to the services performed hereunder for federal or state tax purposes. Direct Seller shall be considered a direct seller or independent contractor and neither federal, state, local income, unemployment, nor payroll tax of any kind shall be paid by Company on behalf of Direct Seller. Direct Seller understands that Direct Seller is responsible to pay, according to law, Direct Seller's income taxes. Direct Seller may be liable for self-employment taxes, Social Security taxes, and other taxes, to be paid by the Direct Seller according to law. Because Direct Seller is engaged in his/her own business, Direct Seller is not eligible for, and shall not participate in, any employer pension, health, or other fringe benefit plan of Company. Company shall not be liable to Direct Seller for any expenses paid or incurred by Direct Seller unless otherwise agreed to in writing.

(Ex. C, § 3.3).

8. The 3508 Agreement includes the following provision, in all capitalized letters and bold:

DIRECT SELLER AGREES THAT HE WILL NOT, AT ANY TIME DURING OR FOLLOWING HIS/HER RELATIONSHIP WITH COMPANY, CONTEST THIS SECTION AND THIS UNDERSTANDING BETWEEN THE PARTIES, NOR WILL DIRECT SELLER CLAIM THAT HE IS ENTITLED TO UNEMPLOYMENT COMPENSATION OR OTHER BENEFITS ARISING FROM HIS/HER RELATIONSHIP WITH COMPANY. DIRECT SELLER FURTHER AGREES THAT IF HE VIOLATES THIS SECTION AND THIS PROMISE, UPON WHICH COMPANY IS RELYING IN ENGAGING DIRECT SELLER, DIRECT SELLER WILL BE IN BREACH OF THIS AGREEMENT AND WILL PAY TO COMPANY LIQUIDATED DAMAGES OF \$500 PER DAY FOR EACH DAY WHICH DIRECT SELLER IS IN BREACH OF THESE COVENANTS AS WELL AS COMPANY'S REASONABLE ATTORNEY'S FEES IN DEFENDING THIS RELATIONSHIP TO ANY STATE OR FEDERAL AGENCY DUE TO DIRECT SELLER'S ACTIONS.

(Ex. C, § 3.3).

9. Section 3.2 of the 3508 Agreement provides: "Direct Seller understands that pricing calculations performed on In-Home Sales by Direct Seller are subject to verification and adjustment by Company. If Direct Seller prices an In-Home Sale incorrectly, due to mismeasurement, miscalculation, or any other reason, the resulting Net Installed Sales Income for that In-Home Sale will be incorrect. If, in the sole determination of Company, Company finds that Direct Seller has made such an error, Company is hereby authorized by Direct Seller to make positive or negative adjustments directly to Direct Seller's expected commission or indirectly by raising or lowering the Net Installed Sales Income on the applicable In-Home Sale for purposes of internally recalculating the commission due on such In-Home Sale."

10. Section 11 of the 3508 Agreement provides: "Section 11. Entire Agreement. This Agreement contains the entire agreement and supersedes all prior agreements and understandings, oral or written, with respect to the subject matter hereof. This Agreement may be changed only by an agreement in writing signed by the parties hereto. Each party hereto has had equal opportunity to negotiate or draft the terms hereof and to seek the advice of counsel, and no provision alleged to be ambiguous shall be construed for or against any party based on the identity of the draftsman of that provision. (Ex. C, § 11).

EXHIBIT A TO THE 3508 AGREEMENT

11. The 3508 Agreement incorporates an "Exhibit A-Standard Compensation" ("the 3508 Exhibit A") which was not included within Respondents' exhibits. (Exhibit A consists of seven pages, pages 1, 2, 4, 5 and 6 are designated as Claimant's Exhibit 2, p. 000002-6, pages 3 and 7 are designated as Claimant's Exhibit 3, pages 000052-53). The 3508 Agreement provides that "Exhibit A may be amended from time-to-time at the discretion of [Employer], but only with prior written notice to direct seller." (Ex. C, § 3.1).

12. The 3508 Exhibit A includes Employer's "Standard Commission Structure," "Commission Eligibility" and other provisions setting forth Employer's policies and procedures applicable to Claimant and other "Direct Sellers." (Ex. 2 & 3).

13. Page 3 of the 3508 Exhibit A (Ex. 3, p. 000052) includes a "Paperwork Error Fees" provision which states:

"The following charges are made in calculating Net Installed Sales Income:

- \$100 • for any completed original sales or finance packet that is not received by the next business day from date of sale. All the required documents must be included. Review the required list with your General Manager regularly.
- \$25 • When proof of income is not received within 48 hours of the contract being submitted. This is only applicable if the POI is required. It includes Cancels if POI is required."

14. Page 4 of the 3508 Exhibit A (Ex. 2, p. 000004) includes the following provision under “Monthly Net Installed Sale Bonus Only”

To qualify for Monthly Net Installed Sales Bonus the Direct Seller must have 2 (two) reviews, one on each assigned website, in that month to qualify for bonus. [Employer] will decide on which websites the reviews will need to be posted on, monthly. Company or Online Marketing Manager will validate all reviews for Direct Seller to receive bonus. Final determinations of what is or is not a valid review will be made at the sole determination of the Company. Any Buyer complaints will lead to a deduction from their paycheck due to the damage caused to the Company's reputation, if it is a non-job complaint:

- \$100- deduction if the review is private
- \$500- deduction if the review is public (on all open forums)

All complaints will be subject to the Company President's discretion. A Direct Seller has 7 days to reverse a review from the date the review was posted.”

15. Page 5 of the 3508 Exhibit A (Ex. 2, p. 0000005) includes the following “No Appointment Result (NRA)” provision:

“If you cannot make it to an appointment on time, you must notify the MOD at least 2 hours in advance and find someone else to cover the appointment. If you do not find anyone to cover the appointment it is considered an NRA. For any NRA that a Direct Seller causes, a \$300 will be deducted from the next commission(s) calculation.”

16. Page 6 of the 3508 Exhibit A (Ex. 2, p. 000006) includes a “Work Attire and Appearance” policy which imposes a dress code and grooming standards. The Work Attire and Appearance policy required Claimant to wear a shirt bearing Employer’s logo, black or khaki dress pants and dress shoes, or during summer months to wear an Employer-branded polo shirt with dress shorts or pants. The policy also required wear and “prominently display” their badges. (The ALJ infers that the referenced “badges” identify the wearer as a representative of Employer.).

17. Page 6 of the 3508 Exhibit A (Ex. 2, p. 000006) includes the following “Performance Requirements”:

“If a lead is sold by you and another direct seller, the commission will be shared equally as will the sale amount for purposes of achieving sales volume. You are required to produce \$180,000 of Net Installed Sales per quarter which is \$60,000 Net Installed Sales per month. Anytime a Direct Seller does not produce \$60,000 Net Installed Sales in a month, [Employer] may take action ranging from a warning notice being issued up to termination of employment. If the Direct Seller produces \$180,000 Net

Installed Sales within that quarter, the warning notice(s) for not having \$60,000 Net Installed Sales in a month will be forgiven.”

18. The 3508 Exhibit A instructs “Direct Sellers” to address questions concerning commissions or bonuses to “your Sales Manager/General Manager.”

EMPLOYEE HANDBOOK

19. Claimant testified Employer provided him the "Company Handbook – Sales Representative," which was admitted and contained in Claimant’s Ex. 2 (“the Handbook”). The Handbook, which consists of 34 pages, includes provisions such “General Employment Policies” in which “sales representatives” are referred to as “employees.” The Handbook references Employer’s commitment to “providing our representatives with the opportunity to advance within the organization according to their skills and experience;” and opportunities for Sales Representatives to “be transferred from one department to another.” The Handbook also states that Employer establishes “Personnel Files” for each sales representative, which may include medical records and a “Medical File.” (Ex. 2, Handbook, § 2, 2.1, 2.7, 2.9, 2.10, 2.11, 2.12, 2.14).

20. Section 7 of the Handbook entitled “Work Hours” provides “Appointments are scheduled at 10a/11a” “Appointments are scheduled at 10a/11a, 2pm/3pm, and 6pm/7pm.” (Ex. 2, p. 000026).

21. Handbook Section 7.2 "Attendance Policy" (Ex. 2, p. 000027) provides:

Timely and regular attendance is an expectation of performance for all [Employer] representatives. To ensure sufficient staffing, positive representative morale, and to meet expected productivity standards throughout [Employer], all representatives will be held accountable for adhering to their work schedule.

22. Section 7.2 includes under “Expectations” that sales representatives were expected to arrive “to trainings and leads 10-15 minutes prior to scheduled time,” and to remain “at trainings/leads for the duration of the scheduled times....”

23. Section 7.2.1 and 7.2.2 of the Handbook include provisions related to “Unexcused Absences” and Notice of Absence.” These provisions require sales representatives to personally contact “your supervisor” to notify Employer of “absences or tardiness,” and that absences may be excused by the “Director of Human Resources.” Section 7.2.1 provides that “an absence occurs when the representative misses more than four (4) hours of work within a normal workday.”

24. The Handbook imposes attire and grooming standards, health and safety standards, and the requirement for reporting of work-related accidents, injuries, and illnesses. (Ex. 2, Handbook, § 2.17, 2.18, 3.7). In addition, the Handbook contains policies which impose attendance requirements and procedures for “unexcused

absences,” including a requirement that the sales representative “contact your supervisor” when an absence occurs. (Id., § 7.2).

25. Section 9 of the Handbook – “Performance Expectations” includes a “Progressive Discipline” policy which includes the potential imposition of a “Performance improvement plan,” and which may result in a “recommendation to terminate employment.” (Ex. 2, Handbook, § 9).

26. The Handbook states: “This Handbook is not intended to create contractual obligations of any kind with respect to the duration of your employment with [Employer]. Rather, employment with the Company is “at will.” This means that either the Sales Representative or the Company may terminate the employment relationship at any time, with or without cause or prior notice.” (Ex. 2)./

27. On September 9, 2019, Claimant signed an “Acknowledgment of Receipt and Agreement to Arbitrate” through which he acknowledged receipt of the Handbook. The acknowledgement form states, in part “The Handbook provides important information about Company policies and procedures that I will be expected to comply with during the term of my employment;” “I understand that, except for the ‘at will’ nature of my employment, any and all Company policies and procedures described herein may be superseded, modified or eliminated from time to time;” and “In the event of a dispute arising out of any aspect of my employment relationship with the Company (including, but not limited to, any claims under tort or contract theories, whether based on common law or otherwise, and all claims or those arising under any federal, state, or local laws covering terms of conditions of employment), the Company and I will both exercise our best efforts toward a resolution by mutual agreement. However, in the event that such agreement cannot be reached, in accordance with Company policy, and as [a] condition of employment, I agree that the dispute shall be settled using the arbitration procedure outlined in Section 8.4 of the Handbook.”

28. The acknowledgement concludes: “By signing below, I agree to the foregoing terms and conditions of my employment with [Employer] and acknowledge the Company’s expectation that I conduct myself in accordance with the policies and procedures set forth in the Handbook.” (Ex. 3, p. 00046).

CLAIMANT’S TESTIMONY

29. Claimant testified at hearing, and the ALJ found Claimant’s testimony to be credible.

30. Claimant testified that before working for Employer, Claimant’s employment had consisted of working for summer camps, and in the restaurant industry. Claimant had no experience in direct sales, soliciting prospective customers for home improvement, remodeling projects or other similar services, including roofs, windows, and siding. Claimant worked exclusively for Employer from September 9, 2019 until, at least, July 7, 2020.

31. Claimant testified that he was offered his position with Employer on September 9, 2019, without the opportunity to review the 3508 Agreement in any meaningful manner. Claimant was provided with the 3508 Agreement and requested to sign at the conclusion of his interview, after being offered the position.

32. Claimant testified his first week with Employer consisted of full-day training every day. Claimant was instructed on how to properly inspect roofs and how to conduct sales. Claimant then went on sales appointments with Employer's senior sales representatives to build up his proficiency to be able to work independently. Claimant characterized the training program as a "30/60/90-day" training program. Claimant testified that due to his inexperience in direct sales, he remained in Employer's training program for between 100 and 120 days, before he was in a position to conduct sales appointments independently.

33. Employer's "30/60/90 Day Direct Seller Trajectory" ("Training Description") document describes Employer's sales model as "time-proven and educational, yet difficult to learn without a full commitment." (Ex. 3, p. 000051). The Training Description indicates that Direct Sellers who "have improper expectations often feel like they are underachieving, while in actuality, they are on track but are in the learning phase. This trajectory path must be understood to fully commit to a Direct Seller career with [Employer]. 1st 30: Learn to write it up! 2nd 30: Learn to retain it! 3rd 30: Learn to get paid on it. The Training Description setting forth this information was initialed by Claimant and Employer's general manager. (Ex. 3).

34. Claimant testified that Employer required Claimant to work Tuesday through Saturday. Employer required Claimant to report to Employer's office if Claimant did not have a morning appointment, to participate in sales meetings or training, or to complete paperwork. Although Claimant was encouraged to develop sales leads, all sales calls in which Claimant participated were derived from leads supplied by Employer. Claimant testified he was expected to convert 30% of sales calls into sales and required to perform a sales demonstration to 75% of prospective customers.

35. Employer provided Claimant with a draw to purchase an iPad containing Employer's programs, sales presentations, and paperwork. Employer also provided Claimant with branded work apparel, bearing Employer's logo, including polo-style shirts, hats, and face masks. Employer imposed grooming standards on Claimant and other sales representatives. Employer provided Claimant with business cards identifying Claimant as a "sales representative" of Employer, with an Employer-supplied email address. Employer provided Claimant with a "demonstration kit" used to conduct sales presentations. Claimant was required to supply his own ladder and tape measure and use his personal cell phone for Employer's business. Employer provided Claimant with a script to use for his voicemail message.

36. Employer paid Claimant under his own name and social security number. (See Ex. 9). Employer did not require Claimant to establish his own operating entity or to be incorporated. Claimant was paid a bi-weekly commission based on his sales. Claimant did not have any separate business operations of own outside the work performed for Employer.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. See § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. See § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id.* at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Employee vs. Independent Contractor Status

Pursuant to §8-40-202(2)(a), C.R.S. "any individual who performs services for pay for another shall be deemed to be an employee" unless the person "is free from control and direction in the performance of the services, both under the contract for performance of service and in fact and such individual is customarily engaged in an independent . . . business related to the service performed."

Claimant has established by a preponderance of the evidence that he provided services to Employer and was paid for his services. Thus, Claimant is presumed to be an employee of Employer under § 8-40-202 (2)(a).

Nonetheless, a putative employer may establish a presumed employee is an independent contractor by proving the presence of some or all of the nine criteria enumerated in §8-40-202(2)(b)(II), C.R.S. See *Nelson v. ICAO*, 981 P.2d 210, 212 (Colo. App. 1998). Section 8-40-202 (2)(b)(II), identifies the following nine criteria that must be shown “to prove independence.” These nine criteria are that the putative employer must not:

(A) Require the individual to work exclusively for the person for whom services are performed; except that the individual may choose to work exclusively for such person for a finite period of time specified in the document;

(B) Establish a quality standard for the individual; except that the person may provide plans and specifications regarding the work but cannot oversee the actual work or instruct the individual as to how the work will be performed;

(C) Pay a salary or at an hourly rate instead of at a fixed or contract rate;

(D) Terminate the work of the service provider during the contract period unless such service provider violates the terms of the contract or fails to produce a result that meets the specifications of the contract;

(E) Provide more than minimal training for the individual;

(F) Provide tools or benefits to the individual; except that materials and equipment may be supplied;

(G) Dictate the time of performance; except that a completion schedule and a range of negotiated and mutually agreeable work hours may be established;

(H) Pay the service provider personally instead of making checks payable to the trade or business name of such service provider; and

(I) Combine the business operations of the person for whom service is provided in any way with the business operations of the service provider instead of maintaining all such operations separately and distinctly.

§ 8-40-202(2)(b)(II), C.R.S.

If the parties have executed a written document that demonstrates by a preponderance of the evidence the existence of these factors, the document creates a rebuttable presumption of an independent contractor relationship between the parties. § 8-40-202 (2)(b)(III) and (IV), C.R.S. To create such a rebuttable presumption, the document must be 1) signed by both parties; 2) all signatures on the document must be

duly notarized; and 3) the document must contain a disclosure, in type which is larger than the other provisions in the document or in bold-faced or underlined type, that the independent contractor is not entitled to workers' compensation benefits and that the independent contractor is obligated to pay federal and state income tax on any moneys earned pursuant to the contract relationship. § 8-40-202 (2)(b)(IV), C.R.S.

Respondents have failed to establish that the 3508 Agreement (which includes the incorporated 3508 Exhibit A) constitutes a written document sufficient to give rise to the presumption that Claimant was an independent contractor, rather than an employee. The 3508 Agreement does not meet the statutory requirements of § 8-40-202(b)(III) and (IV), in several respects. First, the 3508 Agreement does not establish the existence of the nine indicia of independence contained in § 8-40-202 (b)(II).

The 3508 Agreement establishes quality standards in the form of "Performance Requirements" requiring Claimant to produce Net Installed Sales \$60,000 per month and \$180,000 of per quarter, to adhere to paperwork standards, a dress code and grooming standards, and standards for "NRA" appointments. The 3508 Agreement permits Employer to terminate Claimant's contract "at will" during the contract period, without violation of the terms of the contract or failing to produce a result. The 3508 Agreement and 3508 Exhibit A make clear Employer's requirement that Claimant's services be combined with Employer's operations and that there would be no meaningful separation or distinction between Claimant and Employer. Specifically, Claimant was required to present himself as a representative of Employer by wearing a badge, Employer-branded clothing, and attaining reviews of Employer on designated websites to qualify for bonuses. These criteria include deductions in Claimant's "paycheck" for buyer complaints "due to the damage caused to the Company's reputation." These specific requirements and policies make clear that Employer did not consider Claimant's services to be separate and distinct from Employer.

Finally, the 3508 Agreement does not contain a provision that Claimant is not entitled to worker's compensation benefits, and the signatures on the 3508 Agreement are not notarized, as required by § 8-40-202 (2)(b)(IV). The ALJ concludes that the 3508 Agreement does not demonstrate the existence of the nine indicia of independence and does not meet the requirements of § 8-40-202 (2)(b)(III) and (IV). Accordingly, the 3508 Agreement is not sufficient to create a rebuttable presumption that Claimant was an independent contractor.

Because the evidence establishes that Claimant was performing services for pay, and there is no written document establishing Claimant's independent contractor status, the burden of proof rests upon the respondents to rebut the presumption that the claimant was an employee. *Baker v. BV Properties, LLC*, W.C. No. 4-618-214 (ICAO, Aug. 25, 2006). The question of whether the respondents have overcome the presumption and established that the claimant was an independent contractor is one of fact for the ALJ. *Nelson v. Industrial Claim Appeals Office, supra*. See *Industrial Claim Appeals Office v. Softrock Geological Services, Inc.*, 325 P.3d 560 (Colo. 2015) (whether an individual is customarily engaged in an independent trade, occupation, profession, or business related

to the service performed must be determined by applying a totality of circumstances test that evaluates the dynamics of the relationship between the individual and the putative employer). The analysis in *Softrock* reflects that tribunals must look not only at the nine factors to discern customary engagement in an independent business but must also examine other factors involving “the nature of the working relationship” is equally germane to that question in the context of a workers’ compensation matter. See *In re Claim of Pierce*, W.C. No. 4-950-181-02) (ICAO, Sept. 18, 2018).

Respondents have failed to prove by a preponderance of the evidence that Claimant was not an “employee” within the meaning of the Colorado Workers’ Compensation Act. The ALJ finds that the following factors indicate that Claimant was not “customarily engaged in an independent trade, occupation, profession or business related to the services performed” and was not “free from control and direction in the performance of the services, both under the contract for performance of service and in fact” as required by § 8-40-202 (2)(a), C.R.S.

A necessary element to establish that an individual is an independent contractor is that the individual is customarily engaged in an independent trade, occupation, profession, or business related to the services performed. *Allen v. America’s Best Carpet Cleaning Services*, W.C. No. 4-776-542 (ICAO, Dec. 1, 2009). The statutory requirement that the worker must be “customarily engaged” in an independent trade or business is designed to assure that the worker, whose income is almost wholly dependent upon continued employment with a single employer, is protected from the “vagaries of involuntary unemployment.” *In Re Hamilton*, W.C. No. 4-790-767 (ICAO, Jan. 25, 2011).

The evidence at hearing established that Claimant was not “customarily engaged in an independent trade, occupation, profession or business related to the services performed.” Claimant’s testimony credibly established he had no prior experience in direct sales of any kind, no experience in the home remodeling industry, or that he was “customarily engaged” in anything related to the services he provided Employer prior to entering into the 3508 Agreement with Respondents.

Employer imposed quality standards on Claimant’s work and oversaw the actual work and instructed Claimant as to how the work would be performed. As a sales representative, Claimant’s position required him to meet with prospective customers and to produce sales results. In this regard, Employer established “quality standards” for Claimant. With respect to sales, Claimant was required to meet “Performance Requirements,” of producing “Net Installed Sales” of \$60,000 in gross sales per month, and \$180,000 quarter. The 3508 Exhibit A provides that the failure to meet these “Performance Requirements” in a given month could result in “termination of employment.” Claimant credibly testified he was expected to convert 30% of sales calls into sales and required to perform a sales demonstration to 75% of prospective customers. Employer also imposed additional quality standards on Claimant related to work orders and paperwork. For example, the 3508 Agreement required that Claimant submit all work orders to Employer from each buyer within 24 hours of execution. Employer required Claimant to submit “Error Free” paperwork, and contemplated

deducting money from Claimant's commissions where paperwork was not received by the next business day, or "when proof of income is not received within 48 hours of the contract being submitted." Additionally, Section 3.2 of the 3508 Agreement permits Employer to review and adjust Claimant's pricing calculations, indicating that Employer oversaw Claimant's work. In the context of a sales representative position, these "Performance Requirements," paperwork standards, and oversight provisions constitute "quality standards," and oversight of Claimant's work.

Employer provided more than minimal training to Claimant. The 3508 Agreement provides that Claimant would be "informed of and shown the techniques of the Company Business utilizing certain products, presentations and techniques specially designed by Company." Employer's 30/60/90 Day Direct Seller Trajectory document notes that Employer's "sales model" is difficult to learn without a full commitment, and that the training program was anticipated to take at least 90 days. Claimant credibly testified that it took him approximately 3 ½ months to reach a point where he could function as a sales representative. This type of mandated training is more than the "minimal training" contemplated for independent contractors.

Employer maintained the right to terminate Claimant's work at any time, without a violation of the 3508 Agreement, and without cause or liability. Specifically, section 4 of the 3508 Agreement provides that "Services provided for under this Agreement may be terminated AT WILL by either Company or Direct Seller." (Emphasis original). The Handbook also reiterates this principle and states that either party "may terminate the employment relationship at any time, with or without cause or prior notice." Accordingly, the Claimant's work was subject to termination during the contract period without a violation of its terms or a failure to meet specifications of the contract.

Employer dictated the time of performance, and work hours were not negotiated. The evidence established Claimant's work hours were not negotiated. Instead, Employer dictated the days and hours Claimant worked. Employer's "Handbook" devotes three pages to Employer's "Attendance" and "Time Away from Work" policies. Employer dictated the times that appointments were scheduled. The Handbook provides that "Appointments are scheduled at 10a/11a, 2pm/3pm, and 6pm/7pm." The Handbook makes clear that these were requirements, and required Sales Representatives to arrive at leads 10-15 minutes prior to the scheduled time, and remain at leads for the duration of the scheduled times and to obtain "prior approval of the supervisor" if he would be "tardy" to meetings/trainings. The Handbook purports to impose "fines" or deductions from commissions where Sales Representatives missed leads, missed meetings, or could not "make it to an appointment on time." Claimant credibly testified that on days when he did not have a morning appointment, he was required to go to Employer's offices to do training, paperwork or have sales meetings with his team leads. This dictation of working time and requirements that Claimant attain approval from supervisors for issues related to scheduling also shows the oversight and supervision Employer exercised.

Employer paid Claimant personally instead of making checks payable to a trade or business name. The evidence was undisputed that Employer paid Claimant personally,

under his own name and social security number. Claimant was not required to establish an entity of any kind and was not paid through an entity.

Employer did combine its business operations of Claimant's services and did not maintain separate and distinct operations. Employer required Claimant present himself publicly as a representative of Employer, wear a badge, Employer-branded clothing, use an Employer-branded business card, use an Employer-dictated voicemail message, and use Employer provided paperwork. Employer's Handbook indicates Employer would maintain "personnel files" on Claimant, to include medical information. Moreover, Employer incentivized Claimant to foster positive reviews of Employer on websites designated by Employer, and authorized deductions from Sales Representatives' "paycheck due to the damage caused to the Company's reputation."

In addition to these factors, Handbook contains other provisions inconsistent with independent contractor status. For example, Sales Representatives may request transfers to other departments, instructions on how Sales Representatives should respond to media or governmental communications, and a progressive discipline policy.

The record contains no documents indicating Employer required Claimant to work exclusively for Employer. The 3508 Agreement contains a provision that prohibits Claimant from soliciting business from Employer's clients for a period of two years following termination of the agreement. The non-solicitation agreement does not require the Claimant to work exclusively for Employer, but only prevents Claimant from utilizing Employer's trade secret information for himself or others. While the time commitment to Claimant's position may not have permitted Claimant to seek other employment, the ALJ finds no evidence that Claimant was required to work exclusively for Employer.

The provision of "tools" is not significant in the position of a sales representative, . While Claimant was required to provide his own phone, ladder and tape measure, Employer provided sales materials, branded forms, branded attire, business cards, funds for an iPad, forms, and a "demonstration kit."

Although Employer did not require Claimant to work exclusively for Employer, provided minimal materials, and paid a contract commission rate, the ALJ finds that these factors are significantly outweighed by the existence of other factors enumerated in § 8-40-202(2)(b)(II), C.R.S. Based on the totality of the evidence, the ALJ finds that Claimant was not "customarily engaged in an independent trade, occupation, profession or business related to the services performed" and was not "free from control and direction in the performance of the services, both under the contract for performance of service and in fact" as required by § 8-40-202 (2)(a), C.R.S.

ORDER

It is therefore ordered that:

1. Claimant was an "employee" of Employer within the meaning of § 8-40-202(a)(2), C.R.S., on July 7, 2020.

2. All matters not determined herein are reserved for future determination.

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

DATED: November 19, 2020.



Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-119-511-002**

ISSUES

- Did Claimant prove he suffered a compensable injury to his left shoulder on May 17, 2019?
- If Claimant proved a compensable injury, the ALJ will address the following issues:
- Did Claimant prove a left reverse total shoulder arthroplasty recommended by Dr. Papilion is reasonably needed to cure and relieve the effects of his injury?
- What is Claimant's AWW?
- Did Claimant prove entitlement to TTD benefits commencing October 1, 2019?

FINDINGS OF FACT

1. Claimant works for Employer as a commercial tractor-trailer driver. His typical routine was to deliver freight to one location to be unloaded, drive to a second location to be reloaded, and returned to his home base in Denver. Claimant generally deals with "no touch" freight, where the shippers and receivers generally load and unload the trailer. On rare occasions, Claimant assisted in loading or unloading freight from the trailer.

2. Claimant injured his left shoulder on May 17, 2019. The record contains conflicting information regarding the specific location of the accident and whether he was picking up or dropping off a load at the time of the accident. The Employer's First Report indicates Claimant was injured in Rockwell City, Iowa. Claimant reported to Concentra on May 22, 2019 the injury occurred in Cedar Rapids, Iowa. At hearing, Claimant testified he could not remember where the accident occurred, or whether he was loading or unloading. In any event, Claimant's description of the injurious activity has been consistent numerous occasions. The ALJ credits Claimant's account of how the accident occurred, so the specific location and whether he was loading or unloading at the time is of no consequence.

3. Claimant had backed the trailer to a loading dock and was opening the rear trailer doors when a gust of wind caught the left door and "yanked it around. This "jerked" Claimant's left arm, causing immediate pain in his left shoulder.

4. Claimant testified he reported the injury to a "dispatch girl" named "Casey" before heading back to Denver. Claimant testified Casey told him to complete accident paperwork when he got back.

5. Claimant drove back to Denver using primarily his right arm. After returning to Denver, he went to the office and completed an accident report.

6. Respondents presented no witness or other persuasive evidence to contradict Claimant's testimony about reporting the injury on May 17, 2019 or completing an accident report after he returned to Denver.

7. An Employer's First Report was completed on May 22, 2019 by an unknown individual. The form states Employer was notified of the injury on May 22 but does not indicate to whom the injury was reported. The injury is listed as a left shoulder "sprain/strain." The injury mechanism is described as, "5 days ago he was making a delivery when he opened the trailer door, the wind swung the door and yanked."

8. Employer referred Claimant to Concentra for treatment. He saw Dr. Kristina Robinson at his initial visit on May 22, 2019. The history of injury was described as, "left shoulder pain s/p forced hyperextension of left shoulder. Patient reports he was opening a trailer door when a strong gust of wind blew the door open extending his shoulder, immediate pain and anterior shoulder discomfort/tenderness." He described intermittent shoulder pain, worse with activity. Physical examination showed AC joint tenderness, limited range of motion in all directions, and a positive lift off test. Dr. Robinson diagnosed a left shoulder strain, recommended OTC NSAIDs, and gave Claimant work restrictions of no reaching over shoulder level with the left arm.

9. Claimant saw Dr. Jerald Solot at his next appointment on May 25, 2019. There was no change in his left shoulder pain, which was worst at extremes of motion. Examination of the shoulder showed "mildly" limited range of motion with pain. Claimant had not been able to start PT.

10. Claimant saw PA-C Nickolas Curcija at Concentra on May 31, 2019. Claimant's shoulder felt "the same if not worse since last visit." The report states he had "good range of motion and not a lot of pain except with certain movements." With movement, he rated the pain at 7/10. Examination of the shoulder showed anterior and lateral tenderness, weakness with flexion and abduction, and "full" range of motion with pain. Painful arc sign was positive, drop arm test was negative, and liftoff test was equivocal. PA-C Curcija referred Claimant to physical therapy.

11. Claimant attended an initial physical therapy evaluation that same day. The therapist documented flexion of only 136 degrees and abduction of 145 degrees.

12. Claimant saw Dr. Solot on June 10, 2019 and reported "no change since last visit." Dr. Solot documented "limited, painful range of motion of the left shoulder." Based on Claimant's continued symptoms, Dr. Solot ordered an MRI and instructed Claimant to return "after MRI." Dr. Solot indicated he would refer Claimant for an injection or a surgical consultation if the MRI were positive.

13. Claimant tried unsuccessfully to obtain the MRI during the summer. He returned to Concentra on September 25, 2019 and reported, "[he] attempted MRI about a month ago, was unable to tolerate MRI, there was too much motion on all attempts. Pain in shoulder is worse than last visit. Exacerbated by certain motions." Examination of

the shoulder showed limited range of motion was limited in all planes with pain. Concentra referred Claimant to Dr. John Papilion, an orthopedic surgeon.

14. Claimant saw Dr. Papilion on September 26, 2019. The report contains conflicting information regarding the injury. The first paragraph of the history section states Claimant's shoulder symptoms were acute, "nontraumatic," and "the injury occurred at home." The next paragraph states,

[Claimant] is actually known to me for previous rotator cuff repair on his RIGHT shoulder 20 years ago. He's done very well with this. He has an acute injury to his LEFT shoulder which occurred on 5/15/19 [sic]. He is a long-haul truck driver and the wind caught his door and jerked it open. He's had a pop and pain since then [unintelligible] with lifting he felt significant weakness and loss of motion.

15. Dr. Papilion persuasively testified the first paragraph of the history section referenced above was completed by his medical assistant and is erroneous. He personally dictated the remainder of the report, and properly recounted his recollection of how Claimant described the onset of his left shoulder problems began. The history documented by Dr. Papilion is consistent with Claimant's hearing testimony and his reports to other providers.

16. On examination of Claimant's left shoulder, Dr. Papilion noted atrophy, tenderness, and mildly limited range of motion with pain. Flexion was limited to 90 degrees, which is similar to the 100 degrees of flexion measured at Claimant's first Concentra visit. Hawkins, Neer's, and external rotation tests were positive. Dr. Papilion opined Claimant's clinical presentation was consistent with a large rotator cuff tear. Claimant could not complete the MRI because of severe claustrophobia and motion artifact, so Dr. Papilion ordered a left shoulder ultrasound instead. He restricted Claimant from any lifting with his left arm.

17. The ultrasound was completed on September 30, 2019. It showed massive supraspinatus and full thickness subscapularis tears, with probable involvement of the infraspinatus at the common tendon interval, a presumed full thickness rupture of the long head of the biceps tendon with retraction into the upper arm, moderate fatty infiltration of the infraspinatus and supraspinatus muscles, remodeling changes of the greater tuberosity and lesser tuberosity, and cephalad migration of the humeral head with near complete obliteration of the acromiohumeral interval.

18. Claimant followed up with Dr. Papilion on October 1, 2019. Dr. Papilion opined Claimant has a massive rotator cuff tear in his left shoulder with atrophy and rupture of the subscapularis and biceps tendon. He also noted proximal migration of the humeral head consistent with rotator cuff arthropathy. He opined the rotator cuff damage was irreparable and recommended a reverse total arthroplasty. He restricted Claimant from any commercial driving pending the surgery.

19. Claimant has not worked in any capacity since October 1, 2020. Dr. Papilion's restriction of no commercial driving precludes his regular job, and Employer offered no modified duty.

20. On October 20, 2019, Dr. Papilion wrote to Insurer's TPA with additional justification for the requested surgery. Regarding causation, he noted the lack of significant muscle atrophy suggested "early" rotator cuff arthropathy. Although he could not tell the age of the tears from the ultrasound data, he noted Claimant was fully functional and working full duty before the work accident. Dr. Papilion knew of no other recreational or vocational activities that could have caused the condition. He opined the need for surgery was "directly related" to the work injury.

21. Respondents filed a Notice of Contest on October 24, 2019.

22. Claimant saw Dr. Timothy Hall for an IME at his counsel's request on April 28, 2020. Claimant described the accident consistent with his reports to other providers and his hearing testimony. Dr. Hall considered the mechanism of injury "pretty straightforward." Claimant reported significant shoulder pain with activities such as reaching and lifting. Dr. Hall noted decreased shoulder range of motion, including 110 degrees of flexion and 90 degrees abduction. Impingement signs and drop sign were positive. Dr. Hall agreed with Dr. Papilion's recommendation for a reverse shoulder arthroplasty. Regarding causation, he noted Claimant could have had an asymptomatic rotator cuff tear before the accident, although the moderate fatty infiltration and amount of traction was consistent with an injury within a few months of the ultrasound. Dr. Hall opined Claimant's shoulder pain and need for surgery were proximately caused by the work accident. He opined, "This may have been totally an acute event with respect to the local pathology or could be a permanent aggravation of a previous pathology. Be that as it may, the surgical intervention is required to return him to his preinjury level of comfort and function and is therefore 100% related to that work injury."

23. Dr. William Ciccone performed an IME for Respondents on May 29, 2020. Claimant again described the accident as documented throughout the record. Dr. Ciccone noted reduced shoulder range of motion, including 80 degrees of flexion and abduction, 70 degrees of internal and external rotation. He also noted positive impingement signs and "mild" rotator cuff atrophy. Dr. Ciccone agreed a reverse shoulder arthroplasty is reasonably needed but concluded the surgery is not related to the work accident. He opined Claimant suffered a "minor sprain/strain" that was "treated appropriately with conservative measures" and resolved within a few weeks. He thought the reports of "near normal" range of motion on May 31 and June 10, 2019 were inconsistent with a significant shoulder injury. He opined,

Rotator cuff tear arthropathy occurs over a long period of time and is associated with massive rotator cuff tears with associated glenohumeral arthritis. The finding of fatty infiltration of the muscles of the rotator cuff is indicative of a long-standing disease, not an acute injury. This disease is a degenerative disease with the findings on imaging not related to trauma. While I do believe that the claimant suffered a sprain/strain to the shoulder,

I believe this to be a minor injury as the claimant had near full range of motion noted on his examination on 5/31/2019. The finding of fatty infiltration of the muscles of the rotator cuff is indicative of a long-standing disease, not an acute injury.

24. Dr. Ciccone opined Claimant was at MMI from the work-related this sprain/strain on June 10, 2019.

25. On June 30, 2020 Dr. Papilion authored a response to Dr. Ciccone's IME report. He disagreed with Dr. Ciccone regarding the causal connection between the surgery and the work accident. He was not inclined to rely on range of motion measurements obtained in May 2019 by a "a non-orthopedic PA." He noted Claimant had not been evaluated by an orthopedist until Dr. Papilion's examination in September 2019, which demonstrated significant loss of motion, weakness, and evidence of a massive rotator cuff tear. Dr. Papilion further opined,

[E]ven though he may have had a pre-existing condition with the shoulder he was fully functional and it was this incident that pushed him over the edge and necessitated the need for reverse shoulder arthroplasty. It is this fact that I respectfully disagree with Dr. Ciccone. I would consider this aggravation of a pre-existing condition and per Colorado Workers' Compensation Medical Treatment Guidelines, this meets the criteria for surgical indications and relatedness.

26. Dr. Papilion testified via deposition on August 18, 2020. He maintained his opinion the work accident either caused an acute rotator cuff tear or substantially aggravated an underlying pre-existing condition. He opined the injury mechanism described by Claimant could "certainly account for a tear in the rotator cuff." He did not think the clinical findings reported in the Concentra records from May and June were inconsistent with severe rotator cuff injury. He opined patients with severe rotator cuff tears can still have relatively good range of motion. He suspected Claimant had some preinjury shoulder pathology but testified, "perhaps he did not have a normal rotator cuff, but he was fully functional." Dr. Papilion doubted any pre-existing tear was "of this magnitude because I don't think he could of function as well as he was, lifting, and climbing, and doing his job is a long-haul truck driver. He may have had some rotator cuff pathology that was tolerable and not symptomatic." He opined the fatty infiltration shown on the ultrasound could have developed in the four months between the injury and the test. Dr. Papilion opined at a minimum the work accident "certainly exacerbated" Claimant's shoulder and precipitated the need for a reverse total shoulder arthroplasty.

27. Dr. Hall testified at hearing consistent with his IME report. His testimony complements and bolsters the opinions and testimony offered by Dr. Papilion.

28. Dr. Ciccone testified in a post-hearing deposition on September 22, 2020. He reiterated his belief Claimant's clinical presentation reflected in the Concentra records on May 31 and June 10, 2019 was inconsistent with a permanent aggravation of his pre-existing shoulder pathology. Dr. Ciccone opined the findings demonstrated by the

ultrasound are typically not seen early after a massive rotator cuff tear, but appear late in the pathology. He opined the fatty infiltration of the rotator cuff musculature takes years, not months, to develop, which means the tears have been present for years. Dr. Ciccone reiterated Claimant suffered a left shoulder strain, and his physical examinations, diagnostic testing, and course of treatment were consistent with a mild injury that quickly resolved with conservative treatment. He opined Claimant reached his preinjury "baseline" on June 10, 2019, and any ongoing symptoms or need for treatment thereafter was purely related to his pre-existing condition.

29. Dr. Papilion and Dr. Hall's regarding causation are credible and more persuasive than the contrary opinions offered by Dr. Ciccone.

30. Aside from a few memory lapses about non-critical issues, Claimant's testimony was generally credible.

31. Claimant proved he suffered a compensable injury to his left shoulder on May 17, 2019.

32. Claimant proved the left shoulder treatment provided by and through Concentra since May 22, 2019 was reasonably needed to cure and relieve the effects of his compensable injury.

33. Claimant proved the left shoulder reverse total arthroplasty recommended by Dr. Papilion is reasonably needed to cure and relieve the effects of his compensable injury.

34. Claimant's wages fluctuated from week to week, presumably depending on the loads and routes assigned to him. Claimant's gross wages in the 12 weeks from March 11, 2019 through May 20, 2019 provide a fair approximation of his earnings at the time of injury and his subsequent wage loss. Claimant's gross earnings of \$14,353.00 during that period equates to an AWW of \$1,196.08, and a corresponding TTD rate of \$797.39.

35. Claimant worked regular duties through September 9, 2019. There is insufficient persuasive evidence to show why he stopped working on September 9 or to prove he stopped working because of the work accident.

36. Claimant proved he is entitled to ongoing TTD benefits commencing September 26, 2019 when Dr. Papilion restricted him from any lifting with his dominant right arm. That restriction is incompatible with Claimant's regular job. Even though he generally does not have to load and unload his trailer, he must regularly lift various objects necessary to connect and disconnect the trailer and operate the vehicle, including chains and tools.

CONCLUSIONS OF LAW

A. Claimant proved a compensable injury/

To receive compensation or medical benefits, a claimant must prove he is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo. App. 2001). The claimant must prove an injury directly and proximately caused the condition for which she seeks benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). A claim is compensable if an industrial injury aggravates, accelerates, or combines with a pre-existing condition to produce disability or a need for treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). Pain is a typical symptom from the aggravation of a pre-existing condition, and if the pain triggers the claimant's need for medical treatment, the claimant has suffered a compensable injury. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Dietrich v. Estes Express Lines*, W.C. No. 4-921-616-03 (September 9, 2016). But the mere fact that a claimant experiences symptoms after an incident at work does not necessarily mean the employment aggravated or accelerated the pre-existing condition. *Finn v. Industrial Commission*, 437 P.2d 542 (Colo. 1968); *Cotts v. Exempla*, W.C. No. 4-606-563 (August 18, 2005). The ALJ must determine whether the need for treatment was the proximate result of an industrial aggravation or is merely the direct and natural consequence of the pre-existing condition. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Carlson v. Joslins Dry Goods Company*, W.C. No. 4-177-843 (March 31, 2000).

As found, Claimant proved he suffered a compensable injury on May 17, 2019. Claimant's description of the accident is credible. Dr. Papilion and Dr. Hall credibly opined his shoulder symptoms and need for treatment are directly caused by the work accident. Even Dr. Ciccone opined Claimant suffered a "strain" that was "treated appropriately by conservative measures." An injury need not be dramatic to support a finding of compensability. Even a "minor strain" or a "temporary exacerbation" of a pre-existing condition can be a sufficient basis for a compensable claim if it was caused by a claimant's work activities and caused them to seek medical treatment. *E.g., Garcia v. Express Personnel*, W.C. No. 4-587-458 (August 24, 2004); *Conry v. City of Aurora*, W.C. No. 4-195-130 (April 17, 1996).

B. A left shoulder reverse total arthroplasty is reasonably necessary treatment for the compensable injury.

The respondents are liable for medical treatment reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101. The mere occurrence of a compensable injury does not compel the ALJ to approve all requested treatment. Where the respondents dispute the claimant's entitlement to medical benefits, the claimant must prove the treatment is reasonably necessary and causally related to the industrial accident. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). The claimant must prove entitlement to disputed medical benefits by a

preponderance of the evidence. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

Claimant proved the reverse total shoulder arthroplasty recommended by Dr. Papilion is reasonably needed to cure and relieve the effects of his injury. Even Respondents' IME agrees the surgery is reasonably needed, and the primary dispute relates to causation. Dr. Ciccone's opinion Claimant suffered only a "minor" injury and returned to "baseline" by June 10, 2019 is not persuasive. Claimant's preinjury "baseline" was an asymptomatic left shoulder with no functional limitations. By contrast, he has remained continuously symptomatic since the accident, including on June 10, 2019 when Dr. Ciccone thinks he reached MMI. Claimant specifically reported "no change since last visit" on June 10, and the corresponding physical examination showed "limited, painful range of motion of the left shoulder," which is not appreciably different than the findings from his first appointment. Dr. Solot ordered an MRI and indicated he would make a surgical referral if the MRI came back "positive." The MRI probably would have showed severe pathology had Claimant been able to complete it. There is no persuasive evidence Claimant's condition "improved" between May 22 and June 10, 2019. PA-C Curcija' May 31 reference to "full" range of motion is an outlier when viewed in context of other documented exams.

The ALJ credits the causation opinions expressed by Dr. Papilion and Dr. Hall in their reports and testimony. It makes no difference from a legal perspective whether the work accident caused new pathology, aggravated a pre-existing condition, or some combination thereof. The persuasive evidence shows the accident was the proximate cause of Claimant's symptomatology and functional limitations commencing May 17, 2019, which ultimately led to the recommendation for a reverse total arthroplasty.

C. Claimant's AWW is \$1,196.08.

Section 8-42-102(2), C.R.S. provides compensation shall be based on the employee's average weekly earnings "at the time of the injury." The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. But § 8-42-102(3) gives the ALJ wide discretion to "fairly" calculate the employee's AWW in any manner that seems most appropriate under the circumstances. The entire objective of AWW calculation is to arrive at a "fair approximation" of the claimant's actual wage loss and diminished earning capacity because of the industrial injury. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993).

As found, Claimant's average weekly wage is \$1,196.08. His wages fluctuated from week to week depending on the loads and routes assigned to him. The 12 weeks of earnings before the accident provide a fair approximation of Claimant's earnings at the time of injury and his subsequent wage loss. Claimant's gross wages of \$14,353.00 in the 12 weeks of wages from March 11, 2019 through May 20, 2019 equates to an AWW of \$1,196.08, with a corresponding TTD rate of \$797.39.

D. Claimant is entitled to ongoing TTD benefits commencing September 26, 2019.

A temporarily disabled claimant is entitled to TTD benefits to compensate for a wage loss that is proximately caused by a work-related injury and lasts longer than three days. Section 8-42-105(1); *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999); *Montoya v. Industrial Claim Appeals Office*, ___ P.3d ___, 17CA 0322 (Colo. App. 2018). Impairment of earning capacity may be evidenced by a complete inability to work, or by restrictions that impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

As found, Claimant's compensable injury directly and proximately caused a total wage loss commencing September 26, 2019 when Dr. Papilion restricted him from any lifting with his right arm. Before September 26, his only restriction were no overhead or over shoulder use of the right arm, and he managed to perform his regular job until leaving work on September 9, 2019 for unclear reasons. But the prohibition on any lifting with his dominant arm precluded performance of his regular job, and Employer offered no modified work. There is no persuasive evidence Claimant has returned to work, been released to regular duty, or been placed at MMI by an ATP since September 26, 2019. Accordingly, Claimant is entitled to ongoing TTD benefits commencing September 26, 2019.

ORDER

It is therefore ordered that:

1. Claimant's claim for workers' compensation benefits for a May 17, 2019 left shoulder injury is compensable.
2. Insurer shall cover all medical treatment from authorized providers reasonably needed to cure and relieve the effects of Claimant's compensable injury, including the left shoulder arthroplasty recommended by Dr. Papilion.
3. Claimant's average weekly wage is \$1,196.08, with a corresponding TTD rate of \$797.39.
4. Claimant's request for TTD benefits from September 9, 2019 through September 25, 2019 is denied and dismissed.
5. Insurer shall pay Claimant TTD benefits at the weekly rate of \$797.39, commencing September 26, 2019 and continuing until terminated by law.
6. Insurer shall pay Claimant statutory interest of eight percent (8%) per annum on all compensation not paid when due.
7. All issues not decided herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the

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

DATED: November 20, 2020

s/ Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-084-002-001**

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he should be permitted to reopen his July 26, 2018 Workers' Compensation claim based on a change in condition pursuant to §8-43-303(1), C.R.S.

2. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period September 27, 2019 until terminated by statute.

FINDINGS OF FACT

1. Claimant is a 73 year-old male who worked as a truck driver for Employer. On July 26, 2018 at 12:20 p.m. Claimant was involved in a motor vehicle accident (MVA) in Atlanta, Georgia. Claimant rear-ended another truck in front of him while traveling on I-95 North. The responding officer noted that after the accident "[a]ll vehicles came to a controlled rest in the roadway."

2. Claimant sought medical treatment at Concentra Medical Centers in Atlanta beginning at 6:00 p.m. on the day of the accident. Claimant reported bilateral neck and shoulder pain, as well as right shin/knee pain. Claimant denied loss of consciousness and complained of initial dizziness for 10 minutes that resolved. Claimant had no tenderness and full range of motion in his left shoulder. He had tenderness and spasms in his cervical musculature with full range of motion.

3. On July 31, 2018 Claimant began treating at Concentra in Thornton, Colorado. Claimant completed a pain diagram reflecting his symptoms and pain levels. Debra J. Smith, M.D. evaluated Claimant and noted complaints of 4/10 back, neck and arm pain, as well as tingling in both hands, dizziness and headaches. There were no documented complaints of left shoulder pain. Dr. Smith ordered CT scans of Claimant's cervical and thoracic spine and recommended physical therapy.

4. On August 2, 2018 Claimant attended his first physical therapy appointment. Claimant had 1-2/10 pain, but it was "tightness not really pain." He denied headaches, numbness, tingling or other symptoms besides tightness in his upper back and lower neck. The cervical CT showed mild degenerative changes without fractures. The thoracic CT showed moderate degenerative changes without fractures.

5. Dr. Smith re-evaluated Claimant on August 2, 2018. She documented "[m]inimal pain in upper back." Claimant reported improvement, no headaches and 2/10 pain. He denied numbness and tingling down his arms. There were no left shoulder complaints.

6. Claimant's second physical therapy appointment occurred on August 7, 2018. Brea Galvin, P.T. noted Claimant "reports he is doing fine he has no pain and feels his movement is back to normal . . ." She determined that Claimant had met his goals and did not need additional physical therapy.

7. On August 8, 2018 Dr. Smith re-evaluated Claimant. Claimant reported he was feeling good, had no pain and was ready to be released. His cervical exam was normal with no tenderness or muscle spasms and full range of motion. Dr. Smith did not note any left shoulder complaints. She commented that Claimant was "at functional goal, ready for discharge." Dr. Smith determined that Claimant had reached Maximum Medical Improvement (MMI) with no impairment, medical maintenance treatment or permanent restrictions.

8. On August 10, 2018 Respondent filed a Final Admission of Liability (FAL) consistent with Dr. Smith's MMI and impairment determinations. Claimant retained counsel, [Redacted], Esq., who filed an Objection to the FAL and a Notice and Proposal to Select an Independent Medical Examiner (DIME) on August 27, 2018. On September 20, 2018 Ms. [Redacted] notified Respondent that Claimant "will not be moving forward with the DIME at this time."

9. Claimant's primary care provider is Platte River Medical Clinic (PRMC). He was evaluated on August 16, 2018 by Garrett Larson, PA-C for a Medicare Annual Wellness Visit. Claimant's symptoms were sleep disturbances in the form of falling asleep randomly and waking up gasping for breath with his lips turning blue. He denied headaches and dizziness. Claimant's psychiatric status was normal and his neck exam was normal with full range of motion. Claimant also exhibited "normal movement of all extremities."

10. PA-C Larson again evaluated Claimant on September 14, 2018. Claimant was sleeping well and his neck exam was again normal. PA-C Larson next evaluated Claimant on February 22, 2019. A review of Claimant's HbA1c lab results revealed improved but still elevated blood sugar levels.

11. On May 2, 2019 Claimant again visited PA-C Larson for an evaluation. Claimant reported pain from 4-8/10 in his neck and through both shoulders, worse on the left. PA-C Larson noted that "[i]n January, he started having pain in his neck that radiates into his left shoulder." Claimant had limited range of motion in his left shoulder with tenderness in his trapezius and cervical spine. PA-C Larson recommended cervical and shoulder MRIs. He remarked that if the cervical MRI showed stenosis it was likely exacerbated by the motor vehicle accident, but he doubted any rotator cuff syndrome would be related.

12. On May 22, 2019 Claimant underwent an evaluation with primary care physician and PA-C Larson's supervisor Anthony G. Euser, D.O. Dr. Euser diagnosed Claimant with cervical radiculopathy and a left shoulder rotator cuff rupture. Dr. Euser recommended cervical and left shoulder MRIs.

13. On June 13, 2019 Claimant underwent MRI's of his neck and left shoulder. The MRI of his left shoulder revealed a full-thickness, partial articular side tear of the subscapularis, along with supraspinatus tendinosis and articular side fraying. The cervical spine MRI reflected a discogenic desiccation between C3 to T2 as well as facet arthrosis at multiple levels.

14. On September 11, 2019 Claimant underwent an independent medical examination with Caroline M. Gellrick, M.D. Dr. Gellrick noted that she only reviewed Physician Work Activity Status Reports from Concentra Atlanta and Concentra Thornton on July 31, 2018, August 2, 2018 and August 8, 2018 with no narrative notes. Dr. Gellrick made several references to her lack of records and assumptions in her conclusions. She was specifically confused regarding the "nebulous work restrictions, assigned initially, which do not make sense to this examiner for an individual with loss of consciousness, C-spine, shoulder and 'knee contusion' injuries." Moreover, Dr. Gellrick only reviewed PRMC notes beginning May 2, 2019. She elaborated, "[w]hat is missing in the records is what transpired in the fall of 2018 . . . To clarify what transpired in the fall of 2018, medical records should be requested from all of his medical providers for review."

15. Claimant reported to Dr. Gellrick that he had been suffering ongoing neck and arm pain since the July 26, 2018 motor vehicle accident. He noted that he lost consciousness at the scene. Claimant advised that he received no benefit from therapy through Concentra. He also remarked that he would get better on his own. Claimant noted headaches three to four times per week and nightmares four times each week, as well as fear, paranoia and anxiety. Based on Claimant's reports, Dr. Gellrick recommended reopening Claimant's case based on a worsening of symptoms. She diagnosed Claimant with post-concussion syndrome, a cervical strain, a left shoulder strain, dizziness and persistent Post Traumatic Stress Disorder (PTSD). Dr. Gellrick concluded that Claimant was no longer at MMI and "there is no reason for the patient to have [his currently] presenting symptoms and ongoing problems, especially of the c-spine, weakness in the left upper extremity other than the injuries of the MVA."

16. On January 2, 2020 Claimant underwent an independent medical examination with Kathleen D'Angelo, M.D. Claimant reported he did not know if he passed out from the July 26, 2018 motor vehicle accident. He described that when he exited the truck after the accident his "legs went out from under me" and paramedics on the scene had to catch him. Claimant denied receiving any improvement from pre-MMI treatment. He stated he objected when the physical therapist released him because of ongoing pain in his left shoulder, but the therapist encouraged him to do home exercises. Dr. D'Angelo noted there were no findings in the records consistent with an acute left shoulder tear. She stated Claimant's shoulder complaints were caused by adhesive capsulitis attributable to poorly controlled diabetes. Dr. D'Angelo explained the condition was causing myofascial irritation to Claimant's left paracervical and parathoracic musculature. Claimant's shoulder MRI showed mild edema and thickening of the inferior joint capsule that was consistent with an adhesive capsulitis. Dr. D'Angelo concluded Claimant's work-related complaints had resolved, he was at MMI and did not require additional medical treatment. Instead, Claimant had the gradual onset of

symptoms months later that were not consistent with his work accident. Finally, Dr. D'Angelo determined that Dr. Gellrick had erroneously relied on Claimant's statements establishing the causal relationship between his ongoing problems and the July 26, 2018 motor vehicle accident.

17. Claimant testified at the hearing in this matter. He remarked that he did not recall the July 26, 2018 motor vehicle accident and lost consciousness for a short time. He commented that his upper back/neck pain has been constant since the accident and he received no temporary or sustained left shoulder improvement from physical therapy. Claimant also noted that he complained of pain in his left shoulder to Dr. Smith at Concentra Thornton at his first visit. He told Dr. Smith to release him from care despite ongoing pain because he thought he would heal on his own. Claimant also testified about a pain diagram completed when he reached MMI on August 8, 2018. The diagram did not show any pain markings and shows "[n]o Pain" on the pain scale that Claimant circled.

18. Claimant explained that his symptoms began to worsen shortly after he reached MMI. He noted that he was set up for a routine physical and diabetes check-up by Medicare at PRMC. He commented that he reported headaches, upper back pain and left shoulder pain at the August 16, 2018 Medicare Annual Wellness Visit at PRMC. Claimant remarked that PA-C Larson dismissed his complaints. However, he had no explanation for why the record specified he had "no headaches," and the physical exam for his neck and upper extremities was normal. Claimant also commented that the May 2, 2019 note from PRMC stating he began to experience neck pain in January was incorrect.

19. On July 20, 2020 the parties conducted the post-hearing evidentiary deposition of Dr. D'Angelo. She maintained that Claimant has not suffered a worsening of condition since reaching MMI on August 8, 2018 that is causally related to his July 26, 2018 motor vehicle accident. Dr. D'Angelo remarked that Claimant's benign left shoulder examination at Concentra on the date of injury was not consistent with an acute rotator cuff tear. Instead, she agreed with the initial diagnoses of cervical and left-sided trapezius strains. Dr. D'Angelo commented that cervical and thoracic imaging did not show evidence of an acute injury and the course of Claimant's improving symptoms in the Concentra records was consistent with the original diagnoses of cervical and trapezius strains. Notably, the left shoulder did not appear to be a cause for concern in Claimant's treatment.

20. Dr. D'Angelo discussed that in February 2019 Claimant had poorly controlled diabetes with hemoglobin A1C levels of 8.3. She reiterated that Claimant likely had an adhesive capsulitis. Claimant was at a higher risk for the condition due to his diabetes. Dr. D'Angelo described that people with fibrosis or scar tissue within the capsular joint region develop increased pain, do not move their arms and progressively lose range of motion. She noted the risk of developing adhesive capsulitis increases to 10-30% in the diabetic population. Dr. D'Angelo thus was not surprised to see Claimant's complaints arise at the time of elevated blood glucose levels. She testified the edema and thickening in the inferior joint capsule identified on his shoulder MRI was

consistent with adhesive capsulitis that not caused or aggravated by his work accident. Dr. D'Angelo summarized that the rotator cuff tear identified on MRI was degenerative because there were no reported symptoms at or near the time of injury consistent with an acute tear. She noted that, based on the medical records, Claimant's symptoms resolved in August 2018. Claimant's current symptoms arose in 2019 and are unrelated to his July 26, 2018 work injury. Dr. D'Angelo concluded that Claimant remains at MMI.

21. On September 25, 2020 the parties conducted the rebuttal post-hearing evidentiary deposition of Dr. Gellrick. Dr. Gellrick agreed that the information she initially relied upon while evaluating Claimant was limited due to the absence of medical records. However, she recognized that the records show he had moderate pain in his shoulders, neck and trapezius as evidenced by the pain diagram of July 31, 2018. Dr. Gellrick did not dispute that Claimant had adhesive capsulitis, but determined it was related to his work injury. She acknowledged that individuals with diabetes are at higher risk of developing adhesive capsulitis. Nevertheless, she reiterated that Claimant had a "significant" injury in July 2018, suffered continuous symptoms, thought he could get better on his own and then worsened. Dr. Gellrick noted Claimant had no intervening accidents to account for his current cervical or left shoulder conditions. She acknowledged the Concentra Atlanta records documented no tenderness and full left shoulder range of motion. However, she explained that symptoms of a shoulder trauma may not appear for a couple days after the event.

22. Respondents' counsel inquired whether Dr. Gellrick questioned the accuracy of Claimant's account. She stated it would be "hard to put a finger on it without examining him further and asking him." She later testified she would like to speak with Claimant again to "get the details, because I have questions." Dr. Gellrick finally acknowledged she could not render an opinion within a reasonable degree of medical probability to a "100%" degree in light of her questions and concerns. She agreed it would be less likely that an onset of symptoms in January 2019, as documented in the PRMC records, would be related to Claimant's July 26, 2018 work injury.

23. Claimant has failed to establish that it is more probably true than not that he should be permitted to reopen his July 26, 2018 Workers' Compensation claim based on a change in condition pursuant to §8-43-303(1), C.R.S. Initially, Claimant was involved in a motor vehicle accident while driving a truck in Atlanta, Georgia on July 26, 2018. He received medical treatment on the day of the accident and obtained follow-up care through Concentra. After undergoing conservative treatment including physical therapy Dr. Smith determined that Claimant had reached MMI with no impairment, medical maintenance treatment or permanent restrictions on August 8, 2018. Claimant contends that he suffered a worsening of condition to his left shoulder, neck and upper back after reaching MMI that is causally related to his July 26, 2018 motor vehicle accident. However, the medical records and persuasive opinion of Dr. D'Angelo reflect that Claimant has not suffered a change in condition pursuant to §8-43-303(1), C.R.S. that is causally related to his July 26, 2018 work accident.

24. The Concentra records document that Claimant had muscular strains to his neck and upper back and no left shoulder injury. Within a week he had minimal

pain/tightness. On August 7, 2018 he reported to his physical therapist that he was pain free. On the following day Claimant reiterated to Dr. Smith he was feeling good, had no pain and was ready to be released. Claimant had full range of motion in his neck, no objective signs of continuing injury and no subjective complaints. Furthermore, his pain diagram from August 8, 2018 did not document any symptoms. The preceding records directly contradict Claimant's statements that he had continuous pain since the accident that later worsened. Instead, the medical records document minimal injuries which evolved into benign physical exams at MMI. Furthermore, Dr. D'Angelo remarked that Claimant's benign left shoulder examination at Concentra on the date of injury was not consistent with an acute rotator cuff tear. Instead, she agreed with the diagnoses of cervical and left-sided trapezius strains. Dr. D'Angelo also commented that cervical and thoracic imaging did not show evidence of an acute injury and the course of Claimant's improving symptoms in the Concentra records was consistent with the original diagnoses of cervical and trapezius strains. Notably, Dr. D'Angelo specified that Claimant's shoulder and cervical imaging revealed only degenerative conditions.

25. Claimant's first reference to any symptoms after MMI were in the May 2, 2019 PRMC records in which he reported neck and left shoulder pain arising in January 2019. PA-C Larson specifically noted that "[i]n January, he started having pain in his neck that radiates into his left shoulder." Claimant exhibited limited range of motion in his left shoulder with tenderness in his trapezius and cervical spine. Claimant's testimony that he was complaining to PRMC of those issues as early as August 16, 2018, is not supported by the records. It is unlikely that Claimant complained of left shoulder pain, neck pain, headaches, dizziness, or sleeping problems to PRMC during the period August 2018 through the first half of 2019, without any medical record documentation.

26. The PRMC note on May 2, 2019 reflects that Claimant's pain complaints began in January 2019, As Dr. D'Angelo explained, symptoms that arose in January 2019 would not be causally related to minor muscular strains that were treated over the course of two weeks and resolved in August 2018. Dr. D'Angelo discussed that in February 2019 Claimant had poorly controlled diabetes with hemoglobin A1C levels of 8.3. She reiterated that Claimant likely had an adhesive capsulitis. Claimant was at a higher risk for the condition due to his diabetes. She noted the risk of developing the condition increases to 10-30% in the diabetic population. Dr. D'Angelo thus was not surprised to see Claimant's complaints arise at the time of elevated blood glucose levels. She testified the edema and thickening in the inferior joint capsule identified on his shoulder MRI was consistent with adhesive capsulitis unrelated to his work accident. Dr. D'Angelo summarized that the rotator cuff tear identified on MRI was degenerative because there were no reported symptoms at or near the time of injury consistent with an acute tear. She noted that, based on the medical records, Claimant's symptoms resolved in August 2018. However, Claimant's current symptoms arose in 2019 and are unrelated to his July 26, 2018 work injury. Dr. D'Angelo concluded that Claimant remains at MMI for his work accident.

27. In contrast, Dr. Gellrick recommended reopening Claimant's case based on a worsening of symptoms since he reached MMI on August 8, 2019. Dr. Gellrick did

not dispute that Claimant had adhesive capsulitis, but determined it was related to his work injury. She acknowledged that individuals with diabetes are at higher risk of developing adhesive capsulitis. Nevertheless, she reiterated that Claimant had a “significant” injury in July 2018, suffered continuous symptoms, thought he could get better on his own and then worsened. Dr. Gellrick noted Claimant had no intervening accidents to account for his current cervical or left shoulder conditions. She acknowledged the Concentra Atlanta records documented Claimant had no tenderness and full left shoulder range of motion. However, she explained that symptoms of a shoulder trauma may not appear for a couple days after the event. Despite Dr. Gellrick’s opinion, the medical records and persuasive testimony reflect that Claimant suffered injuries during his July 26, 2018 motor vehicle accident that resolved by August 8, 2018 when he reached MMI. Claimant’s first reference to any symptoms after MMI are in the May 2, 2019 PRMC records in which he reported neck and left shoulder pain beginning in January 2019. It is speculative to attribute Claimant’s report of symptoms in January 2019 to his July 26, 2018 motor vehicle accident. The temporal delay and medical records suggest an attenuated causal connection between Claimant’s January 2019 symptoms and motor vehicle accident. Claimant has thus failed to establish that he suffered a worsening condition that is causally related to his July 26, 2018 motor vehicle accident. Accordingly, Claimant’s request to reopen his Workers’ Compensation claim based on a change in condition is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the “Workers’ Compensation Act of Colorado” (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers’ Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers’ Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers’ Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge’s factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. See *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. Section 8-43-303(1), C.R.S. provides that a worker's compensation award may be reopened based on a change in condition. In seeking to reopen a claim the claimant shoulders the burden of proving his condition has changed and that he is entitled to benefits by a preponderance of the evidence. *Osborne v. Industrial Commission*, 725 P.2d 63, 65 (Colo. App. 1986). A change in condition refers either to a change in the condition of the original compensable injury or to a change in a claimant's physical or mental condition that is causally connected to the original injury. *Jarosinski v. Industrial Claim Appeals Office*, 62 P.3d 1082, 1084 (Colo. App. 2002). A "change in condition" pertains to changes that occur after a claim is closed. *In re Caraveo*, W.C. No. 4-358-465 (ICAO, Oct. 25, 2006). The determination of whether a claimant has sustained his burden of proof to reopen a claim is one of fact for the ALJ. *In re Nguyen*, W.C. No. 4-543-945 (ICAO, July 19, 2004).

5. As found, Claimant has failed to establish by a preponderance of the evidence that he should be permitted to reopen his July 26, 2018 Workers' Compensation claim based on a change in condition pursuant to §8-43-303(1), C.R.S. Initially, Claimant was involved in a motor vehicle accident while driving a truck in Atlanta, Georgia on July 26, 2018. He received medical treatment on the day of the accident and obtained follow-up care through Concentra. After undergoing conservative treatment including physical therapy Dr. Smith determined that Claimant had reached MMI with no impairment, medical maintenance treatment or permanent restrictions on August 8, 2018. Claimant contends that he suffered a worsening of condition to his left shoulder, neck and upper back after reaching MMI that is causally related to his July 26, 2018 motor vehicle accident. However, the medical records and persuasive opinion of Dr. D'Angelo reflect that Claimant has not suffered a change in condition pursuant to §8-43-303(1), C.R.S. that is causally related to his July 26, 2018 work accident.

6. As found, the Concentra records document that Claimant had muscular strains to his neck and upper back and no left shoulder injury. Within a week he had minimal pain/tightness. On August 7, 2018 he reported to his physical therapist that he was pain free. On the following day Claimant reiterated to Dr. Smith he was feeling good, had no pain and was ready to be released. Claimant had full range of motion in his neck, no objective signs of continuing injury and no subjective complaints. Furthermore, his pain diagram from August 8, 2018 did not document any symptoms. The preceding records directly contradict Claimant's statements that he had continuous pain since the accident that later worsened. Instead, the medical records document minimal injuries which evolved into benign physical exams at MMI. Furthermore, Dr. D'Angelo remarked that Claimant's benign left shoulder examination at Concentra on the date of injury was not consistent with an acute rotator cuff tear. Instead, she agreed with the diagnoses of cervical and left-sided trapezius strains. Dr. D'Angelo also commented that cervical and thoracic imaging did not show evidence of an acute injury and the course of Claimant's improving symptoms in the Concentra records was consistent with the original diagnoses of cervical and trapezius strains. Notably, Dr. D'Angelo specified that Claimant's shoulder and cervical imaging revealed only degenerative conditions.

7. As found, Claimant's first reference to any symptoms after MMI were in the May 2, 2019 PRMC records in which he reported neck and left shoulder pain arising in January 2019. PA-C Larson specifically noted that "[i]n January, he started having pain in his neck that radiates into his left shoulder." Claimant exhibited limited range of motion in his left shoulder with tenderness in his trapezius and cervical spine. Claimant's testimony that he was complaining to PRMC of those issues as early as August 16, 2018, is not supported by the records. It is unlikely that Claimant complained of left shoulder pain, neck pain, headaches, dizziness, or sleeping problems to PRMC during the period August 2018 through the first half of 2019, without any medical record documentation.

8. As found, the PRMC note on May 2, 2019 reflects that Claimant's pain complaints began in January 2019. As Dr. D'Angelo explained, symptoms that arose in January 2019 would not be causally related to minor muscular strains that were treated over the course of two weeks and resolved in August 2018. Dr. D'Angelo discussed that in February 2019 Claimant had poorly controlled diabetes with hemoglobin A1C levels of 8.3. She reiterated that Claimant likely had an adhesive capsulitis. Claimant was at a higher risk for the condition due to his diabetes. She noted the risk of developing the condition increases to 10-30% in the diabetic population. Dr. D'Angelo thus was not surprised to see Claimant's complaints arise at the time of elevated blood glucose levels. She testified the edema and thickening in the inferior joint capsule identified on his shoulder MRI was consistent with adhesive capsulitis unrelated to his work accident. Dr. D'Angelo summarized that the rotator cuff tear identified on MRI was degenerative because there were no reported symptoms at or near the time of injury consistent with an acute tear. She noted that, based on the medical records, Claimant's symptoms resolved in August 2018. However, Claimant's current symptoms arose in 2019 and are unrelated to his July 26, 2018 work injury. Dr. D'Angelo concluded that Claimant remains at MMI for his work accident.

9. As found, in contrast, Dr. Gellrick recommended reopening Claimant's case based on a worsening of symptoms since he reached MMI on August 8, 2019. Dr. Gellrick did not dispute that Claimant had adhesive capsulitis, but determined it was related to his work injury. She acknowledged that individuals with diabetes are at higher risk of developing adhesive capsulitis. Nevertheless, she reiterated that Claimant had a "significant" injury in July 2018, suffered continuous symptoms, thought he could get better on his own and then worsened. Dr. Gellrick noted Claimant had no intervening accidents to account for his current cervical or left shoulder conditions. She acknowledged the Concentra Atlanta records documented Claimant had no tenderness and full left shoulder range of motion. However, she explained that symptoms of a shoulder trauma may not appear for a couple days after the event. Despite Dr. Gellrick's opinion, the medical records and persuasive testimony reflect that Claimant suffered injuries during his July 26, 2018 motor vehicle accident that resolved by August 8, 2018 when he reached MMI. Claimant's first reference to any symptoms after MMI are in the May 2, 2019 PRMC records in which he reported neck and left shoulder pain beginning in January 2019. It is speculative to attribute Claimant's report of symptoms in January 2019 to his July 26, 2018 motor vehicle accident. The temporal delay and medical records suggest an attenuated causal connection between Claimant's January 2019

symptoms and motor vehicle accident. Claimant has thus failed to establish that he suffered a worsening condition that is causally related to his July 26, 2018 motor vehicle accident. Accordingly, Claimant's request to reopen his Workers' Compensation claim based on a change in condition is denied and dismissed.

ORDER

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

Claimant's request to reopen his July 26, 2018 Workers' Compensation claim based on a change in condition is denied and dismissed.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at <http://www.colorado.gov/dpa/oac/forms-WC.htm>.*

DATED: November 20, 2020.

DIGITAL SIGNATURE:


Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-118-423-002**

ISSUES

- I. Whether Claimant suffered a compensable injury on August 9, 2019 and is entitled to a general award of medical benefits.
- II. Whether Claimant established she is entitled to temporary total disability benefits.
- III. Whether Claimant established she is entitled to temporary partial disability benefits.
- IV. Whether Claimant established she is entitled to a change of physician.

STIPULATIONS

- The parties stipulated to an average weekly wage of \$835.00, subject to an increase based on COBRA.

FINDINGS OF FACT

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

1. Claimant alleges she suffered a back injury at work on August 9, 2019.
2. Claimant worked for Employer for about 14 years as a head chef where she provided meals at a private social club. Her job duties included prepping the food, cooking the food, serving the food, and cleaning up the kitchen. Claimant also described her job as very physical and requiring a lot of standing, lifting, bending, and twisting. Her usual work schedule was Monday through Friday and she would work approximately 6-8 hours, from approximately 8:30 a.m. to 3:00 p.m.
3. Claimant has a history of back pain that existed "for years" before the alleged date of injury. Claimant sought medical treatment and chiropractic care before 2019 for general maintenance of her back pain and to address flare ups of lower back pain and functional issues. During her testimony, Claimant agreed that the need for treatment would occur without a discrete or specific injury and agreed that she would often develop pain spontaneously or from minimal activities. She also agreed that she would not require medical treatment at times. The pain would merely resolve spontaneously.
4. The evidence submitted at hearing establishes Claimant was suffering from increasing back pain in the summer of 2019 and before August 9, 2019. The records establish that before the alleged incident at work, Claimant presented to a new chiropractic provider, Joint Chiropractic, on May 30, 2019. She went to this new chiropractic provider five times during the next month (and then again on August 24, 2019), after an onset of pain from an unknown or unidentified event on May 29, 2019. At the first appointment at Joint Chiropractic, Claimant specified neck and upper back pain in her pain diagram.

She also documented a history of back pain and sciatica. Moreover, the records from Joint Chiropractic include notations for documenting treatment of Claimant's low back in each of the late spring and summer 2019 visits which predate her alleged date of injury. Claimant's treatment frequency of five visits in five weeks shows an increase from her usual treatment frequency which she said consisted around two treatments per year. This increase in treatment suggests Claimant's back pain was elevated in the days and weeks before the alleged incident at work. (Exhibit A, Hearing Testimony.)

5. Claimant's supervisor, Claire G[Redacted], testified that she often spoke with Claimant about back pain since they both suffered from back pain for years before Claimant's alleged work injury. (Hearing Testimony; Exhibits A, C, M, and N.) As a result, Ms. G[Redacted]'s testimony and the Joint Chiropractic records support a finding that Claimant had preexisting and symptomatic back problems that predated the alleged work incident.
6. Claimant testified that she injured her back at the end of her shift on Friday, August 9, 2019. She described injuring herself while cleaning up the kitchen at the end of the day. She testified that on each Friday she has to perform more cleaning tasks, which includes picking up the large rubber floor mats and placing them on the sink. Claimant said that because of the weight of the floor mats, about 15 pounds, she has to pick them up with a swinging motion to get each one up and onto the sink. She stated that it was while she was picking up and swinging a floor mat that she hurt her back. Then, right after the incident, she said she tried to take out the trash but could not lift it because of her back pain and ended up asking a co-worker, Mr. Jay W[Redacted], to take the trash out for her.
7. At the time of her alleged accident, Claimant described her back symptoms. She said her back felt like it "locked-up." Claimant also testified that at the time of the incident, she felt pain going down her legs. Despite Claimant testifying that at the time of the incident she also felt pain going down her legs, the medical records are inconsistent with Claimant's contention that she developed pain down her legs on August 9, 2019.
8. Claimant stated that she neither reported her injury that day nor sought medical treatment because she thought her back would loosen up and get better. So shortly after the incident, Claimant locked up the restaurant and left.
9. Mr. W[Redacted] also testified at the hearing. He confirmed that he was working with Claimant the day of the alleged incident. He confirmed that he saw Claimant when her back locked up and helped her by taking the trash out. He also confirmed Claimant had back problems that predated the alleged work accident. For example, he said that while at work, Claimant would use a foam roller to roll out her back in order to manage her back pain.
10. Rather than seek medical treatment over the weekend, Claimant decided to participate in the Muddy Princess race. According to Claimant, the Muddy Princess is a women's 5k race that takes place over a muddy obstacle course. Claimant testified that she had already paid for the race so she thought that if she took it easy and walked the course, she might feel better. Claimant testified that rather than run the race, she walked the 5k course. Claimant, however, admitted that even though she walked the race, she still had to walk through mud that day. She denied, however, running the race, denied

going under or over any of the obstacles, and denied that her participation in the race aggravated her back. In stark contrast to Claimant's testimony, Claimant's medical records reflect that her participation in the race aggravated her lower back condition.

11. After participating in the Muddy Princess race, Claimant returned to work on Monday, August 12th. Claimant worked that day but testified that she was having trouble performing her job because of her back pain. Claimant also testified that she reported her work injury to her supervisor Clair G[Redacted] on the Monday after the race. Claimant also testified that after reporting her injury, she took the next day off, August 13th, to take it easy, but then returned to work on Wednesday and continued working her regular duties the rest of the week. Again, in stark contrast to Claimant's testimony about her reporting of the injury, Ms. G[Redacted], credibly testified that Claimant did not report an injury to her on Monday, August 12, 2019.
12. The ALJ acknowledges that Claimant did not work on August 13, but there is insufficient evidence about whether this was because of back pain or just a quirk in the schedule, and the ALJ notes that, while Claimant generally worked Mondays through Fridays, she admitted to working other days and hours, too, such as for events, and also that the schedule documented "personal days" when she took August 26 and August 27 off for her injury of August 25, 2019, but that there is no similar notation for August 13. Her supervisor, Ms. G[Redacted], could not state whether Claimant was scheduled to work on August 13 or might have simply not been scheduled. But given the lack of notation of a "personal day" and Ms. G[Redacted]'s credible testimony that she did not believe Claimant reported any work-related injury until August 29, as below, the ALJ finds that Claimant likely did not miss this shift because of any back injury, and as such, missed no time from work the week of August 12 because of any alleged incident on August 9. The ALJ also finds that, even if she did miss work because of back pain, this was more likely than not related to her ongoing back issues that pre-dated August 9 and/or because of her participation the Muddy Princess race that weekend. Claimant worked the balance of the week of August 11, including that Monday, Wednesday, Thursday, and Friday.
13. Claimant also returned to work the week after - From August 19th through August 23rd - and worked every workday and performed her regular job duties. Moreover, as part of her job, Claimant is given the option of cleaning the large commercial grill and stove in the kitchen. This is a very physical task and involves squatting, kneeling, and lifting. Ms. G[Redacted] testified that she had not done that job herself in a couple of years because it aggravated her back. If an employee opts in and agrees to clean the stove and grill, they are paid an extra \$50.00. During this week, and on top of her regular job duties, Claimant agreed to clean the grill and stove, cleaned the grill and stove, and was paid another \$50.00.¹ The ALJ also credits this portion of Ms. G[Redacted]'s testimony as more evidence that Claimant sustained no disability during that time, as she was not only able to perform her usual duties, but the more physical job demands of this special assignment. Nor does it make sense that the employer would allow Claimant to clean the grill after Claimant reported suffering a back injury and was – according to Claimant

¹ On August 21, 2019, Claimant cleaned the commercial grill and stove and was paid an additional \$50.00. (See Exhibit O.)

- having problems performing her regular job duties. As a result, Claimant's actions of cleaning the grill and stove contradict her contention that she suffered an injury at work two weeks earlier, reported that injury, and was unable to perform her regular job duties – without difficulties - since August 9th.

Prior Back Injury and Treatment.

14. As found above, Claimant has had intermittent back pain since she was young and has undergone chiropractic treatment for years. (Ex. A and B.) Moreover, while working for Employer, it was known by her supervisor, Ms. G[Redacted], and co-workers, such as Mr. W[Redacted], that Claimant had preexisting back problems and had a roller at work that she would use to relieve her back pain.
15. On May 30, 2019, Claimant started treating at a new chiropractic center called The Joint Chiropractic. At her first visit, Claimant completed a patient history form and documented her past medical history. She noted, among other problems, that her past medical history included lower back pain, middle back pain, and upper back pain. At this visit, she also completed a pain diagram where she noted pain in her left shoulder, neck, and the middle of her back. At this visit, Dr. Teegerstrom performed SLR (straight leg raise) testing, which was negative on the left and the right. He also did not note Claimant had any symptoms radiating into her lower extremities. He did, however, note Claimant had taut and tender fibers at the L1 and L5 portion of her lumbar spine as well as subluxations. As a result, Dr. Teegerstrom performed chiropractic adjustments at several levels of her neck and back – including her lumbar spine at L1 and L5. He also recommended Claimant follow up with treatment 2 times per week for 2 weeks and then reassess treatment at that time. (Ex. A.)
16. Although Claimant did not follow up and obtain chiropractic treatment 2 times per week, she did continue with treatment. Claimant continued treating with various chiropractors at The Joint from May 30, 2019, through June 29, 2019. At each appointment, the findings, treatment, and recommendations for follow up treatment remained similar - Claimant did not have any symptoms radiating into her lower extremities and treatment was directed towards her neck, middle back, and lower back / lumbar spine. (Ex. A.)

Treatment after August 9, 2019 Incident

17. On August 24, 2019, Claimant presented for another chiropractic treatment. The notes state Claimant complained of - off and on - right sided low back pain and aching for the past week. She also complained of severe aching and sharpness with movement. (Ex. B.) There is not, however, any indication Claimant's work activities caused her to develop her right sided low back pain during the past week. Moreover, "the past week" does not encompass the date Claimant alleges she was hurt at work – which was August 9, 2019 - about 2 weeks earlier. Plus, there is no indication Claimant complained of pain radiating into her legs between August 9th and this appointment.

Dramatic Change in Claimant's Condition after August 25, 2019 incident

18. On Sunday, August 25, 2019, Claimant presented to Kaiser's Urgent Care center. The report from this visit indicates Claimant has had intermittent back problems since she

was young. The medical report from this visit also describes the most recent onset of Claimant's back problems as follows:

- Claimant has had intermittent problems with low back pain since she was younger.
- Claimant is a chef and turned funny while cooking 2 weeks ago and has had right lower back pain since then.
- Her back pain was exacerbated when she ran in muddy purple race which is an obstacle course.
- She notes she went to her chiropractor yesterday for her pain and it might have helped a little.
- She was doing fine, however, until today when she stood up and heard a pop. She has severe pain in her right low back and has numbness in her anterior thigh.
- She started having pain radiating down both of her legs – which occurred after she stood up and heard a pop or snap in her back that day.

19. Claimant was given Toradol for pain and prescribed a steroid burst. It was also noted that Claimant “gets no help with Flexeril,” so it was not prescribed.² Claimant was diagnosed with low back pain with numbness and tingling of her skin and told to follow up with her PCP and get an MRI.

20. Claimant testified that the popping or snapping incident caused immediate and “searing pain” in her back and into her legs, and directly led her to seek urgent treatment at the Kaiser emergent care center on an after-hours basis.

21. On August 29, 2019, Claimant followed up with a physician at Kaiser, Dr. Christina Walden. At this visit, Claimant specifically said that there was no workplace injury when she completed a check-in questionnaire at Kaiser. In the report from Claimant's visit that day, the question, and answer are as follows:

Question: Is today's visit related to Third Party Liability? (Third Party Liability is when another person or company is responsible for paying your charges and not your own personal insurance. Ex: a motor vehicle accident or Workers' Compensation).

Answer: No

22. The notes from the August 29th visit say Claimant was seen in urgent care four days earlier for low back pain radiating to the right side. At this visit, Claimant also described having pain in her left lower back radiating down her left leg with some numbness. It was also noted that Claimant has had back pain in the past but feels this is worse. Claimant also complained of numbness involving her left toes, No. 3, 4, and 5. Based on Claimant's description of her symptoms that developed on August 25th as well as Dr.

² The indication that Claimant told the medical provider that Flexeril does not help reveals Claimant has previously been treated for back pain by a physician and was prescribed Flexeril.

Walden's findings, - low back pain with radicular symptoms in Claimant's lower extremities - she ordered an MRI and referred Claimant to neurosurgery for assessment of her thoracic and lumbar spine.

23. Later that day, Claimant underwent an MRI. The MRI showed a broad-based central disk extrusion [herniation] with severe spinal canal stenosis at the L3-4 level. The MRI findings supported Dr. Walden's decision to refer Claimant to neurosurgery.

Claimant did not report her injury to Employer until after the August 25th incident and a recommendation made for her to see a neurosurgeon.

24. Throughout August 9th through August 28th, Claimant did not state she suffered a compensable work injury and that she desired to pursue a claim. Ms. G[Redacted] credibly testified that Claimant did not report or claim any injury at work until August 29, 2019. Claimant did not complete any paperwork for any workers compensation injury. She did not ask Ms. G[Redacted] to file paperwork or notify the workers' compensation carrier. Moreover, as brought out during the hearing, Claimant has two prior workers' compensation claims that were pursued all the way through settlements. Thus, the ALJ infers Claimant was somewhat familiar with the workers' compensation system and how to report and pursue such claims, but took no action to pursue a claim or report her injury during this three-week time period.

Motor Vehicle Accident on September 11, 2019.

25. On September 11, 2019, Claimant was involved in a motor vehicle accident (MVA). After the MVA, Claimant complained of more consistent pain radiating into her left leg, and new pain radiating into her right leg.
26. On November 4, 2019, Claimant was seen by Dr. William Thoman at Kaiser. At this appointment, she gave a different account as to how she injured her back at work. According to Dr. Thoman's notes, Claimant said her back pain started in August 2019 when she was putting out the trash and picked up some floor mats at work and she felt a twinge in her back and the pain gradually came on and got worse. This note, however, contradicts Claimant's testimony that picking up the floor mats caused her injury and that she was unable to take out the trash. It also contradicts Mr. W[Redacted]'s testimony where he said he had to take the trash out for Claimant because she could not do it after lifting up the floor mats. It also fails to contain the information about the Muddy Princess race and the August 25, 2019 incident when she stood up and felt a pop or snap in her back and then developed severe pain in her back and lower extremities.

Dr. Bernton's IME and Testimony.

27. On February 18, 2020, Claimant was evaluated by Dr. Bernton. As noted in his report, Claimant told Dr. Bernton that she was injured when she was lifting a rubber floor mat at work. It also notes that although Claimant tried to work after the incident, she was ultimately unable to keep working her full shifts. His report states:

Cleaning up at the end of the day and swinging rubber mats that weighed approximately 15 pounds. She notes that she was swinging a mat into the sink; and as she did so, she felt

a "tweak." She notes that it was sore but got worse and continued to worsen over the weekend. She notes symptoms were in the low back, more on the right than on the left. She notes there was also some posterior foot discomfort over the lateral toes.

She notes initially she was trying to stretch and tried to continue to work, although she notes she was not able to continue full shifts in her job as the head chef.

Exhibit M.

28. Based on the history Claimant provided to Dr. Bernton, Claimant merged the timeline of events and left out critical information about her history. Claimant made it sound like once she lifted the rubber mat off the floor at work, she quickly progressed to being unable to work without the occurrence of any other significant events. Claimant, however, left out several critical facts contained in her wage records and medical records. First, Claimant did not tell Dr. Bernton that after the incident at work, she was still able to participate, to some degree, in the Muddy Princess race. Second, she failed to tell Dr. Bernton that the Muddy Princess race made things worse. Third, she failed to tell Dr. Bernton that, except for missing one day of work for an unknown reason, she managed to work full duty, and even took on extra physical job duties – cleaning the commercial stove and grill – before presenting to Kaiser’s urgent care. Fourth, she failed to tell Dr. Bernton that – according to the Kaiser records – she was “doing fine, however, until she stood up and heard a pop” and developed severe pain in her right low back as well as pain and numbness in her right leg. And absent from her description to Dr. Bernton was what she testified to at hearing - that the popping or snapping incident caused immediate “searing pain” in her back and into her legs and directly led her to seek urgent treatment at the emergency room on an after-hours basis.
29. Dr. Bernton testified that the MRI findings were consistent with an acute event as described on August 25 (with some findings that were generally degenerative and pre-existing). He also testified that it is unlikely that the relatively minor event of August 9 – if it even occurred – would cause or aggravate a herniation, the stenosis or any of the other findings, based on the mechanism alleged and based on Claimant’s presentation over the 17 days after the incident. He thought the findings on the MRI were “big time” and a “big disc herniation” and remarked that on the spectrum of determining whether the MRI findings might relate to the event on August 9 or the August 25 incident, it was “way to the end of the scale” in favor of the August 25 incident. He noted that Claimant’s continued work and her participation in the “Mudder” race also supported this, but his primary determination was based on a mechanism, and he noted a study that found that 62% of all disc herniations resulted from a non-specific inciting event as occurred on August 25. He also concluded that it is improbable that Claimant sustained the injuries shown by the MRI findings on August 9 but was still able to keep working, clean the oven and participate in any capacity in the Mudder race.
30. Dr. Bernton also determined that injections and any surgery to address stenosis would relate to pre-existing degeneration that was not impacted by the August 9 incident, or

stemmed from the injuries Claimant sustained on an acute basis on August 25, 2019 and September 11, 2019. (Exhibit M, Hearing Testimony.)

31. Dr. Bernton concluded that both the August 25 and September 11 incidents constituted intervening events, and that all medical treatment needs and disability since that time are related to those injuries. He also concluded that the minimal event of August 9, 2019, assuming that an incident occurred on that date, did not cause the need for any medical treatment, and did not cause any disability. The ALJ credits these opinions of Dr. Bernton and finds them persuasive. His opinions are supported by the medical record and are a plausible interpretation of the evidence.

Dr. Gellrick's IME.

32. While Dr. Gellrick did not testify at the hearing, the ALJ also agrees with Dr. Bernton's opinions in finding her IME report opinion unpersuasive. Dr. Gellrick ignored or did not appreciate the significance of the August 25 event that constituted a discrete injury. She also did not know that Claimant's presentation markedly changed after this acute event. Nor did it appear that she knew that Claimant worked between August 9 and August 25 without issue and even performed increased tasks (cleaning an industrial oven), and may have been under the impression that Claimant stopped working on August 9, and not August 26 and August 29. Moreover, Dr. Gellrick did not critically consider Claimant's current limitations based on her disc herniation that would have precluded her from performing her job in any capacity between August 9 and August 25, if such limitations were present after that August 9 event. She accepted Claimant's inconsistent reports as to her participation in the "muddy race" and did not perform an adequate inquiry into the nature of that race, which involved, at a minimum, walking over three miles partially through mud and possibly some uneven terrain and other obstacles. Dr. Gellrick acknowledged having no records from the September 11th motor vehicle accident, and so did not know that Claimant was suggesting "drastic" increase in pain and new disability that she was attributing to the motor vehicle accident in the worsening context. The ALJ determines these flaws to be fatal to her opinions. Thus, the ALJ does not find Dr. Gellrick's opinions on causation to be credible or persuasive.

Testimony of Jay W[Redacted].

33. Claimant called Jay W[Redacted] to testify as a rebuttal witness. Mr. W[Redacted] was a co-employee who worked regularly with Claimant through the time of her alleged injury. He testified that Claimant had longstanding back problems that significantly predated Claimant's alleged date of injury, and also that he sometimes helped her with more physical tasks. His testimony was sincere, but he recalled few specifics about the injury based on the time that has passed, and his recollection of the chronology did not necessarily track with the evidence. He testified that he witnessed the August 9th incident, after which Claimant's back "locked up." That said, he was unable to recall whether this was while lifting mats or taking out the trash or some other activity and was unable to provide additional specifics. This makes his recollection about whether an incident actually occurred and that he witnessed it, rather than simply recalling later statements by Claimant or seeing her manifesting pain as she often did even before

August 9 – and whether this incident even was on August 9 – subject to some dispute. After that, he recalled, Claimant returned to work and then participated in a race.

34. He also testified that after the race, Claimant appeared to be in much more pain. Mr. W[Redacted] was clear that her presentation was markedly different than before. But he was confident that Claimant worked just a couple of days after that “race,” though and, asked repeatedly, he confirmed that he witnessed Claimant’s markedly different presentation for just two shifts before Ms. G[Redacted] sent her home from work, and that Claimant never returned to her usual position with the company afterward. This time frame conflicts with the “race” that occurred on August 10 or August 11, but does match up with the August 25 incident, after which Claimant missed two days, presented for two shifts in obvious pain and with difficulty walking (per Ms. G[Redacted]) and was then sent home.
35. The ALJ finds that Mr. W[Redacted] saw Claimant exhibit signs and symptoms of back pain on or about August 9. That said, the ALJ cannot credit Mr. W[Redacted]’s recollection in toto. For example, Mr. W[Redacted] said he had to take the trash out for Claimant. Yet Claimant’s statements to Dr. Thoman contradict Mr. W[Redacted]’s testimony. Dr. Thoman stated in his November 4, 2019, report that Claimant said she started developing back pain in August when she was putting out the trash and picked up some floor mats. Moreover, Mr. W[Redacted] testified that Claimant was much worse after the race and had to take two days off and then worked two days before being sent home and never working again. Based on the time sheets, it appears Mr. W[Redacted] is conflating “the race” with the August 25 incident, based on the stated timeline.
36. The ALJ therefore finds that Mr. W[Redacted]’s testimony bolsters the conclusion that the event of August 25 was the significant event in the chronology of events and that it was the sole incident that that caused Claimant’s need for medical treatment and her disability.
37. Mr. W[Redacted] also testified that he may sometime perform other tasks for Claimant – including possibly cleaning “double stack” oven, for which the lower oven would require bending and stooping. He did not recall that he assisted Claimant on August 21, though. The ALJ finds based on Ms. G[Redacted]’s testimony and the wage records that document that Claimant was paid for that service, that Claimant was the one who cleaned the oven without assistance on that date.
38. Overall, the ALJ did not find Claimant’s testimony to be credible or reliable because Claimant.
 - Understated her back problems before August 9, 2019.
 - Understated her participation in the Muddy Princess race and the effect it had on her back.
 - Understated the acute, discrete, and significant injury she sustained on August 25, 2019, when she stood up and suffered a herniated disc.

- Overstated the extent and duration of her symptoms on August 9, 2019.
- Provided inconsistent statements to her medical providers and at hearing about the mechanism of injury and the timing of her symptoms.
- Specifically stated on the August 29, 2019, check-in questionnaire at Kaiser that her treatment for back pain was unrelated to a work injury.

39. As a result, the history and timeline provided by Claimant during her testimony, to Dr. Bernton, and to Dr. Gellrick conflicts with the underlying medical records. Claimant did not have a single incident at work on August 9th that gradually worsened. The ALJ finds, instead, that Claimant had back pain while working on Friday August 9th based on her preexisting back condition. The ALJ also finds that such back pain did not necessitate the need for medical treatment and did not cause any disability. This is evidenced by the fact that Claimant did not report an injury on Friday and did not seek medical treatment based on that incident. Claimant merely obtained chiropractic treatment – which had previously been recommended for her preexisting back condition.

40. The ALJ finds that Claimant had chronic back pain that bothered her while working. Such back pain was merely the result of Claimant’s baseline preexisting condition. Thus, lifting the rubber mat at work did not cause an injury and necessitate the need for medical treatment and did not cause any disability. At that time, Claimant’s pain was due to her preexisting back condition. The ALJ also finds that it was the August 25, 2019, event of standing up that caused her herniated disc that caused a significant increase in Claimant’s back pain and symptoms and necessitated the need for medical treatment, which included the visit to Kaiser’s urgent care, the MRI, and referral to a neurosurgeon for possible surgery and her resulting disability.

CONCLUSIONS OF LAW

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

General Provisions

The purpose of the Workers’ Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers’ compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers’ compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Claimant suffered a compensable injury on August 9, 2019 and is entitled to a general award of medical benefits.

Claimant was required to prove by a preponderance of the evidence that the conditions for which she seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. Claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.*, 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. See *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center*, WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.*, WC 4-606-563 (ICAO August 18, 2005). The question of whether Claimant met her burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000).

As found, the ALJ did not find Claimant's testimony to be credible or reliable for many reasons. For example, Claimant:

- Understated her back problems before August 9, 2019.
- Understated her participation in the Muddy Princess race and the effect it had on her back.
- Understated the acute, discrete, and significant injury she sustained on August 25, 2019, when she stood up and suffered a herniated disc.
- Overstated the extent and duration of her symptoms on August 9, 2019.
- Provided inconsistent statements to her medical providers and at hearing about the mechanism of injury and the timing of her symptoms.
- Specifically stated on the August 29, 2019, check-in questionnaire at Kaiser that her treatment for back pain was unrelated to a work injury.

The ALJ also did not find Dr. Gellrick's opinion about causation to be credible or reliable because Claimant did not provide Dr. Gellrick accurate and complete information about the timing, degree, and cause of her symptoms. Like a house built on sand, an expert's opinion is no better than the facts and data on which it is based. See *Kennemur v. State of California*, 184 Cal. Rptr. 393, 402-03 (Cal. Ct. App. 1982).

The ALJ did credit the opinion of Dr. Bernton to the point that he concluded Claimant did not suffer a compensable injury on August 9, 2019, and that Claimant's injury, need for medical treatment, and disability was caused by the August 25, 2019, incident when she suffered a herniated disc while standing up. Dr. Bernton's testimony was found to be supported by the medical records and was a persuasive interpretation of the underlying evidence that was available to him.

As a result, the ALJ finds and concludes Claimant failed to establish by a preponderance of the evidence that she suffered a compensable injury.

ORDER

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

1. Claimant's claim for benefits is denied and dismissed.

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

DATED: November 24, 2020.

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-134-834-001**

ISSUE

1. Whether Claimant has proven by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course of his employment with Employer.
2. If Claimant established the existence of a compensable injury, whether Claimant is entitled to medical benefits.
3. If Claimant established the existence of a compensable injury, whether Claimant is entitled to temporary disability benefits.

RESPONDENTS' MOTION FOR DIRECTED VERDICT

OACRP 2(B) provides that the Colorado Rules of Civil Procedure apply to Workers' Compensation hearings unless they are inconsistent with the OACRP rules and the provisions of the Workers' Compensation Act. Because neither the Act nor the OACRP prohibits or limits the ability to resolve a case as a matter of law, the C.R.C.P. related to directed verdicts, and specifically, C.R.C.P. 50, is applicable to workers' compensation hearings.

A "motion for a directed verdict admits the truth of the adversary's evidence and of every favorable inference of fact which may legitimately be drawn from it." *Western-Realco Ltd. v. Harrison*, 791 P.2d 1139 (Colo. App. 1989). Every factual dispute must be resolved in favor of the non-moving party and the "strongest inferences reasonably deducible from the most favorable evidence should be indulged in his favor." *Gossard v. Watson*, 221 P.2d 353, 355 (Colo. 1950). "A motion for directed verdict should be granted only in the clearest of cases when the evidence is undisputed, and it is plain no reasonable person could decide the issue against the moving party." *Evans v. Webster*, 832 P.2d 951, 954 (Colo. App. 1991).

C.R.C.P. 50 permits a party to move for a directed verdict at the close of the evidence offered by an opponent or at the close of all the evidence. Respondents moved for directed verdict upon the conclusion of Claimant's case-in-chief. This required the Court to review the evidence admitted at that time, drawing every reasonable inference in favor of the Claimant. The Court took Respondents' motion under advisement, reserving ruling on the motion until this order. Because the Court finds, based on the complete record, that Claimant has failed to meet his burden of establishing a compensable mental impairment, Respondents' motion for directed verdict is denied as moot.

FINDINGS OF FACT

1. Claimant is a 60 year-old-man, who was employed by Employer as the director of security for Employer's hotel in downtown Denver.

2. In late January or early February 2020, Employer began experiencing financial difficulties. In March 2020, Employer made the decision to reduce staffing at Employer's hotel in all departments, including the security department for which Claimant was the director.

3. Respondent's General Manager, Anthony D[Redacted] credibly testified that over the first three days of March 2020, Employer began receiving cancellations of reservations, meetings and conventions due to the COVID-19 pandemic resulting in cancellations of 20,000 room nights, a drop in expected revenue of \$5,800,000 in three days. Occupancy at the hotel dropped from 89 percent to 14 percent.

4. Claimant and other department heads were requested to reduce staff schedule to account for the lower occupancy at the hotel and the loss in revenue. Claimant objected to Employer's decision and communicated his disagreement via email to Mr. D[Redacted]. Claimant testified that in his opinion, Mr. D[Redacted]'s request to cut the security schedule by 40% was totally unacceptable, and he would not let it happen.

5. On March 5, 2020, Mr. D[Redacted] requested that Claimant meet him the following day with his plan to reduce his scheduled by 40% for the next four weeks. In an email on March 6, 2020 at approximately 9:08 a.m., Claimant responded to Mr. D[Redacted] indicating that he "did not have the time to sit down and work out a four-week schedule in three hours." Claimant also communicated his "proposal" to Mr. D[Redacted] for security scheduling. In the email, Claimant stated: "Let me know if you feel this meeting at noon will be constructive. I have my doubts. If it's going to be just simple cost cutting at the expense of Guest and Associate Safety and my 'other family' my Security Team, then I cannot see a positive outcome. Please let me know If you still want to meet so I can decide what actions I need to take to protect the above."

6. The following day, March 6, 2020, Claimant participated in a meeting with Mr. D[Redacted] and Irene Bell, Employer's human resources director at approximately noon. Claimant did not prepare a plan to reduce security schedules by 40% as requested and did not provide the schedules requested. During the meeting, Mr. D[Redacted] and Ms. Bell believed Claimant was aggressive and unprofessional. During the meeting, Claimant stated his belief that Employer (or at least Mr. D[Redacted]) had no concern for hotel guests or associates and criticized Mr. D[Redacted]'s decision regarding reduction in security staffing. At the conclusion of the meeting, Claimant told Mr. D[Redacted] that he should "watch your space" or words to that effect. Mr. D[Redacted] and Ms. Bell interpreted Claimant's statement as a threat. As a result of the meeting, Claimant was asked to leave and go home. Mr. D[Redacted] interpreted Claimant's conduct as insubordinate and made the decision to suspend Claimant.

7. Mr. D[Redacted] testified that he made requests to cut staffing to 15 departments, and Claimant was the only department head who refused to participate.

8. Ms. Bell credibly testified that during the March 6, 2020 Claimant was disrespectful to Mr. D[Redacted], argumentative and unprofessional, and that she interpreted Claimant's statements as threatening.

9. On March 6, 2020, Employer suspended Claimant from his employment for conduct characterized as "unprofessional conduct and veiled threats." (Ex. F)

10. On March 20, 2020, Claimant saw Pamela Wanner, M.D., at Kaiser Permanente. Claimant reported that "he has been disagreeing with general manager and has now been suspended from his job. Now requesting FMLA to deal with significant anxiety over this situation as well as caring for 3 small children." Claimant reported that he did not feel able to work due to the level of stress/anxiety on a daily basis. Dr. Wanner diagnosed Claimant with stress and depression and insomnia, and prescribed medications for these conditions. (Ex. 4).

11. On May 14, 2020 claimant Deirdre Fraller, NP, at Kaiser Permanente. Claimant reported he began having difficulty in January 2020. Claimant reported his employer began having financial difficulty and he was asked to reduce staffing. Claimant felt it was not safe. In March 2020 Claimant was required to make a 40% reduction staff which he felt was "totally unsafe," and he "couldn't let it happen." Claimant reported he tried to raise the issue with the manager by e-mail and then had a meeting with the manager and HR. Claimant noted he was suspended for insubordination in unprofessional conduct and "making veiled threats." (EX. 4).

12. Claimant reported he felt stress and anxiety but denied depression. Claimant reported he had also begun taking medication is in September 2019. Claimant's medical records indicate claim it had experienced marital difficulties beginning in 2019 which contributed to his anxiety. (EX. 4).

13. Ms. Fraller indicated claim it had a prior psychiatric history of major depressive disorder (MDD) and insomnia. Claimant's working diagnosis was a post-traumatic stress disorder, insomnia, and anxiety disorder. Claimant was provided with medications for these conditions. (Ex. 4).

14. The parties have stipulated that Claimant's average weekly wage was \$1,699.25.

15. Claimant did not sustain any physical injury arising out of or in the course of his Employment with Employer.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. See § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. See § 8-43-201, C.R.S. A preponderance of the

evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id.* at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Compensability Of Mental Injury

Claimant contends he sustained a mental impairment arising out of and in the course of his employment with Employer, specifically that he suffered from anxiety, insomnia and post-traumatic stress disorder related to his disagreement with Employer's decision to ask him to cut security department staffing by 40%. The Workers' Compensation Act has authorized recovery for a broad range of physical injuries but has "sharply limited" a claimant's potential recovery for mental injuries. *Mobley v. King Soopers*, WC No. 4-359-644 (ICAO, Mar. 9, 2011). Enhanced proof requirements for mental impairment claims exist because "evidence of causation is less subject to direct proof than in cases where the psychological consequence follows a physical injury." *Davidson v. City of Loveland Police Department*, WC No. 4-292-298 (ICAO, Oct. 12, 2001), *citing Oberle v. Industrial Claim Appeals Office*, 919 P.2d 918 (Colo. App. 1996). A claimant experiencing physical symptoms caused by emotional stress is subject to the requirements of the mental stress statutes. *Granados v. Comcast Corporation*, WC No. 4-724-768 (ICAO, Feb. 19, 2010); *see Esser v. Industrial Claim Appeals Office*, 8 P.3d 1218 (Colo. App. 2000), *aff'd* 30 P.3d 189 (Colo. 2001); *Felix v. City and County of Denver* W.C. Nos. 4-385-490 & 4-728-064 (ICAO, Jan. 6, 2009).

Section 8-41-301(2)(a), C.R.S. imposes additional evidentiary requirements regarding mental impairment claims. The section provides, in relevant part:

A claim of mental impairment must be proven by evidence supported by the testimony of a licensed physician or psychologist. A mental impairment shall not be considered to arise out of and in the course of employment if it results from a disciplinary action, work evaluation, job transfer, lay-off, demotion, promotion, termination, retirement, or similar action taken in good faith by the employer. The mental impairment that is the basis of the claim must have arisen primarily from the claimant's then occupation and place of employment in order to be compensable.

The definition of "mental impairment" consists of two clauses that each contains three elements. The first clause requires a claimant to prove the injury consists of: "1) a recognized, permanent disability that, 2) arises from an accidental injury involving no physical injury, and 3) arises out of the course and scope of employment. *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023, 1030 (Colo. 2004). The second clause requires the claimant to prove the injury is: "1) a psychologically traumatic event, 2) generally outside a worker's usual experience, and 3) that would evoke significant symptoms of distress in a similarly situated worker." *Id.* The issues of whether the "psychologically traumatic event" is one "generally outside of a worker's usual experience," and of a type which would "evoke significant symptoms of distress in a worker in similar circumstances," are questions of fact. See *In re Jasso*, W.C. No. 5-057-876-01 (ICAO, Nov. 16, 2018). Section 8-41-301 (2)(c), C.R.S., further provides that a "claim of mental impairment cannot be based, in whole or in part, upon facts and circumstances that are common to all fields of employment."

Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable mental injury or impairment. To be compensable, a mental impairment must arise from an accidental injury. The evidence does not establish that any "accidental injury" occurred. The Workers' Compensation Act, § 8-40-201 (1) defines "accident" as "an unforeseen event occurring without the will or design of the person whose mere act causes it; an unexpected, unusual or undesigned occurrence; or the effect of an unknown cause, or the cause being known, an unprecedented consequence of it." Claimant's mental impairment (in the form of diagnosed anxiety, insomnia, and PTSD) resulted, in part, from Claimant's disagreement with Employer's direction that Claimant reduce security department staffing by 40% due to financial issues. Mr. D[Redacted] credibly testified the decision to decrease staffing at the hotel was an economic decision driven by occupancy rates and financial conditions, including a drop in hotel occupancy from 89% to 14% over a brief period of time, and decreasing hotel revenue. The ALJ concludes that Employer's decision to request that staffing be reduced in response to economic factors does not constitute an "accident" within the meaning of the Act.

Even if the decision to direct Claimant to cut his labor costs could be characterized as an "accident," a request to reduce staff, or cut costs, based on economic or financial factors is a circumstance that is common to all fields of employment. Similarly, and employee's disagreement with a business decision made by upper management is common to all fields of employment. Because a claim of mental impairment cannot be

based upon facts or circumstances common to all fields of employment, Claimant's mental impairment is not compensable under the Colorado Workers' Compensation Act.

To the extent Claimant's suspension contributed to or caused Claimant's anxiety, insomnia and PTSD, the Workers' Compensation Act specifically provides that a mental impairment resulting from a disciplinary action, termination or other similar action taken in good faith by the employer is not considered to arise out of the course of employment. The evidence established that Claimant sent emails to Mr. D[Redacted] and others which demonstrated his intent to defy Employer's direction to reduce staff, and Claimant's conduct in the March 6, 2020 meeting was reasonably perceived as insubordinate and disrespectful. Claimant's testimony also established his intent not to comply with Employer's request. The ALJ finds that Employer's decision to suspend Claimant was taken in good faith. Accordingly, to the extent Claimant experienced anxiety or distress as a result of his suspension or disciplinary action, it is not compensable as a mental impairment under the Colorado Workers' Compensation Act.

Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. § 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School District #11*, W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012).

Because Claimant has failed to establish that he sustained a compensable work-related injury, his request for medical treatment is denied and dismissed.

Temporary Total Disability Benefits & Average Weekly Wage

To prove entitlement to Temporary Total Disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. See Sections 8-42-(1)(g), 8-42-105(4); *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office*, 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage-earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (citing *Ricks v. Industrial Claim Appeals Office*, P.2d 1118 (Colo. App. 1991)).

Because Claimant has failed to establish that he sustained a compensable work-related injury, his request for temporary total disability benefits is denied and dismissed.

ORDER

It is therefore ordered that:

1. Claimant failed to establish by a preponderance of the evidence that he sustained a compensable injury arising out of the course of his employment with Employer. Claimant's claim is denied and dismissed.
2. Claimant has failed to establish by a preponderance of the evidence an entitlement to medical benefits.
3. Claimant has failed to establish by a preponderance of the evidence an entitlement to temporary total disability (TTD) benefits.
4. All remaining issues are moot.

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



DATED: November 25, 2020.

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-119-454-001**

ISSUES

- Did Claimant prove he suffered a compensable injury because of a work-related motor vehicle accident on September 6, 2019?
- If Claimant proved a compensable injury, the ALJ will address the following additional issues:
- What is Claimant's average weekly wage?
- Did Claimant prove treatment from CCOM was reasonably needed to cure and relieve the effects of the injury?
- The parties agreed to reserve any issues relating to a lumbar surgery recommended by Dr. Bhatti.

FINDINGS OF FACT

1. Claimant worked for Employer as a parts delivery driver. He began the job on September 4, 2019.

2. On September 6, 2019, Claimant was involved in a rear-end motor vehicle accident on Highway 50 in Pueblo. Claimant was stopped at a red light at the intersection with Purcell Boulevard when he was hit from behind by a Ford F-350 work truck. Claimant was driving a Nissan Frontier. The tow hook on the front of the F-350 impacted the rear bumper of Claimant's vehicle and dented the metal. The airbags of Claimant's vehicle did not deploy. The responding State Patrol officer estimated less than \$1,000 damage to Claimant's vehicle. The driver of the F-350 indicated he was traveling 15 miles per hour at the time of the accident. The other driver was cited for following too closely.

3. Claimant was facing forward and unaware of the impending impact. He was "thrown forward, jerked backward . . . my torso went forward, my neck went backwards. That's about what I remember." Claimant's neck hit the headrest when his head was jerked backward.

4. Claimant felt no pain immediately after the accident. He was primarily annoyed and worried the accident would impact his job because it was only his third day of work. While he was waiting for the State Trooper to complete the accident report, Claimant started to feel "discomfort" in his low back.

5. Claimant called his manager, Joe O[Redacted], who came to the accident scene. They returned to the store after the report was completed. Mr. O[Redacted] suggested Claimant go to the emergency room, but Claimant did not want to risk taking

time off work, so Mr. O[Redacted] gave Claimant the number of a triage nurse to call instead.

6. Claimant spoke with a triage nurse, who recommended he use ice, heat, and OTC NSAIDs and pain relievers. He finished his shift and went home. Claimant's back was more painful, so he took some ibuprofen, applied ice, and lay on a heating pad.

7. Claimant's back pain was a bit worse the next morning, but he went to work anyway. The supervisor allowed him to sit in the back room between deliveries.

8. Claimant's back pain continued to worsen over the next several days. He also developed pain and stiffness in his neck. Claimant did not go to the doctor and just "soldiered through it" because he did not want to miss work or risk his job.

9. Claimant eventually requested treatment because his back and neck pain continued to get worse. Employer referred him to CCOM.

10. Claimant saw PA-C Buddy Leckie at his initial CCOM appointment on September 23, 2019. He reported pain in his low back, hips, and neck. He rated his overall pain level at 7/10. Claimant said he had no symptoms immediately after the accident, but he subsequently developed low back pain and stiffness, occasionally radiating into his legs. He also reported neck pain that worsened when he turned his head or looked over his shoulder. Claimant denied any prior back injuries. On physical examination, PA-C Leckie noted tenderness to palpation over Claimant's entire low back, hips, and bilateral trapezius muscles. Claimant moved slowly from sitting to standing, with limited range of motion. PA-C Leckie diagnosed lumbar and cervical strains and referred Claimant for physical therapy. He also gave imposed work restrictions of no lifting over 10 pounds, no overhead reaching, and no ladders.

11. Claimant returned to CCOM on October 7, 2019 and saw Dr. Daniel Olson. He reported "a lot of discomfort" across his lower back, hips, and buttock. He was attending physical therapy and reported some modalities were helpful and others aggravated his pain. Claimant appeared in mild to moderate discomfort. He had some difficulty getting up from a chair and tended to lean forward when standing. Range of motion was limited in all directions. Dr. Olson recommended Claimant continue physical therapy but also ordered pool therapy.

12. On October 16, 2019, Claimant reported some improvement in his neck pain, but no significant change in his low back pain. His overall pain level was 8/10. His main complaint was the inability to stand up straight. Dr. Olson observed Claimant had difficulty standing and could not reach a neutral position, lacking approximately 10° of extension. He was tender to palpation across the lower sacroiliac region with "a lot of tightness and tenderness." Dr. Olson ordered chiropractic treatment because Claimant was not responding to physical therapy.

13. Claimant started seeing Dr. David Vik, a chiropractor, on October 23, 2019. He told Dr. Vik he felt no pain immediately after the MVA, but his back became painful "shortly afterwards." He also noted the onset of neck pain five days after the accident.

Claimant reported constant deep, achy low back and right hip pain ranging from 5-8/10 depending on activity. The pain was interfering with his ability to sleep through the night. He also described neck pain, typically at the level of 5/10, and associated headaches. Examination of his neck and back showed palpable muscle spasm, reduced range of motion, and segmental dysfunction at multiple levels. Multiple provocative tests were positive, suggesting hip, disc, and possible lumbar nerve root pathology. Dr. Vik noted "hyperlordosis, rotational malposition and ligamentous laxity, most commonly seen in flexion type injuries typical of motor vehicle collisions." He expressed concern about Claimant's potential recovery and expected treatment would take a longer than usual to reach MMI.

14. On November 15, 2019, Claimant told PA-C Leckie the chiropractic treatment was helping but his back was still painful and stiff. Standing was the most painful posture. His cervical range of motion was improved but he still had pain when turning his head to the right. He was tender to palpation over the low back and right SI joint, with limited range of motion.

15. Claimant followed up with Dr. Olson on December 6, 2019. His back and neck pain were getting worse because additional chiropractic treatment had not been approved as recommended.

16. Claimant's back and neck pain were worse at his next visit with Dr. Olson on December 30, 2019. Dr. Olson ordered a lumbar MRI and recommended Claimant get back into treatment with Dr. Vik.

17. Claimant underwent the lumbar MRI on January 7, 2020. It demonstrated significant multilevel degeneration and disc bulges, a disc herniation at L5-S1, and a 5 mm synovial cyst at L3-4.

18. On January 20, 2020, Dr. Olson noted ongoing low back and neck pain, difficulty sitting and standing, and weakness in Claimant's legs when he walked. Dr. Olson noted the MRI demonstrated pre-existing degenerative changes, but opined, "it does appear that the car accident has aggravated his condition [and] he has not responded to conservative care to bring him back to baseline. Therefore, recommend a surgical evaluation."

19. Claimant had a surgical consult with Dr. Sana Bhatti, a neurosurgeon, on February 14, 2020. He reported 8/10 low back pain and 6/10 neck pain. He was walking with a cane. Dr. Bhatti ultimately recommended excision of the cyst at L3-4 and a decompression and fusion at L3-5.

20. Claimant had a history of low back issues before the September 6, 2019 MVA. Records from Claimant's PCP, Dr. Anaya, show references to "back pain" starting on October 12, 2015. However, despite noting back pain in the Review of Systems portion of several reports, the accompanying physical examinations repeatedly documented no tenderness to palpation of the cervical, thoracic, or lumbar spines. The first documented clinical abnormality was "lumbosacral paravertebral tenderness to palpation" on April 6,

2017. Dr. Anaya again documented lumbar tenderness to palpation in November 2017. Examinations in January, February, and August 2018 showed no tenderness to palpation.

21. October 29, 2018 was Claimant's first visit with Dr. Anaya specifically prompted by low back pain. Claimant reported, "left low back pain for last several months, and no injury." Physical examination showed some tenderness in the lumbar paravertebral region but a negative straight leg raise. Dr. Anaya diagnosed "backache" and opined, "suspect musculoskeletal, no focal neurologic deficits, however this is [sic] been a chronic problem for him and we will have an x-ray."

22. The x-rays were completed on October 30, 2018. They showed moderate multilevel lumbar spondylosis, without compression deformity or fracture, and minor anterolisthesis of L1 on L2 and L4 on L5.

23. Claimant followed up with Dr. Anaya on November 12, 2018, who noted, "[Claimant] is here because of low back pain he states is [sic] been somewhat of a chronic intermittent problem for him and he has had x-rays showed some degenerative changes no acute findings. He is wanting to get involved in PT I think this appears to be musculoskeletal. He has no focal neurological deficits, he had an x-ray which showed degenerative changes we will go ahead and get involved in PT."

24. Claimant started PT on November 13, 2018. The report states, "patient reports back pain for about one month without incident at onset." Claimant responded well to PT, and by November 19, 2018 he "denied any lower back or leg pain . . . during or following ex[ercises]." Claimant was "very pleased" with his response to therapy. On December 3, Claimant reported "no back pain." On December 6, 2018, his back pain was "much improved", and he was discharged because "does appear to have reached goals."

25. Dr. Anaya continued to list "back pain" in the review of systems on January 14, 2019 and June 12, 2019, but examination of Claimant's back showed no tenderness on both occasions.

26. Claimant injured his low back on April 24, 2019 while moving heavy stones at work with a previous employer, Site One. An examination on April 25, 2019 at UC Health Urgent Care "very minimal pain to palpation to the paraspinal muscles of the lumbar spine," and point tenderness over the right SI joint. He also reported "a twinge of pain every now and then that radiates down the posterior aspect of his right leg and no specific dermatomal distribution down to the level of his knee consistent with sciatic nerve irritation." Lumbar x-rays showed multilevel intravertebral narrowing and lower facet arthrosis, but no acute findings. He was prescribed a Medrol Dosepak and put on a 10-pound lifting restriction.

27. Claimant followed up with Dr. Cynthia Schafer at UC Health on May 2, 2019. Although his pain was improved, Dr. Schafer suggested he consider a less demanding line of work. Claimant had previously worked primarily sedentary jobs and did not regularly engage in exercise. Given his advanced age and arthritis in multiple areas of his body, Dr. Schafer thought Claimant was at risk for more serious injury if he continued with

a job that required him to lift and carry heavy rocks and other landscaping materials on a regular basis. Claimant agreed he was probably not “cut out for this kind work,” but did not want to quit because the employer had invested three months training him. He planned to stick with it through July when demand for landscaping materials was expected to taper off. Dr. Schaffer recommended he discuss the issue with his employer.

28. Claimant’s third and final appointment for the April 2019 injury was on May 16, 2019. The physical examination was entirely normal with no tenderness, swelling, or spasm of his low back, right hip, or right leg. Claimant had decided to quit the job because he was pain-free on the weekend and only had back pain with lifting and bending at work. He planned to reapply for sedentary jobs, perhaps in a call center. Dr. Schafer released Claimant at MMI with no impairment, no restrictions, and no need for maintenance treatment.

29. On June 17, 2019, Claimant saw Dr. Roger Davis, an orthopedic surgeon, regarding his right knee. Although the impetus for the evaluation was worsening knee pain, Dr. Davis also commented on Claimant’s low back: “Lumbosacral spine demonstrates limited range of motion with some tenderness paraspinal as well as into the right buttock region. Negative straight leg raise bilateral lower extremities. Right hip demonstrates some limited range of motion with internal rotation of only 15° with mild right groin pain.” Dr. Davis injected Claimant’s knee. He provided no back-related diagnosis or treatment recommendations.

30. Claimant was seen in the Parkview Hospital emergency Department on July 29, 2019 for weakness and dizziness. The report notes a history of “chronic lower back pain, but examination of his low back was “normal” with no tenderness.

31. Claimant credibly testified his low back pain in July 2019 was related to his severe knee pain. He explained, “the pain in my knee was going up into my hip and into my lower back, but it was my knee that was hurting at the time.” Respondents argue the symptoms were consistent with lumbar radiculopathy, but radicular symptoms would normally radiate from the back into the legs, not the other way around. Rather than reflecting an atypical radicular pattern, the ALJ finds the July 2019 episode of low back pain was probably related to Claimant’s right knee.

32. There is no persuasive evidence Claimant had any significant neck problems before the September 2019 MVA. He underwent a cervical MRI in 2016 that demonstrated multilevel degenerative changes, but the MRI was ordered to investigate the cause of Claimant’s vertigo, not neck pain. Claimant had cervical x-rays on January 6, 2017 and the report lists the indication as “chronic neck pain.” But there is no corresponding treatment record showing when or why Claimant was referred for cervical x-rays. Claimant was being worked up for vertigo and upper extremity neuropathy around that time, which might account for the x-rays. The only contemporaneous mention of preinjury neck symptoms in a treatment record is a November 9, 2016 report from Dr. Howe noting “very tight cervical musculature.” Even if Claimant had some fleeting neck pain in late 2016 or early 2017, there is no indication of any neck symptoms in the two and one-half years before the MVA. Claimant had multiple examinations during that time

for other medical issues and his neck was repeatedly described as “supple” and nontender.

33. Claimant saw Dr. Miguel Castrejon on June 22, 2020 for an IME at his counsel’s request. Claimant reported a constant dull pain in his right lower back radiating into his right posterior lateral leg. His pain was worse with walking, sitting, bending, and lifting. He also described a constant neck pain. Examination of Claimant’s neck demonstrated tenderness, muscle hypertonicity and spasm, and decreased range of motion. Examination of his low back showed tenderness in the paralumbar muscles at L4-S1 and around the right SI joint and mildly positive SLR on the right. Dr. Castrejon diagnosed cervical and lumbar musculoligamentous strains/sprains, element of cervical trapezial myofascial pain syndrome, right lower extremity radiculitis secondary to the L5-S1 disc herniation, and right SI joint dysfunction. He opined the MVA aggravated Claimant’s underlying pre-existing cervical and lumbar multilevel degenerative disc and joint disease. Dr. Castrejon saw no documentation of any pre-injury functional limitation or need for treatment related to Claimant’s neck. He noted Claimant’s April 2019 low back strain resolved quickly with minimal treatment. He opined the September 6, 2019 MVA triggered symptoms and a need for medical care “far and above that which would be expected from a natural progression process.” He opined lumbar surgery was premature and recommended additional evaluation and treatment before considering surgery.

34. On July 27, 2020, Dr. Castrejon authored a supplemental report after reviewing the police accident report. He opined the accident report was consistent with his understanding of the mechanism of injury gleaned from his IME. He opined “at the age of 66 one would expect for the typical individual to manifest some degree of spine degeneration. However, the extent of spondylosis for this individual is considered to have been somewhat more extensive, therefore placing the individual at greater risk for injury, disability, or impairment when compared to a similar age ‘normal’ individual.”

35. Dr. Castrejon testified at hearing consistent with his report. The fact Claimant’s neck pain developed several days after the accident did not change his opinions regarding the causal relationship.

36. Mark Passamaneck is a mechanical engineer who performed an accident evaluation for Respondents. Mr. Passamaneck opined the impact speed of 15 mph in the accident report was simply an “off-the-cuff guess” by the investigating officer. When it was brought to his attention that the 15-mph estimate was provided by the driver of the F-350, Mr. Passamaneck opined driver estimates of speed are most often incorrect. He noted photos of the at-fault vehicle show virtually no damage other than some burnishing to the tow hook on the right bumper. Claimant’s vehicle had a dent in the right bumper, but no fractured taillights, no paint transfer, and there were no documented skid marks at the scene. Mr. Passamaneck concluded the impact speed was 1-2 mph.

37. Dr. John Burris performed an IME for Respondents on August 21, 2020. He also testified via deposition consistent with his report. Dr. Burris agreed with Dr. Castrejon that the radiographic findings predated the accident and degenerative in nature. Dr. Burris stated the lumbar MRI shows advanced degenerative changes that took years to develop.

Dr. Burris opined the several-days delay in the development of neck pain means it was unlikely related to the accident. He opined the fact Claimant had a cervical MRI and x-rays in December 2016 and January 2017 means Claimant had chronic and long-standing pain in the region. He opined the kinetic energy from a vehicle crash at less than 5 mph cannot cause injury because the forces involved would not exceed the body tissues' ability to withstand that force. He opined any energy from the impact was probably absorbed by the seat cushion. He noted no objective evidence of any acute trauma or injury after the MVA. He concluded Claimant suffered no injury that required medical treatment and his subjective reports of pain are unrelated to the MVA.

38. Karin P[Redacted] testified at hearing regarding her observations of Claimant's back and neck condition before and after the accident. Ms. P[Redacted] indicated it was common to discuss Claimant's health, particularly his significant gout. She testified she had not been aware of Claimant having any neck pain before the accident, but he had occasional low back pain "if he worked too hard in the back yard or something." She testified Claimant recovered from the April 2019 work injury in "a few days, may be a week?" After that, she noticed he was improved because he was walking normally, doing his household chores, not complaining of any back pain. After the September 6 MVA, Ms. P[Redacted] observed Claimant having difficulty with basic activities such as sitting, standing, ascending and descending stairs, and lifting because of back and neck pain. She noted he was not doing his normal activities such as cooking dinner or other household chores. She testified she became worried because Claimant was not improving and the pain she observed was different than anything she had observed in the past.

39. Ms. P[Redacted]'s testimony was credible and persuasive.

40. Except for a few memory lapses, Claimant's testimony was generally credible.

41. Dr. Castrejon's opinions are credible and more persuasive than the contrary opinions offered by Dr. Burris.

42. Claimant proved he suffered compensable injuries to his low back and neck because of the September 6, 2019 MVA.

43. Claimant proved the evaluations and treatment provided by CCOM were reasonably needed to cure and relieve the effects of his injury.

44. Claimant was hired by Employer on September 4, 2019 and his first paycheck covered only three days. He continued working full time after the accident despite restrictions through November 16, 2019. Claimant's earnings during the ten full weeks from September 8 through November 16, 2019 provide a fair approximation of his earnings at the time of injury. Claimant earned \$4,266.68 during that period, which equates to an AWW of \$426.67.

CONCLUSIONS OF LAW

A. Claimant proved a compensable injury

To receive compensation or medical benefits, a claimant must prove he is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo. App. 2001). The claimant must prove an injury directly and proximately caused the condition for which she seeks benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

The Workers' Compensation Act recognizes a distinction between an "accident" and an "injury." The term "accident" refers to an "unexpected, unusual, or undesigned occurrence," whereas an "injury" is the physical trauma caused by the accident. Section 8-40-201(1). In other words, an "accident" is the cause and an "injury" is the result. *City of Boulder v. Payne*, 426 P.2d 194 (Colo. 1967). Workers' compensation benefits are only payable if an accident results in a compensable "injury." The mere fact that an incident occurred at work does not necessarily establish a compensable injury. Rather, a compensable injury is one that requires medical treatment or causes a disability. *E.g.*, *Montgomery v. HSS, Inc.*, W.C. No. 4-989-682-01 (August 17, 2016). An injury need not be dramatic to support a finding of compensability. Even a "minor strain" or a "temporary exacerbation" of a pre-existing condition can be a sufficient basis for a compensable claim if it was caused by a claimant's work activities and caused him to seek medical treatment. *E.g.*, *Garcia v. Express Personnel*, W.C. No. 4-587-458 (August 24, 2004); *Conry v. City of Aurora*, W.C. No. 4-195-130 (April 17, 1996).

A pre-existing condition does not preclude a claim for compensation and an injury is compensable if an industrial injury aggravates, accelerates, or combines with the pre-existing condition to produce disability or a need for treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). Pain is a typical symptom from the aggravation of a pre-existing condition, and if the pain triggers the claimant's need for medical treatment, the claimant has suffered a compensable injury. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Dietrich v. Estes Express Lines*, W.C. No. 4-921-616-03 (September 9, 2016). But the mere fact that a claimant experiences symptoms after an incident at work does not necessarily mean the employment aggravated or accelerated the pre-existing condition. *Finn v. Industrial Commission*, 437 P.2d 542 (Colo. 1968); *Cotts v. Exempla*, W.C. No. 4-606-563 (August 18, 2005). The ALJ must determine whether the need for treatment was the proximate result of an industrial aggravation or is merely the direct and natural consequence of the pre-existing condition. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Carlson v. Joslins Dry Goods Company*, W.C. No. 4-177-843 (March 31, 2000).

As found, Claimant proved he suffered compensable injuries to his low back and neck because of the September 6, 2019 MVA. Claimant probably suffered soft tissue strains and/or aggravated his underlying degenerative disk and joint disease. Dr. Burris' argument that the several-days delay in onset of neck pain rules out a causal connection

is not persuasive. Dr. Castrejon's analysis is credible and supported by other persuasive evidence in the record. The ALJ has also given significant weight to Ms. P[Redacted]'s credible observations regarding the significant difference in Claimant's condition before and after the MVA. Although Claimant had pre-existing degenerative changes in his cervical spine, there is no persuasive evidence of any significant preinjury neck symptomatology or treatment. And his "intermittent" preinjury low back pain was easily managed with minimal or no treatment. The November 2018 episode resolved after a few PT sessions. Similarly, the April 2019 back injury resolved in less than two weeks with no residual impairment or limitations. To the extent Claimant's low back was symptomatic at other times, those symptoms did not require any treatment or impede his ability to participate in routine activities. By contrast, Claimant's low back has been continuously symptomatic since the MVA and has reasonably prompted him to seek a variety of treatments, including medication, PT, and chiropractic manipulation. Although the forces involved in the accident may have been relatively minor, they were sufficient to precipitate significant and persistent symptoms in Claimant's neck and back. As Dr. Castrejon persuasively explained, Claimant's pre-existing degenerative conditions increased his susceptibility to injury, and it is of no consequence that the September 6, 2019 MVA may not have caused injury to a different worker.

B. The treatment provided by CCOM was reasonably necessary

The respondents are liable for medical treatment reasonably needed to cure and relieve the effects of an industrial injury. Section 8-42-101. The mere occurrence of a compensable injury does not compel the ALJ to approve all requested treatment. Where the respondents dispute the claimant's entitlement to medical benefits, the claimant must prove the treatment is reasonably necessary and causally related to the industrial accident. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). The claimant must prove entitlement to disputed medical benefits by a preponderance of the evidence. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). As found, the treatment provided by CCOM was reasonably needed to cure and relieve the effects of Claimant's compensable injury.

C. Claimant's AWW is \$426.67

Section 8-42-102(2), C.R.S. provides compensation shall be based on the employee's average weekly earnings "at the time of the injury." The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. But § 8-42-102(3) gives the ALJ wide discretion to "fairly" calculate the employee's AWW in any manner that seems most appropriate under the circumstances. The entire objective of AWW calculation is to arrive at a "fair approximation" of the claimant's actual wage loss and diminished earning capacity because of the industrial injury. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). As found, Claimant's earnings during the ten full weeks from September 8 through November 16, 2019 provide a fair approximation of his earnings at the time of injury. Claimant earned \$4,266.68 during that period, which equates to an AWW of \$426.67.

ORDER

It is therefore ordered that:

1. Claimant's claim for injuries sustained on May 6, 2019 is compensable.
2. Claimant's average weekly wage is \$426.67.
3. Insurer shall cover all medical treatment from authorized providers reasonably needed to cure and relieve the effects of Claimant's compensable injuries, including but not limited to treatment provided by and on referral from CCOM.
4. All issues not decided herein are reserved for future determination.

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

DATED: November 26, 2020

s/ Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that he suffered compensable left lower extremity injuries during the course and scope of his employment with Employer on February 27, 2020.

2. Whether Claimant has established by a preponderance of the evidence that he is entitled to reasonable, necessary and causally related medical treatment for his February 27, 2020 industrial injuries.

FINDINGS OF FACT

1. Employer is an events rental company that leases a storage lot in Commerce City, Colorado. The storage lot is not Employer's primary business location. Claimant is a 59 year-old male who worked for Employer as a truck driver and mechanic. Claimant contends that he injured his left lower extremity while attempting to start a truck on the storage lot during the course and scope of his employment on February 27, 2020.

2. Claimant testified that he resided in a motel for two weeks prior to February 27, 2020. He had just moved his belongings to Employer's storage lot on the morning of the incident. Claimant specified that he checked out of a nearby motel at 10:00 a.m. and packed up his clothes, blankets, television and cat. He placed his belongings in Employer's front office building located on the storage lot. He testified that he had been living in a motor home on Employer's property from August 2018 until he was instructed to vacate the premises in the beginning of January 2020. However, Claimant was advised that he had to leave because the property landlord notified Employer that Commerce City law prohibited Claimant from living on the property.

3. Claimant testified that he was assigned to drive a red Volvo Semi truck on February 27, 2020. He specifically remarked that he had been directed to drive the red Volvo semi truck to move trailers between the company's main location and the storage lot. Claimant detailed that he injured his left lower extremity while attempting to start the truck. He explained that, after he left his belongings in the office on February 27, 2020 at about 10:30 a.m., he went "out to do maintenance on the truck and get it started so it would warm up." He testified that this took about an hour. Claimant remarked that he did not clock in for work because his intention was to perform maintenance, get the truck started and text Human Resources and Sales Director Arielle W[Redacted] that he was "about ready to start."

4. Claimant detailed that the red Volvo semi truck "had its issues" but was in full working order. He commented that the dashboard lights did not function, the compression release or Jake break did not work, the pig tail for the electric on the trailer

only worked on one side because the wires had been cut, and the starter button did not operate. Claimant explained that, as he was trying to start the truck from under the hood, he was standing next to the front frame rail behind the tire so that he could access a wiring harness. While standing and holding the wiring harness, the engine fired and knocked him down. Claimant specified that the truck tire bumped him into the fender and some steel fencing. The front tire of the truck then ran over Claimant's left foot. He testified that, after he blacked out and woke, he took the truck out of gear and noticed that his gray sweatpants were soaked in blood. Claimant then entered the truck and drove to North Suburban Hospital for medical treatment. He remarked that he was in the process of "bleeding out" and did not have a chance to call anyone.

5. At North Suburban Medical Center Claimant reported pain in the hollow at the back of his left knee. Providers noted "a visible skin deformity" with "exposed subcutaneous muscles and vascular structures." Claimant also had a laceration between his toes with active venous oozing.

6. The record reveals that Claimant did not clock in or earn any wages on February 27, 2020. Nevertheless, Claimant explained that, instead of using a punch clock, he sent text messages to Ms. W[Redacted] stating when he began and ended his work shifts. Records reflect that Claimant worked hourly and his time schedule varied. For example, he did not work from February 1, 2020 until February 10, 2020. On February 10, 2020 he worked from 12:15 p.m. to 8:30 p.m. and on February 13, 2020 he only worked from 12:50 p.m. to 1:25 p.m. However, the absence of any work time entries on February 27, 2020 reflects that Claimant was not performing job duties for Employer.

7. Claimant explained that part of his job duties involved maintenance, construction and driving equipment back and forth from Employer's lot to various events. However, Claimant does not have a driver's license. Employer was required to pay out-of-pocket expenses for damages incurred during Claimant's motor vehicle accident in July 2019. As a result of the accident Employer discovered that Claimant did not have a driver's license. In fact, Claimant acknowledged that he had been taken off Employer's insurance policy.

8. Claimant did not call 9-1-1 on the date of injury or contact Employer on February 27, 2020. Employer was unaware that Claimant had been injured at work for at least two weeks after the accident. Claimant underwent several surgeries and was discharged to a rehabilitation facility on March 9, 2020. Claimant contacted Employer after his third surgery and sent a photograph of his foot. He remained in the rehabilitation center until his discharge on March 24, 2020. Claimant acknowledged that he did not report a work related injury until after his release from the rehabilitation hospital when he was told twice that he could not live on Employer's storage lot.

9. The record also reveals that Claimant was likely living on Employer's storage lot around the time of his accident. Claimant testified that when he was released from the rehabilitation facility he was dropped off directly at Employer's storage lot. He remarked that he did not believe that he needed permission to be on the premises and

had keys to the office building on the property. Notably, Claimant's intake form from Vibra Rehabilitation Hospital on March 9, 2020 provided that "he has been living in a motel and then recently moved to a warehouse where he had been staying and is still actively working as a truck driver." Another reference from Vibra specifies that Claimant had been "living in a motel on ground level; had been staying in warehouse after slipping on ice for about 1 week before the incident. Pt states not sure where he will return to upon d/c."

10. Employer's Chief Financial Officer Alya B[Redacted] testified that she has worked for Employer since July of 1999. Ms. B[Redacted] remarked that she was very involved in the day-to-day operations of the company. She commented that her job included managing Workers' Compensation claims with Insurer. Ms. B[Redacted] explained that medical providers usually contact her for a claim number when they are providing service to an injured worker, but no one contacted her for a claim number during Claimant's treatment. In fact, Ms. B[Redacted] testified that she did not learn that Claimant had been injured until she heard a conversation between Owner Mr. W[Redacted] and Claimant over the speaker phone about two weeks after February 27, 2020.

11. Ms. B[Redacted] explained that it did not make sense that Claimant was assigned to drive the red Volvo semi truck on February 27, 2020 because it was not licensed or insured. She noted that the red Volvo was located in Employer's storage lot because it was not actively used by the company. In contrast, Employer's active fleet was located at the main office location. Furthermore, Ms. B[Redacted] remarked that the red Volvo was not road worthy. She also noted that Employer had active trucks and individuals who were licensed to drive them. Ms. B[Redacted] remarked that there was no need for Claimant to transfer trailers on February 27, 2020 because Employer had an outside source performing the work. Finally, she noted that Employer became aware that Claimant did not have a drivers' license after he was involved in a motor vehicle accident and damages would not be covered by their insurance. Therefore, Claimant would not have been directed to drive the red Volvo on February 27, 2020.

12. Ms. W[Redacted] testified that there was no reason for Claimant to be driving a truck on the date of injury. She explained that Claimant had been assigned to work on the office building on the storage site. He was instructed to perform repairs, painting, ripping out carpet, and other tasks designed to prepare the building for use as an office. Ms. W[Redacted] explained that the red Volvo semi truck was not one of Employer's active trucks in the inventory. She also confirmed that Claimant was not driving vehicles because he had been removed from Employer's insurance policy. Ms. W[Redacted] also noted that Employer had hired an outside company to perform the work Claimant testified he was assigned to do on February 27, 2020.

13. Ms. W[Redacted] explained that employees are directed to report Workers' Compensation claims to her. She then investigates the claim and provides the information to Ms. B[Redacted]. All employees are informed of the process at the time of hire. Ms. W[Redacted] remarked that she was unaware Claimant had alleged a work injury. She explained that she had conversations with Claimant after he had been

released from the rehabilitation hospital but he never mentioned a Workers' Compensation claim. Because Claimant had not clocked in on February 27, 2020 and had not reported a claim, Ms. W[Redacted] did not investigate the matter as a Workers' Compensation claim or file a First Report of Injury. She thus did not instruct Ms. B[Redacted] to file a Workers' Compensation claim.

14. Claimant has failed to demonstrate it is more probably true than not that he suffered compensable left lower extremity injuries during the course and scope of his employment with Employer on February 27, 2020. Initially, Claimant testified that he was assigned to drive a red Volvo Semi truck from Employer's storage lot on February 27, 2020. He specifically remarked that he had been directed to drive the red Volvo semi truck to move trailers between the company's main location and the storage lot. Claimant detailed that he injured his left lower extremity while attempting to start the truck. However, despite Claimant's testimony, the bulk of the evidence demonstrates that Claimant was not performing job duties for Employer on February 27, 2020 and thus did not suffer injuries during the course and scope of employment.

15. The record reveals a multitude of reasons demonstrating that Claimant did not suffer injuries while working for Employer on February 27, 2020. Reviewing Claimant's testimony and the circumstances surrounding the incident, Claimant's account is not persuasive. Claimant did not clock in on or earn any wages on February 27, 2020. Records reflect that Claimant worked hourly and his time schedule varied daily. However, Claimant's time sheet reflects that he did not work any hours on February 27, 2020. Furthermore, Claimant explained that part of his job duties involved maintenance, construction and driving equipment back and forth from Employer's lot to various events. However, Claimant did not have a drivers' license and Employer hired an outside service to move equipment. In fact, Claimant acknowledged that he had been taken off Employer's insurance policy. Moreover, the evidence reveals that the red Volvo truck was neither insured nor road-worthy. Finally, Claimant did not report any injuries to Employer until at least two weeks after the accident.

16. The testimony of Employer witnesses also establishes that Claimant did not likely suffer left lower extremity injuries while working for Employer on February 27, 2020. Employer's Chief Financial Officer Ms. B[Redacted] credibly explained that it did not make sense that Claimant was assigned to drive the red Volvo semi truck on February 27, 2020 because it was not licensed or insured. She noted that the red Volvo was located in Employer's storage lot because it was not actively used by the company and not road worthy. In contrast, Employer's active fleet was located at the main office location. Ms. B[Redacted] also noted that Employer had trucks and individuals licensed to drive them. She also remarked that there was no need for Claimant to transfer trailers on February 27, 2020 because Employer had an outside service to perform the work. Finally, Ms. B[Redacted] noted that Employer became aware Claimant did not have a drivers' license after he was involved in a motor vehicle accident and damages would not be covered under their insurance policy. For the preceding reasons, Claimant would not have been directed to drive the red Volvo on February 27, 2020.

17. Employer's Human Resources and Sales Director Ms. W[Redacted] also testified that there was no reason for Claimant to be driving a truck on the date of injury. She explained that Claimant was assigned to work on the office building on the storage site. He was instructed to perform repairs, painting, ripping out carpet, and other tasks designed to prepare the building for use as an office. Ms. W[Redacted] explained that the red Volvo semi truck was not one of Employer's active trucks in the inventory. She also confirmed that Claimant was not driving vehicles because he had been removed from Employer's insurance policy. Moreover, Employer hired an outside company to perform the work that Claimant asserted he was assigned to complete on February 27, 2020. Ms. W[Redacted] thus summarized that it simply did not make sense and would not benefit Employer to have Claimant drive the red Volvo and haul trailers on February 27, 2020. Ms. W[Redacted] also detailed that she was unaware Claimant was alleging a work injury because she had conversations with Claimant after he was released from the rehabilitation hospital and he never mentioned a Workers' Compensation claim. Because Claimant had not clocked in on February 27, 2020 and failed to report a claim, Ms. W[Redacted] did not investigate the matter as a Workers' Compensation claim or file a first report of injury.

18. As the preceding testimony reflects, there are a myriad of reasons demonstrating that it is not likely Claimant was working on the red Volvo truck for Employer on February 27, 2020. Instead, the evidence reveals that Claimant likely used Employer's storage lot property for a residence before and after the February 27, 2020 accident. He was thus present on the storage lot property frequently when he was not working. In fact, when Claimant was released from the rehabilitation facility, he was dropped off directly at Employer's storage lot. He remarked that he did not believe that he needed permission to be on the premises and had keys to the office building on the property. In fact, Claimant acknowledged that he did not report a work related injury until after he was released from the rehabilitation hospital when he was told twice that he could not live on Employer's storage lot. Because Claimant was likely not working for Employer when he was injured on February 27, 2020, his injuries did not have a connection to his work-related functions. Accordingly, Claimant's claim for Workers' Compensation benefits is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. See *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S. (2006); see *City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991). The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.*, 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999 (Colo. App. 2004); *Enriquez v. Americold D/B/A Atlas Logistics*, W.C. No. 4-960-513-01, (ICAO, Oct. 2, 2015).

5. As found, Claimant has failed to demonstrate by a preponderance of the evidence that he suffered compensable left lower extremity injuries during the course and scope of his employment with Employer on February 27, 2020. Initially, Claimant testified that he was assigned to drive a red Volvo Semi truck from Employer's storage lot on February 27, 2020. He specifically remarked that he had been directed to drive the red Volvo semi truck to move trailers between the company's main location and the storage lot. Claimant detailed that he injured his left lower extremity while attempting to start the truck. However, despite Claimant's testimony, the bulk of the evidence demonstrates that Claimant was not performing job duties for Employer on February 27, 2020 and thus did not suffer injuries during the course and scope of employment.

6. As found, the record reveals a multitude of reasons demonstrating that Claimant did not suffer injuries while working for Employer on February 27, 2020. Reviewing Claimant's testimony and the circumstances surrounding the incident, Claimant's account is not persuasive. Claimant did not clock in on or earn any wages on February 27, 2020. Records reflect that Claimant worked hourly and his time schedule

varied daily. However, Claimant's time sheet reflects that he did not work any hours on February 27, 2020. Furthermore, Claimant explained that part of his job duties involved maintenance, construction and driving equipment back and forth from Employer's lot to various events. However, Claimant did not have a drivers' license and Employer hired an outside service to move equipment. In fact, Claimant acknowledged that he had been taken off Employer's insurance policy. Moreover, the evidence reveals that the red Volvo truck was neither insured nor road-worthy. Finally, Claimant did not report any injuries to Employer until at least two weeks after the accident.

7. As found, the testimony of Employer witnesses also establishes that Claimant did not likely suffer left lower extremity injuries while working for Employer on February 27, 2020. Employer's Chief Financial Officer Ms. B[Redacted] credibly explained that it did not make sense that Claimant was assigned to drive the red Volvo semi truck on February 27, 2020 because it was not licensed or insured. She noted that the red Volvo was located in Employer's storage lot because it was not actively used by the company and not road worthy. In contrast, Employer's active fleet was located at the main office location. Ms. B[Redacted] also noted that Employer had trucks and individuals licensed to drive them. She also remarked that there was no need for Claimant to transfer trailers on February 27, 2020 because Employer had an outside service to perform the work. Finally, Ms. B[Redacted] noted that Employer became aware Claimant did not have a drivers' license after he was involved in a motor vehicle accident and damages would not be covered under their insurance policy. For the preceding reasons, Claimant would not have been directed to drive the red Volvo on February 27, 2020.

8. As found, Employer's Human Resources and Sales Director Ms. W[Redacted] also testified that there was no reason for Claimant to be driving a truck on the date of injury. She explained that Claimant was assigned to work on the office building on the storage site. He was instructed to perform repairs, painting, ripping out carpet, and other tasks designed to prepare the building for use as an office. Ms. W[Redacted] explained that the red Volvo semi truck was not one of Employer's active trucks in the inventory. She also confirmed that Claimant was not driving vehicles because he had been removed from Employer's insurance policy. Moreover, Employer hired an outside company to perform the work that Claimant asserted he was assigned to complete on February 27, 2020. Ms. W[Redacted] thus summarized that it simply did not make sense and would not benefit Employer to have Claimant drive the red Volvo and haul trailers on February 27, 2020. Ms. W[Redacted] also detailed that she was unaware Claimant was alleging a work injury because she had conversations with Claimant after he was released from the rehabilitation hospital and he never mentioned a Workers' Compensation claim. Because Claimant had not clocked in on February 27, 2020 and failed to report a claim, Ms. W[Redacted] did not investigate the matter as a Workers' Compensation claim or file a first report of injury.

9. As found, as the preceding testimony reflects, there are a myriad of reasons demonstrating that it is not likely Claimant was working on the red Volvo truck for Employer on February 27, 2020. Instead, the evidence reveals that Claimant likely used Employer's storage lot property for a residence before and after the February 27,

2020 accident. He was thus present on the storage lot property frequently when he was not working. In fact, when Claimant was released from the rehabilitation facility, he was dropped off directly at Employer's storage lot. He remarked that he did not believe that he needed permission to be on the premises and had keys to the office building on the property. In fact, Claimant acknowledged that he did not report a work related injury until after he was released from the rehabilitation hospital when he was told twice that he could not live on Employer's storage lot. Because Claimant was likely not working for Employer when he was injured on February 27, 2020, his injuries did not have a connection to his work-related functions. Accordingly, Claimant's claim for Workers' Compensation benefits is denied and dismissed.

ORDER

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

Claimant did not suffer compensable left lower extremity injuries while working for Employer on February 27, 2020. His request for Workers' Compensation benefits is thus denied and dismissed.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at <https://oac.colorado.gov/resources/oac-forms>.*

DATED: December 1, 2020.

DIGITAL SIGNATURE:


Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUE

Whether Claimant has demonstrated by a preponderance of the evidence that he suffered compensable injuries during the course and scope of his employment with Employer on June 16, 2020.

FINDINGS OF FACT

1. Employer is a landscape company owned by Duane O[Redacted]. On May 23, 2020 Claimant began working for Employer. His job duties involved performing landscaping duties and associated construction work. Claimant also supervised a work crew.

2. On June 16, 2020 Mr. O[Redacted], Claimant and members of his work crew arrived at a customer's home to complete a project. While at the home, Mr. O[Redacted] discussed deck repairs with the homeowner. The homeowner agreed to the construction.

3. In preparation for the repairs, Claimant began moving a large barbeque grill off the deck. Claimant explained that as he touched the first step off the deck, his right foot fell through the wood. He felt his right knee "push out" and heard a popping sound. He noted that both Mr. O[Redacted] and the homeowner witnessed the incident.

4. On the day of the accident Claimant visited the Emergency Department at the University of Colorado Hospital-Aurora Central. Claimant recounted that he "injured his right knee just prior to arrival when he was carrying something off of a deck and the stair broke and he landed with his right knee fully extended." A physical examination by Benjamin Albertus Busch, D.O. revealed tenderness to the medial collateral ligament and pain with stressing of the medial meniscus. X-rays did not reflect any fractures or dislocation. Dr. Busch referred Claimant to orthopedics, provided a prescription for Norco and Naproxen, and placed him in a knee immobilizer. He also gave Claimant crutches and a work note. Claimant remarked that he contacted Mr. O[Redacted] from the hospital to apprise him of the injuries.

5. On June 17, 2020 Claimant reported to Employer's work yard. Mr. O[Redacted] immediately terminated Claimant's employment.

6. Claimant testified that, although his initial symptoms involved his right knee, he subsequently developed pain in his right hip and lower back areas. He continued to seek medical treatment.

7. On June 30, 2020 Claimant returned to the Emergency Department at the University of Colorado Hospital-Aurora Central. Claimant reported pain to his right medial knee that radiated down to his right calf into his foot. He also mentioned lower back pain that started two to three days after his June 16, 2020 accident.

8. On August 24, 2020 Claimant visited UC Health CU Sports Medicine and reported right knee pain. Lakshmi Karra, M.D. M.S. recorded that Claimant suffered an approximately 4-5 foot fall from a balcony while moving a heavy grill on June 16, 2020. Claimant specifically felt his right knee bend “backwards and inwards.” He experienced a “pop” when he moved his right knee back into place. Dr. Karra noted that Claimant reported tenderness at the medial aspect of his right knee and occasional mechanical symptoms of catching/locking. A physical examination of the right knee revealed a trace effusion, MCL laxity and medial joint line tenderness. Dr. Karra ordered a right knee MRI without contrast.

9. On August 25, 2020 Claimant underwent a right knee MRI at UC Health Radiology. The imaging reflected a “clinical suspicion for medial meniscus and MCL injury following a fall from a balcony in mid June.” Claimant testified that he has been advised that he requires right knee surgery as a result of his June 16, 2020 injuries.

10. Employer did not possess Workers’ Compensation insurance on June 16, 2020. Employer has also refused to accept financial responsibility for Claimant’s medical bills as a result of the June 16, 2020 accident.

11. Claimant has established that it is more probably true than not that he sustained compensable injuries to his right lower extremity and lower back during the course and scope of his employment with Employer on June 16, 2020. Claimant credibly testified that on June 16, 2020 he was moving a barbeque grill off a deck while working for Employer. He explained that as he touched the first step off the deck his right foot fell through the wood. Claimant felt his right knee “push out” and heard a popping sound. He subsequently developed lower back symptoms as a result of the accident. The medical records corroborate Claimant’s account because they consistently specify that Claimant suffered a right knee injury while moving a large grill and later developed lower back pain. Medical records also reflect right medial meniscus and MCL injuries that require surgical intervention. Employer did not possess Workers’ Compensation insurance on June 16, 2020 and has refused to accept financial responsibility for Claimant’s medical bills as a result of the accident. Based on Claimant’s credible testimony and a review of the record, Claimant suffered a disability that was proximately caused by injuries arising out of and within the course and scope of his employment with Employer. Claimant is thus entitled to receive Workers’ Compensation benefits.

CONCLUSIONS OF LAW

1. The purpose of the “Workers’ Compensation Act of Colorado” (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers’ Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers’ Compensation case are not interpreted liberally in favor of either

the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. See *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *CJI*, Civil 3:16 (2007).

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson*, W.C. No. 4-589-645 (ICAO, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.*, 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner*, 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). *Soto-Carrion v. C & T Plumbing, Inc.*, W.C. No. 4-650-711 (ICAO, Feb. 15, 2007); *David Mailand v. PSC Industrial Outsourcing LP*, W.C. No. 4-898-391-01, (ICAO, Aug. 25, 2014).

6. As found, Claimant has established by a preponderance of the evidence that he sustained compensable injuries to his right lower extremity and lower back during the course and scope of his employment with Employer on June 16, 2020. Claimant credibly testified that on June 16, 2020 he was moving a barbeque grill off a deck while working for Employer. He explained that as he touched the first step off the deck his right foot fell through the wood. Claimant felt his right knee "push out" and heard a popping sound. He subsequently developed lower back symptoms as a result of the accident. The medical records corroborate Claimant's account because they consistently specify that Claimant suffered a right knee injury while moving a large grill and later developed lower back pain. Medical records also reflect right medial meniscus and MCL injuries that require surgical intervention. Employer did not possess Workers' Compensation insurance on June 16, 2020 and has refused to accept financial responsibility for Claimant's medical bills as a result of the accident. Based on Claimant's credible testimony and a review of the record, Claimant suffered a disability

that was proximately caused by injuries arising out of and within the course and scope of his employment with Employer. Claimant is thus entitled to receive Workers' Compensation benefits.

ORDER

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

1. Claimant suffered compensable right lower extremity and lower back injuries while working for Employer on June 16, 2020. Claimant is thus entitled to receive Workers' Compensation benefits.
2. Employer failed to carry Workers' Compensation insurance on June 16, 2020.
3. Any issues not resolved in this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at <https://oac.colorado.gov/resources/oac-forms>.*

DATED: December 3, 2020.

DIGITAL SIGNATURE:


Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-116-760-002**

ISSUES

- Did Claimant prove she suffered a compensable injury on August 1 or August 2, 2019?
- If Claimant proved a compensable injury, the ALJ will address the following issues:
- Is Claimant entitled to reasonably necessary medical treatment to cure and relieve the effects of her injury, including treatment at Rose Medical Center emergency department and treatment from Dr. Jesse Sutherland?
- What is Claimant's average weekly wage?
- Is Claimant entitled to TTD benefits commencing August 2, 2019?
- Is Employer subject to penalties for failure to carry workers' compensation insurance coverage on Claimant's alleged date of injury?

FINDINGS OF FACT

1. Employer operates a Shell gas station and convenience store in Thornton, CO. Claimant worked for Employer as a cashier and clerk. Claimant's duties include ringing up customer sales, stocking product, and keeping the store clean. Occasionally, Claimant emptied trash from the outside receptacles.

2. Claimant alleges a low back injury on August 1, 2019.¹ She testified she started work at 5:00 AM that day. She testified she lifted a heavy bag of garbage left over from the previous night shift. She heard a pop in her back and felt pain. She testified she worked for a few hours until her boss, Ms. A[Redacted], sent her home at approximately 11:30 AM.

3. Employer submitted into evidence a text message Claimant sent to Ms. A[Redacted] at 4:16 AM on August 1, 2019. The message stated,

I see you called my car won't start but my niece said I can use her car so I will be there soon unless you don't need me

4. Claimant testified her boyfriend, Donald M[Redacted], gave her a ride to work that morning. Mr. M[Redacted] testified at hearing and corroborated Claimant's testimony.

¹ Claimant initially listed August 2, 2019 on the Workers' Claim for Compensation form. But at hearing, she testified the injury actually occurred on August 1, 2019. Nevertheless, the ALJ has considered whether the preponderance of evidence supports a compensable injury on either day.

5. Claimant sought treatment at the Rose Medical Center on August 2, 2019. The report states, "The patient states she injured her back while picking up trash at work (Shell station) yesterday morning." Examination showed pain to palpation in the paraspinal lumbar area, worse on the right side. The ER physician diagnosed "musculoskeletal back pain." He prescribed Valium, tramadol, and a Medrol Dosepak, and advised Claimant to return to the emergency department if her condition worsened.

6. Claimant returned to the emergency department on August 6, 2019 with complaints of worsening back pain and leg weakness. Claimant reported, "[she] was lifting trash at work 5 days ago and while twisting her back heard a pop." She underwent a lumbar MRI, which showed multilevel degenerative changes but no acute injury. The ER physician explained to Claimant the MRI showed nothing acute and her neurological examination was "reassuring." He diagnosed with "back pain" and discharged Claimant with instructions to return if her symptoms worsened.

7. Claimant saw her PCP, Dr. Jesse Sutherland, on August 8, 2019. The report indicates she "presented for follow-up after being seen at Rose last Thursday after injuring back. Hurd popping and back when lifting trash can. Has had no improvement in back pain since ER visit. Had an MRI at Rose. This is happened before; one month ago occurred but then improved in two days." Examination of her back showed tenderness and pain with twisting and bending. Dr. Sutherland diagnosed acute low back pain due to trauma. He prescribed Valium and Percocet, and instructed Claimant to return in a week. Claimant followed up with Dr. Sutherland on August 15, 2019. The report again notes she "presented for follow-up after being seen at Rose on August 6, 2019 after injuring her back a few days before. Heard popping and back when lifting trash can."

8. Employer disputes that Claimant worked on August 1, 2019. Ms. A[Redacted] testified she opened the store because Claimant could not come in due to car trouble. Ms. A[Redacted] testified she and Ms. G[Redacted] worked together the morning of August 1.

9. Ms. G[Redacted] testified at hearing and credibly corroborated Ms. A[Redacted]'s testimony they worked together on August 1, 2019. Claimant did not report to work that day.

10. Employer maintains "Daily Shift Report" forms documenting lottery ticket sales each day. The cashiers identify lottery tickets by number throughout each shift. Each cashier maintains their own log showing tickets they sold that day.

11. Employer submitted into evidence multiple Daily Shift Reports dating to April 2019. The last Shift Report form completed by Claimant was dated July 28, 2019. The logs from July 29, July 30, and July 31, 2019 were completed by other employees. The logs from August 1, 2019 (the alleged date of injury) were completed by Ms. A[Redacted] and Ms. G[Redacted] only. The logs from August 2 were completed by "Thomas," and "Joyce."

12. Each cashier logs into the cash registers with a unique password. The sales receipts printed by the registers show the cashiers' name or assigned number. Claimant was cashier #2.

13. Employer submitted into evidence multiple register receipts from July 28, 2019 through August 2, 2019. The last sales receipt showing Claimant's name or cashier number is dated July 28, 2019. Her name or number do not appear on any receipt from July 29, July 30, July 31, August 1, or August 2.

14. Claimant was paid every two weeks. Her paystub for the period July 15, 2019 through July 28, 2019 shows 15 hours of work. Claimant was also paid for 6.5 hours in the pay period from July 28, 2019 through August 11, 2019. Claimant points to the last paycheck as evidence she worked on August 1. But Ms. A[Redacted] credibly explained the 6.5 hours was intended to remedy an oversight for work done during the previous pay period. Claimant and Mr. M[Redacted] washed the parking lot outside of her normal shift on July 27, 2019. Because she was not clocked in when she washed the parking lot, the hours were not captured by the regular payroll process. Ms. A[Redacted] later realized she had forgotten to pay Claimant for the extra hours, and issued the paycheck for 6.5 hours. Ms. A[Redacted]'s testimony is corroborated by a note on the July 27 Daily Shift Report that states, "Thanks [Claimant] for washing the parking lot."

15. Claimant failed to prove she suffered a compensable injury on August 1 or August 2, 2019. The preponderance of persuasive evidence shows Claimant's last day worked was July 28, 2019. Claimant did not work on August 1 or August 2, 2019.

CONCLUSIONS OF LAW

To establish a compensable claim, a claimant must prove she suffered an injury arising out of and in the course of employment. Section 8-41-301(1)(b); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). The "course of employment" element requires an injury occur within the time and place limits of the employment relationship and during an activity that had some connection with the employee's job-related functions." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991). A claimant must prove entitlement to benefits by a preponderance of the evidence. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). A preponderance of the evidence is that which leads the trier-of-fact, after considering all the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case are not interpreted liberally in favor of either the claimant or the respondents. Section 8-43-201.

As found, Claimant failed to prove she suffered a compensable injury on August 1 or August 2, 2019. The preponderance of persuasive evidence shows Claimant's last day worked was July 28, 2019. Claimant did not work on August 1 or August 2, 2019 and could not have suffered a compensable injury on either day.

ORDER

It is therefore ordered that:

1. Claimant's claim for workers' compensation benefits is denied and dismissed.

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

DATED: December 4, 2020

s/Patrick C.H. Spencer II

Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-087-500-004**

ISSUE

1. Whether Claimant proved by a preponderance of the evidence that he sustained a compensable injury arising out of the course and scope of his employment with Employer.
2. Whether Claimant proved by a preponderance of the evidence that he is entitled to payment of medical expenses.
3. Whether Claimant proved by a preponderance of the evidence that he is entitled to temporary partial disability benefits.
4. Whether Claimant proved by a preponderance of the evidence that he is entitled to permanent partial disability benefits.
5. Whether Claimant proved by a preponderance of the evidence that he is entitled to an award for disfigurement.

PROCEDURAL HISTORY

1. On November 4, 2019, Claimant filed an Application for Hearing in WC 5-087-500-003. The Application for Hearing was mailed to Employer at 1010 S. Joliet St., Aurora, CO 80012. On January 29, 2020, attorney Eduardo [Redacted], Esq., entered his appearance in that matter on behalf of Respondents and indicated his address as 1010 S. Joliet St., Suite 211, Aurora, CO 80012.

2. Claimant and Employer previously were set for hearing on March 24, 2020 in WC 5-087-500-003. The hearing was vacated by stipulation of the parties and an Order from ALJ Michelle Jones on March 23, 2020.

3. In the present matter, WC 5-087-500-004, Claimant filed an Application for Hearing on July 22, 2020 and mailed the Application to Hearing to Employer to 1010 S. Joliet St., Aurora, CO 80012.

4. On August 10, 2020, the Office of Administrative Courts mailed a Notice to Set to Employer at 1010 S. Joliet St., Aurora, CO 80012 and to Mr. [Redacted] also at 1010 S. Joliet St., Aurora, CO 80012. The Notice to Set was returned by the United States Postal Service notated as "unable to forward."

5. On September 9, 2020, the Office of Administrative Courts mailed a Notice of Hearing to Employer at 1010 S. Joliet St., Aurora, CO 80012 and 1838 S. Olathe St., Aurora, CO 80017.

6. On October 16, 2020, Claimant mailed a copy of his Case Information Sheet for the hearing to Employer at 1838 S. Olathe St., Aurora CO 80017, and to Mr. [Redacted] at 1010 S. Joliet St., Aurora, CO 80017.

7. Employer has not entered an appearance in this matter and did not appear for the hearing that took place on November 3, 2020.

FINDINGS OF FACT

1. Claimant was employed by Employer in November 2017. Claimant earned \$18.00 per hour and worked approximately 40 hours per week.

2. In November 2017, while installing a furnace while working for Employer, Claimant sustained a laceration to the index finger on his left hand while operating a bandsaw. Claimant was unable to state the exact date of the injury.

3. Claimant testified that he drove to urgent care and received 23 stitches in his finger. Claimant was unable to identify with the name of the urgent care he visited, other than to testify that it was on Mississippi Avenue and Chambers. Claimant did not submit medical records or other documentation from the urgent care where he received stitches. Claimant also testified that his finger was “broken.” Claimant testified that his medical expenses for urgent care were \$5,773.64, which correlate with the amount adjusted from Claimant’s medical bills for an emergency room visit on July 28, 2018, as discussed below.

4. Claimant testified that Employer did not have workers’ compensation insurance and did not pay for any of Claimant’s medical treatment. Claimant testified that he “filled out paperwork” for Employer but was unclear on the paperwork completed. Claimant testified that he provided his medical bills and medical records to Employer (through Employer’s attorney) and these were returned to Claimant.

5. Claimant testified that, as a result of his injury, he missed two days of work, and returned on restricted duty. Claimant did not submit medical records from his urgent care visit. Claimant continued to work for Employer for an additional eight months and continued to earn \$18.00 per hour. Approximately eight months after Claimant’s injury, voluntarily terminated his employment with Employer.

6. Claimant submitted medical reports from two dates: June 4, 2018, and July 28, 2018. Claimant also submitted photographs of a scar on his left index finger. The submitted records and photographs were admitted as Exhibit 1.

7. On June 4, 2018, Claimant was seen at the Medical Center of Aurora emergency department for a complaint of right flank pain and lower back pain. Claimant submitted only pages 1 and 2 of a six-page record, and associated billing information. The medical record from June 4, 2018 does not mention Claimant’s index finger or his work-related injury. The billing information indicates Claimant incurred medical expenses of \$2,208.01 for treatment on June 4, 2018. Claimant did not testify how his right flank pain and lower back pain was related to his November 2017 work injury.

8. On July 28, 2018, Claimant was seen at the Medical Center of Aurora emergency department. Claimant reported he had pinched his left index finger at work ten days earlier, and then again two days later. Claimant reported swelling and pain at the end of his finger. Claimant reported a history of a laceration at that spot. The ER Physician, Barry Sandler, M.D., diagnosed Claimant with an abrasion, abscess, neurovascular injury and paronychia (inflammation of skin around the nail). Although Claimant had previously injured this location, Claimant did not testify or offer other evidence as to how his pinched finger was related to or caused by his November 2017 work-related injury. Claimant incurred medical expenses in the amount of \$5,975.00 for his emergency room visit on July 28, 2017. The hospital medical bill indicates that \$5,773.64 was contractually adjusted and deducted from Claimant's bill, leaving a balance of \$201.36.

9. Claimant testified and demonstrated that he has decreased range of motion in his left index finger. Claimant did not present testimony or evidence that any physician has provided him with an impairment rating. Claimant testified that no physician, other than at the urgent care on his initial date of treatment indicated that he had any permanent disability as a result of his work-related injury.

10. Claimant has injury-related disfigurement consisting of two scars of approximately ½ inch on his left index finger. The ALJ finds Claimant should be awarded \$200.00 for disfigurement.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. See § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. See § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id.* at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential*

Insurance Co. v. Cline, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Compensability

To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S. (2006); see *City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.*, 961 P.2d 571 (Colo. App. 1998). Proof of causation is a threshold requirement which an injured employee must establish by a preponderance of the evidence before any compensation is awarded. The question of causation is generally one of fact for determination by the ALJ." *Faulkner v. Industrial Claim Appeals*, 12 P.3d 844, (Colo. App. 2000)

Claimant has proven by a preponderance of the evidence that he sustained a work-related injury to his left index finger in November 2017, in the form of a laceration of his finger. Claimant credibly testified that he sustained a laceration of his left index finger while installing a furnace while working for Employer.

Reasonable and Necessary Medical Treatment.

Under section 8-42-101(1)(a), C.R.S., respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of the industrial injury. See *Owens v. Industrial Claim Appeals Office*, 49 P.3d 1187, 1188 (Colo. App. 2002). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). All results flowing proximately and naturally from an industrial injury are compensable. *Id.*, citing *Standard Metals Corp. v. Ball*, 474 P.2d 622 (Colo. 1970). However, when a later injury occurs as the result of another independent intervening cause, no compensability exists. *Owens, supra*, citing *Post Printing & Publishing Co., supra*. Whether a particular condition is the result of an independent intervening cause is a question of fact for resolution by the ALJ. *Faulkner, supra*; *Owens*, 49 P.3d at 1188-89.

Claimant has established by a preponderance of the evidence that the medical treatment he received at the unidentified urgent care facility was reasonable and necessary. Claimant received stitches in his finger to address a laceration of his finger. Claimant has failed to establish that any other specific medical treatment was reasonable, necessary, or related to his November 2017 injury.

Claimant has failed to establish by a preponderance of the evidence an entitlement to additional medical benefits. Claimant's emergency room visit on June 8, 2018 was for flank pain, unrelated to his November 2017 injury. Claimant failed to provide any evidence to establish how the June 8, 2018 emergency room visit was related to his work-related finger laceration. Similarly, Claimant has failed to establish that his July 28, 2018 emergency room visit was causally related to his November 2017 work-injury. The medical records indicate that Claimant pinched his left index finger sometime in July 2018, and subsequently developed an abscess. The evidence does not establish that this injury was related to the November 2017 injury, other than the fact that it was to the same finger. The subsequent injury was an independent intervening cause. Because Claimant's medical treatment on June 8, 2018 and July 28, 2018 was not related to his work-related injury, Respondents are not liable for the expenses associated with this treatment, and Claimant is not entitled to medical benefits for these treatments.

TEMPORARY DISABILITY BENEFITS

To prove entitlement to Temporary Total Disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. See Sections 8-42-103 (1)(g), 8-42-105(4); *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office*, 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage-earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (citing *Ricks v. Industrial Claim Appeals Office*, P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic*, 952 P.2d 831, 833 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

Section 8-42-106(1), C.R.S., provides for an award of Temporary Partial Disability (TPD) benefits based on the difference between the claimant's AWW at the time of injury and the earnings during the continuance of the temporary partial disability. In order to receive TPD benefits the claimant must establish that the injury has *caused* the disability and consequent partial wage loss. Section 8-42-103(1), C.R.S.; *Safeway Stores, Inc. v. Husson*, 732 P.2d 1244 (Colo. App. 1986) (temporary partial compensation benefits are

designed as a partial substitute for lost wages or impaired earning capacity arising from a compensable injury).

Claimant has failed to establish by a preponderance of the evidence that he is entitled to temporary disability benefits. Claimant testified that he returned to work two days following his injury in November 2017, and that he continued to work to work 40 hours per week after returning. Claimant did not present evidence that he was “disabled” for three or more work shifts and did not present evidence that he sustained a difference in earnings after returning to work. Consequently, Claimant failed to meet his burden of establishing that he sustained an industrial injury causing a disability lasting more than three works shirts, and that the disability resulted in an actual wage loss.

PERMANENT PARTIAL DISABILITY BENEFITS

Under section 8-42-107(1)(a), when an injury results in permanent medical impairment, and the employee has an injury or injuries enumerated in the schedule specified in § 8-42-107(2), C.R.S., the employee is limited to the permanent impairment benefits specified in the schedule. The loss of an index finger at various levels is included within the scheduled injuries. § 8-42-107(2)(g-j), C.R.S. Entitlement to permanent impairment benefits requires that an authorized treating physician determine that the claimant has reached maximum medical improvement as defined in § 8-40-201 (11.5), C.R.S. The Workers’ Compensation Act requires that the claimant receive a medical impairment rating, which is then to be applied to the scheduled injury to determine permanent partial disability benefits. § 8-42-107(8)(d), C.R.S.

Claimant has failed to establish by a preponderance of the evidence that he is entitled to permanent disability benefits. Although Claimant demonstrated for the ALJ the loss of range of motion in his finger, and may well have a permanent impairment, Claimant did not present evidence that any physician has placed him at maximum medical improvement or that any physician assigned any permanent impairment rating for his left index finger. Because Claimant has not been placed at maximum medical improvement, his claim for permanent partial disability benefits is not ripe for determination.

Disfigurement

Section 8-42-108(1) provides that a claimant is entitled to additional compensation if he is “seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view.” As found, Claimant has sustained disfigurement as a direct and proximate result of the November 2017 injury. Claimant should be awarded \$200.00 for disfigurement.

ORDER

It is therefore ordered that:

1. Claimant sustained a compensable injury to the index finger of his left hand arising out of the course and scope of his

employment with Employer. Employer is liable for Claimant's injury-related medical treatment and is liable for the expenses Claimant incurred through urgent care on or about the date of injury.

2. Claimant has failed to establish that his medical expenses on June 9, 2018 or July 28, 2018 were related to his work-related injury.
3. Claimant is not entitled to temporary partial disability benefits. Claimant's claim for temporary partial disability benefits is denied and dismissed.
4. Claimant's claim for permanent partial disability benefits is not ripe for determination. Claimant's claim for permanent partial disability benefits is therefore denied and dismissed without prejudice.
5. Employer shall pay Claimant \$200.00 for disfigurement.
6. All matters not determined herein are reserved for future determination.

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

DATED: December 4, 2020.



Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

1. Whether Claimant has proven by a preponderance of the evidence that she is permitted to receive greater than 12 weeks of medical impairment benefits pursuant to §8-41-301(2)(b), C.R.S.

2. Whether Claimant is entitled to a disfigurement benefits in excess of the \$1,100.00 awarded by Prehearing Administrative Law Judge Michelle S. Sisk on May 6, 2020.

FINDINGS OF FACT

The parties agreed to the following stipulated facts:

1. On February 5, 2020 Claimant suffered an admitted work injury. Claimant is a dog groomer and was at work with her Employer's Assistant Manager, Ms. Amber M[Redacted]. Ms. M[Redacted] had brought her Great Dane dog, named Sir, to work. While Ms. M[Redacted] was grooming Sir, Claimant entered the room to obtain a nail trimmer. Ms. M[Redacted] attempted to hand Claimant a nail trimmer, while holding Sir on a leash. Sir then lunged at Claimant, bit her on the left breast and knocked her to the ground.

2. Castle Rock police responded to the scene and investigated the incident. Within their investigation, the General Manager, named Kimberly K[Redacted] stated that she too had been bitten by the same dog in the past.

3. On February 12, 2020 Officer Dave H[Redacted] issued Ms. M[Redacted] a municipal animal summons for one count of §6.02.160(A) Potentially Dangerous Animal, and one count of §6.02.070(A)(1) Licensing.

4. On March 5, 2020 Elizabeth W. Bisgard, M.D. provided a final evaluation of Claimant. Dr. Bisgard released Claimant from care and determined that she had reached Maximum Medical Improvement (MMI). She included a 7% whole person rating for psychological impairment.

5. On March 11, 2020 Ms. M[Redacted] pled guilty to owning one or more potentially dangerous animals in violation of §6.02.160 of the Castle Rock Municipal Code.

6. On April 17, 2020 Respondents filed a Final Admission of Liability (FAL) admitting to a 7% whole person impairment rating. Under the remarks section, Respondents stated that "PPD is limited to twelve weeks of medical impairment benefits pursuant to 8-41-301(2)(b)."

7. On April 28, 2020 Claimant submitted a request for disfigurement to the Division of Workers' Compensation.

8. On May 5, 2020 Claimant submitted her application for hearing on the matters of disfigurement, permanent partial disability and overcoming the cap under C.R.S. §8-41-301(2)(b).

9. On May 6, 2020 Claimant received an award of \$1,100.00 for her disfigurement by order of Prehearing Administrative Law Judge Michelle S. Sisk.

10. On May 6, 2020 Claimant amended her application for hearing to include "Overcoming Prehearing disfigurement award."

Ultimate Factual Findings

11. Claimant contends that she is not limited to 12 weeks of medical impairment benefits under §8-41-301(2)(b), C.R.S. because she was the victim of a crime of violence. She specifically asserts that Ms. M[Redacted]' dog Sir falls within the definition of a "deadly weapon." Claimant argues that Ms. M[Redacted] knew, or should have known, that Sir was a dangerous animal before the altercation. Moreover, she knew that Sir was capable of producing serious bodily injury and neglected to take adequate precautions to prevent him from injuring Claimant. Despite Claimant's contention, she has failed to prove that it is more probably true than not that she is permitted to receive greater than 12 weeks of medical impairment benefits pursuant to §8-41-301(2)(b), C.R.S. Instead, Claimant is limited to 12 weeks of medical impairment benefits because she was not the victim of a "crime" or "crime of violence" under Colorado law. The exception to the 12 week limitation in §8-41-301(2)(b), C.R.S. is thus inapplicable.

12. Initially, on February 5, 2020 Claimant suffered an admitted work injury. While Assistant Manager Ms. M[Redacted] was grooming her dog Sir, Claimant entered the room to obtain a nail trimmer. Ms. M[Redacted] attempted to hand Claimant a nail trimmer while holding Sir on a leash. Sir then lunged at Claimant, bit her on the left breast and knocked her to the ground. Claimant received a 7% whole person psychological impairment rating for her injuries. As a result of the incident, Ms. M[Redacted] pled guilty to owning one or more potentially dangerous animals in violation of §6.02.160 of the Castle Rock Municipal Code.

13. The penalty for the violation of municipal ordinance §6.02.160 was a minimum fine of \$100.00 up to a maximum of \$499.00. Castle Rock, CO Municipal Code §6.02.340(D). The terms "offense" and "crime" are synonymous and mean a violation of, or conduct defined by, any state statute for which a fine or imprisonment may be imposed. §18-1-104(1), C.R.S. However, no conduct shall constitute an offense unless it is described as an offense in this code or in another statute of this state. §18-1-104(1), C.R.S. The violation of a municipal ordinance thus does not fall within the definition of §18-1-104, C.R.S. See *Bovard v. People*, 99 P.3d 585, 591 fn. 10 (Colo. 2004) (noting that the violation of a municipal ordinance is neither a crime nor a

misdemeanor). Based on the preceding, Castle Rock, CO Municipal Code §6.02.160 is neither a criminal statute nor a State of Colorado statute. Ms. M[Redacted]' violation of the municipal code section was thus not a "crime" as contemplated by §8-41-301(2)(b), C.R.S.

14. In fact, although Ms. M[Redacted] was not charged with violating a State of Colorado statute, §18-9-204.5, C.R.S. specifically addresses the unlawful ownership of a dangerous dog. Section 18-9-204.5, C.R.S. provides in relevant part that the:

provisions of this section shall not apply to ... any dog that inflicts bodily or serious bodily injury to any veterinary health care worker, dog groomer, humane agency personnel, professional dog handler, or trainer each acting in the performance of his or her respective duties, unless the owner is subject to a court order ... and the owner has failed to comply with the provisions.

§18-9-204.5(6), C.R.S. Ms. M[Redacted] was not under a court order regarding her dog and Claimant was acting in the performance of her duties as a dog groomer at the time of the industrial injury. Therefore, §18-9-204.5, C.R.S. would not have applied to Ms. M[Redacted] and she would not have committed a "crime" under Colorado law as a result of the February 5, 2020 incident. The exception to the 12 week limit on medical impairment benefits is thus inapplicable. Accordingly, Claimant is limited to 12 weeks of medical impairment benefits.

15. Ms. M[Redacted] also did not commit a "crime of violence" under §16-1-104(8.5)(a)(I), C.R.S. The exception to the 12 week limit on medical impairment benefits in §8-41-301(2)(b), C.R.S. requires the claimant to be the victim of a crime of violence without regard to the intent of the perpetrator. "Crime of violence" is not defined in the Workers' Compensation Act, but is defined in the Colorado Code of Criminal Procedure. A "crime of violence" requires the defendant to use, or possess and threaten the use of, a deadly weapon during the commission or attempted commission of a first or second degree assault. However, Ms. M[Redacted]' dog Sir was not used as a deadly weapon.

16. The record reveals that Ms. M[Redacted] did not "use" or possess and threaten to "use" her dog Sir in a manner capable of producing death or serious bodily injury during the commission or attempted commission of a first or second degree assault. Instead, Ms. M[Redacted] was merely grooming Sir at the time of the incident. She specifically attempted to hand Claimant a nail trimmer, while holding Sir on a leash, when he lunged at Claimant. Ms. M[Redacted] conduct' does not reflect that she sought to "use" the dog in a manner capable of producing death or serious bodily injury. Ms. M[Redacted]' grooming of Sir thus did not render him a "deadly weapon" under §18-1-901(3)(e), C.R.S. Because a "crime of violence" contemplates the use of a "deadly weapon," Claimant was not the victim of a "crime of violence" under §8-41-301(2)(b), C.R.S. The exception to the 12 week limit on medical impairment benefits is thus inapplicable. Accordingly, Claimant is limited to 12 weeks of medical impairment benefits.

17. On March 5, 2020 Dr. Bisgard released Claimant from care and determined that she had reached MMI. In summarizing Claimant's history of medical treatment for her work injury, Dr. Bisgard referenced Claimant's care with R. Williams, PA-C on the date of the incident. PA-C Williams noted that Claimant's left breast had an "approximately 10cm linear and superficial laceration that split the epidermis approximately 5mm." Claimant also exhibited tenderness and other superficial lacerations. Moreover, Dr. Bisgard noted that Claimant had "significant scarring of the breast but does not fall under a functional impairment under the skin chapter" of the *AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised)* (*AMA Guides*). Finally, Claimant testified that the texture of the scarring is not smooth.

18. Claimant is not entitled to a disfigurement award in excess of the \$1,100.00 awarded by Prehearing Administrative Law Judge Michelle S. Sisk on May 6, 2020. As a result of her work injury, Claimant has a visible disfigurement to the body consisting of approximately four inches of scarring as well as abrasions on her left breast. Claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles her to additional compensation. §8-42-108 (1), C.R.S. Insurer shall pay Claimant \$1100.00 for that disfigurement. Accordingly, Prehearing Administrative Law Judge Michelle S. Sisk's disfigurement order issued on May 6, 2020 is affirmed. .

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. See *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and

bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. Because the primary goal in construing statutory language is to determine and give effect to the intent of the General Assembly, the court looks to the plain and ordinary meaning of the words. *State v. Nieto*, 993 P.2d 493, 500 (Colo. 2000). If the language is plain and the meaning is clear, the statute must be applied as written, and the court need not resort to any other method of statutory interpretation. *Id.*

5. Section 8-41-301(2)(b) limits a claimant to 12 weeks of medical impairment benefits, inclusive of temporary disability benefits, except where the claimant was the “victim of a crime of violence” or suffered neurological brain damage as a result of the injury. The statute specifically provides:

where a claim is by reason of mental impairment, the claimant shall be limited to twelve weeks of medical impairment benefits, ...; except that this limitation shall not apply to any victim of a crime of violence, without regard to the intent of the perpetrator of the crime, ...nor to the victim of a physical injury or occupational disease that causes neurological brain damage.

§8-41-301(2)(b), C.R.S.

6. The phrase “crime of violence” is not defined in the Workers’ Compensation Act (Act). However, §16-1-104(8.5)(a)(I), C.R.S. of the Colorado Criminal Code defines “crime of violence.” See *Bralish v. Industrial Claim Appeals Office*, No. 4-455-119 (ICAO, June 5, 2002) (noting that “the ALJ correctly observed that the Code of Criminal Procedure contains a definition of the term “crime of violence”).

7. “Crime of violence” means:

a crime in which the defendant used, or possessed and threatened the use of, a deadly weapon during the commission or attempted commission of ...first or second degree assault, ..., or during the immediate flight therefrom, or the defendant caused serious bodily injury or death to any person, other than himself or herself or another participant, during the commission or attempted commission of any such felony or during the immediate flight therefrom.

§16-1-104(8.5)(a)(I), C.R.S.

8. “Deadly weapon” means:

- (I) A firearm, whether loaded or unloaded; or
- (II) A knife, bludgeon, or any other weapon, device, instrument, material, or substance, whether animate or inanimate, that, in the

manner it is used or intended to be used, is capable of producing death or serious bodily injury.

§18-1-901(3)(e), C.R.S.

9. As found, Claimant contends that she is not limited to 12 weeks of medical impairment benefits under §8-41-301(2)(b), C.R.S. because she was the victim of a crime of violence. She specifically asserts that Ms. M[Redacted]' dog Sir falls within the definition of a "deadly weapon." Claimant argues that Ms. M[Redacted] knew, or should have known, that Sir was a dangerous animal before the altercation. Moreover, she knew that Sir was capable of producing serious bodily injury and neglected to take adequate precautions to prevent him from injuring Claimant. Despite Claimant's contention, she has failed to prove by a preponderance of the evidence that she is permitted to receive greater than 12 weeks of medical impairment benefits pursuant to §8-41-301(2)(b), C.R.S. Instead, Claimant is limited to 12 weeks of medical impairment benefits because she was not the victim of a "crime" or "crime of violence" under Colorado law. The exception to the 12 week limitation in §8-41-301(2)(b), C.R.S. is thus inapplicable.

10. As found, initially, on February 5, 2020 Claimant suffered an admitted work injury. While Assistant Manager Ms. M[Redacted] was grooming her dog Sir, Claimant entered the room to obtain a nail trimmer. Ms. M[Redacted] attempted to hand Claimant a nail trimmer while holding Sir on a leash. Sir then lunged at Claimant, bit her on the left breast and knocked her to the ground. Claimant received a 7% whole person psychological impairment rating for her injuries. As a result of the incident, Ms. M[Redacted] pled guilty to owning one or more potentially dangerous animals in violation of §6.02.160 of the Castle Rock Municipal Code.

11. As found, the penalty for the violation of municipal ordinance §6.02.160 was a minimum fine of \$100.00 up to a maximum of \$499.00. Castle Rock, CO Municipal Code §6.02.340(D). The terms "offense" and "crime" are synonymous and mean a violation of, or conduct defined by, any state statute for which a fine or imprisonment may be imposed. §18-1-104(1), C.R.S. However, no conduct shall constitute an offense unless it is described as an offense in this code or in another statute of this state. §18-1-104(1), C.R.S. The violation of a municipal ordinance thus does not fall within the definition of §18-1-104, C.R.S. See *Bovard v. People*, 99 P.3d 585, 591 fn. 10 (Colo. 2004) (noting that the violation of a municipal ordinance is neither a crime nor a misdemeanor). Based on the preceding, Castle Rock, CO Municipal Code §6.02.160 is neither a criminal statute nor a State of Colorado statute. Ms. M[Redacted]' violation of the municipal code section was thus not a "crime" as contemplated by §8-41-301(2)(b), C.R.S.

12. As found, in fact, although Ms. M[Redacted] was not charged with violating a State of Colorado statute, §18-9-204.5, C.R.S. specifically addresses the unlawful ownership of a dangerous dog. Section 18-9-204.5, C.R.S. provides in relevant part that the:

provisions of this section shall not apply to ... any dog that inflicts bodily or serious bodily injury to any veterinary health care worker, dog groomer, humane agency personnel, professional dog handler, or trainer each acting in the performance of his or her respective duties, unless the owner is subject to a court order ... and the owner has failed to comply with the provisions.

§18-9-204.5(6), C.R.S. Ms. M[Redacted] was not under a court order regarding her dog and Claimant was acting in the performance of her duties as a dog groomer at the time of the industrial injury. Therefore, §18-9-204.5, C.R.S. would not have applied to Ms. M[Redacted] and she would not have committed a “crime” under Colorado law as a result of the February 5, 2020 incident. The exception to the 12 week limit on medical impairment benefits is thus inapplicable. Accordingly, Claimant is limited to 12 weeks of medical impairment benefits.

13. As found, Ms. M[Redacted] also did not commit a “crime of violence” under §16-1-104(8.5)(a)(I), C.R.S. The exception to the 12 week limit on medical impairment benefits in §8-41-301(2)(b), C.R.S. requires the claimant to be the victim of a crime of violence without regard to the intent of the perpetrator. “Crime of violence” is not defined in the Workers’ Compensation Act, but is defined in the Colorado Code of Criminal Procedure. A “crime of violence” requires the defendant to use, or possess and threaten the use of, a deadly weapon during the commission or attempted commission of a first or second degree assault. However, Ms. M[Redacted]’ dog Sir was not used as a deadly weapon.

14. As found, the record reveals that Ms. M[Redacted] did not “use” or possess and threaten to “use” her dog Sir in a manner capable of producing death or serious bodily injury during the commission or attempted commission of a first or second degree assault. Instead, Ms. M[Redacted] was merely grooming Sir at the time of the incident. She specifically attempted to hand Claimant a nail trimmer, while holding Sir on a leash, when he lunged at Claimant. Ms. M[Redacted] conduct’ does not reflect that she sought to “use” the dog in a manner capable of producing death or serious bodily injury. Ms. M[Redacted]’ grooming of Sir thus did not render him a “deadly weapon” under §18-1-901(3)(e), C.R.S. Because a “crime of violence” contemplates the use of a “deadly weapon,” Claimant was not the victim of a “crime of violence” under §8-41-301(2)(b), C.R.S. The exception to the 12 week limit on medical impairment benefits is thus inapplicable. Accordingly, Claimant is limited to 12 weeks of medical impairment benefits.

Disfigurement

15. Section 8-42-108(1), C.R.S. provides that a claimant is entitled to additional compensation if she is “seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view.” If scars are apparent in swimming attire a disfigurement award is appropriate. See *Twilight Jones Lounge v. Showers*, 732 P.2d 1230, at1232 (Colo. App. 1986).

16. As found, on March 5, 2020 Dr. Bisgard released Claimant from care and determined that she had reached MMI. In summarizing Claimant's history of medical treatment for her work injury, Dr. Bisgard referenced Claimant's care with R. Williams, PA-C on the date of the incident. PA-C Williams noted that Claimant's left breast had an "approximately 10cm linear and superficial laceration that split the epidermis approximately 5mm." Claimant also exhibited tenderness and other superficial lacerations. Moreover, Dr. Bisgard noted that Claimant had "significant scarring of the breast but does not fall under a functional impairment under the skin chapter" of the *AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised)* (*AMA Guides*). Finally, Claimant testified that the texture of the scarring is not smooth.

17. As found, Claimant is not entitled to a disfigurement award in excess of the \$1,100.00 awarded by Prehearing Administrative Law Judge Michelle S. Sisk on May 6, 2020. As a result of her work injury, Claimant has a visible disfigurement to the body consisting of approximately four inches of scarring as well as abrasions on her left breast. Claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles her to additional compensation. §8-42-108 (1), C.R.S. Insurer shall pay Claimant \$1100.00 for that disfigurement. Accordingly, Prehearing Administrative Law Judge Michelle S. Sisk's disfigurement order issued on May 6, 2020 is affirmed.

ORDER

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

1. Claimant is limited to 12 weeks of medical impairment benefits.
2. Prehearing Administrative Law Judge Michelle S. Sisk's disfigurement award of \$1100.00 issued on May 6, 2020 is affirmed.
3. Any issues not resolved in this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative

Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at <https://oac.colorado.gov/resources/oac-forms>.*

DATED: December 7, 2020.

DIGITAL SIGNATURE:


Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-101-495-005**

ISSUES

1. Whether Respondents' overcame the DIME opinions of Dr. Raneesh Shenoj by clear and convincing evidence with respect to Claimant's cervical and mental impairment ratings.
2. Whether Claimant overcame the DIME opinions of Dr. Raneesh Shenoj by clear and convincing evidence with respect to MMI, causation and/or permanent impairment.
3. Whether Claimant established by a preponderance of the evidence entitlement to temporary total disability benefits from November 15, 2019 and ongoing.
4. Whether Claimant established by a preponderance of the evidence that he is permanently and totally disabled as a result of his March 3, 2019 injury.
5. Whether Claimant established by a preponderance of the evidence entitlement to a general award of additional authorized, reasonable, and necessary medical benefits, or to an award of *Grover* medical benefits causally related to his March 3, 2019 injury.

RELEVANT PROCEDURAL HISTORY

On May 1, 2020, Respondents applied for hearing on the issue of overcoming the DIME opinion of Dr. Raneesh Shenoj on permanent impairment. (Ex. JJ) That same day, Claimant filed a hearing application endorsing as issues for hearing compensability, medical benefits, average weekly wage, disfigurement, temporary total disability benefits, temporary partial disability benefits, permanent partial disability benefits, permanent total disability benefits, and death benefits. (Ex. KK) On May 20, 2020, PALJ Michelle S. Sisk issued a Prehearing Conference Order striking compensability and death benefits as issues for hearing and clarifying that because Claimant's prior request for temporary total disability benefits had been decided by ALJ Felter's November 14, 2019 Full Findings of Fact, Conclusions of Law, and Order Granting Summary Judgment, the temporary total disability benefit period at issue for hearing was limited to November 15, 2019 and ongoing. (Ex. LL)

This matter originally came to hearing before the ALJ on August 27, 2020, in Denver, Colorado. The hearing was initiated via videoconference and teleconference, it was digitally recorded, Claimant, *pro se*, was present by phone, and Respondents were represented by Mr. [Redacted], who appeared by videoconference. A Hindi/Punjabi to English interpreter translated as needed. The ALJ ultimately continued the August 27, 2020 hearing without taking evidence due to technical and interpreter issues. On September 9, 2020, the ALJ Kabler issued a Procedural Order addressing the areas of the Rescheduled Hearing (full day), Claimant's Participation at the Rescheduled Hearing (in terms of technology required, and Claimant participating virtually from the OAC), Pro

Se Advisement, Interpreter Use, Hearing Exhibits, Witnesses, and the Deposition of Kathleen D'Angelo, M.D.

Prior to hearing, Claimant requested additional deposition time to cross-examine Dr. D'Angelo. By way of history, Respondent began conducting the deposition on August 21, 2020 by telephone. During the first portion of the deposition, Claimant repeatedly interrupted the deposition calling Dr. D'Angelo and Respondent's counsel "liars," and was generally disruptive. Respondent's counsel disconnected Claimant and completed a portion of the deposition without Claimant's participation. On August 27, 2010, the ALJ ordered that the deposition be reconvened to permit Claimant to cross-examine Dr. D'Angelo. That portion of the deposition was completed on September 28, 2020. The ALJ initially allowed Claimant to cross-examine Dr. D'Angelo for one hour. At a telephone conference during the deposition, that time was extended an additional 20 minutes. Following the deposition, Claimant filed a motion requesting an additional 6 hours to cross-examine Dr. D'Angelo. After review of the transcript from the September 28, 2020 deposition, Claimant's motion was denied as unwarranted.

FINDINGS OF FACT

1. The Claimant was a taxi driver for the Employer on his date of injury, March 3, 2019, and the Employer was insured by Pinnacol Assurance on the date of injury. (Ex. GG)
2. On March 3, 2019, the Claimant was involved in a work-related motor vehicle accident while driving a taxi for the Employer. The Traffic Accident report indicates that the accident occurred (or the report was generated) at 12:33 p.m. (Ex. GG; Ex. S)
3. On March 4, 2019, the Claimant was provided a Designated Provider List by the Employer. The Claimant chose Rocky Mountain Medical Group (hereinafter (RMMG)) from the designated provider list as his authorized treating provider (ATP), and on March 6, 2019, the Claimant began care with Annu Ramaswamy, M.D. of RMMG. (Ex. GG).
4. On March 6, 2019, Dr. Ramaswamy provided the Claimant modified duty work restrictions limiting Claimant from cab driving. (Ex. GG)
5. On March 19, 2019, Respondents filed a General Admission of Liability (GAL), which admitted for TTD benefits beginning March 4, 2019. (Ex. GG)
6. On June 25, 2019, Dr. Ramaswamy released the Claimant to full duty work. (Ex. GG)
7. On June 28, 2019, Respondent-Insurer filed a GAL terminating TTD benefits as of June 24, 2019, secondary to Dr. Ramaswamy's full duty work release. (Ex. GG)
8. Drs. Lesnak, Reilly and Moe are ATPs within the chain of referrals. None of these ATPs placed the Claimant under work restrictions after June 25, 2019. (Ex. GG)

9. On July 17, 2019, the Claimant's personal care provider, Scott Sutton, M.D. of Denver Health Medical Center, authored a letter indicating that the Claimant could not drive long periods of time while under the influence of various medications (Ex. GG).

10. Dr. Ramaswamy re-evaluated the Claimant on August 6, 2019 (Exhibit I). The Claimant informed Dr. Ramaswamy he saw a physician at Denver Health, Dr. Sutton, who concluded that the Claimant could not work. Id. Dr. Ramaswamy disagreed, again determining that the Claimant could return to full duty work without restrictions. (Ex. GG).

2007 INJURY AND TREATMENT

11. On December 11, 2007, Claimant was involved in a motor vehicle accident while driving a taxi. (Ex. B).

12. Approximately 25 days after the December 11, 2007 accident, Claimant was seen at University Hospital for neck pain and chest pain. (Ex. B). On February 13, 2008, Claimant underwent a cervical MRI which showed a small disc protrusion on the left at C4-5 and straightening of the cervical lordosis which may have been due to muscle spasms. (Ex. A).

13. On February 28, 2008, Claimant saw Douglas Hammond, M.D. Claimant reported headaches, neck pain, low and mid-back pain, chest pain, and a "clicking" sound in his neck. Dr. Hammond diagnosed Claimant with traumatic headache, abdominal pain, chest wall rib sprain/strain, bilateral hand and forearm abrasions from airbag, cervical, thoracic, and lumbar strains with spasm, and cervical disc derangement. (Ex. B).

14. On April 24, 2008, Claimant was seen by Stephen Batuello, M.D., on referral from Dr. Hammond, for further evaluation. At that time, Claimant complained of clicking and a foreign body sensation in his neck, and pain radiating from his neck into his ears and temporal parietal region. Dr. Batuello noted that Claimant's pain syndrome was disproportionate to the findings on MRI. (Ex. C).

15. On June 2, 2008, Claimant saw Elizabeth Bryniarski, M.D., a neurologist, on referral from Dr. Hammond. Claimant reported memory issues, confusion, depression, anxiety, insomnia, fatigue, dizziness, blurred vision, swallowing difficulty, loss of balance, muscle cramping in the neck, arm numbness, tingling in both arms and legs, and neck pain. Dr. Bryniarski's examination did not demonstrate any cervical radiculopathy or myelopathy. (Ex. D).

16. On July 7, 2008, Claimant saw neurosurgeon John Oro, M.D. Dr. Oro noted that Claimant been through six physical therapy treatments and one chiropractic treatment since the December 11, 2007 accident. Claimant reported his neck pain had progressively increased since the accident, and also reported clicking throughout his neck, dizziness, episodes of numbness in his arms and legs, insomnia, memory problems, balance problems, anxiety, depression, and chest pain. Dr. Oro reviewed Claimant's prior MRI scan, which showed reversible cervical curvature and a small disk hernia at C4-5, and mild congenital stenosis of the mid-cervical spine. Dr. Oro recommended additional imaging studies. (Ex. E).

17. On October 6, 2008, Claimant saw Christopher Huser, M.D., of Metro Denver Pain Management, on referral from Dr. Hammond. At that point, Claimant described a complex pain history with bilateral neck pain with any movement, radiating to his occiput, left shoulder and occasionally pain shooting down both legs. Claimant also reported dizziness, diffuse shaking throughout his body, occasional tinnitus and a clicking sensation in his neck. Dr. Huser noted that Claimant was sent to his office because his first interventionalist felt he was not a candidate for injections. Dr. Huser diagnosed Claimant with a cervical strain and myofascial pain syndrome. Dr. Huser indicated that he felt the majority of Claimant's neck symptoms were attributed to myofascial pain and loss of cervical lordosis, which could be treated conservatively. Dr. Huser agreed claimant was not a candidate for interventional pain management. (Ex. F). Subsequent records from other providers indicate that Dr. Huser performed a cervical epidural injection at some point, with limited relief.

18. Claimant saw Dr. Bryniarski on November 19, 2008, at which time Claimant reported his symptoms had not improved, and he had an adverse reaction to a single dose of amitriptyline, including a panic attack. Dr. Bryniarski diagnosed claimant with post-traumatic headaches, whiplash injury, intermittent infrequent vertigo, clicking sounds in his throat, and anxiety with panic attacks. (Ex. D).

19. On December 22, 2008, Dr. Hammond examined Claimant and opined that Claimant had a 1% whole person impairment rating for chronic pain. He diagnosed Claimant with traumatic headaches, chest wall rib sprain/strain, traumatic vertigo, bilateral hand and forearm abrasions, chronic cervical and thoracic sprain/strain with spasms, lumbar sprain/strain with spasm, cervical disc derangement, insomnia, anxiety, depression, and esophageal discomfort with spasm. Dr. Hammond released claimant from care at maximum medical improvement. (Ex. G).

20. On approximately May 1, 2009, Claimant filed an appeal with the Social Security Administration in which he reported numbness in his left leg, back of his neck, and pain into his cervical spine and lower back. Claimant also reported memory loss. (Ex. H).

21. Claimant saw Dr. Batuello again on October 11, 2009, at which time Dr. Batuello noted that he could find no distinct etiology for Claimant's symptoms. (Ex. C).

22. On February 22, 2010, Claimant saw Dr. Oro for review of flexion/extension MRI scans. Dr. Oro noted that extension of Claimant's neck caused bulging of the C4-5 disk, and stenosis at C4-5, C5-6, and C6-7. Dr. Oro discussed with Claimant that treatment for Claimant's condition would be a 3-level anterior cervical discectomy and fusion (ACDF). (Ex. E).

23. On July 7, 2011, Claimant underwent an independent medical examination with Tashof Bernton, M.D. At that time, Claimant reported symptoms in his cervical, thoracic, and lumbar spine, left shoulder, throat, tingling in his fingers, left leg numbness, dizziness, and chest pain. Dr. Bernton reviewed Claimant's medical records and noted that multiple providers had examined Claimant and found no objective explanation for his physical symptoms. Dr. Bernton opined that "the most accurate assessment of injuries sustained

by this patient in the [December 11, 2007] motor vehicle accident is a cervical and possibly thoracic muscular strain.” Dr. Bernton found that Claimant’s neck range of motion was “within physiologic limits and has no evidence restriction and there is no palpable abnormal tone in the trapezius when the patient rotates his head.” Dr. Bernton further opined that Claimant “does not have permanent disability from the motor vehicle accident of December 11, 2017.” (Ex. I).

24. Dr. Bernton also opined that Claimant “has symptom magnification and/or somatoform problems in which emotional issues result in increased fixation on bodily symptoms and resultant physical complaints. The patient’s clinical course is classic for a somatic presentation including a pattern of increasing symptoms over time, presentation to the emergency room for physical symptoms diagnosed as anxiety, failure of physically based treatments to result in improvement and multiple negative diagnostic evaluations. Disability seeking behavior and identification with the disabled role may play a significant part in the patient’s pain complaints as well.” (Ex. I).

25. On February 14, 2012, Claimant saw Molly Buerk, PA-C at Denver Spine, for neck and lower back pain. Ms. Buerk diagnosed Claimant with brachial plexus lesions, unspecified myalgia, and myositis, sacroiliitis, and cervical spondylosis without myelopathy. Ms. Buerk’s record indicates Claimant was referred by Carolyn Burkhard, M.D.¹ (Ex. J).

26. On December 30, 2013, Claimant saw Scott Bainbridge, D.O. at Denver Spine. Claimant noted he was continuing to experience bilateral cervical pain and headaches with sternal and low back pain. He also reported numbness in his right leg and pain in his right heel. Dr. Bainbridge diagnosed claimant with lumbosacral and cervical spondylosis without myelopathy, and degeneration of lumbar or lumbosacral disc. He discussed with Claimant performing diagnostic blocks to determine if other treatment would be effective. (Ex. J).

27. On November 24, 2015, Claimant saw Levi Miller, D.O. , at Colorado Rehabilitation and Occupational Medicine. Dr. Miller noted that Claimant had been on disability since his December 11, 2007 accident. Claimant reported that he had been involved in a second accident on April 12, 2015, and that the “multitude of symptoms that he had in the past worsened, in particular neck and upper right chest pain.” Dr. Miller found Claimant’s cervical spine had “full range of motion in all cardinal directions.” Dr. Miller diagnosed Claimant with chronic pain syndrome, chronic neck pain, upper right anterior chest pain (consistent with costochondritis); EMG evidence of right tibial and superficial peroneal axial neuropathy, consistent with diffuse peripheral neuropathy. Dr. Miller scheduled claimant for trigger point injections, which were performed on December 1, 2015. (Ex. L).

28. On July 24, 2017, and December 1, 2017, Claimant was seen by Jonathan Scott, M.D., of Blue Sky Neurology. Claimant reported he had previously been recommended

¹ No records from Dr. Burkhard were offered or admitted into evidence.

to undergo a spinal fusion, but declined. Claimant reported he had been on disability since 2009. Dr. Scott diagnosed Claimant with neck pain, and noted that his pain was most consistent with musculoskeletal pain. Dr. Scott indicated that he did not consider Claimant a surgical candidate. He recommended an increased dose of gabapentin and increasing Claimant's dosage of Cymbalta. (Ex. M).

29. On March 27, 2018, Claimant saw Daniel Liebowitz, M.D., at Denver Health's Eastside Clinic. Dr. Liebowitz completed a medical form to permit Claimant to drive for Lyft, but noted he should not drive if sleepy or drowsy, or after taking tramadol or trazodone. Dr. Liebowitz also diagnosed claimant with, among other things, chronic neck pain, and recurrent major depressive disorder, in remission. (Ex. N).

30. On July 19, 2018, Claimant saw Lisa Roeske-Anderson, M.D. at Blue Sky Neurology. Dr. Roeske-Anderson reviewed Claimant's July 26, 2017 MRI and noted that it showed borderline narrow spinal canal with a small central disc at C4-5 without cord or root sleeve deformity. She found claimant had "Full cervical ROM with mild tenderness to palpation on left and a 'pulling' of left cervical region when he turns head to the right laterally. Mild discomfort with cervical extension but no perceived limitations." Dr. Roeske-Anderson referred Claimant for additional physical therapy and to a pain clinic for consideration of cervical injections. (Ex. M).

31. On October 1, 2018 and October 17, 2018, Claimant saw Giancarlo Checa, M.D., a pain physician. Claimant reported neck and chest pain, and pain radiating to his left arm, hand, and all fingers. Dr. Checa noted that Claimant's neck pain was mostly myofascial on exam. Dr. Checa noted normal range of motion. (The ALJ infers that Dr. Checa's range of motion examination was to Claimant's neck). Dr. Checa reviewed Claimant's 2014 MRI and noted he "did not see anything suspicious." Dr. Checa noted that Claimant was taking naproxen, gabapentin, tramadol, Flexeril, Cymbalta and trazodone. Dr. Checa reviewed Claimant's October 2, 2018 Lumbar MRI and noted a low-lying conus medullaris and a tight filum terminale or tethering of the cord. He referred Claimant to Adam Smith, M.D., for a second opinion. (Ex. P).

32. On October 26, 2018, Claimant saw Adam Smith, M.D., of Rocky Mountain Brain and Spine Institute. Claimant reported experiencing "[y]ears of neck and back pain." Claimant reported he had previously seen Dr. Oro who recommended ACDF, and Claimant declined the surgery. Claimant reported then-current symptoms including continued neck pain, extending into the shoulders and sternum, and left arm tingling and numbness, low back, and left leg pain, weakness, and numbness. Claimant rated his neck pain at a 5/10 which he described as "throbbing." Claimant reported difficulty holding his neck in a flexed position and clicking in his neck. Dr. Smith noted Claimant had limited range of motion of the neck with pain on flexion. Dr. Smith diagnosed Claimant with cervical and lumbar spondylosis and lipoma/fatty filum and tethered cord at L3-4. He indicated Claimant's July 26, 2017 MRI showed kyphosis and spondylotic changes at C4-5 and C5-6, with lesser changes at C3-4. Dr. Smith further opined that Claimant may eventually require ACDF at C4-5 and C5-6, and that his kyphosis may be due to the tethered cord. Dr. Smith recommended that Claimant undergo a minimally invasive procedure to remove the lipoma/fatty filum to decompress and untether the spinal cord.

While Dr. Smith noted the procedure may improve some symptoms, it was likely he also had a chronic pain condition. (Ex. Q).

33. On October 29, 2018, Dr. Smith performed surgery on Claimant. The surgery included a left L2, L3 and L4 hemilaminotomy and bilateral partial facetectomy, with intradural intramedullary resection of conus/filum, mass. Following surgery, Claimant saw Dr. Smith on December 4, 2018. At that time, Claimant continued to have neck pain extending into his shoulders and sternum, left arm tingling and numbness and rated his neck pain 5/10. Dr. Smith noted Claimant's left arm and leg numbness was "seemingly nondermatomal." Dr. Smith also noted Claimant had chronic pain syndrome. (Ex. Q).

34. On December 8, 2018, a new cervical MRI was read as showing protrusions and osteophytes at C4-5, C5-6, C6-7, canal narrowing at C4-5, severe left foraminal stenosis at C5-6, and moderate left and right foraminal narrowing at C6-7. (Ex. A).

35. On January 8, 2019, Claimant saw Dr. Smith in follow up. Dr. Smith noted that Claimant was "Doing OK" post-surgically, but continued to have pain symptoms "expected with his chronic pain syndrome." Claimant continued to complain of neck pain, into his shoulders and sternum, that he rated as 5/10 and described as throbbing. Claimant also complained that he felt his right ribs were higher than his left. Dr. Smith noted Claimant had limited range of motion of the neck with pain on flexion. Dr. Smith also noted that he had discussed with Claimant a C4-5 and C5-6 ACDF procedure. Dr. Smith noted the following: "Continues to be very anxious. Fearful body wide pain never getting better. Fearful that he will not have his pain meds. He states: 'I'm uncontrolled. I can't survive without pain medication. If someone stopped my pain medication, I would just go to the ER every day.'" Dr. Smith noted "each visit [Claimant] is more anxious. More signs of narcotic addiction. I think at this point he requires weaning off pain medications and control of his anxiety before pursuing any more surgery." Claimant was to follow-up in three months. (Ex. Q).

MARCH 3, 2019 WORK RELATED INJURY

36. On March 3, 2020, Claimant was transported from the scene of the automobile accident by ambulance to the Rose Medical Center Emergency Department, where he was examined by David Moon, M.D. Claimant's initial greet time at Rose Medical Center was 1:20 p.m. Claimant reported he was restrained during the collision, and had a history of hypertension, chronic neck, and back pain with a history surgery on his back. Claimant complained of left sided neck pain that was non-radiating, after what claimant described as a low-speed accident. Claimant reported no numbness or weakness of his arms or legs. On examination, Dr. Moon found left lateral paracervical neck tenderness, He specifically noted no midline vertebral tenderness, and no tenderness in the cervical, thoracic, or lumbar spine. Dr. Moon's records indicate no neurological deficits and "[n]o other signs of serious injury." Dr. Moon's clinical impression was "Neck muscle strain." Dr. Moon prescribed Tylenol, ibuprofen, and a muscle relaxer, and instructed Claimant to follow up with his personal doctor if his pain continued. Claimant was discharged home at approximately 1:35 p.m. (Ex. T).

37. On March 4, 2019, Employer completed a First Report of Injury or Illness which described Claimant's injury as a contusion of the skull. (Ex. V).

38. On March 6, 2019, Claimant saw Annu Ramaswamy, M.D. Claimant reported a dull pain in his chest, headaches, and hearing a "clicking" sound when he lifted his head while laying down. Claimant also reported neck pain, upper back pain, "electrical shocks" radiating from his neck to head, and mild lower back pain. Claimant reported he had pre-existing neck pain, and that a cervical fusion was recommended at some point. On examination, Dr. Ramaswamy noted tenderness in the cervical spine, and mild tenderness in the thoracic spine with mild trigger point activity. Dr. Ramaswamy diagnosed Claimant with a contusion of unspecified front wall of thorax, strain of muscle, fascia and tendon at neck level, and strain of muscle and tendon of the wall of the thorax. (Ex. V).

39. On March 20, 2019, Claimant returned to Dr. Ramaswamy. Claimant reported numbness in his left hand, occasional dizziness, nausea, and headaches, in addition to lower back, and neck pain. On examination, Dr. Ramaswamy noted tenderness in the left trapezius with trigger point activity; tenderness in the cervical spine; and tenderness in the lumbar spine. Claimant also reported subjective numbness in the left hand. Dr. Ramaswamy placed Claimant at modified duty and recommended that he not drive a taxicab. (Ex. V).

40. On April 10, 2019, Claimant saw Dr. Ramaswamy again. Claimant reported that 5-weeks from his injury, he was worsening, although he also reported being 10-20% better. Claimant again reported neck pain, lower back pain, left hand numbness and tingling, and right chest wall pain. Claimant also reported shortness of breath due to pain. Claimant reported that he was unable to work in any capacity. Dr. Ramaswamy noted that Claimant "is set up for delayed recovery based on his past history (10-year recovery from prior motor vehicle accident. The patient indicates that he needs to take all his medications on a regular basis and if he missed one or 2 doses, he will be in the emergency room. Therefore there is a significant history of chronic pre-existing pain with prior lumbar and cervical pathology." Dr. Ramaswamy recommended a cervical MRI based on Claimant's complaints of neck pain and left hand numbness, which claimant characterized as new since the March 3,2019 accident. (Ex. V).

41. On April 11, 2019, Claimant saw Dr. Smith for a scheduled 3 month follow up from his January 8, 2019 appointment. Dr. Smith's recitation of Claimant's symptoms, including is virtually identical to his complaints of January 8, 2019, including neck and low back pain, headaches, left arm numbness. He reported Claimant's neck range of motion as limited with pain on flexion. Dr. Smith's report does not mention Claimant's work-related injury or the March 3, 2019 automobile accident. (Ex. W).

42. On April 20, 2019, Claimant had a MRI of his cervical spine, which was compared to his MRI of December 8, 2018. The MRI showed a new C5-6 left paracentral disc extrusion and possible free disc fragment with mild indentation of the left side of the cord. (Ex. X).

43. Claimant returned to Dr. Ramaswamy on May 9, 2019. At that time, Claimant reported his condition was worsening. Dr. Ramaswamy opined Claimant was “presenting with diffuse pain and quite a bit of symptomatology with some somatic complaints. Pain behavior is present.” He also noted that the cervical spine MRI revealed a new disc protrusion at the left C5-6 interspace. Dr. Ramaswamy also noted that “some of [Claimant’s] subjective complaints outweigh objective findings.” Dr. Ramaswamy referred Claimant to Lawrence Lesnak, D.O., for a psychiatry consult. Dr. Ramaswamy also noted that he had received some prior medical records that he would review. (Ex. V).

44. On May 15, 2019, Claimant saw Lawrence Lesnak, D.O. on referral from Dr. Ramaswamy. Dr. Lesnak noted that Claimant provided “submaximal effort during my evaluation and frequently limited his activities because of pain/fear of pain.” Dr. Lesnak recommended that Claimant undergo an electrodiagnostic evaluation of his left arm, neck, and scapular region. Dr. Lesnak noted that “it seems quite clear that there is a significant amount of psychosocial factors that are currently affecting his symptoms, his recovery, as well as his overall presentation and perceived functional status.” Dr. Lesnak’s assessment included his opinion that “there is a likely presence of an underlying symptom somatic disorder/somatoform disorder,” and noted that Claimant exhibited a significant amount of anxiety. After conferring with Dr. Ramaswamy, Dr. Lesnak recommended that Claimant undergo a formal pain psychological evaluation and referred him to Kevin Reilly, Psy.D. Dr. Lesnak prescribed no medications, indicating that Claimant reported all of his current medications were prescribed for many years by his pre-accident physicians. (Ex. Y).

45. On May 22, 2019, Claimant returned to Dr. Ramaswamy. Claimant reported he did not notice any change in his condition, and reported ongoing neck and lower back pain, left lower extremity numbness and tingling, left arm numbness and tingling, and right leg pain. He also reported dizziness, chest wall discomfort and shortness of breath. Dr. Ramaswamy noted that Claimant presented with lower back pain, neck pain, left arm numbness/tingling, and left leg weakness in January 2019, based on his review of Dr. Smith’s records. Claimant reported he was 30% worse in regard to neck pain, lower back pain and left arm and leg symptoms. Dr. Ramaswamy referred Claimant for a psychological consult to Kevin Reilly, Psy.D., noting that Claimant had a history of anxiety and stated that if he stopped medication, he would be in the emergency room. Dr. Ramaswamy noted that “[s]trains typically resolve by now and the patient is presented with delayed recovery.” (Ex. V).

46. On June 3, 2019 and June 11, 2019, Claimant saw Kevin Reilly, Psy.D., for a neuropsychological consultation based on the recommendations of Dr. Ramaswamy and Dr. Lesnak. Dr. Reilly performed neuro-psychometric testing using an interpreter and conducted a clinical interview without an interpreter. Dr. Reilly opined that Claimant’s neuro-psychometric testing results could not be considered valid, because of symptoms magnification, exaggerated symptom reporting and negative response bias. Dr. Reilly concluded that Claimant’s “clinical presentation is strongly suggestive of a somatic symptoms disorder/chronic pain condition.” He diagnosed Claimant with somatic symptom disorder with predominant pain. Dr. Reilly found that Claimant presented with strong indications for “non-organic factors influencing symptoms production and/or

maintenance;" and "Symptom validity testing indicates exaggeration." He recommended that Claimant undergo biofeedback therapy that could be concluded within 8 sessions. (Ex. Z).

47. On June 5, 2019, Dr. Lesnak performed EMG testing on Claimant which did not show any evidence of pathology. Dr. Lesnak did not recommend any further diagnostic or interventional treatments and indicated that Claimant was medically safe to return to work as a cab driver without restrictions. (Ex. Y).

48. On June 12, 2019, Claimant saw Dr. Ramaswamy, and reported his condition was unchanged. Dr. Ramaswamy described Claimant as "almost in tears" when explaining his anxiety, which Claimant related to his pain level, and when discussing work status. Claimant reported that he did not see himself working "at all" due to his pain. Dr. Ramaswamy opined that Claimant's diagnoses related to his March 3, 2019 were cervical strain, lumbar strain with evidence for a chest wall contusion as well. He also noted that diagnostic testing did not reveal evidence of new pathology, and that his examination did not correlate with new pathology. Dr. Ramaswamy stated: "In summary, I'm unable to state that here is evidence for a new cervical spine diagnosis based on the patient's examination and diffuse pain. I would have a similar opinion in regards to the lumbar spine diagnosis. The electrical studies do not reveal evidence for an acute cervical radiculopathy. All of this is good news." Ex. V.

49. On June 25, 2019, Claimant saw Dr. Ramaswamy and reported he was no better. Dr. Ramaswamy noted that the MRI showed a disc herniation at the C5-6 space, and there was evidence of bulging at this level prior to his accident. Claimant reported that he was disabled. On examination, Dr. Ramaswamy noted that light touch to the Claimant's chest caused significant pain. He was unable to palpate spasms or trigger points in the cervical, thoracic, or lumbar region. He also noted that several of Claimant's testing, including supine and sitting straight leg raise were discrepant, and Waddell's maneuver suggested no physiologic findings. Dr. Ramaswamy diagnosed Claimant with anxiety disorder, in doing so he stated: "[Claimant] was diagnosed as having cervical and lumbar strains along with chest wall strain initially. His examination does not correlate with [a symptomatic]² disc (C5-6). He presented with some pain behavior and non-physiologic findings. We discussed that his anxiety is significant." Dr. Ramaswamy noted that physical therapy had not been helpful to Claimant. Dr. Ramaswamy discussed with Claimant that he was "unable to put forth an objective diagnosis that would preclude the patient from working full duty. The neuropsychological testing was invalid and therefore [Dr. Reilly] indicates that he cannot put forth an objective psychological diagnosis at this point." Similarly, Dr. Ramaswamy spoke with Dr. Lesnak who reported that Claimant's examination was not consistent with a cervical herniated disc. Dr. Ramaswamy cleared

² Dr. Ramaswamy's June 25, 2019 note states "does not correlate with asymptomatic disc (C5-6)." Based on the totality of Dr. Ramaswamy's opinions, that ALJ infers that this was a dictation/transcription error, and the proper interpretation of this entry is "does not correlate with a symptomatic disc (C5-6)."

Claimant for a return to full duty work. Claimant disagreed with Dr. Ramaswamy's opinion and refused to sign the M-164 form containing this recommendation. (Ex. V).

50. On June 28, 2019, Respondents filed a General Admission of Liability, admitting for medical benefits, and temporary total disability from March 4, 2019 through June 24, 2019, based on Dr. Ramaswamy's June 25, 2019 Physician Report of Worker's Compensation Injury. (Ex. BB).

51. On July 3, 2019, Claimant saw Dr. Reilly. Dr. Reilly noted Claimant was agitated and the appointment was of no therapeutic benefit because Claimant's goal was to say that Dr. Reilly's opinions and findings were incorrect, and that Claimant could not return to work. Dr. Reilly determined Claimant was unlikely to benefit from the previously recommended biofeedback, and that additional contact was "highly unlikely to provide any therapeutic benefit." (Ex. Z).

52. Claimant returned to Dr. Ramaswamy on July 9, 2019. Dr. Ramaswamy noted Claimant was presenting with significant anxiety and emotional distress. Dr. Ramaswamy reiterated he could find no objective diagnosis correlating with a restricted duty/off duty status. Due to Claimant's significant anxiety, Dr. Ramaswamy referred him to Dr. Moe for an evaluation for psychotropic medication to assist with his anxiety. He indicated he would defer to Dr. Moe's opinion on MMI, which would depend on any psychiatric treatment plan recommended by Dr. Moe. (Ex. V).

53. On August 5, 2019, Claimant saw Stephen Moe, M.D., a psychiatrist, on referral from Dr. Ramaswamy. Dr. Moe found "anxiety is far-and-away [Claimant's] most pressing psychiatric concern." Dr. Moe further stated on "multiple occasions during the session, he voiced the belief that a number of his symptoms represent severe problems involving his spine or his brain. In fact, it would not be an exaggeration to say that some degree of anxiety, and at times a quite high level of anxiety, attended just about every topic that [Claimant] and I discussed." Dr. Moe suspected that many of the features Claimant demonstrated since his March 2, 2019 accident were "in play" following the 2007 accident. He also opined that it was probable that Claimant's anxiety contributed to his prolonged disability after the 2007 accident and to his then-current circumstances. Dr. Moe diagnosed Claimant with adjustment disorder with depression and anxiety; somatic symptoms disorder; and illness anxiety disorder (formerly called Hypochondriasis). Dr. Moe recommended replacing Claimant's Cymbalta with Prozac to address his anxiety. Claimant returned to Dr. Moe for two additional sessions on August 21, 2019 and September 4, 2019. (Ex. CC).

54. On August 6, 2019, Claimant saw Dr. Ramaswamy. At that time, Claimant reported, alternatively, that his pain had decreased, that he had not changed at all since his injury, and that he was 20% better. Again, Dr. Ramaswamy was unable to identify any spasms or trigger points in Claimant's cervical, thoracic, or lumbar spine. Dr. Ramaswamy characterized Claimant's examination as "fairly benign" with objective findings that were "minimal at best." Dr. Ramaswamy noted that Claimant "begged me to place him on restrictions today." Dr. Ramaswamy did not place Claimant on work restrictions, finding no basis to do so. (Ex. V).

55. After seeing Claimant again on August 26, 2019, Dr. Ramaswamy stated “In regards to MMI status, once the patient stabilizes from the anxiety standpoint, MMI will follow.” On September 18, 2019, Dr. Ramaswamy noted “Dr. Moe has assessed somatic symptom disorder. From a physical standpoint, the patient would have reached MMI by now.” Dr. Ramaswamy further noted that Claimant’s “physical symptomatology has not improved over time and if anything he continues to worsen. Therefore, physical therapy would not be helpful in this situation.” (Ex. V).

56. On August 19, 2019, Dr. Ramaswamy authored a report responding to questions apparently from Insurer, which included a review of some of Claimant’s medical records prior to the March 3, 2019 accident. Dr. Ramaswamy indicated that Claimant “sustained strains of the cervical, thoracic and lumbar spine (myofascial pain) as related to the March 3, 2019 injury. These conditions have resolved at this point based on his examinations.” Dr. Ramaswamy noted that Claimant continued to have subjective pain complaints without objective findings. He also noted that it was possible that Claimant’s C5-6 disc herniation related to the March 3, 2019 accident, but there was no clinical evidence for discogenic pain, and that condition would be deemed asymptomatic. He indicated that Claimant had not reached MMI, which would depend on Dr. Moe’s opinions regarding Claimant’s psychiatric assessment and determination of causation. (Ex. DD).

57. On October 14, 2019, Claimant saw Dr. Moe. Dr. Moe opined that as of October 14, 2019, Claimant was at MMI from a psychiatric perspective. He recommended continuance of medications for three months, after which time further psychiatric treatment should be provided outside the worker’s compensation system. Dr. Moe then assigned Claimant a 5% whole person mental impairment rating. (Ex. EE).

58. On October 21, 2019, Dr. Ramaswamy noted Dr. Moe had placed Claimant at MMI from a psychiatric standpoint with a 5% whole person impairment. Claimant also presented with numerous symptoms which Dr. Ramaswamy characterized as “somatic symptomatology” and that Prozac had helped his anxiety. Before placing Claimant at MMI, Dr. Ramaswamy ordered chest CT scan to evaluate for chest pathology. (Ex. V).

59. On November 6, 2019, Dr. Ramaswamy authored a report to Insurer. Dr. Ramaswamy opined that Claimant was at MMI as of October 31, 2019. Dr. Ramaswamy indicated he could not put forth any objective diagnoses that then related to the March 3, 2019 work injury. He agreed with Dr. Moe’s 5% whole person impairment rating for psychological impairment and noted that the March 3, 2019 accident aggravated Claimant’s pre-existing anxiety and depression. Dr. Ramaswamy also noted that Claimant had no permanent physical condition related to the March 3, 2019 accident. (Ex. FF).

60. On November 14, 2019, ALJ Felter issued an order that Claimant was not entitled to temporary disability benefits after June 25, 2019, the date Dr. Ramaswamy released Claimant to full duty work. (Ex. GG). ALJ Felter’s relevant findings of fact are incorporated in this Order.

61. On March 15, 2020, Claimant underwent a Division Independent Medical Examination (DIME) performed by Raneesh Shenoi, M.D., to address MMI, permanent impairment and apportionment of cervical, thoracic, lumbar, and psychological conditions. Dr. Shenoi reviewed Claimant's medical records pre-dating his March 3, 2019 accident but did not conduct a review of pre-accident records. Dr. Shenoi opined that Claimant sustained a cervical strain as a result of the March 3, 2019 accident. She also noted that his examination was not consistent with a cervical radiculopathy, despite his new C5-6 disc extrusion. She found Claimant reached MMI on November 14, 2019. Dr. Shenoi opined that Claimant had a cervical strain with reactive issues of anxiety exacerbation following the March 3, 2019 accident. (Ex. HH).

62. Dr. Shenoi noted that Claimant did not sustain injury to the thoracic or lumbar spine. She assigned Claimant a 4% whole person impairment rating for specific disorder of the spine per Table 53 II B, an 8% impairment rating for cervical spine range of motion deficits; and a 5% whole person mental impairment based on Dr. Moe's impairment rating. The combined whole person rating for cervical spine and mental rating is 16%. Dr. Shenoi did not recommend work restrictions or further treatment, other than follow up with Dr. Moe for two months. (Ex. HH).

63. In a letter dated April 7, 2020, Dr. Shenoi noted that she had relied upon Dr. Moe's impairment rating for her assignment of a mental impairment rating to Claimant. (Ex. HH)

64. On April 13, 2020, Dr. Shenoi issued an Addendum to her DIME report, indicating that she had spent an additional 4 hours reviewing Claimant's medical records from before the March 3, 2019 accident. In that Addendum, Dr. Shenoi indicated she believed Claimant's cervical/neck strain from his 2007 Accident had resolved prior to the March 3, 2019 accident or had "gradually evolved into a host of additional symptoms." Dr. Shenoi noted that Claimant's records "reveal structural issues in the cervical spine, such as disc protrusions, congenital spine canal narrowing and degenerative disc disease that, in my opinion, would explain his ongoing chronic neck pain." Dr. Shenoi stated that her impairment rating of 12% for Claimant's cervical spine was unchanged, because "[d]espite his history of chronic neck pain, I do not believe there is a basis for apportionment from his prior accident(s) as I believe the condition of cervical/neck strain had resolved prior to the 03/03/19 MVA." Dr. Shenoi also indicated her opinion regarding mental impairment rating of 5% was unchanged. (Ex. HH).

65. In her report, Dr. Shenoi noted that "Upon reviewing [Claimant's] records after the 03/03/19 MVA, the ER records reflect he had "neck muscle strain." It is superimposed on pre-existing degenerative disc disease, disc protrusions, and spinal canal stenosis but nonetheless, it is a *new* neck strain in my opinion based on his history and injury mechanism on 03/03/19 MVA." (Emphasis original). (Ex. HH).

66. On April 30, 2020, Dr. Moe wrote a letter to Respondent's counsel entitled "Special Report." In that letter, Dr. Moe indicated that he had reviewed some of Claimant's pre-March 3, 2019 medical records. Based on his review of additional records, Dr. Moe stated:

Having been given the opportunity to review medical records of [Claimant] dating back to 2008, it is clear to me that the psychiatric symptoms and impairment with which he presented to me, along with the physical symptoms to which he attributed his psychiatric difficulties, reflected the perpetuation of a chronic and static condition. That is to say, neither [Claimant's] physical nor psychiatric condition changed in any material way as a result of the accident of 3/3/19.

Dr. Moe concluded: "I now believe that [Claimant] did not incur any mental impairment as a result of [the March 3, 2019] accident." (Ex. II).

67. On June 3, 2020, Kathleen D'Angelo, M.D., authored an "Occupational Medicine Record Review" at the request of Respondents. Dr. D'Angelo reviewed Claimant's medical records from January 12, 2008 through Dr. Shenoi's DIME Addendum dated April 30, 2020. Based on her review of records, Dr. D'Angelo opined that Claimant's only work-related injury was "cervical myofascial irritation." Dr. D'Angelo opined that Claimant's injury was "a self-limited issue" that required no treatment beyond his initial appearance at the emergency department on the date of the accident. Dr. D'Angelo opined that Claimant reached MMI on March 3, 2019 at the end of his emergency room visit. (Ex. MM).

68. Dr. D'Angelo testified by deposition that she disagreed with Dr. Shenoi's impairment rating and conclusion in her DIME report and addendum that Claimant had recovered from his 2007 injuries prior to the March 3, 2019 accident. Dr. D'Angelo testified because she considered Claimant an unreliable historian, and range of motion testing is subjective, that none of Dr. Shenoi's range of motion deficits should be considered in assigning Claimant an impairment rating. Dr. D'Angelo opined there was no objective evidence that Claimant's current cervical condition, pain or restrictions were caused, aggravated, or accelerated by the March 3, 2019 accident. Dr. D'Angelo also opined that Claimant would have had the same symptoms in April 2019 if the March 3, 2019 accident had not occurred.

69. On June 11, 2020, Claimant underwent a vocational assessment performed by Roger J. Ryan. Mr. Ryan was admitted qualified as an expert in the field of forensic vocational evaluation testified at hearing that Claimant was able and qualified to return to work in various employment settings that did not require Claimant to drive a vehicle as a condition of employment, such as a cashier, motor vehicle dispatcher, production assembler, and other positions. In total, Mr. Ryan identified 31 potential occupations Claimant could perform. Mr. Ryan also testified that such employment positions are available in the Denver area labor market. (Ex. PP).

70. Claimant testified at hearing sustained injuries to his brain, neck, and spine in the March 3, 2019 accident. Claimant also testified that he continues to experience pain and numbness in his hands and arms, and that he has an ongoing rib injury. Claimant testified that he is unable to focus, has deteriorated memory, and deteriorated eyesight, the ALJ was unable to determine if Claimant related the additional conditions solely to his March 3, 2019 accident or to the 2007 accident. Claimant testified that he was not

experiencing neck pain prior to March 3, 2019, and that his only treatment was for his back. The ALJ did not find Claimant's testimony credible or persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. See § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. See § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id.* at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

RESPONDENTS' CLAIMS

Whether Respondents overcame the DIME of Dr. Shenoj by clear and convincing evidence with respect to impairment rating and causation.

The determination and assessment of permanent impairment requires the DIME physician to diagnose the claimant's condition or conditions and determine their causal relationship to the industrial injury. See *Cordova v. Industrial Claim Appeals Office*, P.3d (Colo. App. No. 01CA0852, February 28, 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998) A DIME physician's findings regarding MMI, causation, relatedness, and impairment are binding on the parties unless overcome by "clear and convincing evidence." § 8-42-107(8) (b) (III), C.R.S.; *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). This enhanced burden of proof for non-scheduled injuries reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998).

The finding of a DIME physician concerning the claimant's medical impairment rating shall be overcome only by clear and convincing evidence. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995); *Lafont v. WellBridge D/B/A Colorado Athletic Club* W.C. No. 4-914-378-02 (ICAO, June 25, 2015).

As a matter of diagnosis, the assessment of permanent medical impairment inherently requires the DIME physician to identify and evaluate all losses that result from the injury. *Mosley v. Industrial Claim Appeals Office*, 78 P.3d 1150 (Colo. App. 2003); *Sharpton v. Prospect Airport Services* W.C. No. 4-941-721-03 (ICAO, Nov. 29, 2016). Consequently, a DIME physician's finding that a causal relationship does or does not exist between an injury and a particular impairment must be overcome by clear and convincing evidence. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998); *Watier-Yerkman v. Da Vita, Inc.* W.C. No. 4-882-517-02 (ICAO Jan. 12, 2015); Compare *In re Yeutter*, 2019 COA 53 ¶ 21 (determining that a DIME physician's opinion carries presumptive weight only with respect to MMI and impairment). The rating physician's determination concerning the cause or causes of impairment should include an assessment of data collected during a clinical evaluation and the mere existence of impairment does not create a presumption of contribution by a factor with which the impairment is often associated. *Wackenhut Corp. v. Industrial Claim Appeals Office*, 17 P.3d 202 (Colo. App. 2000).

The questions of whether the DIME physician properly applied the *AMA Guides*, and ultimately whether the rating was overcome by clear and convincing evidence present questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office*, 17 P.3d 202 (Colo. App. 2000); *Paredes v. ABM Industries* W.C. No. 4-862-312-02 (ICAO, Apr. 14, 2014). A mere difference of opinion between physicians does not necessarily rise to the level of clear and convincing evidence. See *Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-36 (ICAO, Mar. 22, 2000); *Licata v. Wholly Cannoli Café* W.C. No. 4-863-323-04 (ICAO, July 26, 2016).

Mental Impairment

Respondents have established by clear and convincing evidence that Dr. Shenoi's assignment of a 5% mental impairment rating is incorrect. Dr. Shenoi assigned Claimant a 5% whole person impairment rating for mental impairment based exclusively on the opinion of Dr. Moe. Dr. Shenoi conducted no analysis or evaluation to independently arrive at an opinion on mental impairment. Although Dr. Moe initially assigned a 5% mental impairment rating, after reviewing additional evidence, Dr. Moe revised his opinion and opined that Claimant did not incur any mental impairment as a result of the March 3, 2019 work-related injury. No evidence was presented to contradict or contest Dr. Moe's opinion in this regard. Given Dr. Shenoi's reliance on Dr. Moe's opinion, her assignment of a mental impairment rating does not constitute a "difference of opinion." Instead, the ALJ finds that it is highly probable and free from substantial doubt that Dr. Shenoi's assignment of a 5% impairment rating was incorrect. Claimant is not entitled to permanent disability benefits for mental impairment.

Physical Impairment

The substance of Respondents' contention is that Dr. Shenoi's assignment of physical impairment rating to the Claimant is incorrect because Claimant's impairment, if any, is not causally related to his March 3, 2020 accident. The ALJ finds that Respondents have established by clear and convincing evidence that Dr. Shenoi's physical impairment rating is incorrect. The evidence clearly and convincingly demonstrates that Claimant's neck complaints returned to pre-accident status by August 12, 2019 at the latest, and that his physical complaints after August 12, 2019 were not causally-related to his March 3, 2019.

Claimant has significant history of complaints of neck pain dating to his December 2007 automobile accident. During the six months before March 3, 2019, Claimant saw Dr. Checa (in October 2018) and reported neck symptoms virtually identical to those he reported after March 3, 2019, including myofascial neck pain, pain radiating to his left arm, hand, and fingers. Similarly, when Claimant saw Dr. Smith in October 2018, December 2018, and January 2019, he reported neck pain extending to his interscapular area and shoulders, with left arm tingling and numbness. At each visit with Dr. Smith, Claimant rated his neck pain 5/10.

After the March 3, 2019 injury, Claimant initially reported neck pain to the Rose Medical Center ER, which later evolved to headaches, upper back pain, lower back pain, chest pain and radiating pain down his left arm. During the first few months of treatment with Dr. Ramaswamy, Claimant had objective signs of an aggravation of his pre-existing chronic neck condition, including palpable trigger point activity in the cervical spine. By June 12, 2019, Dr. Ramaswamy was unable to palpate trigger point activity or spasms in his neck, although Claimant continued to complaint of significant and increasing neck pain and various other symptoms.

By June 25, 2019, Dr. Ramaswamy indicated that Claimant was not presenting with objective cervical or lumbar diagnoses that would relate to his March 3, 2019

accident, despite Claimant's continued complaints. By July 8, 2019, Claimant was presenting with only diffuse pain that Dr. Ramaswamy was unable to correlate with an objective diagnosis. By August 6, 2019, Claimant reported that his neck pain was a 2-3/10, which was less than the pre-injury levels Claimant reported to Dr. Smith in October 2018, December 2018, and January 2019, and consistent with his reports to Dr. Checa in October 2018. Dr. Ramaswamy obtained Claimant's prior medical records from Dr. Smith and, on August 6, 2019 noted that Claimant's symptoms were the "very similar" to his presentation before March 3, 2019.

The ALJ finds Dr. Ramaswamy's August 12, 2019 report credible and persuasive. In that report, Dr. Ramaswamy opined that Claimant's work-related conditions had resolved at that point in time, and that Claimant's subjective complaints of pain continued without objective findings. The ALJ similarly finds Dr. Ramaswamy's November 6, 2019 report credible and persuasive, and particularly his opinion that Claimant had no permanent impairment for any type of physical condition related to the March 3, 2019 work-injury.

Claimant's continued complaints of neck pain (and numerous other symptoms) fall into a familiar pattern that was evidenced throughout Claimant's medical records, including a tendency to magnify his symptoms. At least four different providers, (Dr. Ramaswamy, Dr. Lesnak, Dr. Reilly and Dr. Moe) found that Claimant engaged in some type of symptom magnification, somatoform disorder or that his complaints were non-physiologic. These findings were consistent with Claimant's pattern prior to the March 3, 2019 accident, as discussed by Dr. Bernton as early as 2011. The evidence indicates that Claimant had a significant history of anxiety about returning to work, and continually requested that Dr. Ramaswamy provide him with work restrictions.

Taking the evidence as a whole, the ALJ finds that it is highly probable and free from serious or substantial doubt that Claimant recovered from his March 3, 2019 work injury by at least August 12, 2019, and that physical symptoms and complaints that he exhibited after that date were not related to the March 3, 2019 work injury.

The ALJ finds Dr. Shenoi's opinion that Claimant had recovered from his 2007 cervical strain and sustained a new cervical strain in the March 3, 2019 accident credible. Dr. Shenoi also notes that Claimant was experiencing ongoing chronic neck pain prior to the March 3, 2019 accident as a result of a multitude of factors. However, her assignment of an impairment rating fails to consider the clear and uncontroverted evidence that Claimant had recovered from his March 3, 2019 cervical strain, and that he had returned to his physical baseline by August 2019. To the extent that Dr. Shenoi determined that Claimant's condition was causally related to his March 3, 2019 work injury, the ALJ finds that it is highly probable and free from serious or substantial doubt that her opinion is incorrect, and Claimant should not have been assigned a permanent impairment rating as a result of the March 3, 2019 work injury.

The ALJ finds that Respondents have established by clear and convincing that Dr. Shenoi's assignment of a permanent impairment rating for Claimant related to the March

3, 2019 work injury was incorrect. Claimant is not entitled to permanent impairment benefits.

CLAIMANT'S CLAIMS

Claimant seeks ongoing temporary total disability benefits, medical benefits, and permanent disability benefits. As set forth below, Claimant has failed to meet his burden of proof for establishing entitlement to these benefits.

Overcoming DIME

As a threshold issue, Claimant must establish by clear and convincing evidence that the DIME Physician's MMI opinion is incorrect to be entitled to TTD benefits or general medical benefits. Claimant has failed to meet this burden. MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." Section 8-40-201(11.5), C.R.S. A DIME physician's finding that a party has or has not reached MMI is binding on the parties unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(III), C.R.S.; *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000); *Kamakele v. Boulder Toyota-Scion*, W.C. No. 4-732-992 (ICAO, Apr. 26, 2010).

MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office*, 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office*, 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007); *Powell v. Aurora Public Schools*, W.C. No. 4-974-718-03 (ICAO, Mar. 15, 2017). A finding that the claimant needs additional medical treatment (including surgery) to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office*, 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office*, 794 P.2d 1090 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.*, W.C. No. 4-320-606 (ICAO, Mar. 2, 2000). Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining the claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Abeyta v. WW Construction Management*, W.C. No. 4-356-512 (ICAO, May 20, 2004). Thus, a DIME physician's findings concerning the diagnosis of a medical condition, the cause of that condition, and the need for specific treatments or diagnostic procedures to evaluate the condition are inherent elements of determining MMI.

The party seeking to overcome the DIME physician's findings regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, *supra*. "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-*

Med, Inc. v. Industrial Claim Appeals Office, 961 P.2d 590, 592 (Colo. App. 1998); *Lafont v. WellBridge D/B/A Colorado Athletic Club*, W.C. No. 4-914-378-02 (ICAO, June 25, 2015). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect, and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc.*, W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appeals Office*, *supra*.

The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.*, W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); see *Shultz v. Anheuser Busch, Inc.*, W.C. No. 4-380-560 (ICAO, Nov. 17, 2000). Rather it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Oates v. Vortex Industries*, WC 4-712-812 (ICAO, Nov. 21, 2008); *Licata v. Wholly Cannoli Café*, W.C. No. 4-863-323-04 (ICAP, July 26, 2016).

Claimant has failed to establish by clear and convincing evidence that Dr. Shenoï's opinion that Claimant reached MMI on November 14, 2019 is incorrect. Dr. Shenoï's opinion is consistent with the opinion of Dr. Ramaswamy and Dr. Moe. No physician has opined that Claimant did not reach MMI by November 14, 2019, and Claimant did not offer any credible evidence to establish that Dr. Shenoï's opinion on MMI is incorrect. Moreover, Claimant has failed to establish that Dr. Shenoï's impairment ratings were incorrect, or that she erred in determining that Claimant's only work-related injury was a cervical strain or failing to provide permanent impairment ratings for any other body parts.

Entitlement To TTD Benefits

To prove entitlement to Temporary Total Disability (TTD) benefits, Claimant must prove his industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office*, 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage-earning capacity as demonstrated by Claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999).

The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) TTD benefits ordinarily continue until terminated by the occurrence of one of the criteria listed in § 8-42-105 (3), C.R.S. These events include:

1) the employee reaching MMI; 2) the employee returning to regular or modified employment; 3) the attending physician releasing the employee to return to regular employment; or 4) the employee is released to return to modified employment and the employer makes a written offer for such, but the employee fails to begin such employment. *Bestway Concrete & TIG Ins. v. Industrial Claim Appeals*, 984 P.2d 680 (Colo. App. 1999).

“The statute provides that the opinion of the attending physician carries conclusive effect with respect to a claimant’s ability to perform regular employment. However, one attending physician’s release to work is not conclusive of the issue if multiple attending physicians render conflicting opinions.” *Bestway Concrete & TIG Ins, supra, citing Burns v. Robinson Dairy, Inc.*, 911 P.2d 661 (Colo. App. 1995). The term “attending physician” as used in § 8-42-105(3), C.R.S., refers to a physician within the chain of authorization who assumes care of the claimant. *Popke v. Industrial Claim Appeals Office*, 944 P.2d 677 (Colo. App. 1997).

The only issue before this ALJ is whether Claimant is entitled to TTD benefits after November 14, 2019. By Order dated November 14, 2019, ALJ Felter found that Claimant was not entitled to TTD benefits after June 25, 2019, the date Claimant’s ATP, Dr. Ramaswamy released him to full duty work. Accordingly, the issue of TTD benefits through November 14, 2019 has been determined. Claimant has failed to establish by a preponderance of the evidence that he is entitled to temporary disability benefits after November 14, 2019 for several reasons. First, Claimant has failed to establish that Dr. Sheno’s determination that Claimant was at MMI on November 14, 2019 is incorrect. Because Claimant was at MMI on November 14, 2019, any entitlement to TTD benefits terminated on that date pursuant to § 8-42-105(3), C.R.S. Second, Claimant has not presented evidence that any authorized treating health care provider has reinstated work restrictions after November 14, 2019, or that he experienced any medical incapacity after November 14, 2019 that would prevent Claimant from working. Claimant’s claim for temporary disability benefits after November 14, 2019 is denied.

Entitlement To Additional Medical Benefits

Claimant asserts he is entitled to past and ongoing medical benefits. There are two possible avenues for Claimant to obtain past and ongoing medical benefits. Claimant must either establish by clear and convincing evidence that Dr. Sheno’s DIME opinion on MMI was incorrect, thereby entitling Claimant to general medical benefits; or establish an entitlement to post-MMI medical benefits (i.e., *Grover* medical benefits), by a preponderance of the evidence. As found, Claimant was at MMI on November 14, 2019. Accordingly, Claimant’s entitlement to ongoing medical benefits after that date requires Claimant to establish entitlement to *Grover* medical benefits, which Claimant has failed to do.

The need for medical treatment may extend beyond the point of MMI where a claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his

condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Hanna v. Print Expeditors Inc.*, 77 P.3d 863, 865 (Colo. App. 2003); *Hobirk v. Colorado Springs School District #11*, W.C. No. 4-835-556-01 (ICAO, Nov. 15, 2012). An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that the claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1999); *Hastings v. Excel Electric*, W. C. No. 4-471-818 (ICAO, May 16, 2002). The claimant must prove entitlement to *Grover* medical benefits by a preponderance of the evidence. *Lerner v. Wal-Mart Stores, Inc.*, 865 P.2d 915 (Colo. App. 1993); *Mitchem v. Donut Haus*, W.C. No. 4-785-078-03 (ICAO, Dec. 28, 2015). An award of *Grover* medical benefits should be general in nature. *Hanna v. Print Expeditors Inc.*, 77 P.3d 863 (Colo. App. 2003); *Anderson v. SOS Staffing Services*, WC No. 4-543-730, (ICAO, July 14, 2006).

Claimant has failed to establish by a preponderance of the evidence an entitlement to *Grover* medical benefits. Claimant sustained a neck strain as a result of his March 3, 2019 work-related accident. Although Claimant has presented medical documentation of treatment he received after reaching MMI, Claimant has offered no competent evidence that any treatment after reaching MMI was reasonably necessary to relieve the effects of his work-related injury or to prevent further deterioration of that condition. In other words, Claimant failed to establish that his post-MMI complaints and symptoms were causally related to his March 3, 2019 work injury. Claimant did not offer the opinion of any medical provider that any ongoing treatment would be reasonably necessary to relieve the effects of his March 3, 2019 injury or to prevent deterioration of that condition. Claimant's claim for *Grover* medical benefits is denied.

Entitlement to Permanent Total Disability Benefits (PTD)

Under §8-40-201(16.5)(a), C.R.S., permanent total disability means “the employee is unable to earn any wages in the same or other employment.” This definition was intended to tighten and restrict eligibility for permanent total disability benefits. *Weld County School District RE-12 v. Bymer*, 955 P.2d 550 (Colo. 1998). A claimant thus cannot obtain permanent total disability benefits if he is capable of earning wages in any amount. *Id.* at 556. Therefore, to establish a claim for PTD the claimant shoulders the burden of proving by a preponderance of the evidence that he is unable to earn any wages in the same or other employment. See §8-43-201, C.R.S. The phrase, “to earn any wages in the same or other employment,” “provides a real and non-illusory bright line rule for the determination whether a Claimant has been rendered permanently totally disabled.” *Lobb v. Indus. Claim Appeals Office*, 948 P.2d 115, 119 (Colo. App. 1997).

The Workers' Compensation Act defines “employment “as “[a]ny trade, occupation, job, position, or process of manufacture or any method of carrying on any trade, occupation, job, position or process of manufacture in which any person may be engaged.” § 8-40-201(8), C.R.S. “Wages” is the rate for which the employee is to be compensated for services. § 8 40 201(19), C.R.S. For purposes of PTD “any wages” means more than zero. See *McKinney v. Indus. Claim Appeals Office*, 894 P.2d 42 (Colo.

App. 1995). In ascertaining whether a claimant is able to earn any wages, test, which must be conducted on a case-by-case basis, is whether employment exists that is reasonably available to the claimant under his particular circumstances. *Bymer*, 955 P.2d at 557; *Holly Nursing v. ICAO*, 992 P.2d 701, 703 (Colo. App. 1999).

The claimant must demonstrate that his industrial injuries constituted a “significant causative factor” in order to establish a claim for PTD. *In Re Olinger*, W.C. No. 4-002-881 (ICAP, Mar. 31, 2005). A “significant causative factor” requires a “direct causal relationship” between the industrial injuries and inability to earn wages. *In Re of Dickerson*, W.C. No. 4-323-980 (ICAP, July 24, 2006); see *Seifried v. Industrial Comm’n*, 736 P.2d 1262, 1263 (Colo. App. 1986). The preceding test requires ascertaining the “residual impairment caused by the industrial injury” and whether the impairment was sufficient to result in PTD without regard to subsequent intervening events. *In Re of Dickerson*, W.C. No. 4-323-980 (ICAP, July 24, 2006). Resolution of the causation issue is a factual determination for the ALJ. *Id.*

Claimant has failed to establish that he is incapable of earning any wages in any capacity. The evidence establishes that Claimant is not subject to any work restrictions, and that his only impediment to returning to work is his own reluctance to do so. None of Claimant’s treating physicians have opined that Claimant is unable to work. With the exception of some limitation in motion of his cervical spine, Claimant has no functional impairment. Claimant’s cervical range of motion does not prevent him from earning any wages in any capacity. Mr. Ryan, Respondents’ vocational expert, credibly testified that Claimant maintains the ability to work in some capacity in a variety of positions, including positions that would not involve driving. Claimant’s testimony that he is unable to work is not credible. Claimant has failed to prove by a preponderance of the evidence that he is incapable of earning any wages, or that he is entitled to receive PTD benefits as a result of the admitted industrial injuries he sustained during the course and scope of his employment with Employer. Claimant’s claim for permanent total disability benefits is denied.

ORDER

It is therefore ordered that:

1. Respondents have established by clear and convincing evidence that Dime physician Dr. Shenoi’s assignment of a 5% whole person impairment for mental impairment is incorrect. Claimant is not entitled to permanent partial disability benefits for mental impairment.
2. Respondents has established by clear and convincing evidence that Dr. Shenoi’s assignment of a 4% whole person impairment for specific disorders of the cervical spine based on Table 53 II B of the AMA Guides to the Evaluation of Permanent Impairment and an 8% whole person impairment for loss of cervical range of motion is incorrect. Claimant is not entitled to permanent partial disability benefits.

3. Claimant has failed to establish by clear and convincing evidence that Dr. Shenoi's opinions that Claimant reached maximum medical improvement on November 14, 2019, or that claimant did not sustain any permanent impairment to his lumbar spine or thoracic spine are incorrect.
4. Claimant failed to establish by a preponderance of the evidence entitlement to temporary total disability benefits after November 15, 2019.
5. Claimant failed to establish by a preponderance of the evidence that he is permanently and totally disabled as a result of his March 3, 2019 injury.
6. Claimant failed to establish by a preponderance of the evidence entitlement to a general award of additional authorized, reasonable, and necessary medical benefits causally related to his March 3, 2019 injury.
7. Claimant failed to establish by a preponderance of the evidence an entitlement to Grover medical benefits causally related to his March 3, 2019 injury.
8. All matters not determined herein are reserved for future determination.

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

DATED: December 7, 2020.



Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUE

A determination of Claimant's Average Weekly Wage (AWW).

FINDINGS OF FACT

1. Claimant began working as a Landscape Foreman for Employer in approximately April 2019. He was hired to work 40 hours each week and earned \$14.00 per hour. Claimant's job duties include mowing lawns, working on landscaping machinery and cleaning leaves and gutters.
2. On April 25, 2020 Claimant sustained admitted industrial injuries to his right hand when a lawnmower fell on him.
3. Claimant missed time from work as a result of his injuries and treatment. Respondents admitted to Claimant's injury and paid Temporary Total Disability (TTD) and Temporary Partial Disability (TPD) benefits for Claimant's resulting wage loss. They specifically paid TPD benefits from May 5, 2020 through May 15, 2020. After Claimant's surgery, Respondents paid TTD benefits from May 16, 2020 through September 3, 2020. Respondents also acknowledged that Claimant earned an Average Weekly Wage of \$505.51.
4. Claimant is an hourly employee who is paid based on the number of hours he actually works in a week. By July 2019 Claimant's pay rate increased to \$20.00 per hour. Claimant asserts that his AWW should be based on his contract of hire at \$20.00 per hour for 40 hours each week or a total of \$800.00.
5. Claimant and Employer's owner Wayne M[Redacted] both testified that Claimant is a seasonal employee because landscaping is a seasonal profession in Colorado. They specifically agreed that the landscaping season runs from March or April through December and ends based on a lack of demand because of inclement winter weather.
6. Mr. M[Redacted] and Claimant both testified that there were some instances when Claimant did not work 40 hours per week and thus did not earn \$800.00. In fact, Claimant's wage records reveal some weeks where he earned \$800.00, some weeks where he earned less than \$800.00 and some weeks where he earned more than \$800.00. Mr. M[Redacted] and Claimant noted that there is a lower demand for landscaping services during snow in the winter and rainy days in the summer. Mr. M[Redacted] specified that the demand for landscaping slows down in November and December due to inclement weather and snow.

7. During the off-season Claimant does not seek other employment, but receives unemployment benefits. Claimant detailed that he received unemployment benefits in the amount of \$316.00 per week or \$632.00 every two weeks.

8. Respondents contend that Claimant earned an AWW of \$505.51. Reviewing Claimant's wage records from April 13, 2019 through January 3, 2020 reveals that he earned a total of \$26,286.40. Respondents reason that dividing \$26,286.40 by 52 weeks to account for the seasonal nature of Claimant's employment yields an AWW of \$505.51.

9. Claimant asserts that his AWW should be \$800.00 because he worked 40 hours per week and earned \$20.00 per hour. However, Claimant and Mr. M[Redacted] both testified that landscaping is a seasonal profession in Colorado. They agreed that the landscaping season runs from March or April through December because of inclement winter weather. Specifically, Claimant works 39 weeks out of a possible 52 weeks or 75% of the year. He does not work another job in the offseason, but receives unemployment benefits of \$316.00 per week. Claimant's request for an \$800.00 AWW is predicated on 52 weeks of full-time employment. However, because Claimant is a seasonal employee, \$800.00 is not an accurate reflection of his wage loss or diminished earning capacity.

10. However, Respondents contention that Claimant earned an AWW of \$505.51 also fails. Considering Claimant's wages from April 13, 2019 through January 3, 2020, he earned a total of \$26,286.40. Respondents reason that dividing \$26,286.40 by 52 weeks to account for the seasonal nature of Claimant's employment yields an AWW of \$505.51. However, Respondents' position fails to account for Claimant's increase in hourly wages from \$14.00 to \$20.00 by July 2019. Respondents' reliance on Claimant's wage records that include the time period when he earned \$14.00 per hour does not accurately reflect his diminished earning capacity. Accordingly, \$505.51 is not a fair approximation of his wage loss.

11. The proper method for calculating Claimant's AWW requires consideration of both the seasonal nature of his job and his raise to \$20.00 in July 2019. Claimant was hired to work 40 hours each week. The testimony of Mr. M[Redacted] and Claimant reflect that there were some weeks when Claimant did not work 40 hours per week and thus did not earn \$800.00. In fact, Claimant's wage records reveal some weeks where he earned \$800.00, some weeks where he earned less than \$800.00 and some weeks where he earned more than \$800.00. However, 40 hours per week is a reasonable representation of Claimant's typical work schedule.

12. Claimant was earning \$20.00 per hour when he suffered industrial injuries on April 25, 2020. Multiplying \$20.00 by 40 hours per week yields an AWW of \$800.00. However, the record reveals that the landscaping season runs from March or April through December. Specifically, Claimant works 39 weeks out of a possible 52 weeks or 75% of the year. Multiplying \$800.00 per week by 75% (.75) of the year yields an AWW of \$600.00. An AWW of \$600.00 considers both Claimant's hourly pay rate of \$20.00 as well as the seasonal nature of his employment. An AWW of \$600.00 thus constitutes a

fair approximation of Claimant's wage loss and diminished earning capacity. Accordingly, Claimant earned an AWW of \$600.00.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. See *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. Section 8-42-102(2), C.R.S. requires the ALJ to base the claimant's AWW on his or her earnings at the time of injury. The Judge must calculate the money rate at which services are paid to the claimant under the contract of hire in force at the time of injury. *Pizza Hut v. ICAO*, 18 P.3d 867, 869 (Colo. App. 2001). However, §8-42-102(3), C.R.S. authorizes a judge to exercise discretionary authority to calculate an AWW in another manner if the prescribed method will not fairly calculate the AWW based on the particular circumstances. *Campbell v. IBM Corp.*, 867 P.2d 77, 82 (Colo. App. 1993). Specifically, §8-42-102(3), C.R.S. grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993); see *In re Broomfield*, W.C. No. 4-651-471 (ICAO, Mar. 5, 2007). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell*, 867 P.2d at 82. Where the claimant's earnings increase periodically after the date of injury the ALJ may elect to apply §8-42-102(3), C.R.S. and determine whether fairness requires the AWW to be calculated based upon the claimant's earnings during a given period of disability instead of the earnings on the date of the injury. *Id.*

5. In *Campbell*, the court stated that "[a]lthough the authority under §8-42-102(3) is discretionary, we believe it would be manifestly unjust to base claimant's disability benefits in 1986 and 1989 on her substantially lower earnings in 1979." *Id.* at 82. Moreover, in *Pizza Hut* the court determined that the calculation of the claimant's AWW based upon employment that he did not hold at the time of his injury more accurately reflected his future earning capacity. The court specifically stated that "the fact that claimant was not concurrently employed by the hospital and the employer at the time of the injury does not preclude the exercise of discretion under §8-42-102(3)." *Pizza Hut*, 18 P.3d at 869. In *Benchmark/Elite, Inc. v. Simpson* 232 P.3d 777, 780 (Colo. 2010) the court reaffirmed that, in determining an employee's AWW, the ALJ may choose from two different methods set forth in §8-42-102, C.R.S. The court noted the first method, referred to as the "default provision," provides that an injured employee's AWW "be calculated upon the monthly, weekly, daily, hourly, or other remuneration which the injured or deceased employee was receiving at the time of injury." *Id.* The court then explained that the second method for calculating an employee's AWW, referred to as the "discretionary exception," applies when the default provision "will not fairly compute the [employee's AWW]." *Id.*

6. As found, Claimant asserts that his AWW should be \$800.00 because he worked 40 hours per week and earned \$20.00 per hour. However, Claimant and Mr. M[Redacted] both testified that landscaping is a seasonal profession in Colorado. They agreed that the landscaping season runs from March or April through December because of inclement winter weather. Specifically, Claimant works 39 weeks out of a possible 52 weeks or 75% of the year. He does not work another job in the offseason, but receives unemployment benefits of \$316.00 per week. Claimant's request for an \$800.00 AWW is predicated on 52 weeks of full-time employment. However, because Claimant is a seasonal employee, \$800.00 is not an accurate reflection of his wage loss or diminished earning capacity.

7. As found, however, Respondents contention that Claimant earned an AWW of \$505.51 also fails. Considering Claimant's wages from April 13, 2019 through January 3, 2020, he earned a total of \$26,286.40. Respondents reason that dividing \$26,286.40 by 52 weeks to account for the seasonal nature of Claimant's employment yields an AWW of \$505.51. However, Respondents' position fails to account for Claimant's increase in hourly wages from \$14.00 to \$20.00 by July 2019. Respondents' reliance on Claimant's wage records that include the time period when he earned \$14.00 per hour does not accurately reflect his diminished earning capacity. Accordingly, \$505.51 is not a fair approximation of his wage loss.

8. As found, the proper method for calculating Claimant's AWW requires consideration of both the seasonal nature of his job and his raise to \$20.00 in July 2019. Claimant was hired to work 40 hours each week. The testimony of Mr. M[Redacted] and Claimant reflect that there were some weeks when Claimant did not work 40 hours per week and thus did not earn \$800.00. In fact, Claimant's wage records reveal some weeks where he earned \$800.00, some weeks where he earned less than \$800.00 and some weeks where he earned more than \$800.00. However, 40 hours per week is a reasonable representation of Claimant's typical work schedule.

9. As found, Claimant was earning \$20.00 per hour when he suffered industrial injuries on April 25, 2020. Multiplying \$20.00 by 40 hours per week yields an AWW of \$800.00. However, the record reveals that the landscaping season runs from March or April through December. Specifically, Claimant works 39 weeks out of a possible 52 weeks or 75% of the year. Multiplying \$800.00 per week by 75% (.75) of the year yields an AWW of \$600.00. An AWW of \$600.00 considers both Claimant's hourly pay rate of \$20.00 as well as the seasonal nature of his employment. An AWW of \$600.00 thus constitutes a fair approximation of Claimant's wage loss and diminished earning capacity. Accordingly, Claimant earned an AWW of \$600.00.

ORDER

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

1. Claimant earned an AWW of \$600.00.
2. Any issues not resolved in this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at <https://oac.colorado.gov/resources/oac-forms>.*

DATED: December 8, 2020.

DIGITAL SIGNATURE:


Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- I. Is Claimant's request for shoulder surgery barred, due to his failure to timely request a DIME?
- II. Alternatively, if not so barred, has Claimant shown, by a preponderance of the evidence, that he is entitled to reopen his claim based upon a worsening of his condition, and thus request a shoulder surgery?
- III. Has Claimant shown, by a preponderance of the evidence, that his admitted hip impairment rating should be converted to that of the Whole Person?
- IV. Is Claimant entitled to a general award of Post-MMI medical maintenance "Grover" benefits?
- V. What is Claimant's Average Weekly Wage?

PRELIMINARY PROCEDURAL ISSUE

As a threshold issue, Claimant offered oral statements, allegedly made by various authorized treatment providers, which in effect, told Claimant that he should not/ need not complain of pain in his shoulder, since the focus of his treatment was on the more serious injury to his hip. As a result, Claimant alleges that he followed their instructions, which resulted in a dearth of documented complaints about his shoulder prior to reaching MMI. As a corollary, Claimant also offered testimony from his brother, Michael V[Redacted], regarding similar alleged statements from ATPs while in his presence.

The ALJ then inquired of the parties whether such statements should be received, not only for their possible effect on the listener (Claimant), but as substantive evidence, under C.R.E. 801(d)(2)(c), as Admissions of a Party Opponent. The parties made their respective positions known, but no agreement was reached on this issue. As a result, the ALJ allowed this testimony to be heard, with the understanding that both parties would brief the issue, and the ALJ might then reconsider his ruling on what theory of admissibility, if any, would allow such statements to be considered by the fact finder. Additional pages over the customary 20-page limit would be permitted to fully brief this evidentiary issue.

In the opinion of the ALJ, both parties did an exceptional job in their position statements of outlining their respective positions, despite the lack of definitive case law in the context of statements by ATPs to Claimants. Someday, in the right case, at the right time, an interpretation of C.R.E. 801(d)(2)(c) will have to be decided by an ALJ in this context. Such matters as agency/employee relationships would be addressed. Appellate rulings would then be made, with the salutary effect of providing better

guidance to future litigants. Upon reflection, this is not the right case to send on that path. An apology is thus rendered by the ALJ at this time, for all the hard work by counsel on this issue.

Instead of admitting these statements as substantive evidence, the ALJ will admit such statements, not for the truth of the matter asserted, *but for the limited purpose of seeing what effect they had on the listener*, to wit: Claimant. As such, statements overheard by Michael V[Redacted] will be admitted as well, as being offered as corroborative of what Claimant indicates he heard. In effect, in this case, Claimant receives the full benefit of having the statements heard for the purpose for which they were offered, without such statements having to be received as substantive evidence. The ALJ hastens to add, however, that by admitting such testimony, it does not mean that such evidence is dispositive, pivotal, persuasive, or even to be believed at all. It just means that it is permitted to be stated by the witnesses.

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

The Work Injury to Claimant's Hip

1. On February 22, 2019 Claimant, a custody control officer with the Colorado Department of Corrections, slipped and fell on his right side. At hearing, he indicated that his right hip "took most of the impact." He was transported to the hospital, and underwent a right hip surgery before being discharged on February 25, 2019. He was given a walker and was walking "comfortably" with it. (Ex. H p. 133).
2. In various consultations and at discharge, Claimant denied any other orthopedic complaints. (Ex F pp. 89, 93-94). At a February 23, 2019 exam, Claimant did not report any shoulder issues. *Id at 95*. Claimant did not report shoulder pain or any shoulder issue from February 22 through February 28, 2019 to any treatment provider while in the ambulance or in a hospital. (Ex. D, E, F).
3. Claimant's first visit to his ATP was on March 1, 2019. (Ex. C). He reported shoulder pain, among many other issues, and his initial diagnosis included a shoulder sprain or strain of the muscles and tendons of the rotator cuff of his right shoulder. *Id at 70*.
4. On March 8, 2019 Claimant went back to his ATP. He reported hand, upper/lower back, neck, knee, and hip pain, but no shoulder pain. *Id at 67*. N.P. Brendon Madrid examined his shoulders and found that they were of an equal height with "full range of motion" bilaterally. *Id at 68*.

No Mention in the Medical Records of Shoulder Pain

5. Claimant did not report shoulder pain or any shoulder issues to any physician or other treatment provider from March 2, 2019 until October 17, 2019. However, during

that same time frame, he did mention various pain issues, unrelated to his hip: his hands, knee, low back, and neck pain on March 8 (Ex. B p. 24); knee pain on April 10 & May 3 *Id* at 25-26; increased pain due to cold on May 9 (Ex. G p. 106); variations of his hip pain as 2019 progressed. (Ex. B.)

6. From February 19 until October 22, 2019, Claimant saw at least 13 medical providers. Except for his initial meeting on March 1, 2019 with N.P. Madrid, Claimant did not mention any shoulder issues to any of those medical providers.

7. As an example, Claimant went through months of physical therapy without mentioning any shoulder issues. (Ex. G). On May 12, 2019 he was discharged from PT after reporting that he was “exercising at home without difficulty.” *Id* at 102. He reported that he was using “free weights, a Nordic track and abdominal machine.” On May 3, 2019 he “tolerat[ed] all exercises well” including a reciprocal arm swing. *Id* at 110.

8. When Claimant’s reported hip pain was at its peak on March 1, 2019, at 7-10/10, 100% of the time, he reported right shoulder pain/aching. (Ex. B p. 23). By March 8, 2019 his hip pain was down to 5/10, 80% of the time, but he no longer reported shoulder pain. *Id* at 24. By April 10, 2019 his hip pain was 2/10 20-30% of the time. Such pain reports remained mostly the same through early May. *Id* at. 25-26.

9. By late May, 2019, Claimant’s hip pain was 1-2/10, 10- 20% of the time. *Id* at 27. On June 26, 2019 his hip pain had increased to 4-5/10 20-30% of the time; still no shoulder pain was reported. *Id* at 28. Hip pain was at 3-4/10, 30% of the time by July 24, 2019, and further down to 2-3/10, 20% of the time on August 22, 2019. These levels continued through the date of MMI, on September 25, 2019 *Id* at 29-31.

10. Claimant was not prescribed any pain medications that would have masked any shoulder pain after he was released from the hospital in late February 2019 through the present, due to his reported high sensitivity to those medications. According to his records, and his hearing testimony, the only pain medication he was on was aspirin “to prevent blood clotting.” (Ex. A p. 3).

New Complaints Arise

11. Claimant filed his first Application for Hearing on October 17, 2019. In this Application, Claimant Requested a reopening, along with authorization for right shoulder surgery. On October 22, 2019 he was seen for a one-time evaluation by Dr. Olson, who was still his ATP. (Ex. C p. 42). Claimant stated he was depressed, but Dr. Olson stated, “I personally did not see any indication that he was depressed” and noted Claimant’s Qpop showed “steady improvement.” Claimant’s depression scores at the time of MMI were “normal” and had not changed significantly for months. *Id* at 52.

12. Claimant had been “doing well psychologically” at MMI. *Id* at 54. Claimant also alleged shoulder pain in his pain diagram; however, he did not bring it up to Dr. Olson. (Ex. B, p. 32). On November 20, 2019 Claimant reported shoulder pain, but this time to Dr. Olson. Dr. Olson noted: “[a]gain, he never really brought up his shoulder to me.” (Ex. C p. 39). On June 3, 2020 Dr. Olson reiterated he was “surprised when [Claimant]

asked about his shoulder, as I had not heard that he was having shoulder pain.” (Ex. 10 p. 117).

Claimant’s Testimony at Hearing

13. At hearing, Claimant testified to constant and debilitating right shoulder symptoms after his date of injury. His shoulder never returned to the state it was in on February 22, 2019 and got worse as time went on. The shoulder pain “never really never stopped,” and he only had one or two pain free days from February 22, 2019 through October 15, 2020. Throughout the summer of 2019, Claimant stated his shoulder was limiting his activities. He was unable to swing his golf club due to shoulder pain. He started lifting weights in April 2019, doing the bench press at 25 pounds. He never moved up in weight, and eventually dropped weight in August before cutting out bench presses altogether. Claimant stated he had to use his left shoulder more than his right shoulder due to aches and inconveniences in his right shoulder.

14. Claimant indicated that while his shoulder hurt throughout the process, he had been told by his ATP(s) that the focus of the medical care was on his hip, and that addressing his shoulder complaints would, in effect, have to wait. As a result of these admonitions, Claimant declined to note his ongoing shoulder complaints on any of the pain charts provided. Claimant clarified that NP Madrid told him that once the hip was addressed, then they could move on to the shoulder issues. The sole occasion where he indicated shoulder pain on the pain chart was on March 1, 2019, after which he stopped even indicating it. He did, however, indicate on the pain chart on March 8, 2019 that his neck was hurting, but this only tangentially affected his shoulder.

15. At the time he was placed at MMI, Claimant’s shoulder was sore, but not exceptionally so. Once his post-MMI activities increased, so then did his shoulder pain. When he mentioned this to Dr. Olson, he was given an X-ray, then an MRI, which revealed the torn rotator cuff. As of the date of hearing, his shoulder is now worse than when he was placed at MMI.

16. Claimant testified that due to the hip surgery, one leg is slightly shorter than the other. As a result, he now suffers from lower back pain. While he thinks there is an association/correlation between his hip injury and his low back pain, he has never seen a medical doctor about this issue. He described certain activities which have been limited due to the back pain, including golf, bike riding, yard work, riding in a car for over two hours, as well as sitting in a chair for too long.

17. Claimant further testified to his belief that he suffers from some level of depression from this injury. While he was not prescribed medication for this, his ATP, Dr. Olson did recommend therapy for his condition. Claimant further indicates that he still suffers pain in his hip, ranging from a dull ache, to an occasional sharp pain. He would like the ability to return to a physician to address his psychological condition if needed, as well as to address the pain in his hip.

Michael V[Redacted]'s Hearing Testimony

18. Claimant lives with his brother, Michael V[Redacted]. Michael has been on disability since 1988, but holds a medical (but not financial) power of attorney on behalf of Claimant. As such, he was able to attend some of Steven's early medical appointments after the work injury. He indicated this included most of the medical appointments for the first month (March), and perhaps half of them the second month (April), and none thereafter. Michael testified that he was present when Steven was told by CCOM physicians that Steven's complaints about his shoulder would have to wait, as their current focus was on the hip injury. Michael did not hear anyone except CCOM physicians tell this to Steven.

19. Michael also testified that he was unaware of any injuries to Claimant's shoulder until the work injury, nor has Claimant suffered any shoulder injury since then. The two of them had shoveled some lava rock in their back yard at one point, but the rock is very light weight, and they were careful not to overdo it.

Dr. Failinger's IME

20. Orthopedist Mark Failinger, M.D., performed an IME of Claimant on May 13, 2020. Claimant told Dr. Failinger he always marked shoulder pain on his 2019 pain diagrams over the summer (Ex. A pp. 5-6). After considering Claimant's story of constant pain after the work injury, Dr. Failinger opined:

Upon careful review of the records, it is not with reasonable medical probability that any significant tearing occurred to the rotator cuff at the work incident of February 22, 2019. A tear of this size would be, with very high medical probability, that of a pre-existing chronic degenerative tear. Almost all rotator cuff tears are those of degeneration, with various injuries causing further tearing that can create some symptoms. If any significant tearing had occurred at the time of the work incident of 02/22/2019, significant pain levels would present (with reasonable medical probability) and be reported both in the post-injury timeframe when he was placing much of his weight on the right shoulder with use of a walker or crutches, or when the pain in the hip decreased to very low levels of 2/10 within 2 months after the injury. The patient stated the pain was present throughout the whole time period and there is no evidence in the records of such...

The patient likely sustained a minimal strain to the rotator cuff, with the initial single mention of symptoms disappearing, and resurgence of symptoms in October 2019. Any significant rotator cuff tear would not "hide" for an eight-month period of time and certainly would not be "masked" by hip pains that were in the very low ranges of only 2/10 within two months following his right hip fracture. Likewise, shoveling lava rock would exacerbate any rotator cuff tear that would have occurred in the fall of 02-22-2019 with high medical probability. Given the above, the onset of

symptoms in October 2019 are more reasonably due to ongoing degeneration rather than due to any pathology or injury created in the fall of 02-22-2019. (Ex. A pp. 18-20).

ATP Dr. Olson's Opinion

21. After considering Claimant's shoulder issue, including the referrals for evaluation to the orthopedist, Dr. Olson also opined that neither Claimant's shoulder complaints, nor the need for right shoulder surgery were work related. (Ex. C p. 35). He explained that it was "difficult to link the shoulder complaints to his fall" due to the documentation on the subsequent pain drawings – and that while it was "possible" to link the shoulder complaints to his fall, it was not "probable." *Id.*

22. The ALJ notes that there is no medical opinion in the record opining that Claimant's right shoulder complaints, or any proposed right shoulder surgery, is related to Claimants admitted work injury to his hip.

The Only Medical Benefit at Issue is the Shoulder Surgery

23. Claimant testified that the only benefits that were denied were the shoulder surgery and some physical therapy benefits. As Respondent noted during the Hearing, Claimant's only requested benefits in his interrogatory responses was the shoulder surgery. (Ex. K).

Conversion

24. The record establishes no off-schedule impairment. Claimant has had a small limp since his work-related hip surgery. And since MMI, it has mostly caused an ache with sometimes a little sharp pain in his hip. However, his low back does not bother him unless he's been walking around and moving for about two hours, and then it gets stiff. Similarly, if he sits for more than two hours, he will get that same ache. If he gets up and moves around, he alleviates it, so "it is really not an issue." He does have pain every day. He told Dr. Failing his pain was "mild soreness" with a 1/10 rating and that he did not feel he needed any treatment for his low back. (Ex. A, p. 4).

25. There are no restrictions or work-related diagnoses related to Claimant's low back in the record, even in the most recent treatment records. (Ex. 10 p. 126). His most recent restrictions are "he may work 12 hours per day. Until his shoulder is treated I would avoid weapons qualification at this time. Patient also limit and avoid running if possible." *Id.*

26. Claimant's low back pain appears to come and go according to activity. In 2020, he reported no low back pain on the following treatment dates: January 1, January 22; February 9; March 9, and April 1. (Ex. 10). Starting in May, 2020, he did begin reporting some back pain in the pain diagrams. (Ex. 10 pp. 140-147). However, this was referred to as hip pain only. *Id.* at 122. None of the physician reports in 2020 document *back* pain verbal reports from Claimant. (Ex. 10). He did tell his physicians that his hip bothers him, but not his low back. *Id.*

Average Weekly Wage

27. The ALJ notes that no explanation accompanies the wage exhibits offered by either party, save for Claimant's mention at hearing (which is borne out by the exhibits available) that he received an increase in his base pay, effective 7/1/2019, along with a 7% pay differential for working second shift. Respondents' Exhibits offer nothing in addition to what Claimant offers (Ex. 4, pp. 19-21). However, certain patterns appear, summarized thusly: The shift differential (SH2) is based upon base pay + overtime pay (OTP) for that pay period. (The SH2 is was noted to be .06858 in fiscal 2018, but increased to .07 in fiscal 2019). OT2, OT3, and SH3 are undecipherable, and while negligible in effect on AWW, do appear in gross wages. Claimant's receipt of overtime pay (thus affecting his SH2 pay) varied widely, from a high of \$831.66 (based upon his base pay of \$3806 for FY2018) to \$0 for each of the first 3 months of calendar year 2019. The ALJ notes further that this zero overtime trend precedes the date of injury, and thus cannot be attributed solely to the work injury itself. April, May, June of 2019 are absent from the record, whereupon only July of 2019 has been supplied.

28. Beginning in July, 2019, Claimant received a base rate of \$4,347, 1 hour of overtime at \$37.62, shift differential pay (presumably SH2) of \$306.12, and .5 hours of "Shift 2 overtime" –however that gets calculated- of \$1.42. Total gross pay is \$4,692.16 for July, 2019, *which the ALJ finds was Claimant's gross monthly pay prior to reaching MMI* in September, 2019. While hardly a "pattern", this single month of July is the only- and most recent-indicator of Claimant's overtime earnings potential. Times 12, and divided by 52 yields an AWW of \$1,082.81 at the time of MMI.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado is to assure quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1)*. Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. *Section 8-43-201, C.R.S.* A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias,

prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The ALJ, as the fact-finder, is charged with resolving conflicts in expert testimony. *Rockwell Int'l v. Turnbull*, 802 P.2d 1182, 1183 (Colo. App. 1990) Moreover, the ALJ may accept all, part, or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968); see also *Dow Chemical Co. v. Industrial Claim Appeals Office*, 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary medical opinion).

C. In this instance, both Claimant and his brother Michael have testified that at least early in Claimant's treatment, he was told that, in effect, they were focusing in the more urgent and serious hip injury, and any shoulder complaints would be addressed later. The ALJ finds it is likely that some statements *to that general effect* were made, if only in passing, by NP Madrid, and perhaps another as well. It makes rational sense to triage the most pressing matter first. However, the effect of such statements has practical limits. ATPs are trained to address multiple injuries as appropriate, and to put it bluntly, the more injuries they treat, the more they get paid. And the sooner they treat a work-related injury, the easier it is to avoid losing one's medical license. The very notion that they would bring Claimant's hip all the way to MMI before even holding discussions on his shoulder is not persuasive to this ALJ.

D. As pointed out by Respondents, Claimant is trying to ride two horses here-and apparently he wants the ALJ to pick the best one for him. If Claimant knew his shoulder was hurting the entire time, and was 'preemptively rebuffed' by his ATPs in seeking shoulder care, his remedy was to seek a DIME. He didn't, and that ship has now sailed. If it really only began bothering him after MMI, then why emphasize these ATP statements which were made back in March and April of 2019? Claimant is no shrinking violet; instead, based upon his hearing demeanor, he appears to be an advocate for himself. And the more the ALJ believes Claimant, the more likely his claim for shoulder surgery should be dismissed outright, for failing to ask for a DIME.

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

Reopening, Worsened Condition of Shoulder

F. Section 8-43-303(1), C.R.S. provides that a worker's compensation award may be reopened based on a change in condition. In seeking to reopen a claim the claimant shoulders the burden of proving his condition has changed and that she is entitled to benefits by a preponderance of the evidence. *Berg v. Industrial Claim Appeals Office*, 128 P.3d 270 (Colo. App. 2005); *Osborne v. Industrial Commission*, 725

P.2d 63, 65 (Colo. App. 1986). A change in condition refers either to a change in the condition of the original compensable injury or to a change in a claimant's physical or mental condition that is causally connected to the original injury. *Heinicke v. Industrial Claim Appeals Office*, 197 P.3d 220 (Colo. App. 2008); *Jarosinski v. Industrial Claim Appeals Office*, 62 P.3d 1082, 1084 (Colo. App. 2002). A "change in condition" pertains to changes that occur after a claim is closed. *In re Caraveo*, W.C. No. 4-358-465 (ICAO, Oct. 25, 2006). Reopening is warranted if the claimant proves that additional medical treatment or disability benefits are warranted. *Richards v. Industrial Claim Appeals Office*, 996 P.2d 756 (Colo. App. 2000); *Dorman v. B & W Construction Co.*, 765 P.2d 1033 (Colo. App. 1988). The determination of whether a claimant has sustained her burden of proof to reopen a claim is one of fact for the ALJ. *In re Nguyen*, W.C. No. 4-543-945 (ICAO, July 19, 2004).

G. The only path for relief for Claimant is to reopen, on the theory that Claimant's shoulder deteriorated rapidly, shortly after being placed at MMI on September, 2019. To persuade the ALJ, Claimant's credibility is thereby damaged by his insistence that his shoulder hurt all along. But since Claimant wants the ALJ to pick a horse for him, the ALJ will abide. No medical evidence supports Claimant's claim that his shoulder issues (which are now very real, and should be addressed) are now linked to his work injury from February of 2019. Aside from the initial pain diagram on March 1, 2019, nothing in the record supports that Claimant tore his rotator cuff during his slip and fall. On the other hand, Respondents have presented a medical opinion of Dr. Failinger, which the ALJ finds to be sufficiently persuasive to rebut any lay opinion of Claimant. Claimant, consistent with the medical records, likely suffered a minor sprain of his shoulder during the fall, which returned to his pre-injury baseline in short order. Even more likely, Claimant has indeed suffered longstanding, degenerative changes to his rotator cuff, which may have become more symptomatic as a result of lifting weights once again (reduced weight or not), and possibly from the *motions* of shoveling lava rock (the low density of which is duly acknowledged herein). Claimant has not shown that his shoulder condition is linked to his work injury, and his request to reopen is therefore denied.

Conversion to Whole Person

H. The ALJ must determine the situs of a Claimant's "functional impairment." *Velasquez v. UPS*, W.C. No. 4-573-459 (ICAO Apr. 13, 2006). The situs of the functional impairment is not necessarily the site of the injury. See *In re Hamrick*, W.C. No. 4-868-996-01 (ICAO, Feb. 1, 2016); *In re Zimdars*, W.C. No. 4-922-066-04 (ICAO, Feb. 4, 2015). Pain and discomfort that limit a claimant's ability to use a portion of the body is considered functional impairment for purposes of determining whether an injury is off the schedule of impairments. *In re Johnson –Wood*, W.C. No. 4-536-198 (ICAO, June 20, 2005); *Vargas v. Excel Corp.*, W.C. 4-551-161 (ICAO, Apr. 21, 2005). However, *the mere presence of pain* in a portion of the body beyond the schedule does not require a finding that the pain represents a functional impairment. *Lovett v. Big Lots*, WC 4-657-285 (ICAO, Nov. 16, 2007); *O'Connell v. Don's Masonry*, W.C. 4-609-719 (ICAO, Dec. 28, 2006).

I. There is no medical evidence in the record, even as expressed in routine medical reports, much less as an expert opinion, that Claimant has a work-related back diagnosis. There are no medical restrictions in the record regarding Claimant's use of his back. Even Claimant's lay testimony does not support some level of permanent impairment of his back, as a result of his hip injury. His back issues come and go, depending upon his activity level. He walks with a small limp. While Claimant no doubt suffers from occasional back pain, there is insufficient evidence in the record, such as one might see from an ATP, that such pain is linked to his hip injury.

Grover Medical Benefits

J. The need for medical treatment may extend beyond the point of MMI where claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Hanna v. Print Expeditors Inc.*, 77 P.3d 863, 865 (Colo. App. 2003); *Hobirk v. Colorado Springs School District #11*, W.C. No. 4-835-556-01 (ICAO, Nov. 15, 2012). An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that the claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1999); *Hastings v. Excel Electric*, W. C. No. 4-471-818 (ICAO, May 16, 2002). The claimant must prove entitlement to *Grover* medical benefits by a preponderance of the evidence. *Lerner v. Wal-Mart Stores, Inc.*, 865 P.2d 915 (Colo. App. 1993); *Mitchem v. Donut Haus*, W.C. No. 4-785-078-03 (ICAO, Dec. 28, 2015). An award of *Grover* medical benefits should be general in nature. *Hanna v. Print Expeditors Inc.*, 77 P.3d 863 (Colo. App. 2003); *Anderson v. SOS Staffing Services*, W. C. No. 4-543-730, (ICAO, July 14, 2006).

K. Claimant has stated, with reasonable record support, that he would like to have ongoing psychological therapy as recommended by his ATP, as well as treatment for pain in his hip which might occur on occasion. The ALJ finds such requests to be reasonable, related to his work injury, and potentially necessary to maintain Claimant at MMI. Therefore, the ALJ will award a general award of *Grover* Medical benefits, which may, of course, be challenged by Respondents once a specific request is made on Claimant's behalf. Nothing in this Order should be construed as authorizing treatment for Claimant's right shoulder.

Average Weekly Wage

L. As already noted in Finding of Fact #28, Claimant's Average Weekly Wage, at the time of MMI, is \$1,082.81.

ORDER

It is therefore Ordered that:

1. Claimant's Petition to Reopen is denied and dismissed.
2. Claimant's request for right shoulder surgery is denied and dismissed.
3. Claimant's request to convert his hip impairment rating to that of the Whole Person is denied and dismissed.
4. Claimant's request for a general award of Post-MMI medical maintenance benefits is granted.
5. Claimant's Average Weekly Wage is \$1082.81.
6. Respondents shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.
7. All matters not determined herein are reserved for future determination.

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

DATED: December 8, 2020

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-095-790-002**

ISSUE

1. Whether Claimant proved by a preponderance of the evidence that left knee surgery recommended by Cary Motz, M.D., is reasonable, necessary, and related to Claimant's January 1, 2019 industrial injury.

FINDINGS OF FACT

1. Claimant was injured in the course and scope of his employment with Employer on January 1, 2019 when he fell from an airplane lift or loading trailer to the ground from a height of approximately 15-17 feet. (Ex. E).

2. On January 1, 2019, Claimant was seen at the UCHealth Emergency Department for pain in his right arm. Claimant reported falling from a lift and landing on his feet and hitting his right arm on the lift. Claimant reported no pain on palpation in his spine or legs. X-rays demonstrated a right ulnar and radial fracture. X-rays of Claimant's heels and spine were also taken, which were negative. Claimant was diagnosed with a forearm fracture of the right ulna and radius. (Ex. 4).

3. On January 2, 2019, Claimant underwent an open reduction internal fixation (ORIF) surgery on his right forearm. Following surgery, Claimant developed a pulmonary embolism which required admission to UCH from January 9, 2019 through January 12, 2019. (Ex. 4).

4. On January 7, 2019, Claimant was seen at Concentra by Allison Hedien, N.P. Claimant reported pain in his right heel and left knee and difficulty walking on them. Examination showed diffuse tenderness of the anterior, lateral, medial and posterior knee with pain on range of motion. Claimant was diagnosed with a left knee strain and prescribed a cane for assistance walking. (Ex. 6).

5. During the January 9, 2019 admission at UCH, Claimant was evaluated for effusion and pain in his left knee. X-rays of the left knee demonstrated no acute osseous (i.e., bony) abnormalities and large suprapatellar effusion. Claimant was diagnosed with leg/knee swelling and a soft tissue injury to the knee (Ligament), painful effusion, and gout. A CT scan of Claimant's left knee was performed that showed no apparent fractures and a moderate amount of joint effusion. The CT interpretation showed "tricompartamental degenerative osteoarthritis," and "areas of full-thickness cartilage fissuring at the central trochlea resulting in subchondral cyst formation." (Ex. 4).

6. On January 12, 2019, Claimant saw James Lendrum, M.D., at UCHealth for an orthopedic consult for left knee pain. Dr. Lendrum noted that Claimant's knee was aspirated with positive uric acid crystals. Dr. Lendrum recommended treatment for gout, and recommended a possible MRI of the left knee, although he expressed no concerns

for a ligamentous injury. Claimant reported that his knee did not feel unstable, and that he only had pain with ambulation. On examination, Dr. Lendrum noted obvious effusion in the left knee, without erythema, and mild tenderness to palpation over the patella and medial joint line. Claimant was diagnosed with a gout flare of the left knee. (Ex. 4).

7. On January 22, 2019, Claimant was seen by Allan Schmelzel, PA at the UCHealth orthopedic clinic. Claimant complained of some left knee pain and was given a hinged knee brace. He was instructed to return in four weeks, and if he had not improved with physical therapy and the brace, an MRI would be considered. (Ex. 4).

8. On February 7, 2019, Claimant had an MRI of his left knee performed at Health Images. The MRI showed a complex tear of the body of the medial meniscus with prominent horizontal component, a mild medial collateral ligament sprain, degenerative changes in the medial tibial plateau and trochlea, and prominent soft tissue nodules in the suprapatellar fat pad, suspected pigmented villonodular synovitis (PVNS). (Ex. 9).

9. On February 22, 2019, Claimant was seen by Amanda Cava, M.D., at Concentra. Dr. Cava noted that Claimant's reported symptoms included pain, decreased range of motion, stiffness, swelling tenderness and painful walking. Dr. Cava reviewed the results of Claimant's left knee MRI and diagnosed Claimant with Acute medial meniscal injury of the left knee and referred Claimant for an evaluation with Cary Motz, M.D. (Ex. 6).

10. On February 26, 2019, Claimant saw Dr. Motz. Claimant reported to Dr. Motz that his knee became more painful a few days after his work injury, and he started to develop some swelling and bruising. Dr. Motz reviewed Claimant's MRI and noted that there were some degenerative changes of the articular cartilage in the patellofemoral joint and medial tibial plateau. He also noted a medial meniscal tear and two small masses that could be an unusual localized PVNS. Dr. Motz examined Claimant's knee and found small effusion, limited range of motion and diffuse tenderness in the entire joint both medially and laterally. Dr. Motz noted that the possible PVNS was not related to Claimant's injury. Dr. Motz aspirated Claimant's knee and performed a steroid injection which improved Claimant range of motion and pain. Dr. Motz indicated he would not recommend surgery due to Claimant's history of a pulmonary embolism and then-current anticoagulation treatment. Consequently, he recommended conservative treatment, to include physical therapy. (Ex. 7).

11. On March 26, 2019, Claimant saw Dr. Motz. Dr. Motz reported the steroid injection from one month earlier had significantly improved Claimant's symptoms and his range of motion and pain were much improved. He recommended Claimant continue physical therapy and wean from his brace as tolerated. (Ex. 7)

12. Dr. Motz saw Claimant again on April 23, 2019, and noted Claimant's knee pain and function were much improved. He did not recommend surgery based on Claimant's history of pulmonary embolism. He indicated Claimant was approaching MMI, and that he would see Claimant again if his symptoms worsened. (Ex. 7).

13. On May 7, 2019, Claimant saw Dr. Cava at Concentra. Claimant's symptoms were improving with occasional limping. Dr. Cava recommended work restrictions including limiting walking and standing to 50% of the time, and no kneeling, squatting, or crawling. (Ex. 6).

14. On June 7, 2019, Claimant saw Dr. Cava. Dr. Cava noted Claimant's symptoms were located in the left anterior knee and included a feeling the knee was giving out, decreased range of motion, and swelling. Claimant reported he could walk about 20 minutes and had pain with walking. On examination, Dr. Cava noted mild swelling and limited range of motion of the left knee. She opined that Claimant's left knee was "nearing plateau" and that he needed to advance endurance for walking and standing. She amended Claimant's work restrictions to sitting 66% of the time, and no kneeling, squatting, or climbing ladders. (Ex. 6).

15. On August 12, 2019, Claimant returned to Dr. Cava, who noted Claimant's knee symptoms had improved, and that he felt weakness going up stairs. On examination, his knee showed no swelling or tenderness, but with crepitus on motion. (Ex. 6).

16. On September 12, 2019, Claimant saw Dr. Cava. Dr. Cava placed Claimant at maximum medical improvement and provided Claimant with an impairment rating for his wrist, elbow, shoulder, and left knee. With respect to the left knee, Dr. Cava assigned a 5% lower extremity impairment rating for a meniscal tear, and no impairment for range of motion (which she noted was normal). She also recommended future care to include a follow up with Dr. Motz for knee injections in the next three months if needed. (Ex. 6).

17. On March 10, 2020, Claimant saw Dr. Cava following shoulder surgery. Claimant reported swelling and sharp pain in his left knee, rated 6/10, "non constant." On examination, Dr. Cava noted joint swelling in Claimant's left knee and night pain. (Ex. 6).

18. On March 31, 2020, Respondents filed an Amended General Admission of Liability, admitting for temporary total disability benefits from January 2, 2019 through August 11, 2019, and from March 3, 2020, ongoing. (Ex. 1).

19. On April 7, 2020, Claimant saw Dr. Cava again, and reported his left leg was doing better, but he still experienced some pain. Dr. Cava referred Claimant to Dr. Motz for a follow up/maintenance visit for his left knee and to repeat an injection if recommended. (Ex. 6).

20. On May 12, 2020, Claimant saw Dr. Motz on referral from Dr. Cava. Dr. Motz noted that Claimant's knee had small effusion, and moderate joint tenderness, with full range of motion and no instability. Claimant reported pain in the left knee with a feeling of instability, popping, clicking, swelling and medial pain. Dr. Motz opined that Claimant had persistent symptoms which Dr. Motz attributed to his medial meniscal tear. He recommended an arthroscopy with partial medial meniscectomy and a limited debridement if there is a prominent mass of the anterior soft tissues. He noted that it is

possible it could be consistent with localized PVNS or synovitis. Dr. Motz indicated that Claimant was no longer on anticoagulation therapy. (Ex. 6).

21. On June 30, 2020, Claimant saw Dr. Cava. Dr. Cava noted Claimant had returned to Dr. Motz for worsening left knee problems and had undergone an IME on June 9, 2020. Claimant reported his left knee had buckled recently going down stairs and that he twisted his left ankle. She found left knee swelling and sharp pain medially. Claimant continued to follow up with Dr. Cava and reported improvement in his left knee over the next several months, although Dr. Cava noted trace swelling on examination several times. (Ex. 6).

22. On June 9, 2020, Claimant underwent an independent medical examination performed by Timothy S. O'Brien, M.D., at the request of Respondents. Dr. O'Brien was qualified as an expert in orthopedics, testified at hearing, and provided a report dated June 29, 2020. (Ex. A).

23. In his report, Dr. O'Brien opines that Claimant sustained a "very minor left knee strain/sprain/contusion" as a result of his January 1, 2019 work injury. Dr. O'Brien opined that there was an "insignificant" amount of energy "dissipated" to Claimant's left knee in his fall on January 1, 2019. The reasons for this, according to Dr. O'Brien is that Claimant sustained a forearm fracture, and that he "always had normal exam findings of the left knee. He has never had an effusion, which would be expected if he had an acute medial meniscus tear. He has never had substantial dysfunction. His MRI scan was essentially normal for age. The MRI scan did not demonstrate any soft tissue swelling or effusion. In fact, it is postulated that he has pigmented villonodular synovitis, which is an incurable and chronic waxing and waning progressive disease that is considered to be autoimmune in its origins. Its true etiology is unknow." (Ex. A, (emphasis added)).

24. Dr. O'Brien further opined that Claimant's left knee was "healed" as of April 23, 2019, and that "he did not require any further medical attention after that point in time, and in fact, sought none." Dr. O'Brien also opined that Claimant had a "pre-existing medial meniscal tear of his left knee that was extant prior to January 1, 2019 as was his degenerative arthritis of the patellofemoral joint and medial compartment as was his pigmented villonodular synovitis." (Ex. A).

25. Dr. O'Brien also opined that the procedure recommended by Dr. Motz is contraindicated. Dr. O'Brien also characterizes the fact that Claimant has a workers' compensation claim as a "comorbidity that adversely impacts treatment outcome in nearly every case." Without support, Dr. O'Brien opined that because Claimant has a worker's compensation claim, he is "much less likely to respond favorably to Dr. Motz's surgical intervention than he would be if there were no claim present in this treatment equation. The reason for this is that when a workers' compensation claim is being adjudicated, the incentivization is to be more ill not healthier. Workers' compensation codes pay more money if a person is sicker than it pays money to reward health. Therefore, there is a disincentive to recover from any treatment and that is why the presence of a workers' compensation claim is considered to be an adverse comorbidity." (Ex. A).

26. Dr. O'Brien testified that had Claimant sustained a meniscal tear during his fall there would be "massive bleeding," which was not noted at Claimant's initial ER visit. The ALJ does not find this testimony credible. Dr. O'Brien also testified regarding medical literature which he contended did not support the idea of performing surgery on Claimant. The medical literature attached to his report consists of abstracts and excerpts from various articles, rather than complete articles. The ALJ does not find the abstract medical articles to be of significant evidentiary value in determination of this matter. For example, several articles address whether MRI is useful or necessary in evaluation of patients with osteoarthritis (OA) and suspected meniscal tears. (2003 Bhattacharyya article, Ex. A, p. 13; 2008 (Concluding that data does not support the routine use of MRI for evaluation of meniscal tears in patients with osteoarthritis); England Article, Ex. A, p. 16-17 (Concluding that incidental findings on MRI are common in the general population and increase with age); 2011 Kemp Article, Ex. A, p. 17-18 (Concluding that given the predictability of MRI findings in patients over the age of 60 with severe osteoarthritis and meniscal symptoms, MRI is unnecessary). Given that the appropriateness of conducting an MRI is not an issue before the Court, the ALJ finds this information irrelevant.

27. Other articles address the efficacy of operative vs. non-operative treatment for degenerative osteoarthritis, degenerative meniscus, or some combination of the two. (2002 Moseley Article, Ex. A, p. 11; 2017 Sihvonen article, Ex. A., p. 11-12; 2009 Kirkley Article, Ex. A, p. 14-15; 2013 Yim Article, Ex. A, p. 17; 2013 Sihvonen article, Ex. A, p. 20; 2014 Katz article, Ex. A, p. 20-21). While the opinions expressed in these articles may be medically sound, it is not clear or persuasive that the conclusions of these studies have been uniformly adopted within the orthopedic surgery community, or whether the conclusions are directly applicable to Claimant's condition.

28. The ALJ does not find the medical literature excerpts to be compelling evidence that the surgery proposed by Dr. Motz, at least for a partial meniscectomy, is unreasonable or unnecessary.

29. Dr. O'Brien's report concludes that Claimant had a "minor injury that healed on or before April 23, 2019 by which time [Claimant] returned to his pre-injury level of function with no permanent partial disability and no need for ongoing medical authorization." (Ex. A). The ALJ finds Dr. O'Brien's opinions to be, in part, outside the area of his demonstrated expertise, lacking in credibility, and not persuasive.

30. Claimant testified he had been employed by Employer as a truck driver for approximately five years driving food to airplanes. On January 1, 2019, while loading a plane, Claimant fell approximately 15-17 feet from a platform, sustaining injuries. Claimant testified that before January 1, 2019, he had no prior problems with his left knee. After January 1, 2019, Claimant testified that he had difficulty bearing weight on his left knee, difficulty walking and not able to bend his knee fully. He testified that his condition improved after receiving the injection from Dr. Motz, which provided relief for 4-6 months. Claimant also testified that two to three weeks after he returned to full duty, his knee symptoms returned. Claimant also testified that he would like to undergo the surgery recommended by Dr. Motz. The ALJ finds Claimant's testimony credible.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. See § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. See § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id.* at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

SPECIFIC MEDICAL BENEFITS AT ISSUE

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School District #11*, W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012). Our courts have held that in order for a service to be

considered a “medical benefit” it must be provided as medical or nursing treatment, or incidental to obtaining such treatment. *Country Squires Kennels v. Tarshis*, 899 P.2d 362 (Colo. App. 1995). A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the claimant’s physical needs. *Bellone v. Industrial Claim Appeals Office*, 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines, Inc.*, W.C. No. 4-517-537, (ICAO, May 31, 2006). A service is incidental to the provision of treatment if it enables the claimant to obtain treatment, or if it is a minor concomitant of necessary medical treatment. *Country Squires Kennels v. Tarshis*, 899 P.2d 362 (Colo. App. 1995); *Karim al Subhi v. King Soopers, Inc.*, W.C. No. 4-597-590, (ICAO, July 11, 2012). The determination of whether services are medically necessary, or incidental to obtaining such service, is a question of fact for the ALJ. *Bellone v. Industrial Claim Appeals Office*, 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines, Inc.*, W.C. No. 4-517-537, (ICAO, May 31, 2006). The existence of evidence which, if credited, might permit a contrary result affords no basis for relief on appeal. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002).” *In the Matter of the Claim of Bud Forbes, Claimant*, No. W.C. No. 4-797-103, 2011 WL 5616888, at *3 (Colo. Ind. Cl. App. Off. Nov. 7, 2011).

The need for medical treatment may extend beyond the point of MMI where claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Hanna v. Print Expeditors Inc.*, 77 P.3d 863, 865 (Colo. App. 2003); *Hobirk v. Colorado Springs School District #11*, W.C. No. 4-835-556-01 (ICAO, Nov. 15, 2012). An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that the claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1999); *Hastings v. Excel Electric*, W.C. No. 4-471-818 (ICAO, May 16, 2002). The claimant must prove entitlement to *Grover* medical benefits by a preponderance of the evidence. *Lerner v. Wal-Mart Stores, Inc.*, 865 P.2d 915 (Colo. App. 1993); *Mitchem v. Donut Haus*, W.C. No. 4-785-078-03 (ICAO, Dec. 28, 2015). An award of *Grover* medical benefits should be general in nature. *Hanna v. Print Expeditors Inc.*, 77 P.3d 863 (Colo. App. 2003); *Anderson v. SOS Staffing Services*, W. C. No. 4-543-730, (ICAO, July 14, 2006).

In cases where the respondents file a final admission of liability admitting for ongoing medical benefits after MMI they retain the right to challenge the compensability, reasonableness, and necessity of specific treatments. *Hanna v. Print Expeditors Inc.*, 77 P.3d 863 (Colo. App. 2003); *Oldani v. Hartford Financial Services*, W.C. No. 4-614-319-07, (ICAO, Mar. 9, 2015). When the respondents challenge the claimant’s request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School District No. 11*, W.C. No. 3-979-487, (ICAO, Jan. 11, 2012); *Ford v. Regional Transportation District*, W.C. No. 4-309-217 (ICAO, Feb. 12, 2009). The question of whether the claimant has proven that specific treatment is reasonable and necessary to maintain her condition after MMI or relieve ongoing symptoms is one of fact for the ALJ. See *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

Consequently, where the claimant asserts the claim should be reopened to award surgery, and the respondents have admitted liability for ongoing medical benefits after MMI, the claimant must show that the proposed surgery has a reasonable prospect for curing or improving his condition. See *Gonzales v. Industrial Claim Appeals Office*, 905 P.2d 16 (Colo. App. 1995); *Jones v. Indus. Claim Appeals Office*, 216 P.3d 619, 620 (Colo. App. 2009). Such proof is to be distinguished from proof of entitlement to ongoing medical treatment because it may relieve the effects of the injury or prevent deterioration of the condition. *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995); *Story v. Industrial Claim Appeals Office*, 910 P.2d 80 (Colo. App. 1995); *Hobirk v. Colorado Springs School District #11*, W.C. No. 4-835-556-01 (ICAO, Nov. 15, 2012).

Claimant has established by a preponderance of the evidence that the surgery recommended by Dr. Motz is reasonable, necessary, and related to his January 1, 2019 work injury. Claimant was placed at MMI by his authorized treating physician, Dr. Cava on September 12, 2019, with a recommendation that Claimant be afforded future medical care in the form of additional injections performed by Dr. Motz. Rather than recommend injections, Dr. Motz recommended arthroscopic surgery, in the form of a partial medial meniscectomy and limited synovial debridement. When Dr. Cava assigned Claimant a medical impairment rating associated with his left knee meniscal tear, the assignment implicitly incorporated her opinion that the injury was related to his January 1, 2019 work injury. Additionally, Dr. Cava assigned work restrictions related to Claimant's knee injury. When originally assessing Claimant's knee, Dr. Motz noted that Claimant's PVNS condition was not related to his work injury. The ALJ infers that by not including the meniscal injury in this statement, Dr. Motz attributed the medial meniscal tear to his work injury.

Respondents rely on the opinions of Dr. O'Brien, in which he opined that Claimant suffered only a minor injury to his left knee, that his meniscal tear was pre-existing, and that surgery is not reasonable, necessary, or related to his work injury. Dr. O'Brien's opinion is based, in part, on speculation and opinions outside the areas of his expertise. In addition, Dr. O'Brien's report demonstrates a significant bias against workers' compensation claimants in general. The ALJ does not find Dr. O'Brien's opinions persuasive or credible in several respects.

Dr. O'Brien speculates that Claimant's left knee meniscal tear was pre-existing. Claimant credibly testified he had no knee issues before January 1, 2019. No records were offered that pre-date Claimant's work injury from which an objective basis of comparison can exist. Although the ALJ finds it reasonable that Claimant's degenerative changes and PVNS pre-dated January 1, 2020, Dr. O'Brien's opinion with respect to the meniscal tear is merely speculation.

Dr. O'Brien's opinion forces significant enough to cause a meniscal tear were not "dissipated" to Claimant's knee is speculative, outside the area of his expertise, and not supported by the contemporaneous medical records. Because Dr. O'Brien was not qualified as an expert in biomechanics, accident reconstruction or physics, the ALJ does not credit his opinions regarding how forces were distributed within Claimant's body.

Moreover, Dr. O'Brien's assumption that the forces from the fall were primarily directed to Claimant's arm is also speculative. The Claimant's initial medical report from the UCH Emergency Department reports that Claimant "landed on feet and right arm on the lift." The UCH Emergency Department performed x-rays of Claimant's bilateral heels, which the ALJ infers indicates the force with which Claimant struck the ground with his feet was sufficient to at least elicit concerns of injuries to his feet, and not that the impact to his lower extremities was "insignificant" as speculated by Dr. O'Brien.

Dr. O'Brien's assertion that Claimant "never" had effusion or significant dysfunction is not supported by the record. To the contrary, Claimant's health care providers, including Dr. Cava and Dr. Motz, noted swelling of his left knee at multiple visits. Claimant was placed in a knee brace and required the use of a cane for ambulation. Further, Dr. Cava placed Claimant on work restrictions reflecting significant difficulty through September 12, 2019.

The ALJ finds that Dr. Cava's opinion on causation and Dr. Motz's implicit attribution to be credible, persuasive and supported by the evidence. The ALJ finds that Claimant established by a preponderance of the evidence that he sustained an acute injury to his medial meniscus as the result of his January 1, 2019 work injury.

With respect to the surgery recommended, Dr. Motz's records indicate that Claimant's PVNS is not related to his work injury. Accordingly, that injury, and treatment for that condition, is not reasonable, necessary, or related to his work injury. The ALJ cannot determine, however, whether that treatment is incidental to the work-related meniscus injury and makes no finding on that issue.

Dr. O'Brien's opinion that arthroscopic surgery for Claimant's injury is contraindicated is not persuasive. Dr. O'Brien testified that arthroscopic meniscal repair was indicated for patients younger than 18 year with acute injuries, but not for patients older than 35 with degenerative conditions. The opinion does not address whether arthroscopic surgery was indicated for patients of Claimant's age with acute injuries superimposed over pre-existing degenerative changes, which is the Claimant's condition. His testimony and the medical literature cited on this issue was not clear or persuasive. At best, the excerpts from literature represent generalizations derived from studies that address situations that may or may not be consistent with the Claimant's presentation.

Dr. O'Brien also opined that Claimant is not likely to benefit from surgery because he is a workers' compensation claimant. Dr. O'Brien's characterization of Claimant's workers' compensation claim as a "comorbidity" and the blanket assumption that workers' compensation claimants are universally motivated by secondary gain issues demonstrates that Dr. O'Brien's opinions are not unbiased. While secondary gain issues may exist in some circumstances, no credible evidence was offered to suggest that Claimant was malingering, exaggerating symptoms or that he was guided by any secondary motivation. Dr. O'Brien's opinion on this issue demonstrates that his opinions are not unbiased and undermines the credibility of his testimony.

The ALJ finds that Claimant has established by a preponderance of the evidence that the surgery recommended by Dr. Motz for Claimant's left knee is reasonable, necessary, and related to his January 1, 2019 work injury.

ORDER

It is therefore ordered that:

1. Claimant proved by a preponderance of the evidence that left knee surgery recommended by Cary Motz, M.D., is reasonable, necessary, and related to Claimant's January 1, 2019 industrial injury.
2. All matters not determined herein are reserved for future determination.

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



DATED: December 9, 2020.

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

- I. Has Claimant shown, by a preponderance of the evidence, that she suffered a compensable work injury on February 3, 2020?
- II. If Claimant has suffered a compensable work injury, has she shown, by a preponderance of the evidence, that she is entitled to medical benefits which are reasonable, necessary, and related to her work injury?
- III. If Claimant has suffered a compensable work injury, has she shown, by a preponderance of the evidence, that she is entitled to Temporary Total Disability payments?
- IV. What is Claimants Average Weekly Wage?

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

Work Incident on February 3, 2020 / Subsequent Treatment

1. Claimant is a former barista for Employer. On February 3, 2020, Claimant reported that she slipped on a piece of ice and she fell. At hearing, Claimant stated that she had both hands full, dropped what she was carrying, and fell onto her left knee and right hand. She testified that she felt pain within the walking boot (from a prior injury) on her left foot, but this pain was different. Claimant testified that upon request of Employer, she worked the remainder of her shift on February 3, 2020.

2. Claimant presented to Concentra Medical Center the next day, February 4, 2020, and was seen by PA Mendy Peterson. She reported low back pain, right knee pain, left knee pain and bilateral neck pain- worse on the left where she hit her shoulder. Claimant stated that she hurt 'all over'. (Ex. C, p. 36). Claimant's physical examination was noted to be 'normal'. *Id* at 37. Claimant was diagnosed with a lumbar strain. She was prescribed cyclobenzaprine, and the file stated: "*PT is medically necessary to address objective impairment/functional loss and to expedite return to full activity.*" *Id.* (emphasis added).

3. On 2/4/2020, PA Peterson further noted: History and mechanism of injury were obtained directly from the patient, unless otherwise noted, and appear to be consistent with presenting symptoms and physical exam." Claimant's medical history was noted, but the only Assessment, initial encounter, was Lumbar Strain. MMI was anticipated for 3/20/2020, and further noted that "*Patient may work their entire shift,*" but with restrictions as follows: lift up to 10 lbs. *constantly*, push/pull up to 20 lbs. *constantly*

(up to 8 hours per day), bend *occasionally* (up to 3 hours per day), stand *frequently* (up to 6 hours per day), walk *frequently*. (Ex. C, p. 39) (emphasis added). Follow-up to be in 2-3 days. *Id.*

4. Claimant returned to Concentra on 2/6/2020, again with PA Peterson. Claimant still complained of left shoulder and right hip pain, and now bilateral hand pain, but still made no mention of left foot/ankle pain. It was noted that Claimant “continues PT with good progress as expected” (Ex. C, p. 40). PA Peterson also stated that Claimant “is going to see her foot doctor for her preexisting condition, as it is ‘not the same as it was before’”. Under Assessment, initial encounter, Claimant was now noted to have “Contusion, left hip”, “Lumbar strain”, and “Left Shoulder Sprain”. Claimant was continued on her medications and PT. It was again noted “*Patient may work their entire shift*”, now with loosened work restrictions from the previous visit. *Id.*

5. Claimant returned on 2/11/2020, and this time was seen by George Johnson, MD. Claimant still complained of left shoulder and right hip pain, but now mostly of her left foot. (Ex. C, p. 44). Dr. Johnson notes that Claimant was “not working due to restrictions.” Dr. Johnson also opined that Claimant’s left foot symptoms were not work related, but noted she was seeing her private foot doctor, Dr. Peck. Physical therapy was noted to improve her back and hip. At this time, her work restrictions were effectively removed, but was noted to be “very close” to being able to perform all her work duties, but was “not quite all the way yet”. *Id.* at 46.

6. On February 20, 2020, Claimant returned, and reported pain in her low back, right hip, bilateral hands and left ankle, all getting worse. PA Peterson noted that Claimant’s mechanism of injury was altered to now include her hands. PA Peterson also noted that Claimant had poor compliance with physical therapy. She documented that Claimant had not returned to work, but merely because *Claimant* felt she was ‘not ready’ to return to work. PA Peterson again opined that Claimant’s foot/ankle and hip complaints were not work-related. (Ex. C, p. 48). Claimant was then released to full duty on February 20, 2020. (Ex. C, p. 47). Claimant has not returned to work, despite the full duty release.

7. Claimant returned on February 27, 2020 and reported that her back and hip were back to “her normal”; however, she was still reporting ankle pain. Dr. Johnson again determined that her ankle pain was not work-related. (Ex. C, p. 53). Dr. Johnson placed Claimant at MMI with no impairment rating, full work, no permanent restrictions, no maintenance care and no medications. Dr. Johnson opined that any additional time off work would be due to her non work-related ankle surgery. *Id.* at 56.

Claimant Has Extensive Pre-Existing Complaints and Treatment

8. Claimant has pre-existing chronic low back pain with bilateral lower extremity symptoms dating back to at least 2001. (Ex. D, p. 81). As early as December 2010, it was noted that Claimant suffered from chronic low back pain for several years and heavy use of narcotics. (Ex. D, p. 58).

9. Claimant also had several instances of narcotics abuse resulting in suspected overdoses in 2011, 2012, and 2015. (Ex. D, pp. 61, 67, 70, 82).

10. Claimant presented to her physicians in May 2019, reporting an increase in pain and symptoms in her low back and bilateral hips and into her groin. Ex. E, p. 150). Claimant denied any falls, accidents or injuries. Claimant was diagnosed with a new onset of bilateral sacroiliitis with low back pain. (Ex. E, p. 151). Claimant had a flare in her chronic low back pain without any precipitating event.

11. Claimant returned to her treating physicians for her bilateral hand symptoms in June 2019. Claimant underwent a steroid injection and she reported a good response for her thumb arthritis. Claimant also reported a popping sensation in her left ring finger, but some in her middle finger. Claimant continued treating for her upper extremity symptoms. (Ex. E, p. 153).

Left Foot Surgery in September 2019, and ongoing Pain Complaints

12. Claimant underwent foot surgery in September 2019. (Ex. K, p. 224). Claimant reported that she continued not to do well after the surgery. She reported to Dr. Peck to be in a lot of pain in her foot and ankle as of January 30, 2020. (Ex. K, p. 223). As a result, Dr. Peck wrote Claimant a note, addressed to Whom It May Concern, stating:

I saw Katherine Pollock in the office today. Please allow her to be off work for 4-6 weeks. She needs to be non-weight bearing to her foot. (Ex. K, p. 220).

However, Claimant continued to work, despite Dr. Peck's recommendation. Three days later, Claimant fell at work, resulting in this claim.

Dr. Nagamani's IME Report

13. Dr. Kevin Nagamani performed a records review for Respondents on June 16, 2020 to address causation of Claimant's ongoing left ankle and foot complaints. (Ex. B, p. 29). Dr. Nagamani opined that the alleged work injury was not a cause or contributing cause to Claimant's current complaints to her left ankle. The MRI did not show any acute findings to claimant's left ankle. Dr. Nagamani opined that since Claimant was wearing a boot, any fall could not have caused any tearing of ankle ligaments. Dr. Nagamani opined while it *could be medically possible* to have tearing of tendons with a forceful contraction of the peroneal muscles while a person is wearing a boot, there was no evidence of this with the work incident. *Id* at 30. Dr. Nagamani opined that there was no treatment warranted for the ankle related to the February 3, 2020 alleged work injury. *Id*.

Dr. Lesnak's IME Report

14. Dr. Lawrence Lesnak performed an IME at Respondents' request on September 16, 2020. (Ex. A). Claimant reported to Dr. Lesnak that her ankle MRI

showed evidence of a bone chip, but that Dr. Peck had not recommended surgery. Claimant reported to him that Dr. Peck referred her for evaluation of her hands due to ongoing symptoms. Dr. Kobayashi provided an injection into the base of her left ring finger, which provided relief. Claimant also underwent an EMG studies of her bilateral upper extremities in May 2020 and Dr. Leppard told her she had worsening nerve damage. Claimant underwent carpal tunnel surgery, cubital tunnel release and right first CMC arthroplasty in June 2020. Claimant also reported that she was evaluated by Dr. Weinstein for her hip, but Dr. Weinstein did not recommend hip surgery. (Ex. A, p. 2).

15. After a review of Claimant's prior medical records, Dr. Lesnak opined that, based on the initial medical evaluation after the February 3, 2020 work incident, there is no documented evidence of any type of injury; only Claimant's subjective pain complaints. Dr. Lesnak opined that Claimant's complaints were essentially unchanged, compared to her pre-existing pain complaints to the same body parts. Specifically, Dr. Lesnak noted that all of Claimant's symptoms alleged after the alleged work injury were documented in medical records prior to the alleged work injury. (Ex. A, p. 25).

16. Dr. Lesnak also noted that Claimant completed a psychosocial screening test at her evaluation. Claimant demonstrated a very high level of somatic pain complaints. Dr. Lesnak opined that such results suggest the presence of an underlying somatic/somatoform disorder. Dr. Lesnak opined that individuals with these conditions frequently embellish and exaggerate their symptoms, rendering the individual's subjective complaints unreliable.

Claimant has Ongoing Issues with Opioids

17. In March 2020, PA Faron at Spinal Diagnostics and Pain replaced Claimant's oxycodone with Norco, to be used as-needed, but not to exceed four times per day. He provided a plan to reduce Claimant's pain medications. PA Faron noted that Claimant's current dosing was 'not a good idea'. (Ex. M, p. 321).

18. Claimant returned in May 2020, seeking additional medications. Claimant had been taking the Norco four times a day, but she was requesting more. Mr. Faron counseled Claimant that opiates were not a substitute for the other modalities to address her reported pain and symptoms. (Ex. M, p. 324).

19. Claimant presented to her treating physicians at Peak Vista for her musculoskeletal pain. On July 27, 2020, Claimant was discharged from the practice, because her PMDP (Prescription Drug Monitoring Program) and UDS (Urine Drug Screen) were both abnormal, including a positive result for oxycodone. The PDMP revealed prescriptions from both Mr. Faron from Spinal Diagnostics and Pain, and also from Dr. Kobayashi. It was noted that Claimant had also filled leftover prescription from a pain provider without notifying the office. Claimant was discharged due to her multiple violations. (Ex. L, p. 296).

Claimant Testified that She Was 100% Disabled

20. Claimant testified that she was 100 percent disabled for many years prior to the work incident. Claimant testified she then went back to work for some time before being found disabled once again after the work incident.

Dr. Lesnak Testifies at Hearing

21. Dr. Lesnak testified that Claimant had an extensive pre-existing medical history for low back and leg symptoms. She had hip symptoms, and chronic upper extremity symptoms, including surgery on her left upper extremity. Dr. Lesnak testified that Claimant already had been recommended for right upper extremity surgery in 2018 and 2019 due to progressive symptoms.

22. Dr. Lesnak testified that the left ankle MRI findings (which have been received into evidence and reviewed by the ALJ) after the work incident did not show any acute findings consistent with a new injury. He also testified that the hip MRI Claimant underwent in June 2020 did not reveal any abnormalities consistent with any type of acute injury or trauma.

23. Dr. Lesnak further testified that Claimant's documented complaints on and after the February 3, 2020 work incident were fairly consistent with her complaints prior to the incident. He noted that there was no evidence of any documented, reproducible, objective findings on exam on February 4, 2020. Dr. Lesnak concluded that while there was an incident on February 3, 2020, there was no resulting injury to Claimant. He opined that while Claimant testified that all of her symptoms were different after the fall, the medical records did not support this contention.

Average Weekly Wage

24. The sole wage document in the record appears to be a Colorado State Unemployment benefits form for Claimant. Although Claimant's name does not appear on the face of said document, the ALJ infers it belongs to Claimant, no objection having been lodged thereto. Claimant's gross wages from this Employer (identified as Pyramid Colorado Management) for calendar year 2019 are noted to be \$31,694.98. Such yearly income yields an AWW of \$609.52.

25. Respondent argues that Claimant earned \$6070.60 over 13 weeks yielding an AWW of \$466.97; however, the ALJ cannot identify the source of this assertion. Claimant, however, asserts that her annual compensation was based on 44 weeks of earnings, and not 52, having taken 8 weeks of personal leave from 9/4/19 to 11/4/2019. Therefore, Claimant argues her AWW should be increased commensurately. The ALJ finds insufficient documentary or testimonial evidence in the record to support this assertion; in fact, Claimant's best quarter for 2019 encompassed the month of September. *The ALJ finds Claimant's AWW to be \$609.52.*

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

1. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40101, C.R.S. 2007, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

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

3. Assessing the weight, credibility and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). Moreover, the weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55, P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting all, part or none of the testimony of an expert witness. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

4. In this instance, while Claimant has shown sufficient evidence to prove that a compensable work injury occurred, her overall credibility has been shown to be rather unpersuasive. The ALJ finds, among other instances, that Claimant has exaggerated her symptomology to her various providers, and has been inconsistent in the symptoms she has reported along the way. As recently as spring, 2020, there is compelling evidence of misuse of prescription medications. As a result of this-along with persuasive medical

evidence to the contrary-Claimant's assertion that her left foot was injured in the fall is simply unconvincing.

5. In contrast, the ALJ finds that Dr. Lesnak has testified sincerely, credibly, and to the best of his medical knowledge. The ALJ is largely persuaded by his reasoning, along with that of Dr. Nagamani; however as noted below, Claimant did suffer a compensable injury, albeit minor.

Compensability, Generally

6. To qualify for recovery under the Workers' Compensation Act of Colorado, a claimant must be performing services arising out of and in the course of her employment at the time of her injury. See § 8-41-301(1)(b) C.R.S. 2007. For an injury to occur "in the course of" employment, the claimant must demonstrate that the injury occurred within the time and place limits of her employment and during an activity that had some connection with her work-related functions. See *Gregory v. Special Counsel, and Travelers Indemnity Co.*, W.C. 4-713-707 (2008); *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arise out of" requirement is narrower than the "in the course of" requirement. See *id.* For an injury to arise out of employment, the claimant must show a causal connection between the employment and injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. See *id.* at 64-1-42; *Industrial Comm'n v. Enyeart*, 81 Colo. 521, 524-25, 256 P. 314, 315 (1927) (denying recovery to claimant who was injured when his steering gave out while he was driving across a bridge on his employer's property on his way home from work). The claimant must prove these statutory requirements by a preponderance of the evidence. See *City of Boulder v. Streeb*, 706 P.2d 786, 789 (Colo.1985).

Compensability, as Applied

7. The ALJ finds, by a preponderance of the evidence, and consistent with the medical providers at Concentra, that Claimant suffered a compensable work injury as a result of her fall on 2/3/2020. No parties are seriously disputing that Claimant slipped and fell. In this case, the ALJ finds that Claimant suffered a lumbar strain, and some associated contusions, which had fully resolved by the time she was placed at MMI, with no impairment, and no work restrictions, by Dr. Johnson of 2/27/2020. The ALJ finds that any other lingering complaints, most notably Claimant's left foot/ankle, are not due to her 2/3/2020 slip and fall work accident. Instead, they are due to longstanding, preexisting issues that are not work-related. The ALJ further finds that Claimant's current complaints-any of them-do not represent an aggravation of her preexisting conditions. Claimant returned to her pre-injury baseline when she was placed at MMI by Dr. Johnson.

Medical Benefits, Generally

8. Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. C.R.S. § 8-42-101. However,

the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. C.R.S. § 8-41-301(1)(c); *Faulkner v. Indus. Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.*, 124 Colo. 210, 236 P.2d 2993. A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co.*, 124 Colo. 210, 236 P.2d 293 (1951).

Medical Benefits, as Applied

9. As noted above, Claimant's providers at Concentra rendered the treatment which they felt was appropriate to treat her compensable work injuries. The ALJ concurs, and finds that medical treatment rendered by Concentra up through Claimant being placed at MMI by Dr. Johnson was reasonable, necessary, and related to her work injuries. Any other treatment sought beyond that date, or for any other conditions, is to be sought outside the Workers Compensation system.

Temporary Total Disability, Generally

10. C.R.S. § 8-42-103(1)(a), requires a claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The term "disability" as used in workers' compensation connotes two distinct elements. The first element is "medical incapacity" evidenced by loss or restriction of bodily function. The second element is loss of wage-earning capacity as demonstrated by the claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999) *Hendricks v. Keebler Co.*, W.C. No. 4-373-392 (June 11, 1999).

Temporary Total Disability, as Applied

11. As noted by Respondents, Claimant has taken a rather anomalous position that she was totally disabled prior to beginning work for Employer, and that she is now once again totally disabled as a result of her work injuries. While taking no position on Claimant's pre-employment status, the ALJ does not concur that Claimant has suffered *any* disability, however temporary, as a result of this slip and fall injury. Claimant's ATPs, with record support, felt that Claimant could return to full duties, with minor work restrictions, *the day following the work injury*. The ALJ concludes that Claimant could have continued her duties as a barista the next day, even with the very minor restrictions being recommended for a back strain and minor contusions. Instead,

Claimant elected to stay off of work entirely, with no attempt to even seek modifications. To the extent that Claimant may indeed have been unable to work, the ALJ finds it was due to her pre-existing foot conditions, and not from this slip and fall. It is duly noted that Dr. Peck recommended that Claimant stay off her feet for 4 to 6 weeks, a mere 3 days before she ignored his advice and fell. The ALJ finds that any wage loss suffered by Claimant was not due to her work injury; if Claimant suffered any involuntary wage loss at all, it was due to preexisting, non-work-related issues.

Average Weekly Wage

12. As noted in Findings of Fact #24, 25, the ALJ finds Claimant's Average Weekly Wage to be \$609.52.

ORDER

It is therefore Ordered that:

1. Claimant has suffered a compensable work injury.
2. Respondents are responsible for all reasonable, necessary, and related medical treatment, as noted above.
3. Claimants claim for Temporary Total Disability payments is denied and dismissed.
4. Claimant's Average Weekly Wage is \$609.52.
5. Respondents shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.
6. All matters not determined herein are reserved for future determination.

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

petition to review form at: <http://www.colorado.gov/dpa/oac/forms-WC.htm>. In addition, it is recommended that you send a copy of your Petition to Review to the Colorado Springs OAC via email at oac-csp@state.co.us.

DATED: December 10, 2020

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

1. Whether Respondents overcame by clear and convincing evidence the opinion of the Division Independent Medical Examination physician, Dr. Counts, as to relatedness of Claimant's shoulder, thoracic spine, and elbow symptoms.
2. Whether Respondents overcame, by clear and convincing evidence, the opinion of the Division Independent Medical Examination physician, Dr. Counts, as to maximum medical improvement.
3. Whether Respondents overcame the provisional opinion of the Division Independent Medical Examination physician, Dr. Counts, as to work related permanent impairment.
4. Whether Claimant completed all additional recommended treatment to support a request for a follow-up DIME per WCRP 11-7.
5. Whether Claimant may request a follow-up Division IME per WCRP 11-7.

FINDINGS OF FACT

1. Claimant is a 55-year-old male firefighter who sustained an admitted injury to his right shoulder while helping lift a 400-pound patient into an ambulance on April 20, 2018.

1. On April 23, 2019, Claimant saw Lori Long Miller, M.D., at US Health Works. Claimant reported pain in his right upper trapezius and upper thoracic paraspinals. On his pain diagram, Claimant circled his right rear scapular and shoulder area, and reported pain rating 6/10. Dr. Long Miller documented an essentially normal examination of Claimant's right shoulder, including documenting full shoulder AROM. Dr. Long Miller did not document an examination of the paraspinal muscle. Dr. Long Miller's documented examination of Claimant's right shoulder is a near-verbatim recitation of her examination of Claimant's left shoulder. She also noted a 2 cm non-tender mass consistent with a lipoma. Despite documenting a benign examination, Dr. Long Miller diagnosed with an "injury of right shoulder," and opined the injury was work-related and was unrelated to any pre-existing condition. Dr. Long Miller ordered physical therapy which was initiated that day. Dr. Long Miller indicated that the reasons for physical therapy included "decreased/impaired functional mobility/capacity, decreased joint range of motion," The goals for physical therapy included increasing Claimant's functional range of motion and decreasing pain, among others. Dr. Long Miller did not recommend any work restrictions. (Ex. 7).

2. On April 23, 2018, Claimant began physical therapy at US Health Works. Claimant reported headache, low back pain and that his shoulder "creaks." On

Examination, Claimant was found to have tenderness and spasm in his trapezius, supraspinatus, infraspinatus, and thoracic paraspinals. Scapular and shoulder pain began the day after the injury. Four trigger points were identified and treated with dry needling: right upper trap, deltoid, infraspinatus, and teres. It was noted that Claimant had good strength and range of motion, and his shoulder going was intact. Shoulder testing was negative. (Ex. E).

3. On April 24, 2018, Respondents filed an additional Employer's First Report of Injury which listed Claimant's body parts affected as "upper extremities – shoulder(s)." (Ex 2).

4. On May 7, 2018, Claimant returned to Dr. Long Miller noting his injury felt 75% better, and he had completed five physical therapy visit. Dr. Long Miller noted that Claimant reported no shoulder pain, weakness, tenderness, or restrictions in range of motion. Claimant also denied elbow pain. Again, Dr. Long Miller's examination of Claimant's right shoulder was identical to his left shoulder. She noted that Claimant was able to return to full duty and was not at maximum medical improvement. (Ex. 7).

5. On May 21, 2018, Claimant followed up with Dr. Long Miller, reporting tight pain in the right shoulder and posterior rib, without radiation, weakness, or elbow pain. On examination, Dr. Long Miller noted tenderness in the right trapezius muscle, but an otherwise normal examination of the right shoulder. Claimant denied elbow pain. Impingement testing of the right rotator cuff was negative. She diagnosed Claimant with a right shoulder strain with thoracic rib dysfunction and referred claimant for chiropractic treatment for his rib. (Ex. 7).

6. On May 21, 2018, Claimant began chiropractic treatment with Marc Cahn, DC initial evaluation. Claimant reported pain medial to his scapula and along the upper thoracic spine. Tenderness was noted in the right upper trapezius, upper trap, levator scapula, rhomboid and fourth costo-vertebral articulation. (Ex. 5).

7. On June 4, 2018, Claimant saw Dr. Long Miller, reporting his injury was 85% better. Dr. Long Miller noted Claimant was "slowly improving." Claimant had completed three chiropractic visits and nine physical therapy visits. Claimant also complained of pain with motion of his shoulder, but otherwise denied restrictions of the shoulder. Claimant also denied elbow pain. (Ex. 7).

8. On June 26, 2018, Claimant saw Dr. Long Miller, reporting his injury was the same, with nagging pain near the medial scapula with shoulder motion. Claimant again denied elbow pain. On examination, Dr. Long Miller noted tenderness of the right trapezius muscle and medial scapula border. Dr. Miller placed Claimant at MMI, with no permanent impairment and no restrictions. She recommended maintenance care to include chiropractic and massage therapy within 8 weeks. (Ex. 7).

9. On August 16, 2018, Claimant transferred his care to Peak Form Medical Clinic and saw Jennie Schulman, PA-C. Claimant reported that his right shoulder pain was symptomatic, and that physical therapy did not help his symptoms. Claimant

reported that his shoulder pain was aggravated with outward and upward movement of his right arm and with lifting and pushing, radiating to his right pectoral muscle. PA Schulman's right shoulder examination was normal with the exception of incomplete internal rotation, and decreased strength with opposed external rotation. Shoulder testing (Speed's, O'Brien's, Drop-arm, Empty can, Neer's, Hawkins', cross-arm, and crank tests) were negative. Claimant was diagnosed with a right rotator cuff strain and cervicgia. Claimant was referred for a right shoulder MRI. PA Schulman opined that Claimant's injury was work-related based on the information available at that time. PA Shulman also opined that Claimant was not at MMI. (Ex. 8)

10. On August 21, 2018, Claimant had a right shoulder MRI which showed generalized moderate tendinosis of the rotator cuff with a small high-grade tear of the infraspinatus and low- grade interstitial tearing of the subscapularis, no other rotator cuff tears, and moderate AC joint arthritis with moderate subacromial/ subdeltoid bursal fluid. (Ex. 5).

11. On August 27, 2018, Claimant saw Francis Thompson, M.D. at Peak Form Medical Clinic. Claimant reported right shoulder and neck pain since his April 20, 2018 accident. Dr. Thompson noted Claimant's right shoulder range of motion was limited in all planes due to pain. Speed's and O'Brien's tests were positive, other shoulder tests were negative. Dr. Thompson noted that the MRI showed generalized moderate tendinosis of the right rotator cuff with a small high-grade tear of the infra spinatus and a low-grade tear of the subscapularis. Dr. Thompson opined that Claimant's injuries were work-related. Claimant was referred to Dr. Mann at Cornerstone orthopedics for an orthopedic consultation (Ex. 8).

12. On August 30, 2018, Claimant saw Thomas Mann, M.D., on referral from Dr. Thompson. Claimant reported moderate, general right-sided shoulder pain from the scapula to the trapezius, neck and down into the biceps and hand. On examination, Dr. Mann found mild tenderness of the AC joint. He also noted pain through the impingement arc, 4/5 external rotation strength, and 5-/5 forward flexion and abduction. Speed's and O'Brien's were both equivocal. Dr. Mann reviewed Claimant's August 21, 2018 right shoulder MRI and interpreted it as showing tendinosis of the rotator cuff, fairly generalized and moderate, with a high-grade partial tear of the infraspinatus and low-grade interstitial tear of the subscapularis, moderate arthropathy, and no significant impingement. He also noted that he felt that Claimant's infraspinatus tear was not accounting for his symptoms. He performed a subacromial cortisone injection and recommended that Claimant do physical therapy. (Ex. 9).

13. Dr. Mann saw Claimant again on September 13, 2018. He noted that the cortisone injection helped some with Claimant's shoulder pain but not the pain in his upper back, neck, and scapular regions. On examination, he noted mild discomfort with impingement maneuvers. Dr. Mann indicated that the MRI changes of Claimant's right shoulder did not warrant surgery at that time. He also indicated that the partial infraspinatus tear may be amenable to platelet-rich plasma (PRP) injection as an alternative to surgery. At that time, Dr. Mann recommended against surgery, and referred Claimant to Dr. Kruse for dynamic ultrasound and possible PRP. (Ex. 9).

14. On September 21, 2018, Claimant returned to Peak Form and saw James Moses, M.D. Claimant reported right shoulder and neck pain, exacerbated with movement. Dr. Moses' examination of Claimant's right shoulder showed limited range of motion due to guarding, positive Speed's, and O'Brien's for pain in the right trapezius, positive empty can test for pain in the trapezius, and cross arm testing positive for pain in the superior shoulder (not the AC joint). Other shoulder testing was negative. Due to Claimant's cervical spine complaints and findings, and MRI of the cervical spine was ordered. (Ex. 7).

15. On September 26, 2019, Claimant had a cervical MRI which showed multi-level degenerative disc disease C4- C7 with mild to moderate bilateral foraminal narrowing at each level, mild canal stenosis C4- C5 and mild to moderate canal stenosis at C5- C6 and C6- C7.

16. On October 16, 2018, Claimant saw Justin Green, M.D., on referral from Dr. Moses, for evaluation for Claimant's cervical pain. Claimant reported overall Dr. Green's impression was cervical strain syndrome, myofascial neck pain, rule out cervical dystonia and facet syndrome. He doubted there was a cervical radiculopathy. Dr. Green noted that Claimant's rotator cuff tears appeared to be chronic. He recommended that Claimant have an EMG to rule out right arm radiculopathy and possible cervical facet injections or Botox if cervical dystonia. (Ex. 11).

17. On October 17, 2018, Dr. Green performed an EMG which was abnormal, showing a mild carpal tunnel syndrome without denervation, which he indicates was causally unrelated to Claimant's work injury. Otherwise, the EMG was normal. He prescribed a Medrol Dosepak and recommended that Claimant have a cervical ESI. (Ex. 11).

18. On October 26, 2018, Claimant returned to Dr. Moses for follow up, accompanied by a nurse case manager. Dr. Moses's assessment was right rotator cuff strain, "with partial thickness tears that appear chronic in nature since they do not correlate with his subjective complaints or physical exam" (no weakness or pain with provocative tests); cervicgia, with radicular symptoms, and ocular migraine (not likely work related). Dr. Moses recommended that Claimant follow up with Dr. Mann to determine if any further treatment of the shoulder was warranted, before moving to diagnostic epidural steroid injections for Claimant's neck. (Ex. 8).

19. On November 1, 2018, Dr. Mann saw claimant and noted he had been in physical therapy and had seen Dr. Green. Examination showed normal range of motion with some mild impingement findings, subtle discomfort on empty can and testing. Dr. Mann believed Claimant's neck was likely causing more of his symptoms. He also recommended that Claimant's neck be addressed before recommending any shoulder intervention other than rehabilitation. (Ex. 9).

20. On November 7, 2018, Claimant saw Jessica Moore-Scheeler, PA-C at Peak Form. PA Moore-Scheeler noted that Dr. Mann recommended proceeding with neck treatment and that no further shoulder treatment was warranted at that time.

Claimant was referred to Dr. Sorenson for the performance of a diagnostic and possibly therapeutic right sided epidural steroid injection. (Ex. 8).

21. On November 11, 2018, Claimant underwent a procedure to excise the lipoma on his right shoulder. (Ex. 5).

22. On November 30, 2018, Claimant saw Ashish Chavda, M.D. Claimant reported ongoing right neck pain with radiation into the right shoulder. (Ex. 10).

23. On December 12, 2018, Claimant was seen by Jennifer Becker, NP at Peak Form. Claimant's right shoulder examination was unchanged from previous examinations. (Ex. 8).

24. On February 6, 2019, Dr. Chavda performed a C7/T1 interlaminar epidural steroid block. (Ex. 10).

25. On February 7, 2019, Claimant was seen by Matthew Brodie, M.D., at Peak Form. Claimant reported pain radiating from his right lateral neck to his shoulder. He also reported that his right shoulder would get "jammed up" and "pops" with abduction greater than 90 degrees. On examination, Dr. Brodie noted reduced active range of motion in the right shoulder and discomfort and weakness on resisted abduction. (Ex. 8).

26. On February 18, 2019, Dr. Mann referred Claimant to Ryan Kruse, M.D., for a right shoulder diagnostic ultrasound and possible cortisone injection. (Ex. 9).

27. On February 28, 2019, Dr. Kruse performed a right subacromial bursa and supraspinatus tendon lidocaine injection and ultrasound. Dr. Kruse noted that Claimant's pain was diffuse and "not entirely all that focal" but he showed signs of impingement and supraspinatus tendinosis. The ultrasound was interpreted as showing focal high grade supraspinatus tendinosis without tear, infraspinatus and subscapularis tendinosis, and moderate AC joint arthropathy. He recommended Claimant undergo PRP injection. (Ex. 9).

28. On February 28, 2019, March 14, 2019, April 11, 2019, April 29, 2019, May 14, 2019, and May 28, 2019, Claimant was seen at Peak Form, without a significant change in symptoms or examination findings. (Ex. 8).

29. On April 5, 2019, Dr. Kruse performed a PRP injection at Claimant's supraspinatus tendon and subacromial bursa. (Ex. 9) Claimant returned to Dr. Kruse in follow up on April 25, 2019, and May 24, 2019, reporting continued pain over his shoulder, pain limited range of motion and that he did not feel any better. He also reported a painful "snapping" over the anterior shoulder. (Ex. 9).

30. On June 18, 2019, Claimant saw Dr. Brodie at Peak Form. Claimant reported improved pain and ROM, and some abnormal sensation in his distal right arm, below his elbow when he moved his shoulder. On examination, Dr. Brodie opined that Claimant's right shoulder appeared to be "riding higher than right side" and that he had full range of motion. Dr. Brodie noted that it was "very promising" that Claimant could

fully actively move his shoulder in all planes, although he remained weak and sore with right shoulder function. (Ex. 8).

31. On June 24, 2019, Claimant reported to Dr. Kruse that he was not better than he was prior to the PRP injection. He complained of increased "popping" throughout the shoulder. A repeat diagnostic ultrasound showed significant improvement of the prior tendon injury, with a small focal area of high- grade tendinosis of the deep fibers of the footprint. Dr. Kruse recommended consideration of a subacromial bursa injection or possible surgery with Dr. Mann. (Ex. 9 & 5).

32. On July 11, 2019, Dr. Mann reviewed Claimant's prior MRI findings and opined that Claimant would be a surgical candidate, given his ongoing symptoms. He recommended an arthroscopic evaluation, rotator cuff debridement and repair, subacromial decompression and bursectomy, after a repeat right shoulder MRI. He also indicated that the surgery would provide an objective evaluation of Claimant's shoulder pathology. A request for authorization of surgery was submitted to Insurer. (Ex. 9).

33. On July 19, 2019, Claimant had a repeat right shoulder MRI without contrast. The MRI demonstrated moderate tendinosis of rotator cuff with no focal-full thickness tear, arthritic changes of the glenohumeral joint; and chondral surface thinning with no grade 3 or 4 changes.

34. On July 22, 2019, Dr. Mann reviewed the July 19, 2019 shoulder MRI, which he opined showed some improvement. Dr. Mann recommended proceeding with the recommended surgery, which he indicated may include a distal clavicle resection. (Ex. 9).

35. On July 23, 2019, Dr. Brodie saw Claimant. Claimant reported pain in his upper back near his scapula and a grinding sensation. H also reported occasional sharp pain in the upper aspect of his right shoulder into his neck, and shoulder weakness secondary to pain. Dr. Brodie reviewed the MRI of Claimant's right shoulder and noted that it demonstrated degenerative changes in the and spurring of the AC joint, rotator cuff and biceps tendinosis, mild labral fraying, and degenerative changes to the glenohumeral joint, but no identified tears. Claimant had full shoulder range of motion with positive impingement signs. In addition, Dr. Brodie reviewed an 18-minute surveillance video provided by Respondents. Dr. Brodie noted that the surveillance showed Claimant using his right arm, including the shoulder, elbow, wrist, hand, and fingers for activities including lawn mowing, washing a car, climbing into a car and power washing. Dr. Brodie's impression was that the surveillance video did not provide evidence of pain-limited functionality regarding the right shoulder, right upper extremity, or cervical spine. He also noted that the Claimant's actions on the video demonstrated "greater functional capacity of the right shoulder when compared to examination findings demonstrated during my clinical examination today." He further opined that "[t]here is a mis-match, or lack of correlation, between the forces observed on the video and today's clinical examination findings, regarding strength." (Ex. O).

36. Mark Failinger, M.D., was qualified as an expert in the field of orthopedic and sports medicine, testified at hearing and issued three reports which were admitted into evidence. On August 16, 2020, Dr. Failinger performed an independent medical examination of Claimant at the request of Respondents. In his report related to that examination, Dr. Failinger opined that Claimant's diagnosis from his April 20, 2018 injury was a right upper thoracic/rhomboid strain. He opined that Claimant's right shoulder and cervical spine were not involved in the work-related injury. Dr. Failinger opined that the mechanism of Claimant's injury was not likely to cause the rotator cuff pathology identified in Claimant's MRI films. While Dr. Failinger agreed that Claimant appeared to be a reasonable candidate for shoulder arthroscopy, he did not believe that he would require rotator cuff repair, and that the surgery was not reasonably related to Claimant's work injury. Dr. Failinger indicated in his report and testimony that it was unlikely that Claimant injured his rotator cuff on April 20, 2018, because acute injuries to the rotator cuff do not typically lay dormant with symptoms emerging later. On August 16, 2020 report, he opined that evaluation by a spine specialist or physiatrist would be reasonable prior to placing the patient at MMI (presumably for Claimant's thoracic strain). (Ex. A).

37. On April 10, 2020, Dr. Failinger issued an Addendum to his prior report at request of Respondents, after reviewing additional records. Dr. Failinger reiterated that Claimant's thoracic pain may be reasonably work related given the consistency of symptoms reported in that area, and the mechanism of injury. Dr. Failinger also noted that Claimant's elbow "could possibly be strained" in the April 20, 2018 injury, but there were no reports of elbow or distal biceps discomfort. (Ex. A)

38. In his April 10, 2020 report, Dr. Failinger indicated the timing of Claimant's proposed surgery after conservative measures had failed indicated that "any other subsequent development of symptoms was more reasonably related to other etiologies or ongoing degeneration rather than to any acute injury that occurred at the work incident of 04-20-2018." He again reiterated that he did not believe the mechanism of injury was such that it would cause a rotator cuff or shoulder injury. He also opined that Claimant would be at MMI as of August 16, 2019 with respect to his thoracic strain, which could change if a spine specialist found positive thoracic findings that were related to the work incident. (Ex. B).

39. Dr. Failinger issued a second Addendum to his report on August 15, 2020. After revising a thoracic MRI dated July 1, 2020, and a clinic note from Dr. Castro on July 17, 2020, he reiterated that Claimant had a mild strain to the thoracic spine with unlikely acceleration of pre-existing degenerative disease. He opined that no further treatment would be necessary for Claimant's thoracic spine, and that Claimant was at MMI on August 1, 2018. He also opined that the medical records did not support a thoracic permanent impairment rating. (Ex. C).

40. At hearing Dr. Failinger testified generally consistent with his reports. He testified that September 5, 2019 was a "fairly reasonable" date for MMI. He further testified that even with a chronic tear in Claimant's shoulder, he could have no pain. He agreed that further evaluation of Claimant's thoracic spine was reasonable, and that it

was reasonable for Claimant to follow up with Dr. Mann. He concluded that a shoulder or scapular strain could explain Claimant's reports of shoulder pain.

41. Claimant saw Dr. Brodie again on August 22, 2019. Dr. Brodie noted that the Claimant's right shoulder pain and associated crepitus appeared to become symptomatic following surgical removal of Claimant's lipoma. On examination, he noted that Claimant had full and symmetrical scapular motion. (Ex. 8).

42. On September 9, 2019, Dr. Brodie reviewed Dr. Failinger's IME report and placed the Claimant at MMI. Dr. Brodie assigned a 10% right upper extremity impairment rating, which converts to a 6% whole person impairment. No permanent work restrictions were assigned. He also recommended that Claimant see a neurosurgeon for his cervical spine issues, which Dr. Brodie indicated were not considered work-related. (Ex. 8).

43. On September 11, 2019, Respondents filed a Final Admission of Liability admitting for a 10% LUE impairment rating. (Ex. EE).

44. On October 8, 2019, Insurer denied authorization for Claimant's proposed surgery pending an IME.

45. On October 15, 2019, Claimant was seen by Rachel Brakke, M.D. at CU Sports Medicine Boulder. Dr. Brakke reviewed the cervical spine MRI and noted moderate [canal and foraminal] stenosis at CS- C6 and C6- C7. Exam revealed a high riding right shoulder with tenderness over the upper trap and levator scapula. Dr. Brakke diagnosed Claimant with right upper trapezius and levator scapula trigger points. Degenerative disc disease worse at CS- C6 & C6- C7 with possible right sided radicular pain, and right sided muscle pain. Dr. Brakke recommended physical therapy. (Ex. 13).

46. On January 3, 2020, Claimant had a scapular x-ray performed which showed no acute abnormality. (Ex. W).

47. On January 15, 2020, Bryan Counts, M.D. performed a Division Independent Medical Examination (DIME) and issued a report dated February 1, 2020. Dr. Counts' examination of Claimant's right shoulder showed limitations in range of motion compared to Claimant's left shoulder, a positive painful arc, equivocal empty can and O'Brien's tests; positive Kennedy and Hawkins' tests, and mild crepitus over the bicipital groove. Examination of Claimant's right elbow showed active range of motion less than the left elbow, and a negative Tinel's test. Examination of the thoracic spine showed mild tenderness over the right paraspinal muscles, and limitations in range of motion. Based on his examination, Dr. Counts opined that Claimant's diagnosis was right shoulder strain and aggravation of underlying rotator cuff tendinosis, impingement syndrome right shoulder, glenohumeral and AC joint arthritis, right shoulder, thoracic strain, and degenerative changes to thoracic spine. He noted as "Not work-related" diagnoses – multi-level degenerative changes with foraminal narrowing and spinal stenosis cervical spine and mild carpal tunnel syndrome of the right wrist. (Ex. 5).

48. Dr. Counts opined that Claimant was not at MMI. He assessed that Claimant had then-current impingement of the right shoulder and problematic crepitus,

probably from the biceps tendon. He also noted that the next step in treatment “should be surgical, with subacromial decompression with probable distal clavicle resection and arthroscopic debridement of the rotator cuff.” (Ex. 5)

49. Dr. Counts noted that “causality should be addressed regarding the neck and thoracic pain.” He noted that the mechanism of injury could certainly injure the thoracic spine and recent plain film of the right scapula do show some degenerative changes.” He recommended a thoracic spine MRI. He also opined that Claimant’s mechanism of injury would not be expected to cause more than a transient aggravation of Claimant’s underlying degenerative changes. (Ex. 5)

50. Dr. Counts then assigned provisional impairment ratings for Claimant’s right elbow (2% whole person upper extremity rating for normalized range of motion deficits), right shoulder (8%) which combined for a total right upper extremity rating of 8% which converts to a 6% whole person impairment. Dr. Counts also assigned a 3% spine impairment for Claimant’s thoracic spine. Dr. Counts also noted that Dr. Brodie also assigned Claimant a 10% upper extremity rating, and no spine rating. (Ex. 5)

51. Dr. Counts reviewed Dr. Failinger’s IME report and agreed with Dr. Failinger’s assessment that Claimant’s cervical spine condition was not work-related. Dr. Counts disagreed that Claimant’s shoulder condition was not-work related, and indicated he discounted Dr. Long Miller’s initial examination, doubting that she performed range of motion testing because the range of motion was identical in both shoulders. He noted the physical therapist’s identification of trigger points and Claimant’s pain diagram on the same day contradicted Dr. Long Miller’s finding of no tenderness in the right shoulder. (Ex. 5).

52. On June 8, 2020, Claimant saw Bryan Castro, M.D. Dr. Castro’s impression was ongoing thoracic pain with radiating pain, and cervical pain with some element of cervical radiculopathy. Dr. Castro recommended a thoracic and cervical MRI to evaluate any neural encroachment. (Ex. W).

53. On July 1, 2020, Claimant had a thoracic MRI which was interpreted as showing multilevel degenerative changes. (Ex. X).

54. On July 17, 2020, Dr. Castro saw Claimant and noted that he had ongoing mid-thoracic and shoulder-blade pain medial to the rhomboid and levator scapula areas. He noted that the MRI showed no neural impingement or instability patterns. Dr. Castro’s impression was that Claimant’s thoracic and shoulder pain was myofascial in nature and that he saw no indication for surgical intervention. He referred Claimant back to Dr. Mann for consideration of further workup on Claimant’s shoulder. He also believed it would be reasonable for Claimant to continue physical therapy. (Ex. Z).

55. On July 20, 2020, Claimant returned to Dr. Mann. Dr. Mann reviewed Claimant’s prior records and imaging and opined that there was no indication for surgical intervention. Claimant was referred for an injection for scapulothoracic pain. (Ex. 9).

FACTS AND PROCEDURAL ISSUES RELATED TO CLAIMANT'S REQUEST FOR RULE 11-7 FOLLOW UP DIME

56. A few days before the October 8, 2020 hearing, Claimant filed a request for a DIME follow-up pursuant to WCRP 11-7 "DIME Follow Up" ("Follow-Up DIME" or "FUD"))

57. At hearing, Respondents disputed Claimant's legal authority to request a FUD. The ALJ determined at hearing that the issue was not endorsed as an issue for hearing, and the parties were directed to submit the issue to the prehearing unit for decision.

58. A prehearing conference was held before PALJ Elsa Martinez Tenriero on October 15, 2020, on Respondent's Motion to strike or stay the FUD. The PALJ also considered Claimant's Motion to Compel Respondents' to request the DIME follow up per Rule 11-7. On October 16, 2020, PALJ Tenriero issued an order denying Respondents' Motion and granting Claimant's motion to compel. On November 2, 2020, Respondent had filed a Motion to Reconsider with PALJ Tenriero, which was denied on November 10, 2020.

59. On November 12, 2020, the parties filed a Stipulation and Agreement agreeing to submit Respondents' appeal of PALJ Tenriero's October 16, 2020 and November 10, 2020 prehearing orders to the ALJ for consideration. The ALJ approved the Stipulation on November 12, 2020.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. See § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. See § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id.* at 641. When determining credibility,

the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Ripeness of Respondent's Claims

Claimants contend that the issues raised by Respondents, including the DIME opinions on MMI, impairment rating and causation are not ripe for hearing under *Town of Ignacio v. Industrial Claim Appeals Office*, 70 P.3d 513 (Colo. App. 2002). Claimants assert because they have unilaterally requested a Follow Up DIME (FUD) under Rule 11-7, the DIME process is not "complete" and therefore the ALJ lacks jurisdiction to decide the issues of whether Dr. Counts' DIME opinions were incorrect in the first instance. Claimant's reliance on *Town of Ignacio* is misplaced. In *Ignacio*, the Court of Appeals addressed the issue of whether an ALJ could resolve issues of MMI in the absence of a DIME, and specifically whether a specialist who provided an MMI opinion qualified as an authorized treating physician. The Court concluded that because the exclusive method for challenging an ATP's MMI opinion was through a DIME, the ALJ did not have authority to determine MMI. Here, a DIME physician was selected and issued a report on whether Claimant was at MMI. The ALJ has located no authority, and Claimant has cited none, which divests the ALJ of jurisdiction over a challenge to a DIME's initial causation and MMI opinions based on the Claimant's attempt to schedule a Rule 11-7 FUD. Nor does the allegation that a Claimant has completed all additional recommended treatment divest the Respondents' of the ability to contest the DIME's initial opinions. The ALJ finds that Respondents' claims are ripe and the ALJ has jurisdiction to determine the issues raised by Respondents in their Application for Hearing.

OVERCOMING DIME OPINIONS

Overcoming DIME on MMI

Respondents contend that Dr. Counts' opinion that Claimant was not at MMI was incorrect. MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment

is reasonably expected to improve the condition.” Section 8-40-201(11.5), C.R.S. A DIME physician’s finding that a party has or has not reached MMI is binding on the parties unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(III), C.R.S.; *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000); *Kamakele v. Boulder Toyota-Scion*, W.C. No. 4-732-992 (ICAO, Apr. 26, 2010).

MMI is primarily a medical determination involving diagnosis of the claimant’s condition. *Berg v. Industrial Claim Appeals Office*, 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office*, 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant’s medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007); *Powell v. Aurora Public Schools* W.C. No. 4-974-718-03 (ICAO, Mar. 15, 2017). A finding that the claimant needs additional medical treatment (including surgery) to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office*, 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office*, 794 P.2d 1090 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.*, W.C. No. 4-320-606 (ICAO, Mar. 2, 2000). Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining the claimant’s condition or suggesting further treatment is inconsistent with a finding of MMI. *Abeyta v. WW Construction Management*, W.C. No. 4-356-512 (ICAO, May 20, 2004). Thus, a DIME physician’s findings concerning the diagnosis of a medical condition, the cause of that condition, and the need for specific treatments or diagnostic procedures to evaluate the condition are inherent elements of determining MMI

The party seeking to overcome the DIME physician’s finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, *supra*. “Clear and convincing evidence” is evidence that demonstrates that it is “highly probable” the DIME physician’s rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998); *Lafont v. WellBridge D/B/A Colorado Athletic Club* W.C. No. 4-914-378-02 (ICAO, June 25, 2015). In other words, to overcome a DIME physician’s opinion, “there must be evidence establishing that the DIME physician’s determination is incorrect, and this evidence must be unmistakable and free from serious or substantial doubt.” *Adams v. Sealy, Inc.*, W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appeals Office*, *supra*.

The rating physician’s determination concerning the cause or causes of impairment should include an assessment of data collected during a clinical evaluation and the mere existence of impairment does not create a presumption of contribution by a factor with which the impairment is often associated. *Wackenhut Corp. v. Industrial Claim Appeals Office*, 17 P.3d 202 (Colo. App. 2000).

The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.*, W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); see *Shultz v. Anheuser Busch, Inc.*, W.C. No. 4-380-560 (ICAO, Nov. 17, 2000). Rather it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Oates v. Vortex Industries*, WC 4-712-812 (ICAO, Nov. 21, 2008); *Licata v. Wholly Cannoli Café* W.C. No. 4-863-323-04 (ICAP, July 26, 2016).

Respondents contend Dr. Counts' determination that Claimant was not at MMI was incorrect for several reasons. First, Respondents contend Claimant did not sustain a work-related rotator cuff injury, and therefore any recommended surgery for that condition was not work-related. Next, Respondents contend Dr. Counts' implicit determination that Claimant sustained a work-related elbow injury (by virtue of his assignment of a provisional impairment rating) was incorrect. Finally, Respondents contend that Claimant's ongoing thoracic spine complaints were not work-related. Ultimately, Respondents argue that Dr. Counts' determination that Claimant was not at MMI was incorrect because the conditions that required further evaluation or treatment were not causally related to Claimant's April 20, 2020 work injury. Respondents have met their burden of establishing by clear and convincing evidence that Dr. Counts' DIME opinions are incorrect in some respects, and have not met their burden in others, as discussed below.

CAUSATION AND RELATEDNESS OF SHOULDER INJURY

Because the determination of whether Dr. Counts' opinions were correct is dependent upon whether his opinions on causation are correct, the ALJ first addresses those issues, before turning to the issue of MMI.

With respect to Claimant's shoulder, Dr. Counts diagnosed Claimant with a right shoulder strain, aggravation of underlying rotator cuff tendinosis, and impingement syndrome of the right shoulder. He did not opine that Claimant's rotator cuff pathology was caused by the April 20, 2018 work injury. The Claimant's medical records support Dr. Counts' opinions.

Despite what appeared to be a benign examination, Dr. Long Miller diagnosed Claimant with an "injury of right shoulder" at his initial visit and referred Claimant to physical therapy for improvement of motion and functionality of his shoulder. Various other providers identified areas of pain and limited mobility in Claimant's shoulder area, including the infraspinatus, supraspinatus, rhomboid, levator scapula, medial scapula, trapezius, and rotator cuff. Although Dr. Failinger testified that the mechanism of injury would not cause a shoulder injury, other providers did determine that Claimant sustained a shoulder sprain, and injury to the shoulder musculature. With respect to Claimant's shoulder impingement, Dr. Mann, Dr. Brodie, and Dr. Kruse each noted that Claimant showed signs of shoulder impingement on testing. Claimant's July 19, 2018 MRI showed a minimally subluxing biceps tendon complex. The ALJ does not find that the evidence unmistakable and free from serious or substantial doubt that Dr. Counts' opinion that Claimant sustained a shoulder impingement is incorrect. The ALJ also finds that

Respondents' have not established by clear and convincing evidence that Dr. Counts' opinion that Claimant sustained a work-related shoulder strain that aggravated underlying rotator cuff tendinosis was incorrect. Although Dr. Counts did not diagnose Claimant with a rotator cuff tear, the ALJ finds the evidence clear and convincing that Claimant did not sustain a rotator cuff tear as a result of his April 20, 2020 work injury.

CAUSATION AND RELATEDNESS OF ELBOW INJURY

Respondents have established by clear and convincing evidence that the DIME physician's determination that Claimant sustained an elbow injury as the result of his April 20, 2018 work injury was incorrect.

Dr. Counts assigned a 2% impairment rating for Claimant's right elbow for normalized range of motion deficits. The evidence is free from substantial doubt that Claimant sustained no work-related injury that contributed to any range of motion deficits in Claimant's right elbow. The only references to Claimant's elbow contained in the medical records are references in Dr. Long Miller's records in which Claimant denied issues with his elbow, and one reference in Dr. Brodie's records where the Claimant reported tingling below the elbow. As Dr. Failinger noted, although Claimant's elbow could possibly have been strained as a result of lifting a gurney, there has been no report of any elbow discomfort or distal biceps discomfort. No physician has diagnosed Claimant with an elbow injury, nor has any physician opined that any work-related injury Claimant sustained affected the range of motion in his elbow.

CAUSATION AND RELATEDNESS OF THORACIC INJURY

Dr. Counts also diagnosed Claimant with a thoracic strain. In his initial report, Dr. Failinger indicated that the Claimant's injury was likely a right upper thoracic/rhomboid strain, which he later referred to as a thoracic strain. Again, Claimant's treating providers noted pain tenderness and spasms in Claimant's thoracic musculature. While Dr. Counts did recommend a thoracic MRI which he characterized as useful to evaluate causation, he also noted that Claimant's impairment rating could be higher if moderate-to-severe thoracic pathology were identified on MRI. The ALJ finds that the evidence is not unmistakable and free from serious or substantial doubt that Dr. Counts' opinion that Claimant sustained a thoracic strain is incorrect.

MMI

Dr. Counts' report indicates that he found Claimant not at MMI for two reasons: First, that Claimant's shoulder required surgery; and second, that further evaluation of Claimant's thoracic spine injury was necessary. Both Dr. Counts and Dr. Failinger agreed that further evaluation of Claimant's thoracic spine was reasonable. The ALJ finds that Respondents have failed to establish by clear and convincing evidence that Dr. Counts' opinion that Claimant was not at MMI with respect to his thoracic spine was incorrect.

As found, Respondents have not established by clear and convincing evidence that Dr. Counts' opinion that Claimant sustained a shoulder strain and impingement was

incorrect. Dr. Counts' determination that Claimant was not at MMI was based, in part, on the opinion that surgery on Claimant's shoulder to include a subacromial decompression with probable distal clavicle resection and arthroscopic debridement of the rotator cuff. Although rotator cuff debridement is not causally related to Claimant's work injury, the ALJ infers from Dr. Counts' report, and Dr. Mann's recommendation for subacromial decompression and distal clavicle resection would be considered to address the Claimant's shoulder impingement. Dr. Failing did not specifically address whether consideration of a shoulder decompression at the time of Dr. Counts' DIME was reasonable. In addition, Dr. Mann indicated that surgery on Claimant's shoulder would help objectively identify the Claimant's shoulder pathology, which would further define the Claimant's condition. Because further evaluation and treatment was recommended which would further define or further treat Claimant's condition, the ALJ finds that the evidence is not unmistakable and free from serious or substantial doubt that Dr. Counts' opinion that Claimant was not at MMI with respect to his shoulder strain and shoulder impingement was incorrect.

Respondents have failed to establish by clear and convincing evidence that Dr. Count's opinion that Claimant was not at MMI with respect to his shoulder strain, shoulder impingement and thoracic strain was incorrect.

Impairment Ratings

Because Respondents have not overcome the DIME's opinion on MMI, Dr. Counts' non-binding, provisional impairment rating is not subject to review.

Appeal Of PALJ Ruling Re Rule 11-7 Follow Up DIME

Respondents contend Claimant lacked the legal authority to request an FUD because WCRP 11-7(A) does not provide a mechanism for a claimant to request an FUD, and that the authority and responsibility for requesting, scheduling, and paying for an FUD rests with respondents. Respondents also argue that the PALJ exceeded her authority in denying Respondents' motions and ordering a Rule 11-7 FUD because the determination of whether Claimant had "complete[d] all additional recommended treatment" requires a determination of fact beyond the authority of the prehearing unit. Respondents are technically correct.

At issue is Claimant's request for a FUD pursuant to WCRP 11-7 (A), which provides:

If a DIME physician determines that a claimant has not reached MMI and recommends additional treatment, a follow-up DIME examination shall be scheduled with the same DIME physician, unless the physician is unavailable or declines to perform the examination. The insurer shall file the Follow-Up DIME form after the claimant completes all additional recommended treatment.

Rule 11-7(A) does not provide a mechanism for a Claimant to unilaterally request an FUD. As such, Claimant's lacked the legal authority to unilaterally request an FUD, based on Claimant's contention that all recommended treatment had been completed.

The PALJ's determination of Claimant's motion to compel Respondents to request a FUD under Rule 11-7 necessarily required the PALJ to make the factual findings that the DIME had placed Claimant at MMI, and that all recommended treatment had been completed. Section 8-43-207.5, C.R.S., provides that the issues addressed in a prehearing conference before a PALJ are limited to: "Ripeness of legal, but not factual, issues for formal adjudication on the record before the director or an administrative law judge in the office of administrative courts; discovery matters; and evidentiary disputes."

As found, the DIME physician did not place Claimant at MMI and recommended additional treatment including surgery, and additional diagnostic testing of Claimant's thoracic spine. Once Dr. Mann rescinded his surgical recommendation, that treatment was effectively "completed." Claimant also completed the diagnostic studies related to his thoracic spine. However, this determination could not be made by the PALJ in the context of a prehearing conference because it required the resolution of factual issues. Because the PALJ's ruling required a determination of disputed evidence, the PALJ's ruling was in premature.

Notwithstanding, the evidence demonstrates that Dr. Counts' found Claimant was not at MMI and recommended additional treatment. Claimant completed this additional recommended treatment. Although Claimant is not empowered by Rule 11-7 to unilaterally request a FUD, the criteria for a Rule 11-7 Follow Up DIME are met. Consequently, the ALJ grants Claimant's Motion to Compel Respondents to request a Rule 11-7 Follow Up DIME.

ORDER

It is therefore ordered that:

1. Respondents have established by clear and convincing evidence that the DIME physician's determination that Claimant sustained a work-related injury to his right elbow was incorrect.
2. Respondents have not established by clear and convincing evidence that the DIME physician's determination that Claimant sustained a shoulder strain, shoulder impingement and thoracic strain as the result of his April 20, 2018 work-injury was incorrect.
3. Respondents' have not established by clear and convincing evidence that the DIME physician's opinion that Claimant was not at maximum medical improvement with respect to his shoulder strain, shoulder impingement and thoracic strain was incorrect.

4. Claimant's motion to compel Respondents to request a DIME follow up under WCRP 11-7 is granted.
5. All matters not determined herein are reserved for future determination.

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



DATED: December 14, 2020.

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUE

1. Whether Claimant established by a preponderance of the evidence that the Division Independent Medical Examination (DIME) Robert Kawasaki, M.D., incorrectly failed to assign Claimant an impairment rating for a distal clavicle coplaning procedure or subacromial decompression.
2. Whether Claimant established by clear and convincing evidence that Dr. Kawasaki incorrectly failed to assign Claimant a cervical spine impairment rating.
3. Whether Claimant's work-related permanent impairment is properly calculated based on the schedule set out in Section 8-42-107(1)(a), C.R.S., or based on the whole person pursuant to Section 8-42-107(8), C.R.S.
4. Whether Claimant is entitled to medical maintenance care.
5. Whether Claimant is entitled to disfigurement benefits.

FINDINGS OF FACT

1. Claimant has been employed by Employer as an assembler since 1969. Claimant's date of birth is April 13, 1947, and she is currently 73 years old.
2. On June 1, 2018 Claimant sustained an admitted injury to her left shoulder arising out of the course of her employment with employer.
3. Claimant initially received conservative therapy under the supervision of authorized treating physician Matt Miller, M.D., at Front Range Occupational Medicine. Conservative treatment included physical therapy at Fast Forward Physical Therapy.
4. Claimant saw Dr. Miller on July 5, 2018, July 16, 2018, July 22, 2018, at each visit, Dr. Miller documented Claimant's complaints of pain and symptoms in her left shoulder. Dr. Miller did not document complaints of cervical spine pain or restriction of motion in Claimant's cervical spine. Dr. Miller diagnosed Claimant with unspecified injury to a muscle/tendon of the rotator cuff. On August 22, 2018, Dr. Miller referred Claimant to Michael Hewitt, M.D., an orthopedic surgeon for evaluation of her left shoulder.
5. After evaluation, Dr Hewitt diagnosed Claimant with left shoulder partial-thickness rotator cuff tear, subacromial impingement and acromioclavicular arthropathy. He recommended Claimant undergo left shoulder surgery. (Ex. 6).
6. On December 5, 2018, Dr. Hewitt performed arthroscopic surgery on Claimant's left shoulder. The procedures performed included left shoulder arthroscopic

rotator cuff repair, left shoulder arthroscopic subacromial decompression, distal clavicle coplaning, and biceps tenolysis. Dr. Hewitt's post-operative diagnosis was left shoulder high-grade partial thickness rotator cuff tear (supraspinatus 90% undersurface tear); subacromial impingement; acromioclavicular arthropathy, and mild biceps tendinopathy with superior labral tear. (Ex. 6).

7. Claimant underwent physical therapy both before and after surgery. Physical therapy records admitted into evidence demonstrate that Claimant's physical therapy treatments were directed to her left shoulder. (Ex. 4).

8. On May 15, 2019, Dr. Miller placed Claimant at maximum medical improvement and assigned Claimant a 10% upper extremity rating for acromioclavicular decompression, and 10% impairment for upper extremity range of motion deficits, for a combined upper extremity rating of 20%. The upper extremity rating converts to a 12% whole person impairment. Dr. Miller indicated that he did not anticipate any ongoing medical needs. Claimant was returned to regular work duty without restriction. (Ex. 5).

9. Subsequently, Claimant requested a Division Independent Medical Examination (DIME), which was performed by Robert Kawasaki, M.D., on November 19, 2019, and a report was issued on December 8, 2019. Dr. Kawasaki agreed that Claimant reached MMI on May 15, 2019. He assigned Claimant a left upper extremity rating of 13% which converts to a 8% whole person impairment. (Ex. A).

10. Claimant reported to Dr. Kawasaki that she had stiffness in her shoulder and pain into her deltoid region. Claimant reported her neck was not injured although she had some neck pain that started 3 to 4 weeks prior to the DIME examination. Dr. Kawasaki's assessment was a left shoulder rotator cuff repair. He noted there was no indication of a specific injury to the cervical spine, and that the recent onset neck pain was unrelated to Claimant's workers' compensation claim. Dr. Kawasaki found no disorders for the Claimant's left shoulder beyond range of motion loss. Dr. Kawasaki wrote that Claimant's surgery included a distal clavicle coplaning which consisted of a shaving off a bone spur which was inferiorly directed from the distal clavicle. He noted that it was not an actual excision of the distal clavicle affecting the acromioclavicular joint, and therefore no impairment for distal clavicle excision was applicable. Dr. Kawasaki also indicated that Claimant should continue independent exercises for her shoulder strength and range of motion, and that no other specific maintenance medical care was apparently needed. (Ex. A).

11. On April 20, 2020, Claimant underwent an independent medical examination performed by Caroline Gellrick, M.D., at Claimant's request. Dr. Gellrick is board certified in Addiction Medicine and Level II accredited. Dr. Gellrick agreed with Dr. Kawasaki's assessment that Claimant was at MMI on May 15, 2019. Dr. Gellrick opined Claimant had a 16% upper extremity impairment rating (12% for range of motion deficits and a 5% for coplaning of the distal clavicle), which converts to a 10% whole person impairment. Dr. Gellrick also opined that Claimant has a 7% whole person impairment for cervical range of motion deficits, which she attributed to Claimant's left shoulder surgery. The combined left upper extremity and cervical spine impairment ratings

assigned by Dr. Gellrick Claimant's convert to a 16% whole person impairment. Dr. Gellrick did not opine that Claimant should receive an additional impairment rating for the subacromial decompression procedure performed by Dr. Hewitt. (Ex. 8).

12. Dr. Gellrick diagnosed Claimant with a left shoulder strain with loss of ROM, a supraspinatus tear, AC joint arthropathy, subacromial impingement, biceps tendinopathy, and SLAP tear. In addition, she diagnosed Claimant with "persistent pain radiating to the cervical spine with cervical spine tenderness with no separate injury on the job of the c-spine with loss of ROM." Dr. Gellrick's report indicates she attributed these conditions to Claimant's June 1, 2018 work injury. (Ex. 8)

13. Dr. Gellrick opined that a distal clavicle coplaning impairment rating, in addition to loss of shoulder motion, was appropriate. Dr. Gellrick indicated, based on past discussions with Dr. Hewitt, Claimant's shoulder surgery was not an extensive Mumford repair which takes 8-10mm of the distal clavicle, but a procedure to smoot out a sharp point to avoid disruption of a rotator cuff repair. Dr. Gellrick stated: "Dr. Hewitt has advised this examiner in the past this is considered for any impairment rating of zero to 5%, but not the full 10% of a distal clavicle repair." Dr. Gellrick wrote that her familiarity with the procedure was (apparently entirely) based on her past discussions with Dr. Hewitt. Dr. Gellrick acknowledged that Dr. Kawasaki's decision not to assign an impairment rating for distal clavicle coplaning followed the "strict Guidelines put forth with the Third Edition AMA Guides and the DOWC of Colorado." Dr. Gellrick noted that "Opinions of different DIME doctors can be seen to go either way as far as rating of clavicle or subacromial arthroplasty or not. In this case, Dr. Kawasaki stuck with upper extremity loss of function distally, not proximal. This examiner respectfully disagrees with Dr. Kawasaki, the patient has lost function proximally with the use of the L arm and L shoulder as is reflected if nothing else in the ROM loss." (Ex. 8)

14. Dr. Gellrick opined that she "respectfully disagrees with the opinions of Dr. Kawasaki" concerning the assignment of a cervical spine impairment rating. Dr. Gellrick relied upon the statement in Desk Aid 11 (Ex. 9), that in unusual cases with shoulder pathology, isolated cervical ROM can be considered without a Table 53 impairment. She indicated that Claimant had severe muscle spasm and tenderness in her cervical spine from the left shoulder surgery "which should be considered without a specific disorder." (Ex. 8)

15. Dr. Gellrick recommended maintenance treatment because Claimant is trying to work full duty and has been on her job for 51 years. She recommended periodic massage therapy, acupuncture, and dry needling for trapezius spasms, which she indicated were precipitated from the left shoulder toward the neck causing loss of cervical range of motion. (Ex. 8)

16. Claimant testified that when she returned to work, she was given and continued to work in a lighter job than she was doing at the time of her injury. Claimant credibly testified that she favors her left arm and avoid lifting her left arm, although she does not have difficulty using her left arm. She credibly testified that she has difficulty

with activities including curling her hair, bathing, dressing, reaching overhead, carrying groceries, and lifting her grandchildren.

17. Claimant testified that she has three surgical scars from her December 2018 surgery on her left arm. The scars are located on the outside and top of Claimant's left shoulder, consisting of arthroscopic punctures, measuring approximately one inch per scar. (Ex. 3). The ALJ finds Claimant should be awarded \$600.00 for disfigurement.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. See § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. See § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id.* at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Overcoming DIME Regarding Impairment Rating

Claimant seeks to overcome the DIME physician's impairment rating in several respects. First, Claimant asserts she is entitled to a whole person impairment for loss of range of motion to her cervical spine. Next, Claimant argues her left upper extremity impairment rating should include an additional impairment based on the distal clavicle coplaning procedure and/or subacromial decompression performed by Dr. Hewitt. Finally, Claimant seeks conversion of the assigned impairment rating to a whole-person impairment.

Cervical Spine Impairment Rating

The finding of a DIME physician concerning a claimant's medical impairment rating shall be overcome only by clear and convincing evidence. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995); *Lafont v. WellBridge D/B/A Colorado Athletic Club* W.C. No. 4-914-378-02 (ICAO, June 25, 2015).

As a matter of diagnosis, the assessment of permanent medical impairment inherently requires the DIME physician to identify and evaluate all losses that result from the injury. *Mosley v. Industrial Claim Appeals Office*, 78 P.3d 1150 (Colo. App. 2003); *Sharpton v. Prospect Airport Services* W.C. No. 4-941-721-03 (ICAO, Nov. 29, 2016). Consequently, a DIME physician's finding that a causal relationship does or does not exist between an injury and a particular impairment must be overcome by clear and convincing evidence. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998); *Watier-Yerkman v. Da Vita, Inc.* W.C. No. 4-882-517-02 (ICAO Jan. 12, 2015); Compare *In re Yeutter*, 2019 COA 53 ¶ 21 (determining that a DIME physician's opinion carries presumptive weight only with respect to MMI and impairment). The rating physician's determination concerning the cause or causes of impairment should include an assessment of data collected during a clinical evaluation and the mere existence of impairment does not create a presumption of contribution by a factor with which the impairment is often associated. *Wackenhut Corp. v. Industrial Claim Appeals Office*, 17 P.3d 202 (Colo. App. 2000).

The questions of whether the DIME physician properly applied the *AMA Guides*, and ultimately whether the rating was overcome by clear and convincing evidence present questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office*, 17 P.3d 202 (Colo. App. 2000); *Paredes v. ABM Industries* W.C. No. 4-862-312-02 (ICAO, Apr. 14, 2014). A mere difference of opinion between physicians does not necessarily rise to the level of clear and convincing evidence. See *Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-36 (ICAO, Mar. 22, 2000); *Licata v. Wholly Cannoli Café* W.C. No. 4-863-323-04 (ICAO, July 26, 2016).

Claimant has failed to prove by clear and convincing evidence that Dr. Kawasaki's determination that Claimant did not have a work-related cervical spine impairment was incorrect. Claimant argues that the absence of a specific Table 53 diagnosis does not preclude a cervical range of motion impairment under the DOWC Desk Aid #11 - Impairment Rating Tips, based on the statement under Spinal Rating 1 – that "In unusual cases with established severe shoulder pathology accompanied by treatment of the cervical musculature, an isolated cervical range of motion impairment is allowed if it is well justified by the clinician. Otherwise, there are no exceptions to the requirement for a corresponding Table 53 rating." Claimant's argument rests on the premise that Claimant had severe shoulder pathology accompanied by treatment of the cervical musculature.

Dr. Kawasaki specifically addressed a cervical spine impairment, stating there was no indication for any cervical spine injury associated with Claimant's claim. Dr. Kawasaki indicated that Claimant's neck condition was of recent origin and not work-related. Accordingly, he did not provide an impairment rating for the cervical loss of range of motion. His conclusion is supported by Claimant's medical records.

Contrary to Claimant's assertion, the evidence does not demonstrate that Claimant developed neck pain and loss of range of motion of her cervical spine related to her left shoulder work injury. The evidence demonstrates that Claimant saw Dr. Miller on five occasions following her injury. Dr. Miller's records do not reflect any complaints of neck or cervical pain, or any range of motion deficits in Claimant's cervical spine, and that all examinations and treatment were geared toward Claimant's left shoulder. Similarly, the physical therapy records admitted into evidence also demonstrate treatment and complaints related to Claimant's left shoulder, with no indication of injury or impairment to Claimant's cervical spine. Dr. Hewitt's records do not include any mention of issues with Claimant's cervical spine. Although both Dr. Kawasaki and Dr. Gellrick reference Dr. Hewitt's August 17, 2018 evaluation in which Claimant's cervical spine showed mild restriction in rotation, the record was not admitted into evidence, and the evidence does not demonstrate that Dr. Hewitt attributed Claimant's then-existing mild restriction to her work-related shoulder injury. Claimant reported to Dr. Kawasaki that her cervical spine pain began three to four weeks prior to his evaluation and was not work related.

Dr. Gellrick's report states that Claimant had severe muscle spasms and tenderness in the cervical spine from the left shoulder as of the date of her examination, and she includes "persistent pain radiating to the cervical spine with cervical spine tenderness with no separate injury on the job of the C-spine with loss of ROM" in her diagnoses. Dr. Gellrick's report does not indicate why she attributed Claimant's cervical range of motion loss to her work-related injury, and her attribution of Claimant's cervical spine condition is not supported by Claimant's contemporaneous records from her treating providers. The ALJ does not find Dr. Gellrick's opinion in this regard credible or persuasive. Dr. Gellrick does not point to a specific error committed by Dr. Kawasaki, and her opinion that the cervical spine should be rated is based on the unsupported opinion that Claimant's cervical spine symptoms are causally related to her work-injury.

Claimant has failed to establish by a preponderance of the evidence that Dr. Kawasaki's determination that Claimant did not have a work-injury-related impairment of her cervical spine was incorrect.

Impairment Rating – Shoulder

The increased burden of proof required by the DIME procedures is not applicable to scheduled injuries, such as Claimant's shoulder. Section 8-42-107(8)(a), C.R.S. states that "when an injury results in permanent medical impairment not set forth in the schedule in subsection (2) of this section, the employee shall be limited to medical impairment benefits calculated as provided in this subsection (8)." Therefore, the procedures set forth in §8-42-107(8)(c), C.R.S., which provide that the DIME findings must be overcome by clear and convincing evidence, are applicable only to non-scheduled injuries. The court of appeals has explained that scheduled and non-scheduled impairments are treated differently under the Act for purposes of determining permanent disability benefits. Specifically, the procedures of § 8-42-107(8)(c), C.R.S. only apply to non-scheduled impairments. *Delaney v. Industrial Claim Appeals Office*, 30 P.3d 691, 693 (Colo. App. 2000); *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998); *Gagnon v. Westward Dough Operating CO. D/B/A Krispy Kreme* W.C. No. 4-971-646-03 (ICAO, Feb. 6, 2018). Claimant has the burden of showing the extent of her scheduled impairment by a preponderance of the evidence. *Burciaga v. AMB Janitorial Services, Inc., and Indemnity Care ESIS Inc.*, W.C. No. 4-777-882 (ICAO, Nov. 5, 2010); *Maestas v. American Furniture Warehouse and G.E. Young and Company*, W.C. No. 4-662-369 (ICAO, June 5, 2007).

Claimant has not met her burden of establishing that she is entitled to an additional impairment rating based on the distal clavicle coplaning or subacromial decompression procedure. The DOWC Desk Aid #11 – Impairment Rating Tips (updated July 2020), states that "Providers may assign up to 10% upper extremity impairment for distal clavicular resection/excision." The evidence establishes that Dr. Hewitt did not perform a distal clavicular resection or excision, but a distal clavicle coplaning. Dr. Kawasaki indicated there only a resection of inferiorly directed distal clavicle exostosis was performed and not an actual excision of the distal clavicle affecting the acromioclavicular joint therefore the distal clavicle excision impairment did not apply. Dr. Gellrick's opinion on the nature of the procedure performed appears to be based entirely on her past discussions with Dr. Hewitt regarding similar procedures on other patients. Dr. Gellrick's report acknowledges that the procedure Claimant underwent was not a distal clavicle resection, but "coplaning to smooth out a sharp point..." Dr. Gellrick's opinion that a separate impairment rating is appropriate is also based on a past conversation with Dr. Hewitt. Given that Dr. Gellrick's opinion is apparently based on past conversations with Dr. Hewitt that were not directly related to Claimant, the ALJ does not find her opinions persuasive.

Claimant's argument that Dr. Kawasaki incorrectly interpreted the Desk Aid as prohibiting the assignment of an impairment rating, rather than giving the rating physician discretion to assign up to a 10% impairment rating is not persuasive. As acknowledged by Dr. Gellrick, Dr. Kawasaki strictly applied the AMA Guidelines. Again, although Dr.

Gellrick disagrees with Dr. Kawasaki's opinion, she does not identify any deviation from the AMA Guidelines or the Impairment Rating Tips.

With respect to Claimant's subacromial decompression, Claimant has failed to establish she is entitled to an additional impairment rating for the procedure. The July 2020 DOWC Desk Aid #11 – Impairment Rating Tips, provides: "In general, subacromial arthroplasty (a term used to describe acromioplasty or subacromial decompression) should be rated using range of motion. There are some situations when loss of range of motion alone may not adequately represent the extent of the impairment following subacromial arthroplasty. In those cases, up to 10% upper extremity impairment may be assigned. Make sure the rationale is provided in the report." (Ex. 9). Based on the DOWC's Impairment Rating Tips, Claimant would only qualify for an additional impairment rating based on the subacromial decompression if her functional impairment resulting from the procedure was not adequately represented by the associated loss of range of motion. Although Dr. Miller assigned a 10% impairment rating for the procedure, his report contains no rationale as to why Claimant's range of motion deficits did not adequately represent the impairment from the procedure. Neither Dr. Gellrick nor Dr. Kawasaki specifically addressed the issue, and neither provided a rationale as to why Claimant would be entitled to an impairment rating beyond loss of range of motion.

The ALJ finds that Claimant has failed to establish by a preponderance of the evidence that Dr. Kawasaki incorrectly failed to assign an additional impairment rating for either procedure performed (i.e., distal clavicle coplaning or subacromial decompression).

Conversion of Scheduled Impairment to Whole Person Impairment

Section 8-42-107(1)(a), C.R.S. limits medical impairment benefits to those provided in §8-42-107(2), C.R.S. when a claimant's injury is one enumerated in the schedule of impairments. The schedule includes the loss of the "arm at the shoulder." See §8-42-107(2)(a), C.R.S. However, the "shoulder" is not listed in the schedule of impairments. See *Bolin v. Wacholtz*, W.C. No. 4-240-315 (ICAO, June 11, 1998). When an injury results in a permanent medical impairment not set forth on a schedule of impairments, an employee is entitled to medical impairment benefits paid as a whole person. See §8-42-107(8)(c), C.R.S.

Because §8-42-107(2)(a), C.R.S. does not define a "shoulder" injury, the dispositive issue is whether a claimant has sustained a functional impairment to a portion of the body listed on the schedule of impairments. See *Strauch v. PSL Swedish Healthcare*, 917 P.2d 366, 368 (Colo. App. 1996). Whether a claimant has suffered the loss of an arm at the shoulder under §8-42-107(2)(a), C.R.S., or a whole person medical impairment compensable under §8-42-107(8)(c), C.R.S., is determined on a case-by-case basis. See *DeLaney v. Industrial Claim Appeals Office*, 30 P.3d 691, 693 (Colo. App. 2000).

The ALJ must thus determine the situs of a claimant's "functional impairment." *Velasquez v. UPS*, W.C. No. 4-573-459 (ICAO Apr. 13, 2006). The situs of the functional impairment is not necessarily the site of the injury. See *In re Hamrick*, W.C. No. 4-868-

996-01 (ICAO, Feb. 1, 2016); *In re Zimdars*, W.C. No. 4-922-066-04 (ICAO, Feb. 4, 2015). Pain and discomfort that limit a claimant's ability to use a portion of the body is considered functional impairment for purposes of determining whether an injury is off the schedule of impairments. *In re Johnson –Wood*, W.C. No. 4-536-198 (ICAO, June 20, 2005); *Vargas v. Excel Corp.*, W.C. 4-551-161 (ICAO, Apr. 21, 2005). However, the mere presence of pain in a portion of the body beyond the schedule does not require a finding that the pain represents a functional impairment. *Lovett v. Big Lots*, WC 4-657-285 (ICAO, Nov. 16, 2007); *O'Connell v. Don's Masonry*, W.C. 4-609-719 (ICAO, Dec. 28, 2006).

Claimant bears the burden of proof by a preponderance of the evidence to establish functional impairment beyond the arm at the shoulder and the consequent right to PPD benefits awarded under § 8-42-107(8)(c), C.R.S. Whether Claimant met the burden of proof presents an issue of fact for determination by the ALJ. *Delaney v. Industrial Claim Appeals Office*, 30 P.3d 691 (Colo. App. 2001); *Johnson-Wood v. City of Colorado Springs*, W.C. No. 4-536-198 (ICAO June 20, 2005). *In re Claim of Barnes*, 042420 COWC, 5-063-493 (ICAO, April 24, 2020).

Claimant has failed to establish by a preponderance of the evidence that her scheduled impairment rating for loss of use of the arm below the shoulder should be converted to a whole person impairment. The evidence at hearing demonstrated that Claimant experiences difficulty using her left arm, including using it above shoulder height, lifting things and household chores. Claimant described her difficulties as being related to her left arm. None of Claimant's treating providers documented any impairment beyond her left shoulder. Dr. Kawasaki expressly stated that Claimant had no disorders of the left shoulder beyond range of motion loss. Only Dr. Gellrick attributes Claimant's cervical spine range of motion loss to her work injury, although no persuasive rationale for this opinion was offered. The evidence does not establish that Claimant sustained any functional loss beyond her left shoulder. As such, Claimant is limited to the medical impairment benefits specified in § 8-42-107(2)(a), C.R.S.

Maintenance Medical Care (Grover Medicals)

The need for medical treatment may extend beyond the point of MMI where claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Hanna v. Print Expeditors Inc.*, 77 P.3d 863, 865 (Colo. App. 2003); *Hobirk v. Colorado Springs School District #11*, W.C. No. 4-835-556-01 (ICAO, Nov. 15, 2012). An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that the claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1999); *Hastings v. Excel Electric*, W. C. No. 4-471-818 (ICAO, May 16, 2002). The claimant must prove entitlement to *Grover* medical benefits by a preponderance of the evidence. *Lerner v. Wal-Mart Stores, Inc.*, 865 P.2d 915 (Colo. App. 1993); *Mitchem v. Donut Haus*, W.C. No. 4-785-078-03 (ICAO, Dec. 28, 2015). An award of *Grover* medical benefits should be general in nature. *Hanna v. Print Expeditors Inc.*, 77 P.3d 863 (Colo.

App. 2003); *Anderson v. SOS Staffing Services*, W. C. No. 4-543-730, (ICAO, July 14, 2006).

Claimant has failed to establish by a preponderance of the evidence an entitlement to maintenance medical care. When he placed Claimant at MMI, Dr. Miller opined that future medical care was not anticipated. Similarly, Dr. Kawasaki opined that although Claimant would need to continue with independent range of motion and strength exercises for her shoulder, she was not on any medications for her left shoulder and there did not appear to be any specific maintenance needs. Dr. Gellrick opined that Claimant would benefit from treatment, to include massage therapy, acupuncture, and dry needling, which would be directed at Claimant's neck and cervical spine symptoms. Because the care recommended by Dr. Gellrick is directed at Claimant's non-work-related cervical spine condition, the treatment is not reasonably necessary to relieve the effects of her work-related shoulder injury or to prevent further deterioration of that condition. Accordingly, the ALJ finds that Claimant has failed to establish by a preponderance of the evidence that such maintenance care is appropriate.

Disfigurement

Section 8-42-108(1) provides that a claimant is entitled to additional compensation if he is "seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view." As found, Claimant has sustained disfigurement as a direct and proximate result of her work injury, consisting of three approximately one-inch scars on her left shoulder. Claimant should be awarded \$600.00 for disfigurement.

ORDER

It is therefore ordered that:

1. Claimant's request for an additional upper extremity impairment rating or distal clavicle coplaning and/or subacromial decompression is denied.
2. Claimant's request for a whole person impairment based on loss of range of motion of the cervical spine is denied.
3. Claimant's request to convert the 13% scheduled impairment for loss of use of the left arm below the shoulder to a whole person impairment rating is denied.
4. Claimant's request for maintenance medical care is.
5. Claimant is entitled to disfigurement benefits in the amount of \$600.00.
6. All matters not determined herein are reserved for future determination.

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



DATED: December 16, 2020

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

- I. Have Respondents, by clear and convincing evidence, overcome the DIME opinion of Dr. Watson, on the issue of Maximum Medical Improvement?
- II. If said DIME opinion has not been overcome, has Claimant shown, by a preponderance of the evidence, that the treatment/diagnostics recommended by Dr. Watson are reasonable, necessary, and related to his work injury.

PROCEDURAL BACKGROUND

A hearing between these parties was held in case WC 5-034-654-002 on September 12, 2019 by the undersigned ALJ. (a copy of the Order issued in connection has been admitted as Exhibit L in this case). The sole issue before the ALJ in that case was the reasonableness, necessity, and relatedness of the lumbar fusion surgery for Claimant's work injury of 12/6/2016. On December 3, 2019, this ALJ found that Claimant had not proven, by a preponderance of the evidence, that said proposed lumbar fusion surgery was reasonable and necessary, nor had he shown that it was related to the work injury.

Shortly after the ALJ issued his ruling (which was not appealed), the ATP, Dr. Daniel Olson, placed Claimant at MMI on January 20, 2020. A Whole Person Impairment rating of 27% was provided. Respondents then filed a FAL consistent with the ATP's report. Claimant then requested a DIME examination, which was performed by Dr. William Watson, MD on June 9, 2020. On June 9, 2020, Dr. Watson issued his DIME report, finding that Claimant was **not at MMI** (but providing a provisional Whole Person Impairment rating of 25%), by finding that Claimant's complaints in fact **were work-related**, and recommending a new CT myelogram and EMG study. Pending the results therefrom, he might recommend surgery. Respondents then filed this Application for Hearing.

At this time, the ALJ will take administrative notice of his prior Order in WC 5-034-654-002. Furthermore, the ALJ will re-adopt and incorporate by reference, all Findings of Fact 1 through 37, inclusive, but make Additional Findings of Fact, below. Consistent with the new issues and new evidence before the ALJ in this matter, entirely new Conclusions of Law will issue.

ADDITIONAL FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Additional Findings of Fact:

The DIME Examination

1. Dr. William Watson, MD, performed his DIME examination on June 9, 2020. He issued his written report that same date, finding that Claimant's lumbar complaints were work related, and finding Claimant not to be at MMI. The narrative portion of the report is over 15 pages, single-spaced. Claimant's medical history is detailed from at least 2008. Greater attention is provided to the medical care Claimant received after the work injury of 12/6/2016. Considerable time is devoted to his analysis of the competing opinions of Drs. Rauzzino and Castrejon.

2. The DIME notes, under Pertinent Issues from the Records:

The examinee returned to see Dr. Daniel Olson on December 30, 2019. Followup for low back pain. *He did hear form (sic) the judge and it was not favorable for him. The judge ruled against surgery.* He was given Toradol 60 mg IM. (Ex 1, p. 14)(emphasis added).

3. The DIME further notes, under Pertinent Medical Issues:

The examinee continues to have pain in the lower lumbar spine. He has pain going down both legs. On the right it is in the L5-S1 distribution and on the left down into the anterior aspect of the ankle and foot. He states that these are much like the symptoms he had before his injury on the left side which required a spinal cord stimulator. (Ex. 1, p. 15).

4. Under Discussion of Diagnostic Testing, the DIME notes that Claimant has had numerous CT myelograms of his lumbar spine, the most recent of which was on 8/23/2018. This revealed mild to moderate spinal stenosis at L4-L5, and mild to moderate foraminal stenosis also noted. At L5-S1 there was degenerative disc bulging, resulting in in mild spinal and moderately advanced bilateral foraminal stenosis.

5. Also noted under Diagnostic Testing:

An EMG evaluation done of February 18, 2019 by Dr. Dwight Caughfield did show chronic right L5-S1 radiculopathy with scattered small PSW/fibs and polyphasics however the presence of large PSWs in the peroneal would imply some ongoing axonal loss. *He recommended imaging correlation. Id at 16* (emphasis added).

6. Under Date and Discussion of MMI, the DIME stated:

I do not believe this individual is at maximal medical improvement. I believe further treatment is indicated.

The examinee prior to his injury of December 6, 2016 was having no spinal pain. He had never had radiation of the pain into the right leg only into the left. His EMG evaluation did specifically point to an L5-S1 chronic radiculopathy, however Dr. Dwight Caughfield said there may be evidence of ongoing axonal loss. Within reasonable medical probability I believe further care is indicated. *Id* at 16. (emphasis added).

7. Under Rationale for your Decision, the DIME states, in pertinent part:

....I believe he may be a candidate for further treatment and possible surgical intervention. I do believe that within reasonable medical probability *the accident [of 12/6/2016] was a new injury*. He of course had degenerative changes prior to this *but was not having any difficulty*.....He has not had a CT myelogram since August 23, 2018. *I would repeat this study and also his EMG with Dr. Caughfield*. After these are accomplished I would like to review them prior to making recommendations regarding possible surgical intervention. *Id* at 17 (emphasis added).

Dr. Rauzzino's Deposition

8. Dr. Michael Rauzzino was deposed on 11/2/2020. He testified that he 'believed' he had reviewed this ALJ's original Order in this case. However, he was not familiar with the DIME physician, Dr. Watson, nor had he reviewed the DIME report. However, he was asked if the medical records were consistent with certain general propositions put forth in the DIME report. He stated that the records were not consistent with Claimant not having spinal pain prior to the work injury, nor with radicular pain down only one leg prior to the injury.
9. Dr. Rauzzino felt that there was no structural basis to conclude that the work injury caused Claimant's bilateral symptoms. However, when asked his opinion about the results of the 2/18/2019 EMG as interpreted by Dr. Watson, he stated he had not seen such report, and it would have been 'greatly helpful' to have seen such report prior to opining on it. However, he still indicated that a repeat of such EMG would not be of assistance, since his complaints are not work-related. He also indicated that he had not seen the medical records from Dr. Lazar, who had performed lumbar surgery on Claimant in 2008. He was unaware whether such surgery was intended to address Claimant's right side or left side.

10. In the final analysis, Dr. Rauzzino did not believe that Claimant's complaints are truly radicular in nature; rather, they are too diffuse, and are the result of a diffuse somatic complaint, and without a corresponding motor deficit.

Dr. Watson's Deposition

11. The DIME physician, Dr. Watson, was deposed on 11/12/2020. He is level II accredited, and is board certified in Orthopedics. He is no longer actively performing surgeries; instead he sees primarily non-operative cases, and performs pre- and post-operative cases for Dr. Danylchuk. He also performs perhaps one to two IMEs per week [the record is unclear if said IMEs were generally on behalf of Insurers, injured parties, some of both, or for the Division].
12. Dr. Watson reviewed the process of conducting this DIME exam, and the results he reached. He lauded Dr. Caughfield's expertise, and opined that Claimant's pain generator, based on his report, was at L4-L5 and L5-S1, right side. He was familiar with Dr. Castrejon's and Dr. Rauzzino's opinions, but reiterated his belief that this was a new injury [of 12/6/2016], and that further diagnostics (EMG and CAT scan) were warranted. Depending on those results, he might recommend surgery. Alternatively, he might recommend physical therapy, facet blocks, epidural steroid injections, or medial branch blocks.
13. When asked on cross-examination if he was aware of certain facts, he acknowledged that he was unaware that this ALJ had previously ruled that the surgery was not related to the work injury, nor had he seen the ALJ's Order. [However, this ALJ notes in Fact #2 above, that the DIME report itself *did* note that the ALJ had declined the surgery request]. He acknowledged that he had not seen any deposition transcripts or hearing testimony from Drs. Rauzzino, Castrejon, Bess, or the Claimant. He only reviewed what had been provided to him.
14. When then asked if having this ALJ's opinion might change his conclusions, he concluded thusly:
- If he had information about the patient *that directly contraindicated the medical records* that I received, then it would make a difference. I would be interested in that. But if he had all the information, you know – in other words, no. I respect lay people's opinion about medical things. I don't think it's an exclusive thing for doctors, but I just guess, I don't know. (Depo transcript, pp. 15-16)(emphasis added).
15. When asked if, based on similar medical records, the ALJ's opinion would change his opinion, he answered:

No. No, it hasn't. *I reviewed all the records*, and it was my conclusion what my conclusion was. What I have said, though is, the Administrative Law Judge had different material than I had, which, you know, *I haven't been given everything*, obviously, so who knows. It might change my mind. *But if I had all the information that the Administrative Law Judge has, and he said that nothing more should be done, I respectfully disagree with that.* *Id* at p. 16 (emphasis added).

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq.*, is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. §8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. §8-43-201, C.R.S.

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

C. Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the

testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The ALJ finds that Claimant was a reasonably consistent medical historian to his medical providers, and to the IMEs. Further, his hearing testimony is reasonably consistent as well. To allay the concerns of Dr. Watson, the ALJ has seen nothing in the record wherein Claimant has made statements which significantly contraindicate what is in the medical reports.

D. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55, P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968). The ALJ finds that each expert has rendered their opinions to the best of their ability, *based upon the information they were provided-and at the time it was provided*. What is clear from all of this is that, for various reasons, no two of the medical providers has had access to the exact same material, at the time they rendered their opinions. And, it is duly noted that as new information comes in, the target starts moving once again. Opinions can be revised or refined, or perhaps nothing changes. The real issue here is one of *persuasiveness*, in the context of the legal arena. However, in the end, once all the reports are reviewed, and all witnesses are deposed, in sequence, and all witnesses testify, it is the ALJ who has everything there is to be had in each case. Thus falls the burden of making decisions, despite the acknowledged deficit of medical training, compared with even a medical student in his early 20s. This irony is humbly noted, but we forge on.

E. Further, courts are to be "mindful that the Workmen's Compensation Act is to be liberally construed to effectuate its humanitarian purpose of assisting injured workers." *James v. Irrigation Motor and Pump Co.*, 503 P.2d 1025 (Colo. 1972).

Overcoming the DIME Opinion on MMI, Generally

F. The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, *supra*; *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998); *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186, 189-190 (Colo. App. 2002); *Sholund v. John Elway Dodge Arapahoe*, W.C. No. 4-522-173 (ICAO October 22, 2004); *Kreps v. United Airlines*, W.C. Nos. 4-565-545 and 4-618-577 (ICAO January 13, 2005). The MMI determination requires the DIME physician to assess, as a matter of diagnosis, whether the various components of a claimant's medical condition are casually related to the injury. *Martinez v. ICAO*, No. 06CA2673 (Colo. App. July 26, 2007). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995) In other words, to overcome a DIME

physician's opinion regarding the cause of a particular component of a claimant's overall medical impairment, MMI or the degree of whole person impairment, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be "unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc.*, W.C. No. 4-476-254 (ICAP, Oct. 4, 2001).

G. This enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appeals Office, supra*. Where the evidence is subject to conflicting inferences a mere difference of opinion between qualified medical experts does not necessarily rise to the level of clear and convincing evidence. Rather it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Oates v. Vortex Industries*, WC 4-712-812 (ICAO November 21, 2008).

H. As a matter of diagnosis the assessment of permanent medical impairment inherently requires the DIME physician to identify and evaluate all losses that result from the injury. *Mosley v. Industrial Claim Appeals Office*, 78 P.3d 1150 (Colo. App. 2003). Consequently, a DIME physician's finding that a causal relationship does or does not exist between an injury and a particular impairment must be overcome by clear and convincing evidence. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). The rating physician's determination concerning the cause or causes of impairment should include an assessment of data collected during a clinical evaluation and the mere existence of impairment does not create a presumption of contribution by a factor with which the impairment is often associated. *Wackenhut Corp. v. Industrial Claim Appeals Office*, 17 P.3d 202 (Colo. App. 2000).

Musings on the DIME Process

I. The ALJ notes that, in order to truly effectuate the intent of the legislature in having a DIME opinion to which all should defer, the DIME *should* be provided with *all pertinent information* which could affect his/her decision. While this could prove overwhelming, especially given the compensation afforded DIME physicians compared with their IME counterparts, more information is better than less. The DIME can place little weight to it, but at least he has it. Which begs a significant question: *Who* should assure that the DIME has every piece of relevant data-the party who requests the DIME, or the opposing party? On a level field (wherein an informed, neutral DIME opinion is the objective) both parties should attempt to "win" at the DIME level- and thus tag their opponent with an enhanced burden of proof to overcome it. Thus, if a party wants to 'win the DIME', there is a process to enhance their case at the outset, to wit: request a Samms conference. This should assure the DIME has everything before the report ever gets written. In such fashion, there is ample time for processing the information and careful reflection by this neutral party. The Samms process is fair game for anyone truly seeking the best product. Foregoing this opportunity to do so, and then attempting a collateral attack on the DIME for not having all the relevant information is not the best practice, in the opinion of this ALJ. If one thinks such information is highly

pertinent, tell the DIME about it, and not the ALJ after the fact. To do so otherwise is risky business, by asking the ALJ to speculate on what the DIME might have valued the most.

J. The ALJ notes that his earlier Order of 12/3/2019 was based upon the best information available at the time. The burden of proof lay with Claimant at that hearing. The ALJ, of course, did not have the opinion of the DIME physician, either in writing, or as clarified in his deposition. While that Order was not appealed, and thus made final, Claimant sought a legally permissible remedy through the DIME process. If the legislature had intended the ALJ to have the final word, they could have done so. Putting aside any turf-related ego bruising to this ALJ, the DIME is now entitled to a legal presumption of validity, as noted above. This ALJ will not look for a way to defer to his own earlier opinion. This is a new ballgame. The burden of proof has now legally shifted, and now we move forward.

Overcoming the DIME: What is the DIME's Opinion?

K. Claimant's initial hearing testimony, as well as Dr. Rauzzino's hearing testimony was available at the time of the DIME request. Likewise, for the depositions of Drs. Castrejon and Bess. The ALJ's Order of 12/3/2019 (without an appeal) was also in the books. All such material might have been **relevant** for consideration by the DIME (had it been tendered via legal process), but there is insufficient evidence that any of it would have been **pivotal** in the DIME's opinion. Dr. Watson made it clear in his deposition that the only thing that *might* have changed his mind would have been statements by the Claimant that *contraindicated* the medical records. No such pivotal statements from Claimant have been brought to the fore by Respondents. Thus, after his deposition, Dr. Watson's DIME opinion remained intact, and the ALJ so finds. Dr. Watson opines that Claimant is not at MMI.

Overcoming the DIME: Is the DIME Opinion Clearly Wrong?

L. It is duly noted by the ALJ that all the medical experts testified consistent with their reports-albeit their testimony brought out greater detail for their respective rationales. Thus, there is nothing to persuade the ALJ that Dr. Watson somehow should have come out the other way, for lack of having their testimony. And as noted, Respondents had their remedy, via Samms conference, had they felt otherwise. Dr. Watson fielded the question about this ALJ's prior Order appropriately, and no – the ALJ did not have access to any smoking gun statements by Claimant. Dr. Watson is not only Level II accredited, he is board certified in Orthopedics, and still active in the practice. In the final analysis, what is before this ALJ is differing medical opinions. By law, the DIME trumps the others. His opinion on MMI is not highly probably incorrect, and the ALJ so finds. Claimant will now require more medical treatment to reach MMI.

Medical Benefits

M. Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-

101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School District #11*, W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012). Our courts have held that in order for a service to be considered a “medical benefit” it must be provided as medical or nursing treatment, or incidental to obtaining such treatment. *Country Squires Kennels v. Tarshis*, 899 P.2d 362 (Colo. App. 1995). A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the claimant’s physical needs. *Bellone v. Industrial Claim Appeals Office*, 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines, Inc.*, W.C. No. 4-517-537, (ICAO, May 31, 2006). A service is incidental to the provision of treatment if it enables the claimant to obtain treatment, or if it is a minor concomitant of necessary medical treatment. *Country Squires Kennels v. Tarshis*, 899 P.2d 362 (Colo. App. 1995); *Karim al Subhi v. King Soopers, Inc.*, W.C. No. 4-597-590, (ICAO. July 11, 2012). The determination of whether services are medically necessary, or incidental to obtaining such service, is a question of fact for the ALJ. *Bellone v. Industrial Claim Appeals Office*, 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines, Inc.*, W.C. No. 4-517-537, (ICAO, May 31, 2006).

N. In this instance, the ALJ finds that Claimant has shown that the treatment recommendations by Dr. Watson in his DIME report are reasonable, necessary, and related to his work injury. Such treatment should include the diagnostics he recommended, including the EMG and CAT Scan, with follow-up treatment, possibly to include surgery, depending upon the diagnostic results.

ORDER

It is therefore Ordered that:

1. The DIME opinion of Dr. Watson has not been overcome. Claimant is not at MMI.
2. Respondents shall pay for all reasonable, necessary, and related medical treatment to bring Claimant to MMI. Such treatment shall include, but not be limited to, the diagnostics as recommended by the DIME physician.
3. Respondents shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.
4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the

certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: <http://www.colorado.gov/dpa/oac/forms-WC.htm>. *In addition, it is recommended that you send a copy of your Petition to Review to the Colorado Springs OAC via email at oac-csp@state.co.us.*

DATED: December 16, 2020

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-007-434-001**

ISSUES

- Are Respondents entitled to request a follow-up DIME with Dr. Higginbotham, and if so, does the ALJ have jurisdiction to award medical benefits?
- Did Claimant prove by a preponderance of the evidence PRP injections recommended by Dr. Ghazi are reasonably needed to cure and relieve the effects of his admitted injury?

FINDINGS OF FACT

1. Claimant has worked as a chiropractor for approximately 30 years. He owns the Employer in this case.

2. Claimant suffered an admitted back injury on February 12, 2016 while moving heavy piece of office equipment.

3. Claimant received primarily conservative care for his injury. He was evaluated by Dr. Paul Stanton, an orthopedic surgeon, who determined Claimant was not a surgical candidate. Claimant was put at MMI by his ATP on March 9, 2017 with a 16% whole person rating for the lumbar and thoracic spines.

4. Claimant saw Dr. John Tyler, a physiatrist, on May 2, 2017. Dr. Tyler thought Claimant was an excellent candidate for trigger point injections followed by aggressive myofascial release techniques.

5. Claimant requested a DIME, which was performed by Dr. Thomas Higginbotham on September 12, 2017. Dr. Higginbotham determined Claimant was not at MMI and recommended the following treatment:

- aggressive deep tissue myofascial work with trigger point injections, as recommended by Dr. John Tyler,
- at least four sessions of biofeedback, and
- use a foam roller or tennis ball for auto massage.

6. Dr. Higginbotham recommended Claimant's ongoing care be managed by a physiatrist. He also opined Claimant did not appear to have a surgical condition, and epidural steroid injections and facet joint injections were "not indicated based on subjective complaints, physical examination and diagnostic studies."

7. Respondents elected not to contest the DIME, and filed a General Admission of Liability on November 1, 2017 conceding Claimant was not at MMI.

8. Claimant continued treating with Dr. Tyler after the DIME. His treatment was interrupted briefly to address injuries suffered in a motor vehicle accident. He resumed treatment and ultimately underwent a series of trigger point injections and myofascial release under Dr. Tyler's direction. The treatment provided temporary relief but no sustained improvement. Dr. Tyler referred Claimant to Dr. Usama Ghazi, also a physiatrist, for consideration of stem cell injections.

9. Dr. Tyler referred Claimant for biofeedback as recommended on March 1, 2018. There is no indication Claimant never pursued biofeedback. Claimant did not mention biofeedback in his discovery responses or at hearing. The ALJ infers Claimant is not interested in pursuing biofeedback.

10. Claimant saw Dr. Ghazi on October 12, 2018. Dr. Ghazi noted Claimant "has not had any diagnostic facet injections, sacroiliac joint injection, [or] interspinous ligament injections. He has not had rhizotomies or epidural steroid injections." Dr. Ghazi recommended a right sacroiliac joint injection and right sciatic nerve block for diagnostic and potentially therapeutic purposes. Depending on Claimant's response, he indicated he might consider additional injections or rhizotomy.

11. Dr. Ghazi requested authorization for the injections on October 22, 2018. Insurer had the request reviewed by Dr. Joseph Fillmore on October 30, 2018. Dr. Fillmore opined, "while not specifically stated in the Independent Medical Evaluation, I believe it is reasonable for diagnostic and therapeutic purposes to trial a right sacroiliac joint injection." Insurer approved the procedure, and Dr. Ghazi performed the injections on March 5, 2019.

12. Claimant received "100%" pain relief from the injections for approximately 10 days. Dr. Ghazi considered that an excellent diagnostic response, and recommended facet injections combined with a repeat SI joint injection. If Claimant again only received temporary relief, Dr. Ghazi indicated he would consider sacroiliac rhizotomy. He also noted Claimant was interested in platelet rich plasma (PRP) injection for the right sacroiliac joint "since the patient is a Doctor of Chiropractic Medicine and wants to focus on natural healing rather than neural ablations and repeated steroid injections in the future."

13. Dr. Ghazi performed the facet injection on July 9, 2019. Claimant returned to Dr. Ghazi on October 4, 2019 and reported significantly less pain. Dr. Ghazi further noted Claimant had been performing home exercises and gave him a refresher on some techniques. Dr. Ghazi remarked Claimant was a potential candidate for medial branch blocks/rhizotomies but Claimant wanted to maximize conservative care including home exercise.

14. Claimant returned to Dr. Ghazi on December 6, 2019. Claimant stated he had full relief from four to six weeks and then his pain returned. Claimant was regular performing home exercises and demonstrated "perfect form," which Dr. Ghazi considered on surprising given Claimant "is a chiropractor and well-versed in these spinal exercises." Although Dr. Ghazi opined Claimant was "certainly a candidate for rhizotomies," he and

Claimant decided to try PRP injections instead. Dr. Ghazi opined a PRP injection “would be a one-date procedure, rather than potentially for separate procedures and would be more cost-effective with no chance of causing spinal extensor weakness. From a medical standpoint, therefore, it makes sense. We will see if we can get this authorized.”

15. Dr. Jeffrey Raschbacher performed a Rule 16 peer review regarding the PRP injections. He recommended denial of the PRP injection as not reasonably necessary. He noted the MTGs and medical literature “do not support use of PRP in the setting.” He saw no substantial likelihood the injections would improve Claimant’s function. Insurer denied the PRP and Claimant requested a hearing.

16. On August 12, 2020, Respondents sent notice that a follow-up DIME appointment with Dr. Higginbotham had been set for September 3, 2020.

17. At a prehearing conference held on August 24, 2020, Respondents argued that they were entitled to a follow-up DIME because all treatment recommended by the DIME had been completed. Respondents argued Claimant’s Application for Hearing should be stricken and all medical benefit issues stayed until after the DIME was completed. Claimant argued *Williams v. Kunau*, 147 P.3d 33 (Colo. 2006) precludes a follow-up DIME until an ATP has placed the claimant at MMI a second time. PALJ Phillips agreed with Claimant’s argument and struck the follow-up DIME appointment.

18. Respondents filed a Renewed Motion to Strike the Application for Hearing and Proceed to Follow-Up Division IME Appointment on September 29, 2020. Claimant filed a response to the motion on October 9, 2020. At the commencement of the hearing, the ALJ informed the parties there had been insufficient time to review and consider the legal issues raised by Respondents’ Motion before the hearing. The ALJ’s preliminary impression was Claimant had the better argument, but the parties were advised no final determination had been made and were invited to address the issue in their post-hearing position statements.

19. Upon further review and reflection, the ALJ agrees the follow-up DIME should have been allowed to proceed because all of the treatment recommended by the DIME has been completed. And because a DIME is actively in progress, all medical benefit issues should be stayed pending receipt of the DIME report.

CONCLUSIONS OF LAW

Williams v. Kunau, 147 P.3d 33 (Colo. 2006) held that a follow-up DIME is a prerequisite to closing a claim when a DIME has previously determined a claimant is not at MMI. The claimant in *Williams* underwent a DIME that found he was not at MMI. The ATP subsequently put the claimant at MMI a second time, and the insurer filed a Final Admission of Liability without sending the claimant back to the DIME physician. The *Williams* court was tasked with determining whether the insurer could file and FAILED based on the ATP’s post-DIME MMI determination, or whether the claimant had to return to the DIME physician for a determination of MMI before the FAL could be filed.

Williams held it was improper to file an FAL based on the ATP's later MMI determination. The court held that once a DIME has found a claimant not at MMI, "the DIME process remains open and, when the treating physician makes a second finding of MMI, the employer or insurer may not file an FAL to close the case prior to returning the claimant to the independent medical examiner" The Court further stated that, "a second determination of MMI by the treating physician would not have any binding effect pending the independent medical examiner's follow-up examination, nor would it be the basis for filing of an FAL because the DIME process in the case is still open."

The procedures governing follow-up DIMEs are found in WCRP 11-7. Previous versions of the Rule contained no reference to any triggering event for a follow-up DIME. The version in effect on Claimant's date of injury provided:

11-7 IME FOLLOW-UP

Sections of this Rule 11 apply to follow-up procedures, as appropriate. If a Level II IME physician determines a claimant has not reached MMI and recommends further treatment a follow-up IME examination shall to the extent possible be scheduled with the original IME physician. The party requesting the follow-up appointment shall provide written notice on a Division prescribed form or a substantially similar form

This ALJ previously understood the procedural rules regarding follow-up DIMEs to operate in the manner as determined by PALJ Phillips, *i.e.*, the follow-up DIME is triggered by another determination of MMI by the ATP. Even though there has never been an explicit statute or rule to that effect, that has been the common understanding and practice for many years since the decision in *Williams*. Consistent with this interpretation, the previous Request/Notification for Follow-Up IME form included a section for the "New MMI Date (as provided by the treating physician)."

But the Division amended Rule 11-7 effective January 1, 2019, which now provides:

11-7 DIME FOLLOW-UP

(A) If a DIME physician determines that a claimant has not reached MMI and recommends additional treatment, a follow-up DIME examination shall be scheduled with the same DIME physician, unless the physician is unavailable or declines to perform the examination. The insurer shall file the Follow-Up DIME form **after the claimant completes all additional recommended treatment.** (Emphasis added).

The ALJ interprets the highlighted language as referring to the treatment recommended by the DIME. This conclusion is reinforced by contemporaneous changes to the Division's follow-up DIME form, which no longer contains any reference to a subsequent MMI determination by an ATP. The most reasonable inference is the Division

intended to address the situation presented here, and provide a mechanism by which a party can obtain a follow-up DIME without being beholden to the ATP.¹

Claimant argues issue should be controlled by the version Rule 11-7 in effect on the date of Claimant's injury. But the DIME rules are merely "procedural" and not "substantive." Accordingly, the rule changes apply to all open cases requiring a DIME regardless of the date of injury. *Arczynski v. Club Mediterranee of Colorado*, W.C. No. 4-156-147 (May 20, 2003).

In this case, the treatment recommended by Dr. Higginbotham was active release techniques in conjunction with trigger point injections, case management by a physiatrist, home exercises, and biofeedback. The recommendations other than biofeedback have been completed. And Claimant had made no effort to pursue biofeedback despite Dr. Tyler's referral in March 2018. The factual predicate for requesting a follow-up DIME under the current version of Rule 11-7(A)—completion of treatment recommended by the DIME—has been satisfied. Therefore, Respondents' request for a follow-up DIME should not have been stricken.

It is well established that ALJs lack jurisdiction to adjudicate curative medical benefits if a DIME has been requested but the report has not been received. Section 8-42-107(8)(b)(III); *Story v. Industrial Claim Appeals Office*, 910 P.2d 80 (Colo. App. 1995); *Hubbard v. University Park Care Center*, W.C. No. 4-907-314-02 (July 17, 2014); *McCormick v. Exempla Healthcare*, W.C. No. 4-594-683 (January 27, 2006); *Eby v. Wal-Mart Stores Inc.*, W.C. No. 4-350-176 (February 14, 2001); *Anderson-Capranelli v. Republic Industries, Inc.*, W.C. No. 4-416-649 (November 25, 2002); *Cass v. Mesa County Valley School District*, W.C. No. 4-69-69 (August 26, 2005). Because Respondents' request for a follow-up DIME has been reinstated, adjudication of the disputed PRP injections is premature.

ORDER

It is therefore ordered that:

1. Respondents' request to set aside PALJ Phillips' August 26, 2020 Prehearing Conference Order striking the follow-up DIME is GRANTED. Respondents may schedule a follow-up DIME with Dr. Higginbotham. Respondents shall coordinate with Claimant's counsel to ensure Claimant's availability for the DIME appointment.
2. Claimant's request for PRP injections recommended by Dr. Ghazi is dismissed without prejudice pending the follow-up DIME report.
3. All issues not decided herein are reserved for future determination.

¹ Although Respondents are seeking the follow-up DIME here, one can also envision a situation where the claimant may want a follow-up DIME to obtain an impairment rating if an ATP refused to make a formal declaration of MMI.

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

DATED: December 18, 2020

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-060-636-003**

ISSUE

1. Whether Respondents have established by a preponderance of the evidence an entitlement to repayment of thirteen thousand forty-two dollars and 57/100 (\$13,042.57) for amounts overpaid to Claimant for temporary total disability benefits.

FINDINGS OF FACT

1. Claimant sustained an admitted work-related injury to his left wrist on October 25, 2017, and had an ORIF (open reduction internal fixation) surgery performed on his left wrist on October 27, 2018, which included the implantation of hardware. (Ex. G).
2. Respondent was entitled to temporary total disability benefits (TTD) beginning on October 26, 2017.
3. On April 27, 2018, Claimant's authorized treating physician, Scott Richardson, M.D., placed Claimant at maximum medical improvement. Dr. Richardson indicated Claimant was cleared to return to work full duty without restrictions. (Ex. A).
4. Insurer's claims representative, Brett B[Redacted] testified that Claimant was at full work duty and had hardware removal surgery on April 1, 2019, which resulted in the reinstatement of TTD benefits beginning on April 1, 2019.
5. On June 8, 2020, Claimant underwent a Division Independent Medical Examination (DIME) performed by David Orgel, M.D. Dr. Orgel placed Claimant at MMI effective April 9, 2020 with a 16% permanent impairment rating for Claimant's left upper extremity. (Ex. G). Claimant's entitlement to TTD benefits terminated on April 9, 2020, upon reaching MMI.
6. Claimant's average weekly wage (AWW) was \$645.60 per week, and he was entitled to AWW benefits of \$430.61 per week. (Ex. G).
7. Claimant was entitled to temporary total disability benefits (TTD) from October 26, 2017 to April 27, 2018 following the initial injury, and again from April 1, 2019 through April 9, 2020 between the removal of surgical hardware and the DIME physician placing him at MMI.
8. For the period of October 26, 2018 to April 27, 2018, Claimant was entitled to TTD benefits totaling \$11,257.38 (i.e., 26.148857 weeks x \$430.61 = \$11,257.38). (Ex. G)
9. For the period of April 1, 2019 through April 8, 2019, Claimant was entitled to TTD benefits totaling \$23,068.39 (i.e., 53.571458 weeks x \$430.61 = \$23,068.39). (Ex. G).

10. Based on Claimant's 16% permanent impairment rating for impairment of the left upper extremity, Claimant was entitled to permanent partial disability (PPD) benefits in the amount of \$9,902.80. (Ex. G).

11. In total, Respondent was entitled to TTD and PPD benefits in the amount of \$44,228.57.

12. Respondents' paid Claimant combined TTD and PPD benefits in the amount of \$57,271.14, resulting Claimant receiving \$13,042.57 in disability benefits to which he was not entitled. (i.e., \$57,271.14 - \$44,228.57 = \$13,042.57).

13. Claimant was provided proper notice of the hearing and did not appear.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. See § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. See § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id.* at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Respondent's Entitlement to Repayment of Disability Benefits

Pursuant to § 8-43-303(1) C.R.S., upon a prima facie showing that the claimant received an overpayment in benefits, the award shall be reopened solely as to overpayments and repayment shall be ordered. No such reopening shall affect the earlier award as to moneys already paid except in cases of fraud or overpayment. *Id.* In 1997, The General Assembly amended subsections (1) and (2)(a) of § 8-43-303 to permit reopening of an award on grounds of fraud and overpayment, in addition to the already statutory reopening methods of error, mistake, or change in condition. *Haney v. Shaw, Stone, & Webster*, W.C. No. 4-796-763 (ICAO July 28, 2011), citing *Simpson v. Industrial Claim Appeals Office*, 219 P.3d 354 (Colo. App. 2009), *rev'd on other grounds Benchmark/Elite, Inc., v. Simpson*, 232 P.3d 777 (Colo. 2010).

The 1997 amendments also provide that no such reopening shall affect the earlier award as to moneys already paid except in cases of fraud or *overpayment*. *Haney*, at *1. The 1997 amendments added § 8-40-201(15.5) defining "overpayment" to mean:

[M]oney received by a claimant that exceeds the amount that should have been paid, or which the claimant was not entitled to receive, or which results in duplicate benefits because of offsets that reduce disability or death benefits payable under said articles. For an overpayment to result, it is not necessary that the overpayment exist at the time the claimant received disability or death benefits under said articles.

There are thus three categories of possible overpayment pursuant to §8- 40-201(15.5). *In Re Grandestaff*, No. 4-717-644 (ICAP, Mar. 11, 2013). An overpayment may occur even if it did not exist at the time the claimant received disability or death benefits. *Simpson v. ICAO*, 219 P.3d 354, 358 (Colo. App. 2009). Therefore, retroactive recovery for an overpayment is permitted. *In Re Haney*, W.C. No. 4-796-763 (ICAP, July 28, 2011).

As found, Respondents have established by a preponderance of the evidence that Claimant received \$13,042.57 in disability benefits to which he was not entitled. Accordingly, Respondents are entitled to recover from Claimant the overpayment of \$13,042.57.

The parties have been unable to agree on a schedule for repayment of the above referenced \$13,042.57. When the parties are unable to agree upon such a schedule, the ALJ is empowered, pursuant to § 8-43-207(q), C.R.S., to conduct hearings to "[r]equire repayment of overpayments." In *Simpson v. Industrial Claim Appeals Office*, 219 P.3d 354 (Colo. App. 2009), *rev'd on other grounds, Benchmark/Elite, Inc. v. Simpson*, 232 P.3d 777 (Colo. 2010), the Colorado Court of Appeals held that with regard to overpayments, the ALJ has discretion to fashion a remedy. Further, the ALJ has the authority to determine the terms of repayment and the ALJ's schedule for recoupment will not be disturbed absent an abuse of discretion. See *Louisiana Pacific Corp. v. Smith*, 881P.2d 456 (Colo. App. 1994). No evidence exists in the record from which the ALJ can determine whether any payment schedule is appropriate.

ORDER

It is therefore ordered that:

1. Claimant shall repay to Respondents \$13,042.57 in overpaid benefits.
2. All matters not determined herein are reserved for future determination.

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



DATED: December 18, 2020.

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUE

Whether Claimant has established by a preponderance of the evidence that he should be permitted to reopen his April 3, 2015 Workers' Compensation claim based on a change in condition pursuant to §8-43-303(1), C.R.S.

FINDINGS OF FACT

1. Claimant is a 48 year-old former Truck Driver and Heavy Equipment Operator for Employer. On April 3, 2015 he sustained an admitted industrial injury to his right hip. Specifically, when the equipment Claimant was operating began to tip forward, he extended his right leg and injured his hip.

2. On April 8, 2015 Claimant visited Gary Zuehlsdorff, D.O. for an evaluation. Claimant reported that on April 3, 2015 the backhoe he was operating started "bucking around" and tipped forward as he was lifting a dumpster. He stuck out his right leg to brace himself and struck his head and left shin. His chief complaint to Dr. Zuehlsdorff was significant right-sided hip pain. After conducting a physical examination, Dr. Zuehlsdorff ordered an MRI of the right hip. The MRI revealed some acetabular impingement but no fractures or tears.

3. On April 17, 2015 Claimant returned to Dr. Zuehlsdorff for an evaluation. After reviewing the right hip MRI, Dr. Zuehlsdorff was "concerned about the very provocative test on external and internal rotation" and impingement. He thus referred Claimant to hip specialist Brian J. White, M.D.

4. Dr. White evaluated Claimant on April 29, 2015. He noted that the MRI revealed a labral tear. Dr. White remarked that Claimant had recently undergone gastric bypass surgery that allowed him to lose about 140 pounds to weigh 292 pounds. He recommended a diagnostic injection to ensure that Claimant was a candidate for a hip arthroscopy.

5. On June 19, 2015 Claimant underwent right hip surgery with Dr. White. The surgery specifically included a femoral osteotomy, acetabular trimming and labrum reconstruction. Claimant received physical and massage therapy following surgery.

6. On July 14, 2015 Claimant returned to Dr. Zuehlsdorff for an examination. He reported continued right hip pain following surgery. Claimant was unable to tolerate NSAIDs due to the previous gastric bypass procedure. Dr. Zuehlsdorff thus prescribed OxyContin and Valium. He referred Claimant to Yusuke Wakeshima, M.D. for pain management.

7. On September 8, 2015 Claimant again visited Dr. Zuehlsdorff for an examination. Claimant was progressing nicely and was “moving pretty well.” Dr. Zuehlsdorff also remarked that Claimant had no depression or anxiety.

8. On October 1, 2015 Claimant returned to Dr. White for an examination. Claimant was able to walk up to one to two miles per day. Dr. White remarked that Claimant’s range of motion in his hip was “nice and smooth” and he was able to walk with a non-antalgic gait.

9. On January 6, 2016 Claimant told Dr. White that he was doing very well and was walking over three miles per day. He felt 85% to 90% better. Claimant was walking without a limp and had no pain with range of motion. Dr. White expected an excellent long term recovery. He wrote a letter to Dr. Zuehlsdorff noting that Claimant could gradually resume work and return to full capacity over the next couple of months.

10. On January 11, 2016 Claimant returned to Dr. Zuehlsdorff for an examination. Dr. Zuehlsdorff recorded that Claimant was not suffering from panic, depression or anxiety. Claimant commented that he was feeling well and hip range of motion was “great.” Dr. Zuehlsdorff recommended work conditioning.

11. On March 6, 2016 Claimant again visited Dr. Zuehlsdorff for an evaluation. Claimant remarked that his pain, strength and range of motion were 95% improved. Dr. Zuehlsdorff determined that Claimant had reached Maximum Medical Improvement (MMI), assigned a 4% lower extremity rating for loss of right hip flexion and cleared him to work without restrictions. Dr. Zuehlsdorff did not assign any specific maintenance medical benefits.

12. On April 8, 2016 Respondents filed a Final Admission of Liability (FAL) consistent with Dr. Zuehlsdorff’s MMI and impairment determinations. Claimant did not object to the FAL and the claim closed.

13. After reaching MMI, Claimant did not return to work for Employer. He obtained a new job with Brannan Sand & Gravel as a Heavy Equipment Operator. Approximately two months after starting with Brannan he had another workplace injury on June 16, 2016. He specifically fell approximately eight to ten feet from a loader.

14. On June 16, 2016 Claimant visited Lon Noel, M.D. for an evaluation. Dr. Noel noted that Claimant had suffered a Workers’ Compensation injury in 2015. He underwent right hip surgery and made a “full recovery.” Dr. Noel noted that Claimant tripped and fell from a loader while working for Brannan. Claimant specifically fell eight to ten feet onto both knees and elbows. After considering Claimant’s medical history, performing a physical examination and reviewing x-rays, Dr. Noel diagnosed Claimant with a left knee contusion and a left hamstring strain.

15. Claimant subsequently underwent physical therapy. By July 18, 2016 Claimant noted to Dr. Noel that he could only perform 30 minutes of activity before his knee flared-up. Dr. Noel commented that Claimant’s left knee MRI revealed a “chondral

impaction/contusion injury.” He thus referred Claimant to Christopher Isaacs, M.D. for an orthopedic evaluation.

16. Dr. Isaacs ultimately recommended surgery in the form of a left knee arthroscopy and chondroplasty to treat patellofemoral compartment chondromalacia. On August 24, 2016 Claimant underwent the procedure. Claimant subsequently received post-surgical treatment for several months.

17. On January 6, 2017 Dr. Noel placed Claimant at MMI for the Brannon injury. He assigned a 16% left lower extremity impairment rating. Claimant received permanent work restrictions including up to 30 pounds of lifting occasionally, no crouching or squatting, minimal kneeling, 30 minutes of sitting or standing before changing positions, no repetitive stair climbing or descending and no use of heavy vibrating machinery. Maintenance medical recommendations included home exercise and over-the-counter medications.

18. On January 9, 2017 Claimant returned to Dr. Zuehlsdorff who was now practicing at Concentra Medical Centers. Dr. Zuehlsdorff noted that Claimant had been working for Brannon since leaving Employer after reaching MMI. Claimant reported that by August 2016 his right hip pain was similar to the levels he had previously experienced. Claimant did not assert a new injury, but a worsening of his original April 3, 2015 right hip injury. After considering Claimant’s history and performing a physical examination, Dr. Zuehlsdorff determined Claimant had sustained an exacerbation of his original injury and assigned work restrictions.

19. On January 11, 2017 Dr. Zuehlsdorff wrote an addendum to his January 9, 2017 medical report. He remarked that he had received a phone call from Claims Adjuster Jeanine. She informed him of the June 16, 2016 Brannon injury. Dr. Zuehlsdorff wrote that Claimant had not appraised him or the adjuster on Employer’s claim of the intervening injury. With the additional information, Dr. Zuehlsdorff explained “that this recent injury could have impacted his [right] hip and would probably have a hard time getting his [right] hip covered now.”

20. On April 26, 2017 Claimant returned to Dr. White for an examination. Dr. White commented that Claimant did very well after his initial right hip surgery. However, Claimant remarked that he had undergone left knee surgery and did not recover well. He specifically commented that “it really threw off his balance” and his right hip became sore. Claimant stated that his left knee was “terrible” and complained of left hip pain. Dr. White determined the right hip joint was fine and attributed Claimant’s symptoms to a muscle balance issue. He suspected a labral tear on the left side and recommended therapy for the right hip.

21. On June 8, 2020 Claimant filed a Petition to Reopen his April 3, 2015 claim. He asserted a change of condition. Claimant attached the April 26, 2017 record from Dr. White and the initial surgical report for the right hip procedure.

22. Claimant testified at hearing in this matter. He commented that when he reached MMI on March 6, 2016 for his injury with Employer, he felt “great” and “really strong.” Claimant explained that his job duties with Brannan were more difficult than his duties with Employer. The job with Brannan specifically involved hauling heavy equipment. Claimant commented that he had no issues with his hip when he began working for Brannan.

23. Claimant testified that, after he underwent surgery for the Brannan left knee injury, he was unable to move in his previous manner. Specifically, he was unable to climb onto a truck or trailer. Nevertheless, he performed some light duty work for Brannan after the injury. However, while performing light duty he started noticing some issues with his right hip when walking and getting in and out of his vehicle. Claimant compared his symptoms to the pain he had experienced at the time of his original hip injury.

24. Claimant explained that he “reinjured” his right hip after he hurt his left knee. He attributed his symptoms to “limping because of the knee” as well as the fact that he began to go into a depression because of suffering two Workers’ Compensation injuries within two years. The depression caused him to gain additional weight.

25. Claimant returned to Dr. Zuehlsdorff after the Brannan injury and was referred back to Dr. White. However, he did not return to Dr. White until he was able to receive coverage through Medicaid because the visit was not covered by Insurer. Claimant acknowledged that a right hip replacement was recommended, but he was not a candidate because of his weight. He now weighs approximately 400 pounds.

26. Claimant testified that he initially underwent gastric bypass surgery in 2014 and had a revision in 2017. He lost 150 pounds after the initial gastric bypass but none after the revision surgery. Claimant further clarified that, following his initial gastric bypass surgery, stomach pain curtailed his eating. However, the Oxycodone pain medication he began taking prevented him from experiencing the pain and allowed him to continue eating. Claimant specified that he received the Oxycodone through Medicaid after visiting Dr. White in 2017. The Oxycodone was not authorized by Insurer.

27. Claimant has failed to establish that it is more probably true than not that he should be permitted to reopen his April 3, 2015 Workers’ Compensation claim based on a change in condition pursuant to §8-43-303(1), C.R.S. Initially, on April 3, 2015 Claimant sustained an admitted industrial injury to his right hip. After receiving conservative treatment he underwent right hip surgery with Dr. White on June 19, 2015. On March 6, 2020 Dr. Zuehlsdorff determined that Claimant had reached MMI, assigned a 4% lower extremity rating for loss of right hip flexion and cleared him to work without restrictions. On April 8, 2016 Respondents filed a FAL consistent with Dr. Zuehlsdorff’s MMI and impairment determinations. Claimant did not object to the FAL and the claim closed.

28. Claimant did not subsequently return to work for Employer but obtained a new job with Brannan. Approximately two months after starting with Brannan he

suffered another workplace injury on June 16, 2016. Claimant underwent left knee surgery as a result of the Brannon injury and Dr. Noel placed him at MMI on January 6, 2017. Claimant returned to Dr. Zuehlsdorff on January 9, 2017 and remarked that by August 2016 his right hip pain had returned to the levels he had previously experienced. On June 8, 2020 Claimant filed a Petition to Reopen his April 3, 2015 claim. Claimant contends that he suffered a change in his right hip condition since reaching MMI on March 6, 2020 that is causally connected to his April 3, 2015 industrial injury. He attributes the worsening of his right hip condition to weight gain and depression. Claimant specifically asserts that the weight gain is work related because he overate due to depression as a result of multiple Workers' Compensation injuries. However, Claimant's contention fails because the June 6, 2016 Brannon injury constituted an intervening event that severed the causal connection to the April 3, 2015 injury and any relationship between Claimant's weight gain and his right hip condition is speculative.

29. The June 6, 2016 Brannon injury constituted an intervening event that severed the causal connection to the April 3, 2015 injury. Claimant had a good recovery following his right hip surgery with Dr. White. He reached MMI and was released to full duty with a nominal permanent impairment rating. Claimant was not awarded any specific post-MMI maintenance care and did not seek any post-MMI care for his right hip until after the intervening Brannon injury. In fact, Claimant acknowledged that he had good function at the time he began working for Brannon. However, after he underwent surgery for the Brannon left knee injury, he was unable to move as he had in the past. While working light duty for Brannon he began noticing issues with his right hip when walking and getting in and out of his vehicle. Claimant compared his symptoms to the pain he had experienced at the time of his original hip injury on April 3, 2015. In assessing Claimant on January 9, 2017 Dr. Zuehlsdorff determined he had sustained an exacerbation in his original injury and assigned work restrictions. However, Dr. Zuehlsdorff was unaware of the June 6, 2016 Brannon injury. After Dr. Zuehlsdorff received information about the Brannon injury he wrote an addendum report on January 11, 2017. He told Claimant that the intervening fall at Brannon could have impacted his hip and might result in difficulty getting coverage for additional medical care. Finally, the April 26, 2017 note from Dr. White reveals that some degree of right hip pathology was secondary to complications of his left knee injury. Specifically, Dr. White determined Claimant's right hip joint was fine and attributed Claimant's symptoms to a muscle balance issue. In conjunction with Claimant's testimony, the records from Drs. Zuehlsdorff and White reveal that the Brannon intervening injury increased Claimant's right hip symptoms and caused a need for medical treatment. The record thus reflects that the June 6, 2016 injury triggered the worsening of Claimant's right hip condition and severed the causal connection to the original April 3, 2015 industrial injury.

30. Claimant remarked that he "reinjured" his right hip after he hurt his left knee. He attributed his symptoms to "limping because of the knee." Claimant also explained that the depression of suffering two injuries caused him to gain additional weight. He detailed that, after his initial gastric bypass surgery, stomach pain reduced his eating. However, the Oxycodone pain medication he received through Medicaid after visiting Dr. White in 2017 prevented him from experiencing the pain and allowed him to continue eating. Despite Claimant's testimony, there is no medical evidence

establishing his mental health conditions or relating his weight gain to the conditions. In fact, Claimant's struggles with food and eating were an issue prior to the April 3, 2015 injury because he underwent gastric bypass surgery in 2014. Claimant's mental health and weight gains were never treated as compensable aspects of his original injury. Moreover, Claimant noted that physical inactivity, his medication regimen and his inability to work all contributed to his depression. However, the preceding explanations can be connected to the original work injury. Furthermore, the medication that allowed Claimant to overeat was not authorized by Insurer or recommended as a maintenance medical benefit. Claimant's inability to engage in physical activity also cannot be attributed to the original injury because he was released without any physical restrictions and began working for Brannan without any issues. Claimant was only unable to return to work after the Brannan injury on June 6, 2016. The preceding reveals that it is speculative to construct a causal relationship between Claimant's weight gain and right hip injury. Accordingly, Claimant's Petition to Reopen his April 3, 2015 Worker's Compensation claim based on a change in condition is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. Section 8-43-303(1), C.R.S. provides that a worker's compensation award may be reopened based on a change in condition. In seeking to reopen a claim the claimant shoulders the burden of proving his condition has changed and that he is

entitled to benefits by a preponderance of the evidence. *Osborne v. Industrial Commission*, 725 P.2d 63, 65 (Colo. App. 1986). A change in condition refers either to a change in the condition of the original compensable injury or to a change in a claimant's physical or mental condition that is causally connected to the original injury. *Jarosinski v. Industrial Claim Appeals Office*, 62 P.3d 1082, 1084 (Colo. App. 2002). A "change in condition" pertains to changes that occur after a claim is closed. *In re Caraveo*, W.C. No. 4-358-465 (ICAO, Oct. 25, 2006). The determination of whether a claimant has sustained his burden of proof to reopen a claim is one of fact for the ALJ. *In re Nguyen*, W.C. No. 4-543-945 (ICAO, July 19, 2004).

5. The existence of a weakened condition is insufficient to establish causation if the new injury is the result of an efficient intervening cause. *Owens v. Industrial Claim Appeals Office*, 49 P.3d 1187, 1188 (Colo. App. 2002); *In Re Lang*, W.C. No. 4-450-747 (ICAO, May 16, 2005). No liability exists when a later accident occurs as the direct result of an intervening cause. *Vargas v. United Parcel Service*, W.C. No. 4-325-149 (ICAO, Aug. 29, 2002). However, the intervening event does not sever the causal connection between the injury and the claimant's condition unless the disability is triggered by the intervening event. See *Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970); *Vargas v. United Parcel Service*, W.C. No. 4-325-149 (ICAO, Aug. 29, 2002). If the need for medical treatment occurs as the result of an independent intervening cause, then the subsequent treatment is not compensable. *Owens*, 49 P.3d at 1188. The new injury is not compensable "merely because the later accident might or would not have happened if the employee had retained all his former powers." *In Re Chavez*, W.C. No. 4-499-370 (ICAO, Jan. 23, 2004). The determination of whether an injury resulted from an efficient intervening cause is a question of fact for the ALJ. *Id.*

6. As found, Claimant has failed to establish by a preponderance of the evidence that he should be permitted to reopen his April 3, 2015 Workers' Compensation claim based on a change in condition pursuant to §8-43-303(1), C.R.S. Initially, on April 3, 2015 Claimant sustained an admitted industrial injury to his right hip. After receiving conservative treatment he underwent right hip surgery with Dr. White on June 19, 2015. On March 6, 2020 Dr. Zuehlsdorff determined that Claimant had reached MMI, assigned a 4% lower extremity rating for loss of right hip flexion and cleared him to work without restrictions. On April 8, 2016 Respondents filed a FAL consistent with Dr. Zuehlsdorff's MMI and impairment determinations. Claimant did not object to the FAL and the claim closed.

7. As found, Claimant did not subsequently return to work for Employer but obtained a new job with Brannan. Approximately two months after starting with Brannan he suffered another workplace injury on June 16, 2016. Claimant underwent left knee surgery as a result of the Brannon injury and Dr. Noel placed him at MMI on January 6, 2017. Claimant returned to Dr. Zuehlsdorff on January 9, 2017 and remarked that by August 2016 his right hip pain had returned to the levels he had previously experienced. On June 8, 2020 Claimant filed a Petition to Reopen his April 3, 2015 claim. Claimant contends that he suffered a change in his right hip condition since reaching MMI on March 6, 2020 that is causally connected to his April 3, 2015 industrial injury. He

attributes the worsening of his right hip condition to weight gain and depression. Claimant specifically asserts that the weight gain is work related because he overate due to depression as a result of multiple Workers' Compensation injuries. However, Claimant's contention fails because the June 6, 2016 Brannan injury constituted an intervening event that severed the causal connection to the April 3, 2015 injury and any relationship between Claimant's weight gain and his right hip condition is speculative.

8. As found, the June 6, 2016 Brannan injury constituted an intervening event that severed the causal connection to the April 3, 2015 injury. Claimant had a good recovery following his right hip surgery with Dr. White. He reached MMI and was released to full duty with a nominal permanent impairment rating. Claimant was not awarded any specific post-MMI maintenance care and did not seek any post-MMI care for his right hip until after the intervening Brannon injury. In fact, Claimant acknowledged that he had good function at the time he began working for Brannan. However, after he underwent surgery for the Brannon left knee injury, he was unable to move as he had in the past. While working light duty for Brannan he began noticing issues with his right hip when walking and getting in and out of his vehicle. Claimant compared his symptoms to the pain he had experienced at the time of his original hip injury on April 3, 2015. In assessing Claimant on January 9, 2017 Dr. Zuehlsdorff determined he had sustained an exacerbation in his original injury and assigned work restrictions. However, Dr. Zuehlsdorff was unaware of the June 6, 2016 Brannan injury. After Dr. Zuehlsdorff received information about the Brannon injury he wrote an addendum report on January 11, 2017. He told Claimant that the intervening fall at Brannan could have impacted his hip and might result in difficulty getting coverage for additional medical care. Finally, the April 26, 2017 note from Dr. White reveals that some degree of right hip pathology was secondary to complications of his left knee injury. Specifically, Dr. White determined Claimant's right hip joint was fine and attributed Claimant's symptoms to a muscle balance issue. In conjunction with Claimant's testimony, the records from Drs. Zuehlsdorff and White reveal that the Brannan intervening injury increased Claimant's right hip symptoms and caused a need for medical treatment. The record thus reflects that the June 6, 2016 injury triggered the worsening of Claimant's right hip condition and severed the causal connection to the original April 3, 2015 industrial injury.

9. As found, Claimant remarked that he "reinjured" his right hip after he hurt his left knee. He attributed his symptoms to "limping because of the knee." Claimant also explained that the depression of suffering two injuries caused him to gain additional weight. He detailed that, after his initial gastric bypass surgery, stomach pain reduced his eating. However, the Oxycodone pain medication he received through Medicaid after visiting Dr. White in 2017 prevented him from experiencing the pain and allowed him to continue eating. Despite Claimant's testimony, there is no medical evidence establishing his mental health conditions or relating his weight gain to the conditions. In fact, Claimant's struggles with food and eating were an issue prior to the April 3, 2015 injury because he underwent gastric bypass surgery in 2014. Claimant's mental health and weight gains were never treated as compensable aspects of his original injury. Moreover, Claimant noted that physical inactivity, his medication regimen and his inability to work all contributed to his depression. However, the preceding explanations can be connected to the original work injury. Furthermore, the medication that allowed

Claimant to overeat was not authorized by Insurer or recommended as a maintenance medical benefit. Claimant's inability to engage in physical activity also cannot be attributed to the original injury because he was released without any physical restrictions and began working for Brannan without any issues. Claimant was only unable to return to work after the Brannan injury on June 6, 2016. The preceding reveals that it is speculative to construct a causal relationship between Claimant's weight gain and right hip injury. Accordingly, Claimant's Petition to Reopen his April 3, 2015 Worker's Compensation claim based on a change in condition is denied and dismissed.

ORDER

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

Claimant's request to reopen his April 3, 2015 Workers' Compensation claim based on a change in condition is denied and dismissed.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at <https://oac.colorado.gov/resources/oac-forms>.*

DATED: December 21, 2020.

DIGITAL SIGNATURE:


Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-096-951-003**

ISSUES

- Did Claimant prove by a preponderance of the evidence she is permanently and totally disabled?
- Did Claimant prove treatment from Dr. David Weinstein, including a right shoulder arthroscopy, is causally related to her admitted industrial injury?
- The parties reserved issues relating to treatment for Claimant's neck recommended by Dr. Douglas Crowther.

FINDINGS OF FACT

1. Claimant worked for Employer in the "nursing relief pool." Her duties included transporting patients to medical facilities in Colorado Springs or Denver.

2. Claimant suffered admitted injuries to her neck, upper back, and right shoulder on September 13, 2018 while transporting a combative patient to Parkview Hospital.

3. Claimant saw Employer's designated provider at Southern Colorado Clinic on September 14, 2018. She reported pain in her neck, upper back, right shoulder, and low back. PA-C Schwartz diagnosed cervical, thoracic, lumbar, and right shoulder "sprains" and "strains." He prescribed cyclobenzaprine and ibuprofen and referred Claimant for massage therapy. He released Claimant to work with no restrictions.

4. Claimant followed up with Dr. Terrence Lakin at Southern Colorado Clinic on September 27, 2018. She reported 6/10 pain. She was "working without restrictions but feels due to increased pain and working on the men's unit during one-on-one she may benefit from some restrictions." Examination showed spasm and trigger points in the paracervical muscles, pain to palpation of the upper and lower back muscles, and painful shoulder range of motion. Dr. Lakin administered trigger point injections and imposed work restrictions of "please keep off forensic units/high-risk patient contact."

5. Employer offered Claimant modified work in the staffing office. Her duties included answering phones, typing, and writing within her restrictions. The work was entirely sedentary and primarily involved picking up the telephone receiver, transferring callers, and writing phone messages by hand. Claimant's supervisor, Frankie M[Redacted], observed Claimant occasionally while she was working modified duty in the staffing office. Claimant never mentioned having any difficulty doing the work and exhibited no signs of pain or discomfort. Ms. M[Redacted] considered Claimant "a good employee" and "she did a very good job."

6. Claimant took FMLA leave around October 15, 2018 for unrelated reasons.

7. Claimant had a psychological evaluation with Dr. Herman Staudenmayer on November 21, 2018. She reported a history of depression and multiple life and family stressors. She did not feel the work accident was an "assault." She denied any psychological impact from the injury. Dr. Staudenmayer did not believe she required psychological counseling but thought she could benefit from self-regulation/relaxation training with biofeedback for pain management.

8. Claimant was evaluated by Dr. David Weinstein, an orthopedic surgeon, on February 15, 2019. She described constant pain in the right shoulder radiating to the right paracervical region around the shoulder blade. Dr. Weinstein reviewed images from a January 30, 2019 right shoulder MRI which showed "possible fraying" of the rotator cuff but no discrete tear. He opined Claimant's pain was primarily myofascial and saw no evidence of surgical pathology. He recommended conservative care including therapy, dry needling, and trigger point injections.

9. On March 11, 2019, Dr. Lakin changed Claimant's restrictions to lifting 5-10 pounds occasionally with the right arm, no over-shoulder activities with the right arm, and "do not overuse left arm to compensate." Claimant returned to modified duties in the staffing office on March 14, 2019.

10. Claimant returned to Dr. Staudenmayer on May 8, 2019. She reported depression, anxiety, and symptoms of PTSD. She was also experiencing significant family distress. She described the work accident in much more dramatic fashion than at the prior evaluation, using terms such as "acute terror," "extremely frightening," and "terrorizing." Her MMPI suggested somatization of emotional dysfunction and stress responses, possible amplification of symptoms as a cry for help, and a tendency to develop physical symptoms in response to stress. Dr. Staudenmayer diagnosed PTSD "with delayed expression" and recommended 12 sessions of counseling.

11. On May 14, and June 10, 2019, Claimant's ATP noted she was working with restrictions and having no issues.

12. On June 27, 2019, Claimant told PA-C Schwartz computer work was aggravating her neck pain. He encouraged her to raise her screen to eye level so she is not looking down, and use good posture and ergonomic technique at her workstation. Claimant requested the limitation to 8-hour shifts be continued.

13. Claimant received trigger point injections from Dr. Caughfield but reported no benefit. She had previously received no benefit from trigger point injections administered by Dr. Sparr.

14. On August 5, 2019, Dr. Lakin discharged Claimant for noncompliance. He noted she "appears much more comfortable" than her reported 8/10 pain level during the appointment. Claimant had exceeded the clinic's threshold for no-shows and rescheduling, which was also evident with other specialty clinics to which she had been referred. Dr. Lakin noted a similar pattern when he treated her for other injuries in the

past. As a result, he opined “I no longer believe that she is engaged in her care to make any progress.”

15. Claimant completed her therapy with Dr. Staudenmayer on September 9, 2019. Although Claimant was still complaining of stress and anxiety, Dr. Staudenmayer did not recommend any additional therapy and provided no psychological work restrictions.

16. Dr. J. Douglas Bradley took over as Claimant’s primary ATP on September 11, 2019. Examination showed tenderness around the right shoulder and neck musculature with decreased range of motion. Dr. Bradley restricted Claimant to no lifting over 5 pounds with the right arm.

17. Claimant participated in a Functional Capacity Evaluation (FCE) on November 4, 2019. The FCE assessed restrictions of 5-pounds lifting, frequent bilateral handling, frequent walking, occasional reaching with the left arm, no reaching with the right arm, and no fingering bilaterally. Claimant was described as cooperative and attempted all tasks except crouching and kneeling, which she declined because of right knee pain. The examiner noted, “the results of this evaluation suggest that [Claimant] gave a self-limited effort, with 16 of 19 consistency measures within the expected limits.” Claimant failed the grip testing and a positive REG score, which the evaluator stated, “is a probable indication of the submaximal or unreliable effort in the standard test.” Many attempted activities were described as “not tolerable” because of shoulder, neck, or knee pain. There was no objective verification of Claimant’s subjective reports of pain too severe to perform various activities. Accordingly, the accuracy of the FCE depends in large part on the reliability of Claimant’s reports.

18. Dr. Bradley placed Claimant at MMI on November 7, 2019 with a 20% combined whole person rating for the right shoulder and neck. Based on the FCE results, he opined Claimant could work up to eight hours per day with no lifting over 5 pounds, no overhead lifting, sit 30 minutes per hour, and stand/walk 30 minutes per hour. He also recommended she continue medications for at least six months.

19. On December 17, 2019, Respondent filed a Final Admission of Liability (FAL) admitting for Dr. Bradley’s rating and medical benefits after MMI.

20. Employer terminated Claimant in January 2020 because it could not accommodate a 5-pound right upper extremity lifting restriction on a permanent basis.

21. At her maintenance care visit in February 2020, Dr. Bradley referred Claimant to Dr. Scott Primack for evaluation and treatment of her shoulder and neck pain.

22. Claimant was evaluated by Dr. Primack on March 31, 2020. On exam, Dr. Primack noted reduced cervical range of motion but full motion of both shoulders. He found no specific shoulder injury. Dr. Primack opined Claimant remained at MMI and had no specific treatment recommendations. He opined there was “no reason why she cannot sit, stand, walk or lift up to 20 pounds occasionally and 15 pounds frequently.”

23. On June 30, 2020, Dr. Bradley adjusted Claimant's work restrictions to "return to full work/activity today. Patient may work entire shift. No reaching above shoulders with affected extremity(s). Unable to use power/impact/vibratory tool with right upper extremity."

24. Respondent obtained video surveillance of Claimant on March 3, 4, and 5, 2020. The video shows Claimant engaged in routine activities with no apparent pain or limitation. Although the activities are not physically demanding, they do show Claimant moving her right arm and neck more freely than she has reported or demonstrated on evaluations.

25. Respondent obtained an IME from Dr. Nicholas Kurz. Dr. Kurz ultimately issued to reports and testified at hearing. Dr. Kurz opined the FCE is an inaccurate representation of Claimant's capabilities because of her self-limiting and suboptimal effort during testing. He opined the activities shown on the surveillance video are inconsistent with the FCE results, Claimant's reported limitations, and the ranges of motion she demonstrated at the IME. Dr. Kurz persuasively explained the video surveillance shows Claimant can move her neck to both sides, bend and decide to bend with her cervical spine, looked down, and look up. He also noted Claimant used her right upper extremity normally to control a child, reach overhead, open doors, and reach out to grab branches with no apparent loss of function or pain. He noted records from multiple providers on multiple occasions documenting full neck and right shoulder range of motion. He opined Claimant has no work restrictions related to her September 13, 2018 work injury.

26. Claimant has a high school diploma from Central High School in Pueblo, Colorado. Her work history includes work and vegetable fields, weighing and bagging product in a meatpacking plant, work in a day care facility, and work at Estes Industries where she put wires inside a box. Claimant then underwent CNA training, obtained a CNA license, and worked as a CNA for Employer for almost 11 years. Claimant is proficient in both English and Spanish and previously provided translation services in a prior job.

27. Claimant had previous work-related injuries before September 2018: a left shoulder injury and right knee injury. She was released to full duty with no restrictions or permanent impairment from those injuries. Claimant had been working her regular job with no limitations at the time of her September 13, 2018 injury.

28. Katie Montoya conducted a vocational assessment on behalf of Respondent. Ms. Montoya considered the restrictions from Drs. Lakin, Bradley, Primack, and Kurz, and the FCE. Ms. Montoya opined it would be "difficult to find work" within the restrictions from the FCE. However, she noted "many reasons why using this FCE for permanent restrictions would not be representative of her work -related limitations, and I do not know that it is truly representative her overall abilities based on the self-limited effort." She opined the restrictions imposed by Dr. Lakin from March 2019 through the end of his treatment relationship would allow for the full range of light work. Similarly, she explained Dr. Primack's restrictions would also allow the full range of light work. Regarding Dr. Bradley's updated restrictions of no over-shoulder reaching and no use of power tools did not fit a specific exertional level but would be job specific. Ms. Montoya

discussed her general process of labor market research and her specific investigation for this case. She noted unemployment rates in Pueblo were not as favorable as they had been in February and March but have improved since the early months of the COVID-19 pandemic.

29. Rodney Wilson conducted a vocational evaluation on behalf of Claimant. Mr. Wilson relied primarily on the restrictions set forth in the FCE and Dr. Bradley's MMI report. Claimant told Mr. Wilson she was taking methocarbamol, trazodone, and amitriptyline, which made her drowsy and mentally foggy. Mr. Wilson emphasized high levels of unemployment in Claimant's labor market because of the pandemic. Consistent with Ms. Montoya's opinion regarding the employment-limiting effects of the FCE restrictions, Mr. Wilson opined Claimant is unable to earn any wages and is not consistently employable in the competitive labor market.

30. Dr. Kurz's and Ms. Montoya's opinions the FCE does not accurately represent Claimant's residual functional capacity are persuasive. The usefulness of an FCE largely depends on the effort the individual being tested. Claimant failed three validity measures, which indicates "probable submaximal effort." Moreover, the limitations outlined in the report are more extreme than would reasonably be expected based on Claimant's underlying pathology. For example, there is no persuasive reason Claimant would be precluded from all fingering bilaterally. Nor is the restriction of no reaching with the right arm consistent with Claimant's medical condition or abilities demonstrated on the video.

31. Although the ALJ credits some of Dr. Kurz's opinions, his conclusion Claimant has no injury-related limitations is unpersuasive because it is based on the unsupported supposition Claimant's injuries resolved within a few weeks. That is not consistent with the persuasive medical evidence, including documented (and admitted) permanent impairment caused by the work accident. Nevertheless, the fact Claimant suffered permanent medical impairment does not necessarily equate to a level of functional impairment consistent with permanent total disability. The restrictions outlined by Dr. Primack are reasonable and consistent with other persuasive evidence in the record. The preponderance of persuasive evidence shows Claimant can sustain competitive employment at the light exertional level. Although Claimant has described more severe impairment, she has probably embellished her limitations to appear more disabled than she truly is. Claimant's testimony and self-description of her limitations are given no weight the extent they conflict with the ability to perform light work.

32. Ms. Montoya's vocational opinions are credible and more persuasive than those offered by Mr. Wilson. Ms. Montoya persuasively opined Claimant is employable in a variety of light occupations such as cashier, crewmember, food preparation, monitor, companion, and delivery.

33. Claimant failed to prove she cannot earn any wages in the same or other employment.

34. Claimant was involved in a rear-end motor vehicle accident on August 10, 2020.

35. Claimant saw Dr. Weinstein on August 27, 2020 “for a new issue in regard to both of her shoulders.” Claimant told Dr. Weinstein the MVA “caused her neck to start bothering her and she had increase in bilateral shoulder pain.” Dr. Weinstein noted,

The patient has a history of a work-related right shoulder injury and states she had a baseline level of pain that she was able to tolerate. She also reported she had a baseline level of left shoulder pain that she was able to tolerate since 2005. The patient states **since the car accident she has had significant increase in her bilateral shoulder pain as well as her neck pain.** (Emphasis added).

36. On examination, Dr. Weinstein noted tenderness to palpation about the scapular rotator musculature. She had decreased strength, a positive Speed’s test, and positive impingement signs bilaterally. Claimant’s clinical findings were significantly worse than the previous evaluation in 2019. Dr. Weinstein ordered MRIs of both shoulders to evaluate rotator cuff pathology.

37. Claimant underwent an MRI of the right shoulder on September 15, 2020. It was interpreted as showing moderate rotator cuff tendinopathy, a 1.7 cm x 1.4 cm full-thickness supraspinatus tendon tear, and mild AC joint degenerative changes.

38. Claimant followed up with Dr. Weinstein on September 25, 2020. She reported her symptoms were unchanged since the previous evaluation. Dr. Weinstein noted myofascial tenderness over the right and left paracervical areas and scapular rotators bilaterally. The right shoulder was markedly tender over the subacromial space with a positive impingement sign. There was marked weakness with rotator cuff testing. Dr. Weinstein reviewed the MRI images, and appreciated a 2 cm x 1.5 cm full-thickness supraspinatus tear in the right shoulder. He also saw a high-grade partial tear of the tendon in the left shoulder. He recommended a right shoulder arthroscopic subacromial decompression with rotator cuff repair. He also planned to administer a cortisone injection to the left shoulder during surgery.

39. Claimant failed to prove the right shoulder surgery recommended by Dr. Weinstein is causally related to her September 2018 work accident. The January 30, 2019 right shoulder MRI showed only “possible fraying” of the rotator cuff with no discrete tear. Claimant’s examination of the time was consistent with myofascial pain, and Dr. Weinstein persuasively determined she was not a surgical candidate. By contrast, the September 15, 2020 right shoulder MRI shows a full thickness rotator cuff tear, for which Dr. Weinstein recommended surgery. Although the surgery is reasonably needed, the preponderance of persuasive evidence shows the rotator cuff tear was caused by the August 10, 2020 MVA and is entirely unrelated to the September 2018 work accident.

CONCLUSIONS OF LAW

A. Claimant failed to prove she is permanently and totally disabled

A claimant is considered permanently and totally disabled if she cannot “earn any wages in the same or other employment.” Section 8-40-201(16.5)(a), C.R.S. The term “any wages” means wages in excess of zero. *McKinney v. Industrial Claim Appeals Office*, 894 P.2d 42 (Colo. App. 1995). To prove permanent total disability, the claimant need not show that the industrial injury is the sole cause of her inability to earn wages. Rather, the claimant must demonstrate that the industrial injury is a “significant causative factor” in her permanent total disability. *Seifried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986). In determining whether the claimant can earn wages, the ALJ may consider a wide variety of “human factors.” *Weld County School District RE-12 v. Bymer*, 955 P.2d 550 (Colo. 1988). These factors include the claimant’s physical condition, mental abilities, age, employment history, education, training, and the “availability of work” the claimant can perform within her commutable labor market. *Id.* Another human factor is the claimant’s ability to obtain and maintain employment within her limitations. See *Professional Fire Protection, Inc. v. Long*, 867 P.2d 175 (Colo. App. 1993). The ability to earn wages inherently includes consideration of whether the claimant can get hired and sustain employment. See e.g., *Case v. The Earthgrains Co.*, W.C. No. 4-541-544 (ICAO, September 6, 2006); *Cotton v. Econo Lube N. Tune*, W.C. No. 4-220-395 (ICAO, January 16, 1997). If the evidence shows the claimant cannot “sustain” employment, the ALJ can find she is not capable of earning wages. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office*, 21 P.3d 866, 868 (Colo. App. 2001).

As found, Claimant failed to prove she is unable to earn any wages in the same or other employment. The FCE does not provide an accurate representation of Claimant’s functional capacity. Claimant’s subjective description of her limitations do not provide a reliable basis to determine her residual functional capacity. The preponderance of persuasive evidence shows Claimant can sustain employment at the light level, as opined by Dr. Primack. Ms. Montoya’s vocational opinions are credible and persuasive. As Ms. Montoya explained, Claimant can work and earn wages in a variety of occupations such as cashier, crewmember, food preparation, monitor, companion, and delivery. Claimant failed to prove she is permanently and totally disabled.

B. Claimant failed to prove the right shoulder surgery recommended by Dr. Weinstein is related to her work injury

The employer is liable for medical treatment reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101. The need for medical treatment may extend beyond maximum medical improvement (MMI) if the claimant requires periodic maintenance care to prevent further deterioration of their physical condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). The mere occurrence of a compensable injury does not compel the ALJ to approve all requested treatment. Even where the respondents admit liability for medical benefits after MMI, they retain the right to challenge the compensability and reasonable necessity of specific treatment. *Hanna v. Print Expeditors Inc.*, 77 P.3d 863 (Colo. App. 2003). Where the

respondents dispute the claimant's entitlement to medical benefits, the claimant must prove the treatment is reasonably necessary and causally related to the industrial accident. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). An injury need not be the sole cause of a claimant's need for treatment so long as there is a "direct causal relationship" to the industrial accident. *Seifreid v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1996); *Munoz v. JBS Swift & Co. USA, LLC*, W.C. No. 4-780-871-03 (October 7, 2014). The claimant must prove entitlement to disputed medical benefits by a preponderance of the evidence. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

As found, Claimant failed to prove the right shoulder surgery recommended by Dr. Weinstein is causally related to her September 2018 work accident. The January 30, 2019 right shoulder MRI showed only "possible fraying" of the rotator cuff with no discrete tear. Claimant's clinical examination of the time was consistent with myofascial pain, and Dr. Weinstein persuasively determined Claimant was not a surgical candidate. By contrast, the September 2020 right shoulder MRI shows a full thickness rotator cuff tear, for which Dr. Weinstein appropriately recommended surgery. Although the surgery is reasonably needed, the rotator cuff tear was caused by the August 10, 2020 MVA and is entirely unrelated to the September 2018 work accident.

ORDER

It is therefore ordered that:

1. Claimant's claim for permanent total disability benefits is denied and dismissed.
2. Claimant's claim for medical benefits in the form of right shoulder arthroscopic surgery recommended by Dr. Weinstein is denied and dismissed.
3. All issues not decided herein are reserved for future determination.

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

review form at: <http://www.colorado.gov/dpa/oac/forms-WC.htm>. In addition, please send a courtesy copy of your Petition to Review to the Colorado Springs OAC office via email at oac-csp@state.co.us

DATED: December 23, 2020

s/ Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUE

Whether Claimant has demonstrated by a preponderance of the evidence that the total disc replacement revision surgery and anterior cervical fusion and discectomy at C5-6 requested by Brent Kimball, M.D. is reasonable, necessary and causally related to her August 24, 2016 industrial injury.

FINDINGS OF FACT

1. Claimant is a 35-year-old female who worked as a gymnastics instructor for Employer. Claimant's job duties included teaching, demonstrating and assisting students in the performance of gymnastic maneuvers. On August 24, 2016 Claimant suffered an admitted industrial injury to her neck during the course and scope of her employment. While spotting one of her students during a trick on the trampoline, Claimant turned her head and felt a pulling sensation in her neck. She gradually developed bilateral muscle soreness that progressively worsened.

2. Claimant subsequently received conservative treatment for her neck injury. She specifically underwent an Epidural Steroid Injection (ESI) from C7-T1 that worsened her symptoms. Claimant also performed cervical traction at home with minimal relief. Moreover, she received eight sessions of physical therapy with massage and dry needling. However, because conservative measures failed, Claimant underwent a Total Disc Replacement (TDR) performed by Brent Kimball, M.D., on May 1, 2017. Pre-operatively, Dr. Kimball noted that Claimant was not a good candidate for an Anterior Cervical Discectomy and Fusion (ACDF) based on her age and the likelihood of requiring additional surgery in the future.

3. On August 7, 2018 F. Mark Paz, M.D. determined that Claimant had reached Maximum Medical Improvement (MMI) as of May 8, 2018. At the time of Dr. Paz's examination, Claimant reported 6-7/10 neck pain located primarily on the left side. Dr. Paz recommended medical maintenance care including physical therapy, medications and follow-up with her surgeon once per year. He assigned Claimant a 21% whole person impairment rating.

4. On January 22, 2019 Claimant underwent a Division Independent Medical Examination (DIME) with Caroline Gellrick, M.D. Dr. Gellrick agreed with Dr. Paz's May 8, 2018 MMI determination and assigned Claimant a 30% whole person impairment rating. Claimant reported 7/10 pain that had started gradually with an increase in her activity since August 2018. Claimant noted that she was still receiving treatment for her lupus. Dr. Gellrick concurred with Dr. Paz's recommendations for medical maintenance care.

5. On March 27, 2019 Respondents filed a Final Admission of Liability (FAL). Respondents acknowledged that Claimant reached MMI on May 8, 2018, suffered a

30% whole person impairment rating and was entitled to receive medical maintenance benefits as outlined by Dr. Gellrick.

6. On February 7, 2020 Claimant returned to Dr. Kimball for a follow-up visit. Claimant noted a return of neck pain, with shooting pain into her left arm. X-rays demonstrated that Claimant had stable post-surgical changes at C5-6 and stable motion at C2-4.

7. On February 18, 2020 Claimant underwent an MRI of her cervical spine. The imaging revealed multilevel degenerative changes without significant spinal stenosis or foraminal narrowing. Claimant also had a normal cervical cord signal without foraminal narrowing or spinal stenosis.

8. On March 12, 2020 Claimant received bilateral facet injections from D. Jonathan Bernardini, M.D. based on a referral from Dr. Kimball. Dr. Bernardini noted Claimant reported 25% pain relief immediately following the procedure. However, by April 13, 2020 Claimant told Dr. Kimball that she had not experienced any relief from the injections. Dr. Kimball referred Claimant for an EMG of the upper extremities and noted the EMG was "essential to determining if her symptoms are coming from C5-6." He commented that the MRI and x-rays revealed Claimant's C5-6 level was stable.

9. Claimant returned to Dr. Bernardini on May 7, 2020 for bilateral C5-6 transforaminal steroid injections. Claimant reported that she experienced 100% relief of symptoms immediately following the injections. However, Claimant later reported to Dr. Kimball that she had only mild initial relief and within a few hours her pain had worsened. On May 12, 2020 Dr. Bernardini noted that Claimant exhibited no weakness, sensory deficits or myelopathic findings following a "thorough physical examination."

10. On June 29, 2020 Claimant returned to Dr. Kimball for an evaluation. Claimant reported 8-9/10 neck pain radiating to her head and into her bilateral shoulders and arms. Dr. Kimball remarked that Claimant's EMG from June 9, 2020 was unremarkable. He noted that Claimant exhibited full range of motion except for neck movement. Dr. Kimball reasoned that the origin of Claimant's pain was likely the C5-6 level. He thus proposed revision of the TDR and an ACDF of C5-6. Dr. Kimball expressed concern that adjacent levels might require surgical repair in the future. On July 22, 2020 Dr. Kimball submitted a request for prior authorization to perform a revision of the TDR and an ACDF at C5-6.

11. On July 28, 2020 Michael Janssen, D.O. provided a physician advisor opinion regarding the requested surgery. He explained that Claimant had no anatomical reasons for her subjective complaints 18 months after reaching MMI and her pain generator has not been identified. Dr. Janssen remarked that proceeding with surgery would not be consistent with the Cervical Spine Colorado Division of Workers' Compensation Medical Treatment Guidelines (*Guidelines*). He also noted that, based on the failure to identify the pain generator, Claimant's current condition was not work-related. Dr. Janssen noted that Claimant might have the same clinical outcome from an ACDF as her prior surgery due to the multilevel degenerative disc disease identified in her cervical spine.

12. On September 21, 2020 Claimant underwent an independent medical examination with Michael J. Rauzzino, M.D. Dr. Rauzzino thoroughly reviewed Claimant's extensive medical records and conducted a physical examination. Claimant reported constant and excruciating neck pain that radiated into her shoulders, arms and primarily the first two digits of her hands. She denied neck difficulties prior to her 2016 injury, but Dr. Rauzzino remarked that her pre-2016 medical records controverted her report. Dr. Rauzzino explained that Claimant's intake form endorsed a broad range of symptoms including every description of pain and pain-producing activity enumerated on the form. Although Claimant was essentially unable to move her neck in any direction during physical examination, at other times Dr. Rauzzino observed Claimant turn her head much more fully. Dr. Rauzzino detailed that Claimant's sensory examination was not consistent with the C5-6 dermatome. She instead reported a diffuse, non-anatomic range of sensory loss and pain over many areas. He administered a Computerized Outcomes Management Technologies (COMT) assessment. Claimant scored "Distressed-Somatic," that was consistent with patients who have a propensity for poor surgical outcomes.

13. Dr. Rauzzino summarized that none of Claimant's extensive treatment has improved her condition, but has worsened her symptoms over the past four years. He also noted that Claimant's EMG was negative, the cervical MRI showed no significant stenosis at the proposed surgical level and the artificial disc was functioning properly. Dr. Rauzzino remarked that, despite the objective findings, Claimant's subjective symptoms were non-physiologic and reflected a striking contrast to the benign objective findings. He concluded that there was no reasonable basis to believe that an ACDF at C5-6 would improve Claimant's condition, especially in the absence of any nerve root compression. Dr. Rauzzino explained that Claimant's work-related injury had been successfully treated with the TDR in 2017. Claimant's diffuse, non-anatomic symptoms were more likely due to her non-work related chronic fibromyalgia and SLE-like condition for which she had been receiving treating since 2007.

14. Claimant testified at hearing in this matter. She explained that she had obtained significant relief following her TDR surgery on May 1, 2017. However, she gradually began to develop increased pain. Her current symptoms specifically started in August of 2018 while she was working as a gymnastics coach demonstrating techniques, lifting athletes, and catching and spotting children weighting between 70-120 pounds. Claimant stopped working as a gymnastics instructor in April of 2020 due to the COVID-19 pandemic. Claimant noted that, if the surgery did not relieve her pain, there was no purpose in pursuing the ACDF.

15. Dr. Rauzzino testified at the hearing in this matter. He maintained that revising the TDR, removing the artificial disc at C5-6 and performing an ACDF was not reasonable, necessary and causally related to Claimant's August 24, 2016 admitted industrial injury. He considered the pain diagram Claimant completed for his independent medical examination and the radiology studies of her cervical spine. He explained that, based on Claimant's original injury and subsequent MRIs, he would have expected her to have C6 radiculopathy only on the left side. A C6 radiculopathy would correspond to sensory findings in only the first two digits of the left hand with discrete numbness up the arm. Based on the diffuse presentation of Claimant's

symptoms beyond the C5-6 dermatome, Dr. Rauzzino explained that there is no reasonable basis to believe that a fusion at C5-6 will relieve her pain.

16. Dr. Rauzzino commented that Claimant has reported a broad constellation of symptoms that have increased since her initial presentation. However, all objective testing and imaging reveals that the TDR and decompression were successful. Dr. Rauzzino specified that Claimant's recollection of her improvement following the TDR was inconsistent with his review of the medical records. Moreover, Claimant's neck pain and headaches never improved following the surgery. Dr. Rauzzino noted that Claimant's Waddell testing and COMT assessment suggested that she has reported non-anatomic pain and has a high likelihood of poor outcomes from treatment.

17. Dr. Rauzzino remarked that Dr. Kimball was satisfied with the placement of the artificial disc and the disc has not failed. He explained that an ACDF will cause abnormal stress on adjacent discs and they will wear out. He detailed that the TDR was devised to allow the disc to function normally and preserve motion in younger patients. Revising the TDR and performing an ACDF will not improve Claimant's current symptoms, but will degrade the condition of her cervical spine. Dr. Rauzzino noted that Dr. Kimball had already discussed the need for future surgeries if the ACDF was not performed because the procedure would likely lead to more problems at adjacent levels. He remarked that, if the artificial disc had failed, an ACDF would be appropriate. However, the radiographic evidence reflects that the artificial disc is functioning properly and the motion of the artificial disc has been maintained. Dr. Rauzzino noted that, prior to operating, C5-6 should be identified as the pain generator. However, the objective evidence reveals that C5-6 is not the root cause of Claimant's symptoms. Specifically, Claimant's negative EMG, imaging showing no nerve root compression and negative injection responses reveal that C5-6 is not her pain generator. The inability to identify the pain generator at other levels does not justify performing surgery at C5-6.

18. Dr. Rauzzino explained that proceeding with the ACDF would be inconsistent with the *Guidelines* because Claimant does not have any of the four indications for the surgery including a ruptured disc, spondylosis, spinal instability or non-radicular neck pain. Moreover, Claimant does not meet the standards in the *Guidelines* for revision surgery because they require functional outcomes that exceed a claimant's current status. Notably, the proposed surgery will require significant manipulation and changes to Claimant's spine that will cause adjacent discs to degrade more quickly and require additional treatment. Dr. Rauzzino summarized that the proposed TDR revision and ACDF is not causally related to Claimant's August 24, 2016 industrial injury. Finally, the procedure is not reasonable and necessary to cure or relieve the effects of Claimant's work-related injury.

19. Claimant has failed to demonstrate that is more probably true than not that the proposed TDR revision surgery and ACDF at C5-6 is reasonable, necessary and causally related to her August 24, 2016 industrial injury. Initially, on August 24, 2016 Claimant suffered an admitted industrial injury to her neck when she turned her head and felt a pulling sensation in her neck while spotting one of her gymnastics students. After receiving conservative treatment Claimant underwent a TDR performed by Dr. Kimball on May 1, 2017. Claimant reached MMI on May 8, 2018 with a 30% whole

person impairment rating. She subsequently developed renewed neck pain accompanied by shooting pain into her left arm. After a cervical spine MRI, Claimant received bilateral facet injections and bilateral C5-6 transforaminal steroid injections. By June 29, 2020 Claimant returned to Dr. Kimball and reported 8-9/10 neck pain radiating into her head, bilateral shoulders and arms. Dr. Kimball determined that Claimant's pain originated at the C5-6 level. On July 22, 2020 Dr. Kimball submitted a request for prior authorization to perform a revision of the TDR and ACDF at C5-6.

20. The medical records reveal that Claimant has reported a broad constellation of symptoms that have increased since her initial presentation. However, all objective testing and imaging reveals that the TDR and decompression were successful. Claimant's medical history includes extensive treatment for diffuse symptoms due to a chronic condition that began in 2007. After Claimant returned to her physical job duties as a gymnastics coach in 2018 she began experiencing gradually increasing pain and symptoms. While some symptoms were similar to those from her August 24, 2016 work-injury, they expanded beyond the areas that are physiologically consistent with her initial injury. After Claimant reported her symptoms to Dr. Kimball, he ordered comprehensive diagnostic testing to locate her pain generator. Although the diagnostic testing failed to identify Claimant's pain generator, Dr. Kimball nevertheless recommended a TDR revision and ACDF.

21. Despite Dr. Kimball's opinion, the persuasive medical opinions reflect that the proposed surgery is not reasonable, necessary and causally related to Claimant's August 24, 2016 industrial injury. Dr. Rauzzino persuasively concluded that the proposed revision TDR and ACDF is not causally related to Claimant's August 24, 2016 injury. Instead, Dr. Rauzzino determined that Claimant's diffuse symptoms are most likely related to her chronic fibromyalgia or SLE-like syndrome for which she has treated since 2007. He explained that Claimant's radiographs and MRI showed that the artificial disc from the TDR was functioning properly and there was no compression of her C6 nerve root. Dr. Rauzzino noted that Claimant's EMG testing of the C6 nerve root, which Dr. Kimball stated was essential to determining the pain generator, was normal. He also remarked that Claimant's facet and transforaminal injections provided no diagnostic response at C5-6. Furthermore, Dr. Rauzzino explained that Claimant's report of increasing and diffuse pain throughout her upper extremities, torso, neck and head are inconsistent with the expected physiologic presentation of a problem at C5-6.

22. Dr. Rauzzino summarized that Claimant's objective testing and subjective complaints were insufficient to justify proceeding with an ACDF pursuant to the *Guidelines*. Specifically, Claimant does not have any of the four indications for the surgery including a ruptured disc, spondylosis, spinal instability or non-radicular neck pain. Moreover, Claimant does not meet the standards in the *Guidelines* for revision surgery because they require functional outcomes that are expected to be better than a claimant's current status. Notably, the proposed surgery will require significant manipulation and changes to Claimant's spine that will cause adjacent discs to degrade more quickly and require additional treatment. Similarly, Dr. Janssen persuasively determined that Claimant's subjective complaints lacked objective anatomic correlation. He explained that Claimant had no anatomical reasons for her subjective complaints 18 months after reaching MMI and her pain generator was not identified. Dr. Janssen

remarked that proceeding with surgery would not be consistent with the Cervical Spine *Guidelines*. He also noted that, based on the failure to identify a pain generator, Claimant's current condition was not work-related. Accordingly, the medical records and persuasive medical opinions demonstrate that the proposed TDR revision and ACDF is not causally related to Claimant's August 24, 2016 industrial injury.

23. Although Dr. Kimball has attributed Claimant's current symptoms to the C5-6 level and her work-related injury, his opinion is not consistent with a complete review of the medical records and the results of Claimant's recent diagnostic testing. Dr. Kimball's conclusions are predicated on the assumption that Claimant's pain generator is C5-6. However, as Dr. Rauzzino explained, Claimant's presentation of symptoms is not consistent with an injury at C5-6 and the proposed ACDF at that level will not provide pain relief. Accordingly, the proposed TDR revision and ACDF is not causally related to Claimant's August 24, 2016 industrial injury. The procedure is also not reasonable and necessary to cure or relieve the effects of Claimant's work-related injury. Claimant's request for a TDR revision and ACDF is thus denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. See *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the

employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). The claimant bears the burden of demonstrating a causal connection between his industrial injuries and the need for additional medical treatment. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier*, W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

5. The *Guidelines* were propounded by the Director pursuant to an express grant of statutory authority. See § 8-42-101(3.5)(a)(II), C.R.S. The *Guidelines* are the accepted professional standards for care under the Workers' Compensation Act. *Rook v. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005). In *Hall v. Industrial Claim Appeals Office*, 74 P.3d 459 (Colo. App. 2003) the court noted that the *Guidelines* shall be used by health care practitioners when furnishing medical treatment under the Workers' Compensation Act. See Section 8-42-101(3)(b), C.R.S.

6. The purpose of an ACDF is to relieve pressure on one or more nerve roots or the spinal cord. WCRP 17, Exhibit 8(G)(2)(b)(i)(A). Indications for ACDF include radiculopathy from a ruptured disc or spondylosis, spinal instability or patients with non-radicular neck pain meeting fusion criteria. *Id* at (G)(2)(b)(i)(C). The goal of TDR is maintaining physiologic motion at the treated cervical segment by inserting a prosthetic device into the cervical intervertebral space. *Id* at (G)(3). Notably, “re-operation is indicated only when the functional outcome following the re-operation is expected to be better, within a reasonable degree of certainty, than the outcome of other non-invasive or less invasive treatment procedures... Re-operation has a high rate of complications and failure and may lead to disproportionately increased disability.” *Id* at (G).

7. As found, Claimant has failed to demonstrate by a preponderance of the evidence that the proposed TDR revision surgery and ACDF at C5-6 is reasonable, necessary and causally related to her August 24, 2016 industrial injury. Initially, on August 24, 2016 Claimant suffered an admitted industrial injury to her neck when she turned her head and felt a pulling sensation in her neck while spotting one of her gymnastics students. After receiving conservative treatment Claimant underwent a TDR performed by Dr. Kimball on May 1, 2017. Claimant reached MMI on May 8, 2018 with a 30% whole person impairment rating. She subsequently developed renewed neck pain accompanied by shooting pain into her left arm. After a cervical spine MRI, Claimant received bilateral facet injections and bilateral C5-6 transforaminal steroid injections. By June 29, 2020 Claimant returned to Dr. Kimball and reported 8-9/10 neck pain radiating into her head, bilateral shoulders and arms. Dr. Kimball determined that Claimant’s pain originated at the C5-6 level. On July 22, 2020 Dr. Kimball submitted a request for prior authorization to perform a revision of the TDR and ACDF at C5-6.

8. As found, the medical records reveal that Claimant has reported a broad constellation of symptoms that have increased since her initial presentation. However, all objective testing and imaging reveals that the TDR and decompression were successful. Claimant’s medical history includes extensive treatment for diffuse

symptoms due to a chronic condition that began in 2007. After Claimant returned to her physical job duties as a gymnastics coach in 2018 she began experiencing gradually increasing pain and symptoms. While some symptoms were similar to those from her August 24, 2016 work-injury, they expanded beyond the areas that are physiologically consistent with her initial injury. After Claimant reported her symptoms to Dr. Kimball, he ordered comprehensive diagnostic testing to locate her pain generator. Although the diagnostic testing failed to identify Claimant's pain generator, Dr. Kimball nevertheless recommended a TDR revision and ACDF.

9. As found, despite Dr. Kimball's opinion, the persuasive medical opinions reflect that the proposed surgery is not reasonable, necessary and causally related to Claimant's August 24, 2016 industrial injury. Dr. Rauzzino persuasively concluded that the proposed revision TDR and ACDF is not causally related to Claimant's August 24, 2016 injury. Instead, Dr. Rauzzino determined that Claimant's diffuse symptoms are most likely related to her chronic fibromyalgia or SLE-like syndrome for which she has treated since 2007. He explained that Claimant's radiographs and MRI showed that the artificial disc from the TDR was functioning properly and there was no compression of her C6 nerve root. Dr. Rauzzino noted that Claimant's EMG testing of the C6 nerve root, which Dr. Kimball stated was essential to determining the pain generator, was normal. He also remarked that Claimant's facet and transforaminal injections provided no diagnostic response at C5-6. Furthermore, Dr. Rauzzino explained that Claimant's report of increasing and diffuse pain throughout her upper extremities, torso, neck and head are inconsistent with the expected physiologic presentation of a problem at C5-6.

10. As found, Dr. Rauzzino summarized that Claimant's objective testing and subjective complaints were insufficient to justify proceeding with an ACDF pursuant to the *Guidelines*. Specifically, Claimant does not have any of the four indications for the surgery including a ruptured disc, spondylosis, spinal instability or non-radicular neck pain. Moreover, Claimant does not meet the standards in the *Guidelines* for revision surgery because they require functional outcomes that are expected to be better than a claimant's current status. Notably, the proposed surgery will require significant manipulation and changes to Claimant's spine that will cause adjacent discs to degrade more quickly and require additional treatment. Similarly, Dr. Janssen persuasively determined that Claimant's subjective complaints lacked objective anatomic correlation. He explained that Claimant had no anatomical reasons for her subjective complaints 18 months after reaching MMI and her pain generator was not identified. Dr. Janssen remarked that proceeding with surgery would not be consistent with the Cervical Spine *Guidelines*. He also noted that, based on the failure to identify a pain generator, Claimant's current condition was not work-related. Accordingly, the medical records and persuasive medical opinions demonstrate that the proposed TDR revision and ACDF is not causally related to Claimant's August 24, 2016 industrial injury.

11. As found, although Dr. Kimball has attributed Claimant's current symptoms to the C5-6 level and her work-related injury, his opinion is not consistent with a complete review of the medical records and the results of Claimant's recent diagnostic testing. Dr. Kimball's conclusions are predicated on the assumption that Claimant's pain generator is C5-6. However, as Dr. Rauzzino explained, Claimant's presentation of symptoms is not consistent with an injury at C5-6 and the proposed

ACDF at that level will not provide pain relief. Accordingly, the proposed TDR revision and ACDF is not causally related to Claimant's August 24, 2016 industrial injury. The procedure is also not reasonable and necessary to cure or relieve the effects of Claimant's work-related injury. Claimant's request for a TDR revision and ACDF is thus denied and dismissed.

ORDER

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

1. Claimant's request for a TDR revision and ACDF is denied and dismissed.
2. Any issues not resolved in this Order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at <https://oac.colorado.gov/resources/oac-forms>.*

DATED: December 23, 2020.

DIGITAL SIGNATURE:


Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- What is the DIME's true rating?
- Did Respondents overcome the DIME's impairment rating by clear and convincing evidence?
- Did Claimant prove she is permanently and totally disabled?
- Claimant withdrew the endorsed issue of medical benefits after MMI.
- The parties agreed to reserve the issue of disfigurement.
- Respondents' counsel indicated Insurer has been paying Claimant TTD since the date of MMI and asked that a specific determination regarding any applicable offsets or overpayments be reserved pending a ruling on the PTD claim.

STIPULATIONS

The parties stipulated Claimant reached MMI on January 9, 2019. The parties further stipulated Claimant received Social Security retirement income in the amount of \$1,598 per month and was receiving Social Security income before the injury.

FINDINGS OF FACT

1. Claimant worked for Employer as a stock and hub driver. Her duties included putting away stock, pulling stock transfers, and delivering parts. Before her work injury, Claimant had been retired for many years. She returned to work because she was board and looking for something to do other than play golf.

2. Claimant suffered an admitted injury on April 5, 2018 when a brake rotor fell out of a box and landed on her left foot. She suffered a crush injury and displaced first metatarsal fracture.

3. Claimant underwent an open reduction with internal fixation of the left foot first metatarsal shaft on April 18, 2018. Claimant currently has a titanium locking plate and screws in her left foot which prevents motion of her great toe joint.

4. Claimant received authorized treatment through Concentra Medical Center. Initially, she seemed to heal relatively well from the injury and surgery. However, she eventually developed symptoms in the left foot consistent with sympathetic nerve pain.

5. Dr. Shimon Blau, a physiatrist, evaluated Claimant on August 28, 2018. Based on the clinical findings, Dr. Blau opined, "I have a high suspicion for CRPS in this

patient I recommend further testing for workup for this including a triple phase bone scan, autonomic testing battery including QSART and stress thermogram.”

6. Claimant underwent a triple phase bone scan on September 12, 2018, which was “equivocal” for CRPS.

7. Dr. Tashof Bernton performed autonomic testing and stress thermography on September 24, 2018. Physical examination of the left lower extremity demonstrated atrophy of the left calf. Dr. Bernton observed the left foot appeared slightly discolored compared to the right with some reticular pattern on the skin. He also noted slight fusiform swelling of the toes and marked hyperalgesia over the foot and lower leg. Hair and nail appearance were symmetric. The autonomic testing battery was consistent with “high probability of dysautonomia.” The thermogram showed temperature asymmetry consistent with CRPS. Dr. Bernton opined, “Both [tests] met criteria for complex regional pain syndrome. With two positive objective diagnostic tests, the patient meets criteria for confirmed the complex regional pain syndrome per the Colorado Workers’ Compensation Treatment Guidelines.”

8. Dr. Bernton recommended sympathetic blocks, adjustment of Claimant’s medications, and a compound topical cream.

9. Claimant was evaluated by Keith Meier, NP, at Concentra on September 26, 2018. She described constant severe sharp and burning pain. On examination, the left foot was discolored (a “bluish tone”) and had a “shiny” appearance. The foot was cool to the touch and extremely sensitive to light touch. NP Meier documented similar clinical findings on October 11, 2018.

10. Claimant had a lumbar sympathetic block on November 13, 2018, which provided no benefit.

11. Dr. Blau placed Claimant at MMI on January 7, 2019. He assigned a 25% whole person rating for CRPS under Table 1, page 109 of the *AMA Guides* because “she has difficulty walking long distances greater than about 30 to 45 minutes as well as a lot of difficulty walking on any services that are not level.” Dr. Blau recommended ongoing maintenance care, including physician follow-up and medications. Claimant was instructed to “follow up with Dr. Pineiro . . . for final MMI determination status.”

12. Claimant saw Dr. Piniero on January 9, 2019. She agreed Claimant was at MMI, pending confirmation from her psychologist. At the time of the appointment, had been on temporary work restrictions of sedentary work only, no more than two hours per day. Dr. Piniero converted the temporary work restrictions to permanent restrictions.

13. On April 9, 2019, Claimant saw Dr. Richard Gordon, a physiatrist who replaced Dr. Blau at Concentra. She described constant burning, aching, stabbing pain in the left foot and said the foot “stays cold and is purple.” Claimant reported difficulty donning and doffing socks on the left foot and could not fully weightbear, causing her to walk on the outside of the foot. On examination, Dr. Gordon noted no atrophy of the foot, but weakness with multiple motions. She reported hypersensitivity to light touch “with

rapid withdrawal, and at which point, the patient became tearful.” He noted “skin of both feet appears reddish purple and practically identical. To the touch, there were no obvious skin temperature changes.” He diagnosed CRPS but opined, “this is a tentative diagnosis based on the fact that her triple phase bone scan was negative, she had no significant improvement with lumbar sympathetic nerve blocks, and no consistent and reproducible findings on today’s physical exam. I am hesitant to rely on the results of the thermography and autonomic testing solely to diagnose CRPS.”

14. Respondents requested a DIME to challenge Dr. Blau’s rating, and Dr. Justin Green was selected as the DIME physician. Claimant saw Dr. Green on April 29, 2019. Dr. Green diagnosed CRPS likely Type I. He opined, “there is consistent documentation that supports a work-related traumatic injury requiring surgical intervention and subsequent development of Complex Regional Pain Syndrome.” He agreed with January 9, 2019 as the date of MMI and with Dr. Blau’s 25% impairment rating. He further opined, “I am also in agreement with work restrictions no greater than two hours daily of work with 90% of the time in a seated position, preferably with the leg elevated.”

15. Claimant followed up with Dr. Gordon on May 7, 2019. He reiterated his doubts regarding the diagnosis of CRPS, noting symmetrical discoloration in both feet and “no obvious temperature change when comparing side to side.”

16. On May 21, 2019, Dr. Gordon noted Claimant was working at two hours per day at Hearts and Horses Therapeutic Riding and “she is tolerating this fairly well.” On exam, he noted the left foot was erythematous and slightly dusky when compared to the right foot. It was also slightly cooler than the right foot. He noted no atrophy but did not test strength “secondary to the patient’s previous exaggerated pain behavior, which resulted in the fixation of exam.” Claimant ambulated with a cane. He recommended a TENS unit and suggested Claimant consider a repeat lumbar sympathetic nerve blocks with a different provider than who had administered the first block.

17. On June 4, 2019, Dr. Gordon noted the TENS unit was not helpful and “actually made her left foot pain and paresthesias worse. She has decided that she does not want to proceed with the repeat left lumbar sympathetic nerve block and does not want to be considered for a spinal cord stimulator.” She had recently started a compound cream, which was helpful.

18. Dr. Bernton re-evaluated Claimant on November 20, 2019. He noted “clear objective findings consistent with [CRPS],” including marked hyperalgesia over the first toe, objective atrophy of the left calf, marked range of motion loss not associated with any orthopedic injury, and slight discoloration of the left foot. Dr. Bernton opined “given the diagnostic tests, the only diagnosis that explains the patient’s current symptoms and objective findings is complex regional pain syndrome.”

19. Dr. Carlos Cebrian performed an IME for Respondents. He initially evaluated Claimant on December 14, 2018. He later provided a supplemental report dated October 31, 2019 after reviewing records. He also testified via deposition. Dr.

Cebrian disputes the diagnosis of CRPS. He explained there is a “clinical diagnosis” and a “confirmed diagnosis.” For patients such as Claimant who may meet the initial criteria for clinical CRPS, a confirmed the diagnosis is still required, which should include a finding that “no other diagnosis better explains the signs and symptoms.” Dr. Cebrian opined Claimant was taking medications with anticholinergic affects and did not properly follow the pre-testing protocol regarding such medications. He opined it is medically probable Claimant’s positive thermogram and QSART are “false positives,” and Claimant does not have CRPS. He noted the triple phase bone scan and sympathetic blocks were not diagnostic of CRPS. He opined Claimant complained of isolated pain to a small area of the distal portion of the left foot, which is atypical for CRPS. He also cited Dr. Gordon’s examination findings which led Dr. Gordon to question the diagnosis of CRPS. Ultimately, Dr. Cebrian opined Claimant has neuropathic pain but not CRPS.

20. Dr. Bernton convincingly refuted Dr. Cebrian’s opinions regarding CRPS in a narrative report and his deposition testimony. He noted the thermography results were “strongly positive” and the autonomic testing battery showed a “high probability” of dysautonomia. He explained Dr. Cebrian “goes out of his way to construct a very improbable scenario in which, in his opinion, the patient does not have complex regional pain syndrome.” He opined, “The patient has a number of clinical findings which would not be explained by any of the hypotheses put forth by Dr. Cebrian.” Dr. Bernton strongly disagreed with the argument Claimant’s test results represented a “false positive.” He disagreed Claimant was taking anticholinergic medications, but even if she were, that could produce a false negative, but not a false positive. He also pointed out Dr. Cebrian’s examination documented significant temperature asymmetries in the left foot, which refutes Dr. Cebrian’s conclusions and “strongly supports” the diagnosis of CRPS. After reviewing the physical examination documented in Dr. Cebrian’s report, Dr. Bernton testified, “he’s essentially diagnosed Complex Regional Pain Syndrome here.”

21. Dr. Bernton’s opinions regarding the diagnosis of CRPS are credible and persuasive.

22. Respondents obtained video surveillance of Claimant on multiple dates in November 2018, December 2018, January 2019, and June 2019. The video shows Claimant standing and walking with no apparent difficulty on multiple dates. On June 3, 2019, Claimant is shown standing on her balcony smoking six cigarettes over two hours. There is no chair or anything else on which to sit on the balcony. Claimant then went to the grocery store and walked with slight limp with no cane. She next went to Applebee’s where she remained for more than two hours until reporting to work at Hearts and Horses. Time records show she worked her full two-hour shift that day. On June 4, 2019, Claimant was first seen standing normally on her balcony smoking two cigarettes within twenty minutes. Approximately 10 minutes later, Claimant walked around while getting gas with no significant limp and did not use a cane. But when she attended her appointment at Concentra later that morning, she began using a cane and walking slowly with a pronounced limp. Claimant used a cane to go up and down the stairs and curb at Concentra. After leaving Concentra, she visited the office at her apartment complex, and again used the cane and walked with a pronounced limp. However, when Claimant got out of her vehicle at home a few minutes later, she did so without a cane and walked

normally with only a slight limp. Less than ten minutes later, she was filmed smoking on her balcony, walking with a normal stride swaying and shifting her weight between her feet without issue. In total, she was shown standing and smoking on six occasions over three and one-half hours after returning home.

23. Claimant attempted to explain away the video surveillance by testifying her symptoms “wax and wane” and the video was taken on “good days.” She testified the pain increases when she is up and about for any significant time. She testified on June 4, 2019, “I had my leg up all morning long. You know, and, if I have my leg up all morning or all afternoon long, then I can do some things.” Claimant’s testimony regarding the video is unpersuasive. Claimant was filmed on numerous occasions in multiple locations. She was repeatedly shown on her balcony smoking cigarettes with no chair, stool, or footrest in sight. She went to Applebee’s and sat for prolonged periods of time with no indication she needed to elevate her leg. She repeatedly walked without an assistive device and displayed only a minimally antalgic gait. On June 4, she gingerly hobbled into Concentra using a cane but was observed at other times that same day standing walking with no apparent difficulty. Based on the extensive video footage, the ALJ finds Claimant has probably embellished her reported functional limitations to appear more disabled than she truly is. As a result, Claimant’s testimony and self-described limitations are not a useful or persuasive tool for determining her residual functional capacity.

24. Respondents took Dr. Green’s deposition on April 28, 2020. Dr. Green had the opportunity to review additional medical records, including reports from Dr. Cebrian and Nurse Meier. He also reviewed the video surveillance before the deposition. Dr. Green maintained his opinion Claimant suffers from CRPS and qualifies for an impairment rating under the Station and Gait section on pages 107 and 109 of the *AMA Guides*. The pertinent portions of the *AMA Guides* provide:

| <p>Station and Gait The ability to stand and walk provides criteria for evaluating spinal cord disorders affecting the lower extremities. These criteria are:</p> <table border="1"> <thead> <tr> <th>Description</th> <th>% Impairment of the Whole Person</th> </tr> </thead> <tbody> <tr> <td>1. Patient can rise to a standing position and can walk <i>but</i> has difficulty with elevations, grades, steps, and distances</td> <td>5-20</td> </tr> <tr> <td>2. Patient can rise to a standing position and can walk with difficulty <i>but</i> is limited to level surfaces. There is variability as to the distance the patient can walk</td> <td>25-35</td> </tr> <tr> <td>3. Patient can rise to a standing position and can maintain it with difficulty <i>but</i> cannot walk</td> <td>40-60</td> </tr> <tr> <td>4. Patient cannot stand without a prosthesis or the help of others</td> <td>65</td> </tr> </tbody> </table> | Description | % Impairment of the Whole Person | 1. Patient can rise to a standing position and can walk <i>but</i> has difficulty with elevations, grades, steps, and distances | 5-20 | 2. Patient can rise to a standing position and can walk with difficulty <i>but</i> is limited to level surfaces. There is variability as to the distance the patient can walk | 25-35 | 3. Patient can rise to a standing position and can maintain it with difficulty <i>but</i> cannot walk | 40-60 | 4. Patient cannot stand without a prosthesis or the help of others | 65 | <p>Table 1. Spinal Cord and Brain Impairment Values</p> <table border="1"> <thead> <tr> <th>A. Spinal Cord and/or Brain</th> <th>% Impairment of the Whole Person</th> </tr> </thead> <tbody> <tr> <td>Station and gait</td> <td></td> </tr> <tr> <td>Can stand but walks with difficulty</td> <td>5-20</td> </tr> <tr> <td>Can stand but walks only on the level</td> <td>25-35</td> </tr> <tr> <td>Can stand but cannot walk</td> <td>40-60</td> </tr> <tr> <td>Can neither stand nor walk</td> <td>65</td> </tr> </tbody> </table> | A. Spinal Cord and/or Brain | % Impairment of the Whole Person | Station and gait | | Can stand but walks with difficulty | 5-20 | Can stand but walks only on the level | 25-35 | Can stand but cannot walk | 40-60 | Can neither stand nor walk | 65 |
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25. Given the minimal difficulties with standing and walking objectively demonstrated on the video, Dr. Green reduced the rating to 10%. Dr. Green opined Claimant’s appearance in the video was inconsistent with her presentation at the DIME

or her self-reported condition. He specifically noted “the extent of the surveillance [] that appeared to be relatively consistent as to her activity levels and method of gait.” His rationale for reducing the rating from 25% to 10% rating was, “The description [] is, patient can rise to a standing position and can walk but has difficulty in elevation, grades, steps, and distances. I think that more likely fits what I saw in surveillance.”

26. Dr. Green’s final rating is 10% whole person as set forth in his deposition.

27. Claimant has performed some work activity since the injury. She initially returned to modified duty with Employer on June 1, 2018 with sedentary restrictions per Dr. Nystrom at Concentra. Claimant never worked a full eight hours of modified duty. Claimant alleged she was in too much pain to even work four hours per day. Because of her reported worsening, Dr. Nystrom reduced Claimant’s restrictions to four hours per day on August 2, 2018 and reduced them again to two hours per day on August 26, 2018. Claimant claimed she could not even tolerate two hours per day of sedentary work. Employer did not question her allegations and allowed her to leave early if she requested.

28. On March 12, 2019, Claimant was informed by Caitlin Smyth, a vocational case manager at Corvel, that Employer “is no longer able to accommodate her for light duty at the store so they have asked that I find her a placement.” Corvel placed Claimant in a transitional work program at Hearts and Horses, a nonprofit organization. Claimant started the position on March 25, 2019, performing receptionist duties. Hearts and Horses did not question Claimant’s reported symptoms or limitations and allowed her to leave early or miss shifts whenever she requested.

29. No persuasive evidence corroborates Claimant’s allegations she could not consistently tolerate working two hours per day in sedentary positions. Opinions in the record limiting Claimant to no more than two hours per day are not credible and given no weight in assessing her residual functional capacity.

30. Multiple treating and examining providers have opined Claimant can work part-time or full-time at the sedentary or light level.

31. On May 7, 2019, Dr. Gordon opined Claimant could work “a sedentary position with a lifting/carrying limitation of 20 pounds.” On June 4, 2019, Dr. Gordon reiterated Claimant can work in a sedentary position, and opined, “she can gradually increase up to 4 hours per day over the next 2 to 3 weeks and then up to an eight-hour workday. She may want to consider seeking a vocational rehabilitation specialist for assistance in job placement.”

32. Dr. Cebrian opined Claimant can work eight hours per day in the sedentary or light category.

33. NP Meier testified via deposition on August 25, 2020. He testified Claimant’s appearance on the video was significantly different than her presentation at medical appointments:

A. The surveillance was surprising to me. I mean, I admit that. . . .

Q. . . . Why do you say it was surprising?

A. [Claimant's] presentation and clinic was, you know, that she appeared to be in a significant amount of pain with a significant limp, using her cane. When I saw the video, there were several instances where I didn't see her using a cane. From what I can observe from the video, she didn't appear to be having much favoring of her leg at all at a gas station, walking kind of across the island, putting gas in her car, et cetera.

34. NP Meier agreed with Dr. Cebrian Claimant can work full time at the sedentary or light level. He testified that, "When I read Dr. Cebrian's note and looked and observed her, watching the video myself, it did seem prudent to go ahead and change the restrictions off of what I saw her in the video being able to physically do."

35. Dr. Green had initially provided severe restrictions of working no more than two hours per day with her leg elevated. But he rescinded those restrictions during his deposition based on the video and additional medical records. He testified Claimant could work at least four to six hours per day at the sedentary level, with a progression to eight hours over several weeks depending on clinical progress. Once she reached six- or eight-hour shifts, Dr. Green would impose additional limitations of no prolonged standing or walking, the ability to change positions every 20 to 30 minutes, and the ability to elevate her leg if needed during her rest breaks. He also testified Claimant could possibly progress to light level work.

36. Dr. Bernton testified the video did not change his opinion regarding Claimant's diagnosis of CRPS. He noted "subtle gait antalgia" in the video, which he indicated was consistent with her presentation to him.¹ Although Dr. Bernton suggested he disagrees with Dr. Cebrian's opinion Claimant can perform the full range of light work, he specifically declined to offer any opinion regarding Claimant's specific work restrictions or functional capacity.

37. Katie Montoya performed a vocational evaluation for Respondents. Claimant described an extremely restricted lifestyle because of her foot pain. Claimant told Ms. Montoya she keeps her foot elevated by using a pillow and sitting in a recliner. She alleged her work at Hearts and Horses was "difficult" because she could not elevate her foot sufficiently. Claimant initially stated she was doing "fine" with getting to work and attending her scheduled shifts, although Claimant's attorney "reminded" her of missing work on several occasions. On further prompting from her attorney, Claimant stated weather changes cause her pain to flare severely. Claimant stated it took more than 20 minutes that day to put on her shoe because of severe pain and swelling. Claimant alleged she had cut the sides of her shoes to alleviate pressure on her foot. Claimant stated she needs her son or grandson to bring groceries into her apartment. She stated she had recently driven to Estes Park but simply "looked, and then came home." She stated she could not walk around in Estes Park and needed to elevate her foot. Claimant

¹ This is not entirely consistent with Dr. Berton's initial report, wherein he described Claimant's gait as "significantly antalgic." In any event, the ALJ agrees with Dr. Bernton's assessment that Claimant demonstrated "subtle" gait abnormalities in the video.

stated Hearts and Horses allowed her to elevate her foot on a waste basket but claimed that was not high enough. Claimant told Ms. Montoya she used a cane “all the time.”

38. Ms. Montoya reviewed various medical opinions regarding Claimant’s work tolerance, from only two hours per day to a full range of light work as opined by Dr. Cebrian. She opined the primary issue seemed to be the number of hours Claimant could tolerate. She noted Claimant had a “fairly good skill base from her prior work activities” that would transfer to a variety of sedentary jobs, including purchasing, inventory, and customer service. She opined it “would be likely difficult to obtain and maintain [work] with only two hours of workday available; however, even if she were at four hours per day opportunities would be available with increased options if able to work full time.”

39. Ms. Montoya reviewed the video surveillance after submitting her initial report. She accurately noted Claimant was filmed driving, running errands, standing, and socializing. Ms. Montoya observed multiple occasions where Claimant walked in and out of stores and restaurants without a cane. Additionally, she repeatedly stood on her porch outside in what probably were colder temperatures and appeared to be putting her full weight on the left foot. She appeared to be wearing regular tennis shoes in at least one video. Ms. Montoya observed Claimant sitting a barstool her restaurant with no attempt to elevate her foot. She noted Claimant did not appear to have difficulty ambulating, although conceded that was a “non-medical opinion.” Claimant went to Applebee’s in more than one video and was seen walking outside (“again no cane”) and standing and smoking. She noted Claimant was out running errands are going to Applebee’s for periods longer than two hours.

40. Ms. Montoya was “surprised at the level of activity and movement noted based on my conversation with [Claimant]. It was also surprising in light of her comments to me as well as what is noted in the medical record how frequently she was out and about around town without a cane.”

41. Michael Fitzgibbons performed a vocational evaluation on behalf of Claimant. During their interview, Claimant described severe limitations similarly to those she relayed to Ms. Montoya. Claimant told Mr. Fitzgibbons she uses a cane “most of the time” to assist with ambulation. She stated she had difficulty with prolonged sitting and “spending any time on her feet at all.” She stated she kept her left leg elevated most of the time to alleviate pain. Mr. Fitzgibbons could not identify any competitive jobs where two hours of sedentary activity was adequate for any employer. Crediting Claimant’s self-described severe functional limitations and alleged difficulty tolerating two hour shifts in a sedentary position with an accommodating employer, Mr. Fitzgibbons opined Claimant cannot sustain employment and earn wages in any occupation.

42. Ms. Montoya issued an updated report on June 26, 2020 after reviewing additional medical records, including Dr. Green’s deposition and updated opinions from NP Meier. She referenced increasing work-from-home employment opportunities as the job market changes in response to the ongoing pandemic. She also cited COVID screener positions at many offices (medical and otherwise) with limited physical demands

and “it would not appear those will be eliminated anytime soon.” Ms. Montoya reiterated her opinion Claimant can return to work “should she desire to do so.”

43. Mr. Fitzgibbons issued a supplemental report, also on June 26, 2020. He noted Claimant had missed more shifts while working at Hearts and Horses than is generally acceptable in the competitive labor market. He pointed out the unemployment rate has decreased approximately 300 to 400% in Larimer County since February 2020. He opined older workers are the most likely to become chronically unemployed and least likely to be hired during economic downturns. He opined the surveillance video did not conclusively show Claimant engaging in any activities inconsistent with her described symptoms and limitations. Mr. Fitzgibbons concluded Claimant cannot work or earn a wage without professional vocational assistance.

44. Ms. Montoya and Mr. Fitzgibbons testified via deposition consistent with their reports.

45. Dr. Berton’s opinions regarding the diagnosis of CRPS are credible and more persuasive than the contrary opinions offered by Dr. Cebrian.

46. Respondents failed to overcome the 10% DIME rating by clear and convincing evidence.

47. Ms. Montoya’s vocational opinions and conclusions are credible and more persuasive than the contrary opinions offered by Mr. Fitzgibbons.

48. Claimant failed to prove she is permanently and totally disabled.

CONCLUSIONS OF LAW

A. Respondents failed to overcome the DIME’s 10% whole person rating

A DIME’s determination regarding whole person impairment is binding unless overcome by “clear and convincing evidence.” Section 8-42-107(8)(C). Clear and convincing evidence is “unmistakable and free from serious or substantial doubt.” *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App. 2002). The party challenging a DIME’s conclusions must demonstrate it is “highly probable” the impairment rating is incorrect. *Qual-Med v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998); *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). Determining a claimant’s injury-related diagnoses is an “inherent” part of performing a rating, and the DIME’s findings in this regard are entitled to presumptive weight in the context of whole person impairment. *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998). If the DIME issues multiple or conflicting opinions concerning MMI or whole person impairment, the ALJ must determine the DIME’s true opinion as a matter of fact. *Magnetic Engineering v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). Depending on the circumstances, the DIME’s true “findings and determinations” may be found in the DIME report(s) or testimony at a deposition or hearing. *Andrade v. Industrial Claim Appeals Office*, 121 P.3d 328 (Colo. App. 2005); *Lambert & Sons, Inc. v. Industrial Claim Appeals Office*, 984 P.2d 656 (Colo. App. 1998).

As found, the DIME's true rating is 10% as set forth in Dr. Green's deposition. Dr. Green rescinded the 25% rating contained in his original report after reviewing of the video surveillance.

Respondents failed to overcome the DIME's 10% whole person rating by clear and convincing evidence. Dr. Berton's opinions regarding Claimant's diagnosis of CRPS are credible and more persuasive than the contrary opinions offered by Dr. Cebrian. As Dr. Berton explained, the thermogram results were "strongly positive" and the autonomic testing battery showed a "high probability" of dysautonomia. Both tests support the diagnosis of CRPS. Multiple providers documented clinical signs consistent with CRPS, including Dr. Cebrian himself. Claimant satisfies the diagnostic criteria for CRPS set forth in the MTGs. The DOWC "recommends" CRPS be rated under Table 1, Section A, p. 109 of the *AMA Guides*. Dr. Green appropriately used the "Station and gait" section of Table 1 to rate Claimant's impairment. The original 25% rating was incorrect considering Claimant's functionality demonstrated by the video. Dr. Green's decision to assign a 10% rating is reasonable based on the evidence available to him, which includes not just the video but also voluminous medical records and his personal examination of Claimant. The minimum category of ratable impairment under the Station and gait section of Table 1 is "Can stand but walks with difficulty," which corresponds to a rating of 5%-20% whole person. Claimant demonstrated a mildly antalgic gait at numerous points on the video and it is reasonable to conclude she has some degree of difficulty with ambulation. The ALJ also notes 10% is at the lower end of the available range in that category. The decision of where an individual falls within the applicable range is largely a judgment call, and the 10% selected by Dr. Green is well within his zone of discretion as the rating physician.

B. Claimant failed to prove she is permanently and totally disabled

A claimant is considered permanently and totally disabled if she cannot "earn any wages in the same or other employment." Section 8-40-201(16.5)(a), C.R.S. The term "any wages" means wages in excess of zero. *McKinney v. Industrial Claim Appeals Office*, 894 P.2d 42 (Colo. App. 1995). Evaluation of a claimant's ability to earn wages is not limited to "full-time" work; the ability to sustain part-time work in a competitive, non-sheltered work environment precludes a permanent total disability award. *E.g., Work v. Adams County*, W.C. No. 4-191-303 (August 30, 2020). To prove permanent total disability, the claimant need not show that the industrial injury is the sole cause of her inability to earn wages. Rather, the claimant must demonstrate that the industrial injury is a "significant causative factor" in her permanent total disability. *Seifried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986).

In determining whether the claimant can earn wages, the ALJ may consider a wide variety of "human factors." *Weld County School District RE-12 v. Bymer*, 955 P.2d 550 (Colo. 1988). These factors include the claimant's physical condition, mental abilities, age, employment history, education, training, and the "availability of work" the claimant can perform within her commutable labor market. *Id.* Another human factor is the claimant's ability to obtain and maintain employment within her limitations. See *Professional Fire Protection, Inc. v. Long*, 867 P.2d 175 (Colo. App. 1993). The ability to

earn wages inherently includes consideration of whether the claimant can get hired and sustain employment. See e.g., *Case v. The Earthgrains Co.*, W.C. No. 4-541-544 (ICAO, September 6, 2006); *Cotton v. Econo Lube N. Tune*, W.C. No. 4-220-395 (ICAO, January 16, 1997). If the evidence shows the claimant cannot “sustain” employment, the ALJ can find she is not capable of earning wages. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office*, 21 P.3d 866, 868 (Colo. App. 2001).

Claimant failed to prove she is permanently and totally disabled. The persuasive evidence shows Claimant can sustain at least part-time work in a variety of sedentary occupations. Ms. Montoya’s vocational opinions and conclusions regarding Claimant’s ability to earn wages are persuasive. Claimant has sedentary-level transferrable skills from her previous work in purchasing, inventory, and customer service. Given Claimant’s prior work history and transferrable skills, Ms. Montoya persuasively opined Claimant has viable work options at the sedentary level even if limited to four-hour shifts. The severe initial restrictions from Dr. Pineiro and Dr. Green are not credible in light of the functional abilities objectively shown by the video. NP Meier, Dr. Green, and Ms. Montoya credibly expressed their “surprise” regarding Claimant’s demeanor and activities demonstrated on the video as compared to her prior in-person presentations. Most providers who have seen the video (including Dr. Green) have opined Claimant can work at least at the sedentary level and possibly the light level. Dr. Bernton repeatedly declined to offer any opinion regarding Claimant’s work capacity. As a result, Claimant lacks persuasive support from any treating or examining provider for a specific set of limitations that would rule out all work. Of course, a claimant is not required to provide medical opinion evidence and can support a claim by any competent evidence. *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983). But the persuasive non-medical evidence does not support her claim either. After observing Claimant’s tolerance for prolonged standing and her ability to walk with only a mildly antalgic gait on several occasions using no assistive device, the ALJ is not persuaded she needs to elevate her leg with a frequency or in a posture than could not be accommodated in sedentary jobs. Nor will Claimant likely need excessive breaks or miss work beyond customary tolerances if working at the sedentary level. While the ALJ does not doubt Claimant experiences pain from her CRPS, the preponderance of persuasive evidence fails to demonstrate a level of functional impairment or disability sufficient to prevent her from earning “any wages” at the same or other employment.

ORDER

It is therefore ordered that:

1. Respondents’ request to set aside the DIME’s 10% rating is denied and dismissed.
2. Insurer shall pay Claimant PPD benefits based on a 10% whole person rating. Insurer may take credit for any temporary disability benefits paid after Claimant reached MMI on January 9, 2019.

3. Insurer shall pay Claimant statutory interest of 8% per annum on all indemnity benefits not paid when due, but only to the extent Insurer's liability for those benefits is not satisfied by application of the credit referenced in the preceding paragraph.

4. Claimant's claim for permanent total disability benefits is denied and dismissed.

5. The issues of disfigurement, offsets, and overpayment are reserved for future determination.

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

DATED: December 27, 2020

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-097-502-001**

ISSUE

1. Whether Respondents have overcome by clear and convincing evidence the DIME Physician's assignment of a 10% whole person permanent impairment for emotional disturbance related to a brain injury.
2. Whether Respondents have overcome by clear and convincing evidence the DIME Physician's opinion that Claimant sustained work-related a neck injury and was not at MMI for her neck condition.
3. Claimant's average weekly wage.

FINDINGS OF FACT

1. Claimant sustained an admitted injury on January 2, 2019 arising out of the course of her employment with Employer. Claimant has been employed as a flight attendant for Employer for approximately twenty years. On January 2, 2019, Claimant struck her forehead on a galley counter inside an airplane while performing her preflight duties. Although Claimant had a brief period of "blacking out" she did not fall or break the skin and completed her shift. Over the next few days, Claimant began experiencing headaches, nausea, and cognitive issues.
2. On January 7, 2019, Claimant saw Erick Hennessy, PA-C, at Concentra in Layton, Utah. Claimant reported she was doing her routine duties when she turned and struck her head on a counter. She reported experiencing headaches and nausea two days later, and some mental difficulties. Claimant also reported mild pain in the posterior neck bilaterally, with intermittent symptoms. Claimant reported no significant past medical history. On examination, PA Hennessy noted Claimant's neck was supple, with normal lordosis, no tenderness and full range of motion. On the same date, a Physician's Initial Report of Work Injury or Occupational Disease was completed indicating Claimant's diagnosis was post-concussional [sic] syndrome and contusion of unspecified part of head. Claimant was authorized to return to work on modified activity, including no activities requiring depth perception, no climbing ladders, may not work in safety sensitive position and may not work at heights. (Ex. F).
3. On January 10, 2019, Claimant saw PA Hennessy, with an assessment of head contusion and post-concussion syndrome. Claimant reported no change in her post-concussion syndrome, and no significant medical history. On examination, PA Hennessy found neck stiffness, but no joint pain, no muscle pain, and no neck pain. Examination of the cervical spine showed normal lordosis, no tenderness and full range of motion. Claimant's work restrictions were continued. (Ex. F).

4. On January 17, 2019, Claimant saw PA Hennessy again. Claimant reported feeling better. PA Hennessy noted Claimant had no joint or muscle pain (under Review of Systems). Examination of Claimant's cervical spine showed normal lordosis, no tenderness and full range of motion. Claimant reported no significant medical history. (Ex. F).
5. On January 25, 2019, Claimant returned to PA Hennessy, reporting she had a setback that week, which appeared to be related to cognitive issues, such as concentration and carrying on conversations. Examination of Claimant's cervical spine showed normal lordosis, no tenderness and full range of motion. (Ex. F).
6. On February 1, 2019, Claimant saw PA Hennessy for post-concussion syndrome, reporting no change in her condition. Claimant reported neck pain and stiffness, but no joint pain, no back pain, and no muscle weakness. PA Hennessy did not document an examination of Claimant's cervical spine, but noted her neck was "supple and symmetric." (Ex. F).
7. On February 8, 2019, Claimant saw PA Hennessy again. At that time, Claimant reported no joint or muscle pain, and no complaints of neck pain or stiffness were documented. PA Hennessy did not document an examination of Claimant's cervical spine, but noted her neck was "supple and symmetric." (Ex. F).
8. On February 20, 2019, PA Hennessy noted that Claimant was 75% of the way toward meeting the physical requirements of her job, and his assessment was post-concussion syndrome and head contusion. PA Hennessy did not document any complaints of neck pain or stiffness, and his musculoskeletal review was negative. Again, PA Hennessy did not document an examination of Claimant's cervical spine, but noted her neck was "supple and symmetric." Claimant noted having difficulties with emotional stress. (Ex. F).
9. On March 1, 2019, Claimant was seen by Barry Gardner, M.D., at Concentra in Layton, Utah. Claimant reported sleep disturbance, concentration decrease and depressive syndrome, but no headaches. Dr. Gardner's musculoskeletal review was negative, and no cervical spine examination was performed. Claimant reported no significant medical history. (Ex. F).
10. On March 19, 2019, Claimant saw PA Hennessy again. Claimant reported improvement, especially on physical activities. She was referred for a physical medicine and rehabilitation (PMR) consult. Claimant reported she was fine "physically," but her memory and cognitive function did not seem normal. PA Hennessy did not document any complaints of neck pain or stiffness, and his musculoskeletal review was negative. Again, PA Hennessy did not document an examination of Claimant's cervical spine, but noted her neck was "supple and symmetric." (Ex. F).
11. On April 29, 2019, PA Hennessy noted that Claimant was 50% of the way toward meeting the physical requirements of her job. It was noted that Claimant was originally referred to a PMR physician who did not treat head injuries or post-concussion syndrome, so it was recommended that Claimant see Jeffery Randle, M.D. PA Hennessy did not

document any complaints of neck pain or stiffness, and his musculoskeletal review was negative. PA Hennessy did not document an examination of Claimant's cervical spine, but noted her neck was "supple and symmetric." Claimant reported cognitive issues when she was overstimulated or under stress. (Ex. F).

12. On May 15, 2019, Claimant saw Dr. Randle at Salt Lake Orthopedic Clinic for evaluation of post-concussion syndrome. Claimant reported symptoms including cognitive issues, and difficulty with loud noise, crowds and being exposed to a lot of movement. Claimant reported a previous history of a traumatic brain injury five years earlier with migraine headaches. Claimant did not report a history of chronic neck pain. Dr. Randle's found Claimant's cervical spine range of motion "grossly limited with pain," with normal strength and muscle tone. He diagnosed Claimant with post-concussion syndrome and recommended neuropsychological testing and speech therapy. (Ex. J).

13. On June 18, 2019, Claimant saw Dr. Randle. Dr. Randle noted Claimant's cervical spine range of motion was "grossly limited with pain," and diagnosed Claimant with cervicgia (i.e., neck pain). He indicated he would see Claimant again after she had begun neuropsychological counseling. Dr. Randle indicated that speech therapy could provide Claimant with strategies for her memory and to decrease her stress. (Ex. J).

14. On July 5, 2019, Claimant underwent a speech pathology evaluation performed by Maria Gurrister, M.S., and began a course of speech therapy which concluded on October 3, 2019. On October 3, 2019, Ms. Gurrister found Claimant's overall function was within normal limits and her prognosis for further improvement was favorable with Claimant's use of strategies learned during speech therapy. Ms. Gurrister noted that no further speech therapy services were warranted.

15. On July 22, 2019, Claimant returned to Dr. Randle. He again recommended Claimant schedule neuropsychological testing. Dr. Randle noted Claimant's cervical spine range of motion was "grossly intact," and diagnosed Claimant with cervicgia and post-concussion syndrome. Dr. Randle's record from this date indicates that Claimant was recommended to undergo physical therapy for "postconcussion syndrome – cervical 5th vertebrae" for four to six weeks. Claimant did not receive the recommended physical therapy. (Ex. J).

16. On October 10, 2019, Dr. Randle saw Claimant for follow up for post-concussion syndrome. Claimant reported speech therapy had been helpful and that she did not get neuropsychological testing. Claimant reported occasional cognitive issues, but otherwise was doing well. Dr. Randle diagnosed Claimant with work-related post-concussion syndrome and cervicgia and placed her at maximum medical improvement. He also authorized Claimant to return to work on that date, with no functional limitations or restrictions. Dr. Randle did not find Claimant had any permanent impairment and assigned no impairment rating for any condition. (Ex. J).

17. On November 25, 2019, Claimant began treatment with chiropractor Clint J. Grover, D.C. From November 25, 2019 through February 24, 2020, Claimant saw Dr. Grover on 14 occasions. Claimant testified she self-referred to Dr. Grover for neck pain.

18. Dr. Grover's records purport to document complaints of stiffness, tightness, discomfort in twenty-three different areas of Claimant's body, including her lower, mid, and upper back; right, left, front and back of her head; left, right and back of her neck; both clavicles; both TMJ; left and right trapezius; right shoulder; right and upper chest; right elbow; pubic region; right triceps; and bottom of her right foot. In his records, Dr. Grover indicates Claimant reported visual analog scale (VAS) pain ratings for as many as 17 different body parts at a given appointment. Portions of Dr. Grover's records include statements that Claimant reported her discomfort had improved or declined from the previous visit, although the records demonstrated the opposite. In other instances, Dr. Grover documents complaints in areas where Claimant testified she had no recollection of having problems. For example, Claimant testified she had no recollection of TMJ or jaw issues, pelvic pain, or chest pain. Dr. Grover, however, documented that Claimant had right sided TMJ complaints occurring between 60-90% of the time at every visit, complaints in the "pubic region" at all but two visits, and chest pain on multiple occasions.

19. When questioned about the various areas Dr. Grover documented as complaints, Claimant testified that she did not "know where all this is coming from." Claimant testified she does not relate any complaints involving body parts other than her neck to her work injury. Claimant testified she stopped seeing Dr. Grover because he was not a "standard chiropractor." The ALJ finds Dr. Grover's records lack any indicia of accuracy, reliability, or credibility. (Ex. I).

20. In January 2020, Claimant began seeing Keith McGoldrick, Ph.D., at Beehive Neuropsychology. Claimant reported her cognitive symptoms and headaches were increased with stress, loud noises, crowded environments, and visually stimulating environments, which caused her anxiety. Claimant also reported having anxiety and panic attacks related to stressful situations. Claimant saw Dr. McGoldrick through February 2020. (Ex. K).

21. On February 14, 2020, Claimant saw Khoi Pham, M.D. for a Division independent medical examination (DIME). Dr. Pham reviewed Claimant's medical history but was not aware Claimant had a history of neck pain or that she had received a 5% cervical spine impairment rating prior to January 2, 2019. Dr. Pham diagnosed Claimant with post-concussive syndrome, adjustment disorder with anxiety and depressed mood, and "cervicalgia. ? sprain." (Ex. 1).

22. Dr. Pham found Claimant was at MMI for her post-concussive syndrome and noted she had a mild concussion that should heal "realistically by now (even with a history of a prior concussion in 2010)." He noted she had a normal head CT and a completely normal neurological exam. He believed her persistent cognitive/memory complaints as well as visual disturbances were from adjustment disorder. He also noted that Claimant's history of depression with ADD could interfere with appropriate recovery. Dr. Pham assigned Claimant a 10% whole person impairment for her head injury under the AMA Guides for Nervous System either Disturbances of Complex, Integrated Cerebral Functions or Emotional disturbances. Dr. Pham included with his report a page from the AMA Guides indicating that the impairment rating assigned was for "mild to moderate emotional disturbance under unusual stress." (Ex. 1).

23. On examination of Claimant's cervical spine, Dr. Pham noted "I don't think the patient is at MMI for her cervicalgia. She has significant decreased ROM (esp. flexion) of her cervical spine that I could not explain (no palpable muscle spasm, no evidence of myelo-radiculopathy on exam)." He further stated:

"Notes from Concentra stated that she had normal ROM of the cervical spine on several visits. However, Dr. Randle's notes did document patient's neck pain and decreased ROM. As a matter of fact, he wanted her to have some PT to the neck which she apparently did not have. Reportedly, she had chiropractic treatment as well as massage therapy since and she still can't flex her neck more than 10 degrees today. So until the neck issue is resolved, the patient is NOT at MMI."

Dr Pham did not assign a provision impairment rating for Claimant's neck "due to persistent neck issue." (Ex. 1).

24. Dr. Pham testified by deposition and was offered and accepted as an expert in neurology. Dr. Pham testified Claimant did not disclose to him her history of chronic migraines or neck pain. Dr. Pham testified there was no indication in Claimant's medical records of complaints of neck pain in the first 4 ½ months after her injury. He also opined if there had been a significant neck issue, Concentra would have referred Claimant to physical therapy for her neck, which did not occur. He testified he did not know whether the Claimant had any neck complaints or neck problems prior to her January 2019 work injury, nor was he aware of any prior impairment rating for her neck, and that information would be helpful in understanding Claimant's neck issues.

25. On June 30, 2020, Claimant saw Lawrence Lesnak, D.O., for an independent medical examination requested by Respondents. Dr. Lesnak was offered and accepted as an expert in physical medicine and rehabilitation and testified by deposition consistent with his report. (Ex. A).

26. Claimant initially reported to Dr. Lesnak that she had no history of neck pain, or neck symptoms, but also disclosed prior neck injuries in 2011 and 2015. Claimant reported she was continuing to have complaints of pain in her neck and left occipital/temporal region. Claimant reported confusion when stressed and difficulty with bright lights. She also reported neck stiffness. Dr. Lesnak opined that Claimant had a high level of somatic pain complaints during his "psychosocial" testing and testified that the mechanism of bending forward and striking your forehead on a countertop is not one that would cause or aggravate cervical spine pathology. (Ex. A).

27. Dr. Lesnak opined that Dr. Pham provided an erroneous impairment rating by assigning Claimant a 10% whole person impairment rating for her brain injury. Dr. Lesnak opined that there was "absolutely no evidence to suggest" that Claimant had an organic brain syndrome, which he opined was a prerequisite to assigning an impairment rating for Claimant. Ultimately, Dr. Lesnak opined that Claimant was at MMI and that there was "no medical evidence to support that [Claimant] has sustained any type of permanent functional impairments" from her work-injury. (Ex. A).

28. Claimant testified at hearing. Claimant testified she told Dr. Pham she had prior neck problems and a history of chronic migraines as part of the DIME examination. She testified did not recall whether she told Dr. Pham she had a previous permanent impairment rating for her neck. She also testified that she repeatedly told providers at Concentra that she had prior neck issues and that her neck was examined at Concentra. Claimant testified that prior to her January 2019 injury, she was not receiving active treatment for her neck. She testified she had previously had physical therapy and massage for her neck, and that she would, but that she would stretch or use heat if it were irritated.

29. On November 10, 2019, Respondents filed a Final Admission of Liability and admitted for TTD benefits in the amount of \$18,279.87 for the period of January 7, 2019 through October 9, 2019, at the rate of \$463.62 per week. The rate of \$463.62 reflects an admitted average weekly wage of \$695.43 per week. Respondents' FAL was based on Dr. Randle's opinion on October 10, 2019 that Claimant was at MMI without permanent impairment, and that Claimant was able to return to work on October 10, 2019.

30. Claimant's employment wage records reflect that during the calendar year 2018, Claimant earned gross wages of \$48,563.62, or \$933.92 per week.

31. Respondents' calculation of Claimant's AWW is, apparently based on the period of October 1, 2018 through January 1, 2019, a total of six pay periods, and includes four pay periods for which Claimant received no wages. Respondents' calculation not a fair approximation of Claimant's average weekly wage.

PRIOR TREATMENT

32. Claimant sustained work-related injuries on November 2, 2013 as the result of turbulence in an airplane, in which she struck her head, twisted her neck, and injured her lower back. Claimant reported to her health care providers that she had immediate diffuse head and neck pain, and intermittent upper and lower limb paresthesia into the upper arm and ulnar digits. Following that injury, Claimant was seen at LDS Hospital and diagnosed with cervical and lumbar myofascial strains. On December 19, 2013, Claimant reported to Utah Care that she had a prior work-related whiplash injury in July 2011 from which she had never fully recovered, and that she had a history of neck pain that had "been going on for years." Examination demonstrated that Claimant cervical range of motion was 60% of normal in flexion, extension, and rotation. She was diagnosed with aggravation of chronic neck pain, with right upper limb radiation into the ulnar digits for which she received a series of trigger point injections. (Ex. C, D).

33. On September 26, 2014, in an appointment with Douglas Shepherd, M.D., at Utah Care, Claimant reported that she had sustained an injury to her neck during a flight in June 2013 in which she was "bounced around." She reported receiving approximately six weeks of physical therapy for that injury and denied ongoing/residual symptoms from that incident. (Ex. D).

34. On September 26, 2014, Dr. Shepherd assigned Claimant a 5% whole person impairment for her cervical spine injuring, including a disc extrusion at C-4-5 resulting in

mild stenosis, with several levels of annular tears. He noted that Claimant's cervical range of motion was 50% of normal in extension, and 70% of normal in all other planes of movement. He noted that he could not apportion the Claimant's impairment without records from previous injuries in June 2013 and July 2011. He also noted that Claimant had been placed at "medical stability" as of June 20, 2014 at the latest. (The ALJ infers that "medical stability" is the equivalent of maximum medical improvement).

35. On June 29, 2015, Claimant saw Dr. Shepherd for her neck and back pain. Claimant reported that she continued to have neck and low back pain, and increasing flareups occurring 2-3 times per month, lasting up to three days. She reported working but missing up to 6 days per month due to symptoms. On examination, Dr. Shepherd noted that Claimant's cervical range of motion was about 40% of normal in flexion, and 70-80% of normal in all other planes. Claimant also reported that her symptoms were aggravated by stress or overexertion. Dr. Shepherd recommended she continue independent exercises and follow up as needed. (Ex. D)

36. Claimant returned to Dr. Shepherd on March 10, 2016, reporting recurrent/progressive neck pain with some headaches. She reported diffuse aching pain over the posterior neck and head, with occasional symptom radiation to the right elbow. Dr. Shepherd reported Claimant's cervical range of motion was approximately 60% of normal. Claimant was provided a trial of Mobic and prescribed a Medrol Dosepak and received trigger point injections. She was diagnosed with cervical myofascial pain syndrome, cervicalgia, chronic pain generation, and degeneration of cervical intervertebral disc. Dr. Shepherd recommended an epidural steroid injection for Claimant's ongoing symptoms, which he attributed to her November 2013 work injury. (Ex. D)

37. On June 24, 2016, Claimant was seen at Intermountain Bountiful Clinic, in Utah. Claimant reported ongoing neck pain, which she reported triggered migraine headaches. She was diagnosed with chronic neck/thoracic pain with migraine headaches.

38. Claimant testified that prior to January 2, 2019, she had received chiropractic treatment for her neck, but no records were produced or admitted into evidence.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. See § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. See § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id.* at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

OVERCOMING DIME ON MMI, CAUSATION AND IMPAIRMENT

The Act defines MMI as “a point in time when any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition.” § 8-40-201(11.5), C.R.S. Where disputes exist on whether a Claimant has reached MMI, the ALJ must resolve that issue.

Under § 8-42-107 (8)(b)(III), C.R.S., a DIME physician's opinions concerning MMI and whole person impairment carry presumptive weight and may be overcome by clear and convincing evidence. “Clear and convincing evidence means evidence which is stronger than a mere ‘preponderance’; it is evidence that is highly probable and free from serious or substantial doubt.” *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411, 414 (Colo. App. 1995). Accordingly, a party seeking to overcome a DIME's MMI determination and/or whole person impairment rating must present “evidence demonstrating it is ‘highly probable’ the DIME physician's MMI determination or impairment rating is incorrect and such evidence must be unmistakable and free from serious and substantial doubt. *Adams v. Sealy, Inc.*, W.C. No. 4-476-254 (ICAP, Oct. 4, 2001); *Leming v. Indus. Claim Appeals Office*, 62 P.3d 1015, 1019 (Colo. App. 2002). Whether a party has overcome the DIME physician's opinion is a question of fact to be resolved by the ALJ. *Metro Moving & Storage*, 914 P.2d at 414.

The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc.*, W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); see *Shultz v. Anheuser Busch, Inc.*, W.C. No. 4-380-560 (ICAO, Nov. 17, 2000). Rather it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Oates v. Vortex Industries*, WC 4-712-812 (ICAO, Nov. 21, 2008); *Licata v. Wholly Cannoli Café* W.C. No. 4-863-323-04 (ICAP, July 26, 2016).

As a matter of diagnosis, the assessment of permanent medical impairment inherently requires the DIME physician to identify and evaluate all losses that result from the injury. *Mosley v. Industrial Claim Appeals Office*, 78 P.3d 1150 (Colo. App. 2003); *Sharpton v. Prospect Airport Services* W.C. No. 4-941-721-03 (ICAO, Nov. 29, 2016). Consequently, a DIME physician's finding that a causal relationship does or does not exist between an injury and a particular impairment must be overcome by clear and convincing evidence. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998); *Watier-Yerkman v. Da Vita, Inc.* W.C. No. 4-882-517-02 (ICAO Jan. 12, 2015); Compare *In re Yeutter*, 2019 COA 53 ¶ 21 (determining that a DIME physician's opinion carries presumptive weight only with respect to MMI and impairment). The rating physician's determination concerning the cause or causes of impairment should include an assessment of data collected during a clinical evaluation, and the mere existence of impairment does not create a presumption of contribution by a factor with which the impairment is often associated. *Wackenhut Corp. v. Industrial Claim Appeals Office*, 17 P.3d 202 (Colo. App. 2000).

The questions of whether the DIME physician properly applied the *AMA Guides*, and ultimately whether the rating was overcome by clear and convincing evidence present questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office*, 17 P.3d 202 (Colo. App. 2000); *Paredes v. ABM Industries* W.C. No. 4-862-312-02 (ICAO, Apr. 14, 2014).

DR. PHAM'S OPINION REGARDING TBI

Respondents assert that Dr. Pham incorrectly assigned a 10% whole person impairment rating for Claimant. The ALJ finds that Respondents have not met their burden of establishing that Dr. Pham's opinion that Claimant is entitled to a 10% whole person impairment rating is incorrect. Dr. Pham determined Claimant qualified for an impairment rating based on "mild to moderate emotional disturbance under unusual stress." Claimant's contemporaneous medical records demonstrate that she experienced post-concussion symptoms consistently from the January 7, 2019 through at least February 2020. Claimant consistently reported difficulties coping with stressful situations which resulted in reported cognitive issues and emotional responses, such as panic attacks and anxiety. Dr. Lesnak testified that the *AMA Guides* require an organic brain syndrome for the assignment of an impairment rating under Claimant's circumstances, but do not point to any specific section of the *AMA Guides* imposing such a requirement. The ALJ finds Dr. Pham's opinion that Claimant sustained a 10% whole person impairment credible. The ALJ does not find it "highly probable" that Dr. Pham's opinion

is incorrect, or that the evidence contrary to Dr. Pham's opinion to be free from unmistakable and free from serious or substantial doubt. Claimant is entitled to a 10% whole person impairment for emotional disturbance due to her post-concussion syndrome.

DR. PHAM'S OPINION REGARDING NECK INJURY

Respondents assert that Dr. Pham incorrectly attributed Claimant's reported neck pain to her work injury, and therefore improperly based his opinion that Claimant was not at MMI on the existence of that condition. Dr. Pham found that Claimant had "cervicalgia" (i.e., cervical or neck pain), and that cervicalgia must be addressed before Claimant could be found to be at MMI. Inherent in Dr. Pham's opinion is a determination that the symptoms Claimant reported at the DIME examination were causally related to her January 2, 2019 work injury. The ALJ finds that Respondents have met the burden of establishing by clear and convincing evidence that Dr. Pham's opinion that Claimant's then-existing cervicalgia was work-related is incorrect.

Although Dr. Pham diagnosed Claimant with cervicalgia, neither his report nor testimony offer any explanation as to how Claimant's cervicalgia symptoms in February 2020 were causally related to her January 2019 work injury. Dr. Pham's report indicates that he could not find an explanation for her cervical pain. His diagnosis of "cervicalgia" (i.e., neck pain), is qualified with "? Sprain," from which the ALJ infers that Dr. Pham questioned whether Claimant had sustained a cervical sprain. The evidence demonstrates that Claimant struck her head on a counter, with enough force to cause a bump on her head, but not to break the skin or cause her to fall. Dr. Lesnak testified, credibly, that the mechanism of bending forward and striking your forehead on a countertop is not one that would cause or aggravate cervical spine pathology. Claimant offered no evidence to explain what pathology caused Claimant's reported neck stiffness and pain, and neither Dr. Pham nor Dr. Randle include any such rationale in their respective records.

Moreover, the evidence demonstrates, to the extent Claimant had neck symptoms related to her January 2, 2019 work injury, those symptoms were subjective, minor, and resolved within a relatively short time frame. Claimant reported mild neck stiffness and pain to Concentra on January 7, 2019, January 10, 2019, and February 1, 2019. Examinations on those dates of treatment, which Claimant testified were performed, did not demonstrate any restriction in range of motion, much less the significant limitations reported to Dr. Pham and Dr. Randle. Her records from Concentra document no complaints of neck pain after February 1, 2019. On March 19, 2019, Claimant reported that she felt fine "physically." At her final visit to Concentra on April 29, 2019, Claimant reported no neck pain, and no findings were made with respect to her neck. Although Claimant reported neck issues on three occasions, and was examined for them, the Concentra providers identified no objective injury, made no diagnosis of a neck injury, and recommended no treatment for her neck. The ALJ finds credible Dr. Pham's testimony that had Claimant had a significant cervical spine injury, Concentra would have recommended treatment, which did not occur.

When Claimant saw Dr. Randle on May 15, 2019, her complaints of neck pain were significantly different than those reported at her last Concentra visit two weeks earlier. Claimant reported tenderness to palpation of her cervical paraspinal musculature and grossly limited range of motion with pain (as opposed to no symptom and full range of motion on April 29, 2019). No explanation was offered by Claimant for the seemingly sudden emergence of neck pain on May 15, 2019 when she saw Dr. Randle, given that she had not reported neck-related issues since February 1, 2019, three and one-half months earlier. Dr. Randle did not document any explanation as to how Claimant's reported neck symptoms were related to her work injury four months earlier. By July 22, 2019, Dr. Randle noted Claimant's cervical range of motion was intact. Dr. Randle's records also do not indicate that he was aware of Claimant's prior chronic neck pain. When Dr. Randle placed Claimant at MMI and included within his diagnosis of work-related conditions "cervicalgia" he noted that Claimant had no permanent impairment and assigned no impairment rating.

Given the Claimant's prior chronic neck pain, her failure to report that condition to her treating providers or Dr. Pham, the lack of objective findings supporting a neck injury, the lack of a specific diagnosis of pathology that would cause cervicalgia, the relatively minor mechanism of injury, the resolution of the reportedly minor neck pain and stiffness after one month, Dr. Pham's admitted inability to explain the cause of Claimant's decreased range of motion, and Dr. Randle's opinion that Claimant was at MMI on October 10, 2019 without the assignment of an impairment rating for her neck, the ALJ finds the evidence free from serious and substantial doubt and it is highly probable that Dr. Pham's causation and MMI determination with respect to Claimant's neck is incorrect. The ALJ finds that Dr. Randle's opinion that Claimant was at MMI for her neck on October 10, 2019 without permanent impairment is correct.

AVERAGE WEEKLY WAGE

Section 8-42-102(2), C.R.S. (2020) requires the ALJ to determine a Claimant's AWW based on his or her earnings at the time of injury. The ALJ must calculate the money rate at which services are paid to the claimant under the contract of hire in force at the time of injury. *Pizza Hut v. ICAO*, 18 P.3d 867, 869 (Colo. App. 2001). The objective when calculating the AWW is to arrive at a "fair approximation of the claimant's wage loss and diminished earning capacity." *Campbell v. IBM Corp.*, 867 P.2d 77, 82 (Colo. App. 1993).

On November 10, 2019, Respondents filed a FAL admitting to TTD benefits for the period of January 7, 2019 through October 9, 2019, at the adjusted rate of \$463.62 per week (reflecting an admitted AWW of \$695.43 per week). Although Claimant's wage records for the year 2018 are in the record, Respondents offered no evidence as how Respondents arrived at its calculation for Claimant's AWW. Claimant contends her an AWW based on her gross pay for the calendar year preceding her injury is a fair approximation of her wage loss. For the calendar year 2018, Claimant earned gross wages of \$48,563.62, or \$931.36 per week. The ALJ finds that Claimant's average weekly wage was \$931.36 per week.

Respondents contend that in addition to proving the appropriate calculation for AWW, Claimant must also prove an entitlement to TTD benefits. Counsel for Respondents sent Claimant's counsel an email on September 15, 2020, which indicated that "Respondents will be taking the position at the upcoming hearing that the Claimant was never temporarily disabled for this claim. As a result, we will not be agreeing to any increased in TTD benefits, even if the average weekly wage is adjusted." Respondents argue that this email is sufficient to endorse the "issue" for hearing. The ALJ finds Respondents' position without merit. Respondents admitted to TTD benefits from January 7, 2019 through October 9, 2019, did not endorse the issue of withdrawal of the FAL, and have not sought to reopen the issue. Claimant is not required to establish entitlement to TTD as a condition of seeking an increase in AWW.

Section 8-43-203(2)(b)(II) provides that a claim will be automatically closed "as to the issues admitted in the final admission if the claimant does not, within thirty days after the date of the final admission, contest the admission in writing and request a hearing on any disputed issues that are ripe for hearing, including selection of an independent medical examiner pursuant to section 8-42-107.2." The statute further provides that in cases where a DIME is requested "pursuant to section 8-42-107.2, the claimant is not required to file a request for hearing on disputed issues that are ripe for hearing until after completion of the division's independent medical examination." Section 8-43-203(2)(d), C.R.S., provides that once a case is closed under subsection (2) "the issues closed may only be reopened pursuant to section 8-43-303." Thus, once a claim is closed by an FAL issues resolved by the FAL are not subject to further litigation unless reopened under § 8-43-303, C.R.S. *Leewaye v. Industrial Claim Appeals Office*, 178 P.3d 1254 (Colo. App. 2007).

Respondents filed a Final Admission of Liability on November 10, 2019, admitting for TTD Benefits for the period of January 7, 2019 through October 9, 2019. Claimant then requested a DIME. After completion of the DIME process, Respondents filed an Application for Hearing endorsing PPD benefits and other issues, and Claimant filed her Response to Application for Hearing, endorsing multiple issues, including "average weekly wage" and "Temporary Total Disability benefits from 1/02/19 to statute." Notwithstanding, Claimant has not argued for or presented evidence to establish an entitlement to TTD benefits before January 7, 2019 or after October 9, 2019. Instead, Claimant seeks a determination that Respondents' calculation of AWW was incorrect.

If Claimant sought to expand the admitted time frame for TTD benefits, Respondents' position would be correct. But Claimant has not done so. Because the issue of entitlement from January 7, 2019 through October 9, 2019 has been admitted, Respondents may not relitigate that specific issue unless the issue is reopened under §8-43-303, C.R.S. Section 8-43-303 provides for reopening on the grounds of fraud, overpayment, an error, a mistake, or a change in condition. Respondents, as the proponent of reopening the issue, would bear the burden of proof to establish grounds for reopening. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Barker v. Poudre School Dist.*, W.C. No. 4-750-735 (ICAO, Mar. 7, 2012). However, Respondents Application for Hearing does not endorse the issue of reopening or withdrawal of the FAL, and Counsel's email indicating that it would take the position that

Claimant was “never temporarily disabled” is not sufficient to constitute an endorsement of the issue for hearing.

ORDER

It is therefore ordered that:

1. Respondents have failed to establish by clear and convincing evidence that Dr. Pham’s assignment of a 10% whole person impairment for emotional disturbance is incorrect. Claimant is entitled to a 10% whole person permanent impairment rating as assigned by Dr. Pham.
2. Respondents have established by clear and convincing evidence that Dr. Pham’s determination that Claimant’s cervical symptoms at the time of his examination were causally related to her January 2, 2019 work injury, and his opinion that Claimant was not at MMI for cervicalgia is incorrect. Claimant was at MMI for cervicalgia on October 10, 2019 without any permanent impairment for such injury.
3. Claimant’s Average Weekly Wage is \$931.36 per week.
4. All matters not determined herein are reserved for future determination.

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

DATED: October 5, 2021



Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

Has the claimant demonstrated, by a preponderance of the evidence, that she is incapable of earning wages in the same or other employment as a result of the admitted January 4, 2017 injury and is therefore entitled to an award of permanent total disability (PTD) benefits?

Has the claimant sustained a serious permanent disfigurement to areas of her body normally exposed to public view, resulting in additional compensation?

At hearing, the parties agreed to reserve the endorsed issue of whether a recommended medical treatment (specifically a compound cream) was reasonable, necessary, and related to the admitted January 4, 2017 work injury.

FINDINGS OF FACT

1. The claimant worked for the employer as a dental biller. This job entailed reviewing billing, communicating with dentists about the billings, making corrections, preparing invoices, and providing customer service to patients. The claimant's office was in one building and the main clinic was in another building. As a result, she would walk between these buildings on a daily basis to obtain billing records.

2. On January 5, 2017, the claimant was walking between the two buildings. There had been a snowstorm, and the sidewalks had not yet been shoveled. As a result, the claimant did not recognize where the sidewalk ended, and unexpectedly stepped off the curb, twisting her right ankle.

3. On January 6, 2017, an x-ray of the claimant's right ankle showed moderate tibiotalar effusion, tibiotalar degenerative joint disease with a chronic appearing osteochondral lesion, demineralization, but no acute fracture.

4. The claimant's authorized treating physician (ATP) for this claim is Dr. James McLaughlin. The claimant was first seen by Dr. McLaughlin on January 6, 2017. At that time, the claimant reported continuing pain in her right ankle. The claimant was already using Tramadol related to a prior thoracic spine injury. As a result, Dr. McLaughlin recommended the use of ibuprofen. He also recommended the use of an ankle brace.

5. On January 25, 2017, a magnetic resonance image (MRI) of the claimant's right ankle showed a bone contusion at the lateral talar head neck junction, evidence of the dorsal breaking from the talus, and a mild midfoot sprain.

6. On February 14, 2017, the claimant returned to Dr. McLaughlin. On that date, Dr. McLaughlin referred the claimant to Dr. Christopher Copeland, a foot and ankle orthopedist.

7. On March 2, 2017, the claimant was seen by Dr. Copeland. At that time, the claimant reported right ankle pain, instability, weakness, and decreased range of motion. Dr. Copeland diagnosed a right ankle sprain, and opined the claimant might have impingement symptoms in the ankle. Dr. Copeland recommended the use of a CAM boot and consideration of a therapeutic injection.

8. On May 16, 2017, the claimant returned to Dr. Copeland. At that time, the claimant reported burning pain in her right ankle. Dr. Copeland noted that the claimant's pain was primarily on the anterior ankle and the presence of a palpable dorsal talar spur. On that date, Dr. Copeland administered a therapeutic injection to the claimant's right ankle.

9. On May 22, 2017, the claimant was seen by Dr. McLaughlin. At that time, the claimant reported that the injection administered by Dr. Copeland initially resulted in better function, particularly with walking. However, that relief wore off after an hour or two, and she had increased pain thereafter.

10. The claimant returned to Dr. Copeland on June 15, 2017, and reported "a couple of hours" of relief from the injection. On that date, Dr. Copeland recommended a right ankle arthroscopy with possible open excision of the bone talus and nerve decompression.

11. Dr. Copeland performed the recommended surgery on July 5, 2017. The procedure included right ankle arthroscopy with extensive debridement, excision of bone of the distal tibia, and excision of bone of the dorsal talus that involved an additional incision.

12. On August 17, 2017, the claimant was seen by Dr. McLaughlin and reported that she was feeling better and physical therapy was helpful. Dr. McLaughlin noted that the claimant would be returning to work the next day. He listed work restrictions of four hours of sit down duty, elevate the right leg, and park close to work.

13. On August 31, 2017, the claimant returned to Dr. McLaughlin and reported that working for four hours was painful. Dr. McLaughlin kept the claimant on a four hour work restriction, but added that every 15 minutes she should elevate the leg and alternate heat and cold.

14. On October 26, 2017, the claimant was seen by Dr. Copeland who noted that the claimant was experiencing nerve pain. Although Dr. Copeland noted that he did not believe that the claimant had complex regional pain syndrome (CRPS), he recommended the claimant undergo electromyography (EMG) testing.

15. On November 8, 2017, Dr. McLaughlin opined that the claimant had nerve entrapment, with ongoing adjustment disorder and depression. On that date, Dr. McLaughlin also noted that the claimant was scheduled to see Dr. Brittnay Matsumura.

16. The claimant was first seen by Dr. Matsumura on November 9, 2017. On that date, Dr. Matsumura recorded the claimant's reports of a fire-like sensation in her right foot and that the right foot gets cold. Dr. Matsumura listed the claimant's diagnoses as right ankle injury, chronic pain of the right ankle, neuropathic pain of the right ankle, and adjustment disorder with depressed mood. Following her examination of the claimant, Dr. Matsumura opined that the exam was not consistent with a diagnosis of CRPS and did not clearly indicate a specific peripheral nerve issue.

17. On November 30, 2019, Dr. Joel Dean administered EMG and nerve conduction studies (NCS). Following the testing, Dr. Dean noted evidence of a peroneal nerve injury. He further noted that it could be due to lumbosacral radiculopathy or cervical myelopathy.

18. On November 7, 2017, Dr. McLaughlin discussed with the claimant additional testing for CRPS. Such testing would include a bone scan, thermography, and quantitative sudomotor axon reflex test (QSART). Dr. McLaughlin also opined that the claimant's exam seemed to indicate focal nerve entrapment. On that same date, the claimant reported that her employment with the employer had ended as the employer was "going 'a different direction' ". Dr. McLaughlin noted his preference that the claimant get back to work and listed the claimant's work restrictions as two hours of "sit down duty", and a recommendation that the claimant "park close to work".

19. On January 12, 2018, a three phase bone scan showed "relative decreased uptake in the right ankle and foot when compared to the left". The radiologist, Dr. Roy Erb, noted that this could support a diagnosis of CRPS, but not "the classical pattern."

20. Based upon the results of the three phase bone scan, on January 15, 2018, Dr. McLaughlin requested authorization for a Functional Capacity Evaluation (FCE). He also recommended the claimant undergo QSART and thermography testing.

21. On January 29, 2018, the claimant attended an FCE with Marty Haraway, OTR. In the FCE report, Therapist Haraway found that the claimant met, and slightly exceeded, the demands of her current sedentary job. Therapist Haraway recommended that the claimant would be able to sit for at least two hours at a time, followed by standing for up to 30 minutes. It was also the opinion of Therapist Haraway that the claimant was able to walk up to 15 minutes at a time; and was able to occasionally bend, squat, crouch and kneel. Therapist Haraway also recommended occasional lifting and carrying up to 15 pounds and occasional pushing and pulling up to 10 pounds.

22. On February 26, 2018, the claimant returned to Dr. Matsumura. At that time, Dr. Matsumura reviewed the results of an Autonomic Testing Battery and thermography studies. Dr. Matsumura noted that both tests were positive and met the criteria of a CRPS diagnosis. Dr. Matsumura recommended that the claimant undergo a sympathetic blockade.

23. On March 29, 2018, Dr. Kenneth Lewis administered a right L3 lumbar sympathetic block.

24. On April 3, 2018, Dr. McLaughlin took the claimant off of all work, pending the completion of the sympathetic blocks.

25. On April 5, 2018, Dr. Lewis repeated the right L3 lumbar sympathetic block. A third right L3 lumbar sympathetic block was administered by Dr. Lewis on April 12, 2018.

26. On April 10, 2019, the Social Security Administration notified the claimant that pursuant to the Social Security Act, she was deemed disabled from the date of April 13, 2018.

27. On May 9, 2018, the claimant was seen by neurosurgeon, Dr. Giancarlo Barolat. At that time, the claimant reported her pain as a burning, lightning bolt sensation. She also reported hypersensitivity in her right foot. Dr. Barolat noted that Dr. Lewis had recommended a spinal cord stimulation procedure. After his examination of the claimant, Dr. Barolat opined that the claimant was an excellent candidate for a neurostimulation trial. He also opined that given the claimant's symptoms, it would be appropriate to place the stimulator on the claimant's sciatic nerve.

28. Prior to the authorization of the nerve stimulator the claimant attended a psychological independent medical examination (IME) with Dr. Stephen Moe. In addition, the claimant attended an IME Dr. Kathleen D'Angelo. Subsequently, the nerve stimulator was authorized by the respondent.

29. Following a one week trial, on July 16, 2019, Dr. Barolat implanted the recommended and authorized sciatic nerve stimulator. The medical records after that date indicate that the claimant did well with the nerve stimulator.

30. The claimant testified that the paddle for the nerve stimulator was implanted in the back of the claimant's right thigh at the sciatic nerve. The battery was implanted at the top of the claimant's right thigh.

31. The claimant also testified that following the implantation of the nerve stimulator, the claimant went from being bedridden to being able to be up a little at a time.

32. On November 12, 2019, Dr. McLaughlin placed the claimant at maximum medical improvement (MMI). In addition, Dr. McLaughlin assessed a permanent whole person impairment rating of 31 percent.¹ With regard to permanent work restrictions, Dr. McLaughlin recommended the claimant undergo an additional FCE.

33. On December 18, 2019, the respondent filed a Final Admission of Liability (FAL) admitting for the MMI date of November 21, 2019.

34. On February 17, 2020, the claimant was seen by Therapist Haraway for the second FCE. Therapist Haraway listed the claimant's physical tolerances to include: alternate between sitting and standing every 30 minutes; walk up to 15 minutes at a time;

¹ 20 percent whole person for the CRPS diagnosis; 13 percent whole person related to mental health; and the scheduled impairment of five percent for the claimant's right lower extremity (which converts to two percent whole person).

occasionally carry up to ten pounds; occasionally push and pull up to 12 pounds; and occasional crouching and squatting. Therapist Haraway opined that if the claimant is allowed to manage her symptoms she would be reliable in a sit down job. With regard to managing symptoms, Therapist Haraway listed “minimum elevating, laying down, taking off her shoe, alternating positions”. In addition, it was noted in the FCE report that the claimant might miss work days if her pain “exacerbated to the point of needing to lay down or [cannot] concentrate on anything but the pain.”

35. On February 24, 2020, the claimant returned to Dr. McLaughlin. Based upon the recommendations listed by Therapist Haraway in the FCE, Dr. McLaughlin assigned permanent work restrictions as follows:

max lifting 15 pounds, 5 pounds routinely, carrying 10 pounds max, walking 15 minutes at a time with smooth surfaces and less if not, max standing 30 minutes at a time, avoid crawling, kneeling, and squatting with no ladders. May miss days, probably about 4 to 8 per month, due to pain control and issues. May need to lie down throughout the day.

36. On March 2, 2020, the claimant attended a vocational assessment with Torrey Beil. In her March 31, 2020 report, Ms. Beil opined that the claimant had training and experience that was relevant in jobs with a consistent hiring need. In addition, Ms. Beil noted that the claimant’s prior training and work experience was “particularly valuable in the current job market.” She also opined that the claimant’s training and experience could be applicable in sedentary and part-time positions.

37. Ms. Beil issued a second report on June 2, 2020. In that report, Ms. Beil listed a number of skills the claimant possesses that could be applied to employment. In addition, Ms. Beil opined that because of the claimant’s skills and experience, the claimant would be qualified to apply for positions in medical offices and clerical positions and listed six such open positions. Ms. Beil also noted that the claimant had expressed a desire to work from home. Ms. Beil opined that this was a reasonable option for the claimant and would allow for more flexibility in her pain management.

38. Ms. Beil’s testimony was consistent with her written reports. Ms. Beil confirmed her opinion that the claimant is capable of obtaining employment and earning a wage. Ms. Beil reviewed positions in billing, medical reception, and medical clerk that did not exceed the claimant’s medical restrictions. Ms. Beil testified that the claimant could start with PRN or part-time employment. Ms. Beil testified that, in her opinion, the claimant is able to work from home, which would be an ideal situation for the claimant. Ms. Beil also testified that she finds no medical report that states that the claimant must miss four to eight days per month. Similarly, she finds no medical report that requires the claimant has to take naps.

39. On July 6, 2020, the claimant was seen by Bob Van Iderstine for a vocational evaluation. In a report dated July 9, 2020, Mr. Van Iderstine opined that due to her work restrictions, the claimant would not be able to sustain employment. He specifically referenced Dr. McLaughlin’s statements that the claimant may miss work four to eight days per month due to pain control issues, and she would need to lie down

throughout the day to manage her pain symptoms. Mr. Van Iderstine opined that employers would not allow for that number of missed days per month. Nor would employers accommodate the claimant's need to lie down during her work day.

40. Mr. Van Iderstine's testimony was consistent with his written report. Mr. Van Iderstine testified that it is his opinion that the claimant is not able to return to employment. This is due to her pain issues and the work restrictions outlined by Dr. McLaughlin. It is not reasonable for her to return to the workforce because of her injury and limitations due to her injury. He noted that the claimant uses the nerve stimulator; micro current; and medications, which, in his opinion are not compatible with working in a workplace. Mr. Van Iderstine reiterated Dr. McLaughlin's statement that the claimant could miss four to eight workdays a month because of her pain. Mr. Van Iderstine also pointed to the claimant's work restrictions as listed in the FCE.

41. Mr. Van Iderstine testified that the claimant would not be able to stay on a work schedule because she has to lie down throughout the day and has other pain modalities and medications to treat her pain. In addition, it is his belief that employers will not tolerate four to eight days off per month. Mr. Van Iderstine also noted that the claimant has a limited ability to focus. As a result, it is his opinion that the claimant would not be able to meet production demands or quotas.

42. Mr. Van Iderstine also testified that in his opinion, the claimant is not capable of working outside of her home. Similarly, the claimant is not capable of working from home because certain productivity is expected. Mr. Van Iderstine does not believe that the claimant could not work in a "gig economy" type job (such as Lyft or Uber) because of her issues with driving.

43. The claimant provided testimony regarding her prior work experience. The claimant held certification with the Internal Revenue Service from 1990-1993. The claimant was an accounts receivable manager for the Daily Sentinel for 11 years, starting in June 1998. In that position, she measured ads for the newspaper for billing verification, created reports, and helped customers with billing questions. At one time, she was sending out 1800 bills in a month for that employer. She also worked as a human resources administrator at Cabela's where her duties included maintaining employee files, processing payroll, doing all scheduling, and helping set up for functions. The claimant also worked as a billing administrator for General Surgeons of Western Colorado for one year. During that employment, she posted payments, resubmitted insurance claims, followed up with claims, and handled collections

44. The claimant testified that her current symptoms include feelings of buzzing and tingling. She still spends a lot of her time in bed and generally her pain dictates her activity level. She also testified that the "fiery poker feeling" has been better since she received the nerve stimulator. However, that feeling has not fully resolved. Since using the nerve stimulator, the claimant sometimes experiences extreme muscle spasms in her thigh, causing her to scream. Her calf is always in spasm, but it varies in intensity.

45. The claimant also utilizes a micro current machine. This device involves the use of pads on the claimant's foot and her back, with different programs to relieve her

pain. The claimant uses the micro current machine 4 to 5 times per week, and up to 2 to 3 times per day.

46. The claimant noted that when blood pools in her foot, she has increased pain. Standing with weight on her right foot is incredibly painful. It is a struggle for the claimant to wear shoes, but the claimant feels she has to in cold weather. In addition, the claimant has tenderness at her surgical scar on the top of her right foot and to the right side. The claimant is able to wear a Hoka running shoe, because the shoelaces are on the side, so there is no extra pressure on the top of her foot. She can wear the Hoka shoe for 15 to 20 minutes. She can also wear slides from Under Armour. With the slides, she moves the slide from her scar to avoid pressing on that area.

47. The claimant further testified that she has days when she stays in bed, and uses medication, micro current, pain meds, and sleep, to manage her pain. Some food and anxiety will increase her pain. Other times, the pain increases for no reason. The claimant testified that on a “bad day” her pain is so bad she is unable to put her shoe on, is taking narcotics, and would be unable to sit at a desk. She further testified that on those days she would not be able to go to a workplace. In addition, on such a day, the claimant would not be able to interact with customers or produce work product. The claimant does not believe that she could work from home, even if she had no set schedule and no production requirements.

48. The claimant testified that she has not sought employment because she has been spending her days maintaining her pain.

49. The claimant obtained a certificate for medical coding through self-paced and online classes at home. This was before the nerve stimulator was implanted. The employer paid for the coding certification. The claimant did not use the coding training in her job with the employer. The claimant does not believe that her coding certification will increase the likelihood that she will be able to work. That is because to do medical coding you need to be proficient and fast. With her pain, she cannot do that.

50. The claimant can drive, but only if she has to. This is because it is painful to push on the gas. Mostly the claimant’s roommate will drive her places. The claimant is waiting for authorization for adaptive driving, which would include hand controls. If she obtains these hand controls, she would not have to use her feet to drive. The claimant does not believe that getting hand controls for her car will increase the likelihood that she will be able to work. That is because of her pain. For example, the claimant cannot drive with the nerve stimulator on.

51. The claimant is the guardian of her 20-month-old granddaughter. The claimant’s roommate does all of the childcare and cooking in their home. The roommate also takes the granddaughter to daycare four days a week. The claimant is able to play with her granddaughter. She is only able to be her granddaughter’s guardian because of her roommate. She became a guardian so that her granddaughter did not go into foster care. This is a short-term arrangement, “hopefully just for a few more months.”

52. The ALJ credits the medical records, the claimant's testimony regarding her ongoing symptoms, and the opinions of Dr. McLaughlin and Mr. Van Iderstine over the conflicting opinions of Ms. Beil. The ALJ finds that the claimant has demonstrated that it is more likely than not that she is incapable of earning a wage as a result of her occupational injury. The ALJ recognizes that the claimant has prior experience and skills that would be useful in seeking employment. However, the claimant's myriad of injury related physical limitations and need for accommodations lead the ALJ to find that it is more likely than not that the claimant is not capable of earning a wage.

53. Disfigurement was appropriately endorsed for hearing. The ALJ left the evidence open so that the claimant could provide photographs of her alleged disfigurement. Based upon the photographs received (and entered into evidence as the claimant's exhibit 17), the ALJ finds and concludes that as a result of the January 5, 2017 work injury, the claimant has a visible disfigurement to the body consisting of scarring and skin discoloration. More specifically:

a) On the claimant's right foot there are areas of discoloration with a scar measuring approximately one and one-half inch in length.

b) On the back of the claimant's right thigh, at the site of the implanted paddle, there is a scar that is approximately three inches in length. In addition, the scar has a railroad pattern running the entire length of the scar.

c) At the site of the implanted battery pack, there is a scar that measures approximately three inches in length. This scar also has a railroad pattern running the entire length of the scar.

CONCLUSIONS OF LAW

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

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

3. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

4. In order to prove permanent total disability, claimant must show by a preponderance of the evidence that he is incapable of earning any wages in the same or other employment. Section 8-40-201(16.5)(a), C.R.S. (2012). A claimant therefore cannot receive PTD benefits if he is capable of earning wages in any amount. *Weld County School Dist. RE-12 v. Bymer*, 955 P.2d 550, 556 (Colo. 1998). The term "any wages" means more than zero wages. *Lobb v. ICAO*, 948 P.2d 115 (Colo. App. 1997); *McKinney v. ICAO*, 894 P.2d 42 (Colo. App. 1995). In weighing whether claimant is able to earn any wages, the ALJ may consider various human factors, including claimant's physical condition, mental ability, age, employment history, education, and availability of work that the claimant could perform. *Weld County School Dist. R.E. 12 v. Bymer*, 955 P.2d at 550, 556, 557 (Colo. 1998). The critical test is whether employment exists that is reasonably available to claimant under his particular circumstances.

5. The claimant is not required to establish that an industrial injury is the sole cause of his inability to earn wages. Rather the claimant must demonstrate that the industrial injury is a "significant causative factor" in his permanent total disability. *Seifried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986). Under this standard, it is not sufficient that an industrial injury create some disability which ultimately contributes to permanent total disability. Rather, Seifried requires the claimant to prove a direct causal relationship between the precipitating event and the disability for which the claimant seeks benefits. *Lindner Chevrolet v. Industrial Claim Appeals Office*, 914 P.2d 496 (Colo. App. 1995), rev'd on other grounds, *Askew v. Industrial Claim Appeals Office*, 927 P.2d 1333 (Colo. 1996).

6. The respondents are not required to prove the existence of a job offer to refute a claim for permanent total disability benefits. *Black v. City of La Junta Housing Authority*, W.C. No. 4-210-925 (ICAO, December 1998) (claimant is not permanently totally disabled even though respondents' vocational expert was unable to identify a single job opening available to claimant); *Beavers v. Liberty Mutual Fire Ins. Co.*, (Colo. App. No. 96 CA0275, September 5, 1996) (not selected for publication); *Gomez v. Mei Regis*, W.C. No. 4-199-007 (September 21, 1998). Rather, the claimant fails to prove permanent total disability if the evidence establishes that it is more probable than not that the claimant is capable of earning wages. *Duran v. MG Concrete Inc.*, W.C. No. 4-222-069 (September 17, 1998).

7. As found, the claimant has demonstrated, by a preponderance of the evidence, that she is incapable of earning wages in the same or other employment as a result of the January 4, 2017 injury. Therefore, the claimant has successfully demonstrated by a preponderance of the evidence that she is permanently and totally disabled and she is entitled to an award of permanent total disability (PTD) benefits. As

found, the medical records, the claimant's testimony regarding her ongoing symptoms, and the opinions of Dr. McLaughlin and Mr. Van Iderstine are credible and persuasive.

8. Section 8-42-108 (1), C.R.S. provides that a claimant may be entitled to additional compensation if, as a result of the work injury, she has sustained a serious permanent disfigurement to areas of the body normally exposed to public view.

9. As found, the claimant has permanent impairment on her right foot and right thigh as described above. Therefore, the ALJ orders that the respondent shall pay the claimant \$1,500.00 for that disfigurement. The respondent shall be given credit for any amount previously paid for disfigurement in connection with this claim.

ORDER

It is therefore ordered:

1. The respondents shall pay the claimant permanent total disability (PTD) benefits.
2. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.
3. The respondent shall pay the claimant \$1,500.00 for her permanent disfigurement.
4. All matters not determined here are reserved for future determination.

Dated this 29th day of December 2020.



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

- I. Has Claimant shown, by a preponderance of the evidence, that the right ankle revision surgery as proposed by Dr. Shank, is reasonable, necessary, and related to Claimant's admitted work injury?

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

The Initial Work Injury

1. Claimant suffered an admitted injury on January 22, 2019 when she slipped and fell on ice in the Employer parking lot. According to the Employer's First Report of Injury WC1, the initial complaint was to her right ankle only. The WC1, while lacking in detail, indicates that Employer was informed of the incident the same day. (Ex. M, p. 221).

2. However, instead of pursuing Workers Compensation, Claimant initially reported to Champions Family Medical on January 28, 2019, complaining of persistent swelling and stabbing pain in her right ankle. (Ex. B, p. 28). X-rays were essentially normal (Ex. K, p. 201). On January 30, 2019, Claimant was referred to podiatry, still reporting pain. Ex. B, p. 30).

3. A MRI of Claimant's right ankle was taken on March 27, 2019. Under IMPRESSION, several things were noted:

1. Torn anterior talofibular ligament
2. Torn anterior band of the tibiofibular ligament suggesting an ankle sprain.
3. High-grade partial longitudinal tear of the peroneus brevis tendon
4. High-grade partial tear of the posterior tibialis tendon, appears chronic. No retraction.
5. No acute osseous abnormalities.
6. Tendonopathy in the peroneus longus tendon without complete tear. (Ex. L, p. 209).

4. Claimant was then referred to the Hansen Clinic. By this time, the MRI had revealed "a few things", and her right ankle pain persisted. (Ex. C, p. 37). Podiatrist

Mark Mauer noted that Claimant had “Mild calvaneal varus while standing which is partially correctable with a block test.” *Id* at 38.

5. After the MRI was reviewed, Dr. Mauer suggested several conservative therapy options, including an ankle brace, but also noted:

I had a long discussion with the patient regarding *surgical options* which would include peroneus brevis to longus tendon transfer lateral ankle stabilization with or without first metatarsal dorsiflexion osteotomy and to likely include ankle arthroscopy with synovectomy. *Id* at 39. (emphasis added).

6. Claimant returned to Dr. Mauer on April 15, 2019. Claimant had followed the recommended conservative treatment regimen, but continued to report the same symptoms, now to include a burning sensation while driving. (Ex. C, p. 41). It was agreed to continue conservative treatment, with the addition of a Medrol dosepak. *Id*.

7. Claimant returned on May 20, 2019, reporting “a lot worse” pain over the posterior and lateral aspects of her right ankle. She was also placed into a cam boot at this appointment. (Ex. C, p. 46).

Workers Compensation Treatment

8. On July 11, 2019, Claimant then presented to Dr. John R. Shank, MD with the Colorado Center for Orthopedic Excellence. Focus at this appointment was on the right ankle, although she reported symptoms to her left ankle as well, albeit less severe. Conservative measures had not provided relief. At this time, Dr. Shank indicated to Claimant that her peroneal tendon pathology would not likely heal with conservative treatment. Risks were assessed and discussed, and Claimant indicated that she would like to proceed with surgery. (Ex. D, pp. 49-50).

9. On August 12, 2019, Dr. Shank performed surgery on Claimant’s right-ankle described as: right-ankle modified Brostrom-Gould with repair of both the anterior talofibular ligament and calcaneofibular ligaments; right-ankle arthroscopic debridement extensive of tibia and talus; right peroneal debridement with repair; right peroneal tendon sheath tenosynovectomy; and right-ankle arthroscopic synovectomy. (Ex. E, p. 98).

10. Dr. Shank then performed surgery on Claimant’s left ankle on February 12, 2020. (Ex. E, pp. 103-105).

11. On April 15, 2020, Wallace Larson, MD, performed an IME for Respondents. At the examination, Claimant advised Dr. Larson that she continued to have right-ankle pain. Dr. Larson opined that Claimant had reached MMI with respect to her right ankle injury. (Ex. I. p. 173).

Claimant's Reported Right Ankle Symptoms Persist

12. Claimant was seen by Dr. Shank on May 21, 2020. Claimant reported pain in her right foot and right ankle in the peroneal tendon sheath and musculature. Dr. Shank ordered a repeat right-ankle MRI. (Ex. D p. 83).

13. Dr. Shank again evaluated Claimant on June 9, 2020. He reviewed diagnostic studies of the right ankle, noting that the right-ankle MRI revealed degenerative changes of the peroneal tendon, intact Bostrom repair, medial talar dome osteochondral defect, and normal peroneal longus tendon. (Ex. D, p.85).

14. In his report for this June 9, 2020 visit, Dr. Shank discussed the possibility of additional right-ankle surgery Dr. Shank stated:

At this point, we discussed with Konnie peroneal tendon surgeries *can be* very difficult to recover from. There is *not* a surgical treatment that will give her a *normal* tendon. If she feels as if she has had no improvement from the surgery, we discussed a right peroneal tendon transfer with debridement and repair versus an allograft reconstruction. She is going to think about her options. If she would like to proceed with surgical treatment, she will contact me. I discussed with the patient the goal of *any* surgical treatment is to *improve her symptoms* and *may not* give her a normal ankle. She is going to think about her options and contact us. *Id* at 85-86. (emphasis added).

15. Claimant contacted Dr. Shank by telephone on June 30, 2020, and advised Dr. Shank of her decision:

Konnie contacted our office, stating she would like to proceed with revision peroneal tendon surgery. I have discussed with her in the past peroneal tendon debridement and repair, tenosynovectomy with either transfer or allograft reconstruction with semitendinosus allograft. The patient is going to think about which options she would prefer if she has a major tear or near rupture of her peroneal tendons. She will likely be nonweightbearing for two to four weeks depending on the extent of the surgery. Risks and benefits of the surgery were discussed including risks of infection, bleeding, damage to tendons, nerves, vessels, ligaments, risk of ongoing pain, neurovascular injury, DVT, wound complications, chronic pain, chronic stiffness, need for additional surgery in the future, risks of sural neurapraxia, ongoing peroneal tendon pain, and ongoing symptoms. The patient will be limited weightbearing for two to four weeks. We will proceed with surgical treatment at the patient's convenience. (Ex. D, p. 93).

Right Ankle Revision Surgery Not Authorized

16. On July 2, 2020, Dr. Shank's office requested right-ankle surgical authorization *Id* at 96. Respondents initially denied authorization for the right-ankle surgery proposed by Dr. Shank on July 13, 2020. (Ex. F, p. 107). A final denial was issued on September 11, 2020. *Id* at 113.

17. After yet another visit on September 10, 2020, Dr. Shank noted:

...The patient states that *she is doing well with her left side*. Her right side has continued to struggle. She notes ongoing pain about the lateral aspect of her ankle, both adjacent to the Brostrom repair site and peroneal tendon sheath. The patient states that prior to her work related injury on 1/22/2019, where she slipped on the ice at Elements Massage, she had no significant bilateral symptoms. Again, her left side is doing well. She continues to have right-sided pain. We have discussed a possible revision surgery on the right side in the past. *She has had extensive therapy and other treatments postoperatively and continues to have pain*. (Ex. 1, p. 1)(emphasis added).

18. Under PLAN, Dr. Shank noted:

At this point I discussed with Konnie, I don't know if a revision surgery will help her pain, it is *certainly an option* for her. We discussed today a revision right ankle arthroscopy with peroneal tendon debridement/repair, possible transfer, possible allograft reconstruction. However, I discussed with Konnie there is a *chance* that revision surgery will not help her. It is *very difficult* to recreate a normal peroneal tendon sheath. *The patient certainly has no hindfoot varus to realign on exam*. I am not quite sure why the outside medical records suggest an osteotomy as she has no varus. I have encouraged her to perform additional physical therapy, revision is certainly a treatment option for her if she elects to proceed with this, however she *may* wind up with the same amount of pain as she does now. There is *certainly a chance* that surgical treatment could worsen her symptoms as well. She is going to think about her options. I am happy to see her back at any point in the future to further discuss. I think *both her ankle injuries were directly related to her work-related injury* at Elements Massage. *Id* at 2. (emphasis added).

Dr. O'Brien's IME and Hearing Testimony

19. Respondents commissioned an IME with Timothy O'Brien, MD on August 17, 2020. (Ex. J).

20. In his IME report dated August 31, 2020, Dr. O'Brien opined that right-ankle surgery proposed by Dr. Shank was neither reasonable, necessary, nor related to the admitted work injury.

21. Dr. O'Brien also testified at hearing. He is a board-certified orthopedic surgeon whose surgical subspecialties included ankle and foot surgery.

22. Dr. O'Brien testified that Claimant has a varus/equinovarus deformity in her right foot, a relatively rare genetic condition. This condition is unrelated to any injury, and causes a person's foot to turn inward. As a result, the arch actually increases as the person ages, in contrast to the typical person, whose feet tend to flatten with time. Dr. O'Brien's opinion that Claimant has varus deformity in right-heel and forefoot was based on his examination of Claimant at the IME appointment and his review of podiatrist records.

23. A report from Claimant's personal care physician dated April 25, 2018 documented swelling in Claimant's lower extremities. (Ex. A, pp. 2-4). Dr. O'Brien testified that these findings were "very consistent with this equinovarus deformity. "

24. Dr. O'Brien testified that the surgery proposed by Dr. Shank would likely fail in its aim to decrease symptoms because the proposed surgery does not address the pre-existing varus/equinovarus deformity. Unless this condition is corrected, he opined, "*peroneal tendons cannot be rescued.*" Dr. O'Brien testified that Claimant's, genetic equinovarus deformity has likely been the cause of Claimant's right-foot and ankle symptoms, since before the work injury and thereafter. Accordingly, the right ankle/foot surgeries performed and recommended are "*doomed to fail because the equinovarus has to be corrected.*"

25. Dr. O'Brien testified that varus/equinovarus deformities result in "attrition" of ankle tendons, which often manifest as tendon inflammation on MRI.

26. Dr. O'Brien further opined that, "*The amount of peroneal deterioration that has existed for many years in Ms. Benson's foot was demonstrated in that first MRI scan...the vast majority of it was preexisting, a personal health issue.*" However, he further noted: "*..I'm not denying the fact that there was an injury and it did produce the need for [the initial right ankle] surgery.*"

27. Dr. O'Brien testified that the surgery proposed by Dr. Shank would not, likely, reduce Claimant's symptoms and could increase symptoms because the surgery is not designed to address the underlying source of symptoms which is the unrelated varus/equinovarus deformity in Claimant's right ankle/foot. "*[I]f you don't address the hindfoot and forefoot boney deformities, there is no way you can get the peroneal tendon healthy enough to stop generating pain.*" Dr. O'Brien opined that Dr. Shank "really may not have fully appreciated the amount of varus that exists."

28. Dr. O'Brien testified that that Claimant's symptoms will likely worsen with the surgery proposed by Dr. Shank, because the situs of surgery does not have much subcutaneous fat. A second, revision surgery will de-vascularize the foot/ankle, traumatize nerves, and "*create more pain generation than relieve pain.*"

29. When defining the "necessary" component of the proposed surgery, Dr. O'Brien opined:

Well, it's not necessary from the standpoint that orthopedic surgeons typically when we use that nomenclature *necessary* we mean that *life or limb is at risk*. So, *necessary* surgery literally means you're trying to preserve the body or part of the body. (Transcript, p. 38)(emphasis added).

30. Dr. O'Brien characterized a number of Claimant's reported symptoms as "nonorganic", despite the failure of her numerous providers declining to so designate in their reports. He alluded to demographically controlled studies tending (in the tens of thousands) to show that persons being treated under Workers Compensation fare less well than those receiving similar treatments in a non-comp setting. He stated that inherent in the Workers Comp system is the potential for secondary gain, since "If they get well, then they get zero dollars at the time of their settlement. We only give people money if the[y] do less well. So, what...the comp system does is actually pay for ill health, not good health." (Transcript, p. 70).

31. Dr. O'Brien did not review the actual MRI images (reading the summaries instead), since he was not a treating physician. For that same reason, he did not offer specific alternatives for treatment, other than certain conservative modalities. However, he eventually conceded:

Well, obviously *surgical options shouldn't be ignored*, but I would tell her *because she has an open claim* that that open claim can create—until that is closed, it can create a framework wherein *none* of the things that we traditionally use are going to be very beneficial, which is why I always try to help people who have an open claim understand that their—probably their—their biggest beneficiary as far as enhancing health is that they control their own destiny a lot more than a physician. But as long as the claim is open, I will tell people that the statics [sic. statistics] show they're not going to respond as favorably to therapy, to an injection, to surgery, whatever it is. *People with an open claim don't do as well.* (Transcript, p. 79)(emphasis added).

Claimant Testifies at Hearing

32. Claimant testified that she slipped on ice coming into work upon leaving her car. She did not fall, grabbing her car instead, but noticed pain in her ankles after slipping. She thought it was just an ankle sprain, so did not intend to file a Workers

Compensation claim initially; instead she sought treatment with her personal physician. Only when she realized the situation was more serious at the Hanson Clinic did she seek treatment through Workers Comp. She eventually wound up with Dr. Shank.

33. The initial surgery he performed on her right ankle seemed to help. However, once she became more active again, she developed more pain. There was more swelling and discoloration. This issue still persists, to the point of having to remove her shoe, due to swelling, on a daily basis. Her job as a massage therapist involves a lot a standing, which she cannot tolerate due to the pain. She described her frustration at not being able to work, and is now concerned she might not be able to return to her job as a massage therapist due to the ongoing pain. Ice therapy provides some, but limited relief. She also is awakened by the pain at night regularly.

34. Claimant discussed the pros and cons of the revision surgery with Dr. Shank. At this point, she wants to proceed with it. She has complete faith in Dr. Shank, and feels the pain will not go away without surgery. She is willing to take the chance on it, since there has not been a viable alternative suggested, because "I'm willing to try anything." Claimant acknowledged that the surgery will not give her a "normal ankle"; rather, it is hoped it might alleviate her symptoms, primarily pain. However, she understands that it might not even reduce her pain; it theoretically could even make it worse.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado is to assure quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1)*. Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. *Section 8-43-201, C.R.S.* A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The ALJ, as the fact-finder, is charged with resolving conflicts in expert testimony. *Rockwell Int'l v. Turnbull*, 802 P.2d 1182,

1183 (Colo. App. 1990) Moreover, the ALJ may accept all, part, or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 165 Colo. 504, 441 P.2d 21 (1968); see also *Dow Chemical Co. v. Industrial Claim Appeals Office*, 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary medical opinion).

C. In this instance, the ALJ finds Claimant to be credible in recounting the work incident, and in describing her ongoing symptoms to her medical providers and IMEs to the best of her abilities. As ascribed by Dr. O'Brien, *any* injured worker who enters the Workers Comp system can be tainted by the possibility, however remote, of seeking some sort of secondary gain. While that is no doubt correct on occasion, there is certainly no reason in this case to pigeonhole Claimant in such fashion. The pain Claimant is describing is very real, and the ALJ does not attribute it to nonorganic factors. Claimant is not satisfied with collecting TTD payments; instead, she is willing to undergo the additional pain and rehab from a revision surgery, even with uncertain result, in an effort to gain greater long term function and return to work. That is the antithesis of seeking a secondary gain. Similarly, were Claimant driven by such ulterior motives (subconsciously or otherwise), she would not have deferred putting in a comp claim the same day she fell. She actually tried to "shake it off," until it became clear there was damage that had to be addressed. Likewise, while Claimant also had a *left* ankle surgery, she reported good results from that – once again, not a sign of seeking secondary gain.

D. Dr. O'Brien, while highly credentialed, and no doubt sincere in his beliefs, has placed undue emphasis on secondary gain issues. As such, his overall *persuasiveness* has been diminished; such is the price of being unyielding on issues that one might more credibly equivocate.

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

Medical Benefits, Generally

F. Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School District #11*, W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012). Our courts have held that in order for a service to be considered a "medical benefit" it must be provided as medical or nursing treatment,

or incidental to obtaining such treatment. *Country Squires Kennels v. Tarshis*, 899 P.2d 362 (Colo. App. 1995). A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the Claimant's physical needs. *Bellone v. Industrial Claim Appeals Office*, 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines, Inc.*, W.C. No. 4-517-537, (ICAO, May 31, 2006). A service is incidental to the provision of treatment if it enables the claimant to obtain treatment, or if it is a minor concomitant of necessary medical treatment. *Country Squires Kennels v. Tarshis*, 899 P.2d 362 (Colo. App. 1995); *Karim al Subhi v. King Soopers, Inc.*, W.C. No. 4-597-590, (ICAO, July 11, 2012). The determination of whether services are medically necessary, or incidental to obtaining such service, is a question of fact for the ALJ. *Bellone v. Industrial Claim Appeals Office*, 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines, Inc.*, W.C. No. 4-517-537, (ICAO, May 31, 2006).

Medically Necessary

G. Suffice it to say, the ALJ does not share Dr. O'Brien's definition of medically necessary, as outlined in his deposition. Were this the case, few orthopedic surgeries that are performed on a daily basis- comp or not-would meet his definition of *necessary*. This revision surgery is not being proposed to save Claimant's life, nor to save her limb. It is, however, intended to cure or relieve the effects of her work injury, and it is certainly associated with Claimant's current physical needs – needs which were wrought by her work injury. At this point, no viable alternative exists to relieve Claimant of her condition, other than a second crack at a surgery. Unless that occurs, Claimant could be permanently unable to perform any job requiring her to be on her feet.

Related to Work Injury

H. At one point, Dr. O'Brien intimated, without overtly expressing, that Claimant's condition could be attributed to her congenital equinovarus condition- which Dr. O'Brien opined was more severe than noted by Dr. Shank. Suffice it to say, even if one accepted his opinion on the degree of severity of Claimant's underlying condition, that is the underlying condition that Claimant brought to work with her on January 22, 2019. Prior to this work injury, Claimant had no ankle problems in her life, and now she does. Even Dr. O'Brien later conceded that the original right ankle surgery by Dr. Shank was reasonable, necessary, and related to her work injury, and the ALJ concurs. The records also indicate Claimant was compliant with conservative measures leading up to this point. The ALJ also finds that Claimant's current condition is related to her original work injury, and not due to some intervening cause.

Is the Revision Surgery Reasonable?

I. Time will tell, but Claimant has earned the right to find out. She understands the difficulties in recovering from ankle surgery, having now done so once already on each ankle. She understands that the results are uncertain, having experienced a partial failure once already on the right side. She understands that the goal of this revision procedure is to alleviate some of the pain, and not to provide her

with a 'normal' ankle – those days are gone for good. The ALJ cannot accept at face value Dr. O'Brien's proposition that revision surgeries are always doomed to fail, just because the first attempt provides the best chance of success. Were this correct, no one would ever perform a revision. Instead, it would always be "Game over, and accept your fate." The other problematic proposition put forth by Respondents is that someone in Claimant's shoes cannot get on the true path to recovery *unless and until* they accept that their Workers Comp claim has now been *closed* – thus foreclosing surgical alternatives. This circular reasoning is simply not persuasive.

J. Lastly, Dr. O'Brien has opined that the revision surgery as being proposed by Dr. Shank is doomed to fail, due to Dr. Shank's failure to first address Claimant's underlying equinovarus condition. Dr. Shank - and Dr. Mauer, for that matter – took note of what they perceived as mild equinovarus in Claimant. In each instance, they saw the MRI images, which Dr. O'Brien did not. The ALJ finds and concludes that Claimant's treating physician is in the best position to decide if this underlying condition must be addressed as a condition precedent to the revision surgery. The treating physician would then decide if and how this might be accomplished. *If in the opinion of Dr. Shank*, after re-reviewing Claimant's *current condition* (after being denied the procedure last summer) this equinovarus condition should be addressed first (or concurrently), then the ALJ finds that to be a reasonable adjunct to the revision surgery.

ORDER

It is therefore Ordered that:

1. Respondents shall pay for right ankle revision surgery being proposed by Dr. Shank.
2. Respondents shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.
3. All matters not determined herein are reserved for future determination.

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

petition to review form at: <http://www.colorado.gov/dpa/oac/forms-WC.htm>. *In addition, it is recommended that you send a copy of your Petition to Review to the Colorado Springs OAC via email at oac-csp@state.co.us.*

DATED: December 29, 2020

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-140-431-001**

ISSUES

1. Whether the claimant has demonstrated, by a preponderance of the evidence, that on April 14, 2020 he suffered an injury arising out of and in the course and scope of his employment with the employer.
2. If the claim is found compensable, whether the claimant has demonstrated, by a preponderance of the evidence, that he is entitled to reasonable and necessary medical treatment related to the work injury.
3. If the claim is found compensable, what is the claimant's average weekly wage (AWW)?

FINDINGS OF FACT

1. The claimant has worked for the employer for approximately 13 years. In 2020, the claimant was paid \$26.00 per hour and he worked 40 hours per week. The claimant's job duties include setting concrete forms, laying the forms out, and packing out the forms. The position involves a great deal of climbing and heavy lifting. The claimant testified that prior to April 12, 2020, he was able to perform all of his normal job duties.
2. The claimant testified that on April 12, 2020, he was working for the employer setting forms. Specifically, he was placing a brick ledge. The claimant testified that the brick ledge was made of lumber and plywood and measured three feet tall and 14 feet long. He estimates that it weighed between 100 and 110 pounds. The act of placing the brick ledge involved setting it down and into place.
3. The claimant also testified that while he was placing the brick ledge, he felt a strain in his right arm and instant pain. This pain was located in the claimant's right bicep. The claimant assumed that the pain would lessen and he went about his normal day. However, the pain continued and on April 14, 2020 the claimant reported the incident to the employer on that date¹.
4. The claimant's authorized treating provider (ATP) for this claim is Dr. Craig Stagg. The claimant was first seen by Dr. Stagg on April 16, 2020. On that date the claimant reported pain and grinding in his right shoulder that began while the claimant was doing heavy lifting. Dr. Stagg diagnosed an acute shoulder strain and ordered an x-ray to rule out a rotator cuff injury. In addition, Dr. Stagg recommended the use of a sling and over-the-counter pain medication.

¹ The records of the Division of Workers' Compensation list April 14, 2020 as the claimant's date of injury. Therefore, the ALJ does not correct the date to April 12, 2020 when restating the findings and opinions of medical providers.

5. An x-ray of the claimant's right shoulder was taken on April 16, 2020. The x-ray showed severe glenohumeral degenerative joint disease.

6. On April 23, 2020, Dr. Stagg recommended magnetic resonance imaging (MRI) of the claimant's right shoulder. In addition, Dr. Stagg referred the claimant for an orthopedic consultation with Dr. Mitch Copeland.

7. On April 27, 2020, an MRI of the claimant's right shoulder showed severe glenohumeral degenerative joint disease with moderately severe glenoid version with extensive grade 4 chondromalacia and subchondral cystic changes and synovitis. In addition, the MRI showed chronic tearing of the posterior, superior, and anterior labrum with tendinopathy and partial thickness tearing of the biceps tendon, and the articular surface of the distal supraspinatus and infraspinatus tendons were without full thickness tear or retraction.

8. On April 29, 2020, the claimant was seen by Dr. Copeland. At that time, the claimant reported that he started having right shoulder symptoms after heavy lifting on April 14, 2020. The claimant listed his symptoms as pain, popping, grinding, locking, and decreased range of motion. The claimant described his pain as aching, stabbing, and throbbing. Dr. Copeland reviewed the results of the MRI and listed the claimant's diagnoses as: a tear of right glenoid labrum, right rotator cuff tendinopathy, and osteoarthritis of the right glenohumeral joint. Dr. Copeland noted that the claimant would eventually need a shoulder replacement, but given the claimant's age, that was not a current recommendation. Dr. Copeland recommended and administered a steroid injection on that same date.

9. On May 1, 2020, the claimant returned to Dr. Stagg who noted the MRI results and that Dr. Copeland had administered an injection. Dr. Stagg also noted the claimant had a degenerative labral tear. At that time, Dr. Stagg referred the claimant to physical therapy.

10. On May 27, 2020, the claimant returned to Dr. Copeland. At that time, Dr. Copeland recommended that the claimant stop working in manual labor. In addition, he recommended the claimant undergo a platelet rich plasma (PRP) injection.

11. On June 2, 2020, Dr. Jon Erickson reviewed the request for a PRP injection to the claimant's right shoulder. In his report, Dr. Erickson noted that the claimant had advanced glenohumeral osteoarthritis, as evidenced by the "complete loss of articular cartilage on the medial humeral head". Dr. Erickson did not find evidence of acute trauma to the claimant's right shoulder. In addition, he did not find evidence on the MRI of any aggravation or worsening of the condition of the claimant's right shoulder. Dr. Erickson recommended denial of the requested PRP injection. Based upon Dr. Erickson's report, the respondents denied authorization for the PRP injection.

12. On June 10, 2020, the claimant was seen by Dr. Stagg. In the medical record of that date, Dr. Stagg noted that although the claimant was asymptomatic prior to the injury at work, "the x-ray and MRI findings predate the injury" of April 14, 2020. On that date, Dr. Stagg referred the claimant to Dr. Ellen Price for pain management.

13. The claimant testified that he was seen by Dr. Price and she administered acupuncture. In addition, Dr. Price recommended the use of a TENS unit.

14. On June 30, 2020, Dr. Erickson was asked to reconsider his opinion regarding the PRP injection. In his report of that date, Dr. Erickson noted Dr. Copeland's opinion that a PRP injection would be "the most appropriate treatment" of the claimant's right shoulder condition. Dr. Erickson disagreed with this statement and noted that it could be reasonable to consider an intra articular steroid injection to treat the claimant's symptoms. Dr. Erickson reiterated his opinion that the degenerative arthritis in the claimant's right shoulder was not caused by the claimant's work activities.

15. In a July 15, 2020 medical record, Dr. Stagg agreed with Dr. Copeland's recommendation of a PRP injection.

16. Subsequently, Dr. Copeland referred the claimant to Dr. Sean Grey in Fort Collins, Colorado. On October 15, 2020, the claimant was seen by Dr. Grey. On that date, the claimant reported experiencing right shoulder pain since April 2020. The claimant also reported that for approximately a year he had experienced reduction in his shoulder range of motion and some stiffness. Dr. Grey listed the claimant's diagnoses as osteoarthritis of the right glenohumeral joint, abrupt increase in right shoulder pain with underlying arthrosis, and potential biceps tendon tear. Dr. Grey recommended the claimant undergo right shoulder surgery. That surgery would include arthroscopy and debridement with CAM procedure.

17. At the request of the respondents, Dr. Mark Failing conducted a review of the claimant's medical records. In his October 15, 2020 report, Dr. Failing identified the claimant's diagnoses as: severe degenerative joint disease of the right shoulder with degenerative labrum, rotator cuff tendinosis, and biceps tendinosis. Dr. Failing opined that these diagnoses were not related to the claimant's April 2020 incident at work. Dr. Failing also opined that the claimant did not sustain a new injury on April 14, 2020. Dr. Failing described the condition of the claimant's right shoulder as "significant severe preexisting degenerative joint disease". Dr. Failing noted that for a shoulder in this condition, symptoms "can occur at any time with or without use of the shoulder."

18. Dr. Failing noted that there was no indication that on April 14, 2020, the brick ledge fell or that there was "other impact or sheer force applied to the shoulder." It is Dr. Failing's opinion that the findings on imaging are all preexisting and were not worsened by the claimant's work activities on April 14, 2020. Dr. Failing also noted that a total shoulder arthroplasty may be the only reasonable option for the claimant's right shoulder symptoms. He further noted that a total shoulder arthroplasty would treat the claimant's preexisting severe degenerative joint disease and not any pathology created on April 14, 2020.

19. The claimant continued working for the employer from April 14, 2020 through November 17, 2020. During that time, the claimant worked as a foreman. The claimant testified that this was less physically demanding than his regular position.

20. The claimant testified that on November 18, 2020, Dr. Gray performed surgery to his right shoulder.

21. The ALJ credits the medical records and the opinions of Drs. Erickson and Failing. The ALJ is not persuaded by the claimant's testimony regarding the nature and onset of his right shoulder symptoms. The ALJ places specific weight on the opinion of Dr. Failing that symptoms "can occur at any time with or without use of the shoulder" when there is "significant severe preexisting degenerative joint disease" in that shoulder. The ALJ finds that the claimant has failed to demonstrate that it is more likely than not that in April 2020, he suffered an injury to his right shoulder at work. The ALJ also finds that the claimant has failed to demonstrate that it is more likely than not that his working conditions aggravated, accelerated, or combined with the preexisting arthritis to necessitate medical treatment of his right shoulder.

CONCLUSIONS OF LAW

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

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

3. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

4. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it

“aggravates accelerates or combines with a preexisting disease or infirmity to produce disability or need for treatment.” See *H & H Warehouse v. Vicory, supra*.

5. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that he suffered an injury arising out of and in the course and scope of his employment with the employer. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that his work activities aggravated, accelerated, or combined with a preexisting condition to necessitate medical treatment. As found, the medical records and the opinions of Drs. Erickson and Failing are credible and persuasive.

ORDER

It is therefore ordered the claimant’s claim for workers’ compensation benefits is denied and dismissed.

Dated this 30th day of December 2020.



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. For statutory reference, see section 8-43-301(2), C.R.S. and OACRP 26. You may access a petition to review form at: <https://oac.colorado.gov/resources/oac-forms>.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us**. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.

**OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NOS. 5-024-075-002 and 5-075-911-002**

ISSUES

The hearing addressed two separate workers' compensation claims.¹ Those claim numbers are WC 5-024-075, with a date of injury of August 7, 2016; and WC 5-075-911, with a date of injury of April 29, 2018.

WC 5-024-075

Whether the claimant has demonstrated, by a preponderance of the evidence, that she suffered a change in condition to warrant the reopening of a workers' compensation claim related to an admitted injury that occurred on August 7, 2016.

WC 5-075-911

1. Whether the claimant has demonstrated, by a preponderance of the evidence, that on April 29, 2018, she suffered an injury arising out of and in the course and scope of her employment with the employer.

2. If the claimant proves a compensable injury, whether the claimant has demonstrated, by a preponderance of the evidence, that medical treatment she has received to her back and/or bilateral knees is reasonable, necessary, and related to her work injury.

3. If the claimant proves a compensable injury, whether the claimant has demonstrated, by a preponderance of the evidence, that medical treatment she has received to her back and/or bilateral knees is authorized.

4. If the claimant proves a compensable injury, whether the claimant has demonstrated, by a preponderance of the evidence, that she is entitled to temporary total disability (TTD) benefits and/or temporary partial disability (TPD) benefits.²

5. If the claimant proves a compensable injury, what is the claimant's average weekly wage?

¹ The claimant has a third workers' compensation claim (WC 5-072-588) regarding an incident in March 2018 involving her right small toe. That incident is not at issue in this order.

² At hearing, the claimant did not designate specific dates for which she believes she would be entitled to TTD or TPD benefits. The ALJ notes that in the Application for Hearing (AFH) for both WC 5-024-075-002 and WC 5-075-911-002, the endorsed dates listed for both TTD and TPD benefits are "4/30/18 to TBD".

FINDINGS OF FACT

1. The claimant was employed with the employer as a wildfire firefighter. In this position, the claimant regularly took part in training exercises. On August 7, 2016, the claimant was engaged in such training. The claimant testified that while she was rolling a 200 pound tractor tire in training, she felt a pinch in her back. The claimant also testified that she also injured her knees on that date.

2. The claimant received medical treatment for her low back related to the August 7, 2016 incident. The claimant's diagnoses were consistently listed as lumbar strain with L5-S1 radiculopathy.

3. On September 12, 2016, the respondents filed a General Admission of Liability (GAL). Subsequent GALs were filed on October 25, 2016, and November 8, 2016, respectively. It was during this time that the claimant was released to full duty with no work restrictions.

4. On November 15, 2016, the claimant's authorized treating provider (ATP) James Pitts, PA-C with Animas Surgical Hospital, placed the claimant at maximum medical improvement (MMI). PA Pitts also noted that the claimant was released to full duty with no work restrictions. In addition, PA Pitts determined the claimant had no permanent impairment.

5. Based upon PA Pitts's November 15, 2016 report, on November 16, 2016, the respondents filed a Final Admission of Liability (FAL). In the FAL, the respondents admitted for the MMI date of November 15, 2016 and no permanent impairment.

6. The claimant did not object to the November 16, 2016 FAL.

7. On April 29, 2018, the claimant was engaged in training that was similar to the training she performed on August 7, 2016. The claimant testified that she was instructed to flip a 200 pound tractor tire seven to eight times. Then she was instructed to carry a roll of 100 feet of five inch fire hose.

8. The claimant testified that immediately following that training, she felt sore. However, during the night she awoke with pain.

9. On April 30, 2018, the claimant sent a text message to her coworker, Timothy H[Redacted] that stated:

Wow. Looks great. Another hard day and hard workout. Carried 25 ft of 5 inch two times across Bay outside and rolled big as (*sic*) tire about 10 times. Seth said since I have a full release there is no reason why I can't do it. So I did. Let's see how I feel tomorrow..*(sic)* I love and miss you all. See you tomorrow hopefully.garden (*sic*) looks great. Tell them all I am proud of them and you also. I love you Tim. Thanks for all your hard work.

10. Mr. H[Redacted] responded via text message as follows:

Your text was a little confusing about the tire. If I remember right, Captain R[Redacted] made it crystal clear no one was to flip the tire and if someone got hurt doing it there would be disciplinary action. Don't screw yourself. Love you.

11. On April 30, 2018, the claimant sent a text message to Chief R[Redacted]. Specifically, the text message stated:

Chief, this is Rachael. Hey I am at work. I don't want to cause anymore (*sic*) strife, but today for PT Seth had us flip the tire outside from North to South bays and carry a 50 foot 5 inch hose from North to South Bay. I tried telling him that you said no tire, but he was [adamant] on my full release and I need to participate. I did flip that tire around 8 times and carry that 150 pound 5 inch and I am lying in bed with a back ache and my knees are sore. Sir, I have been on antibiotics this shift for a respiratory infection, didn't want to say anything due to trying to go to daughters (*sic*) graduation. I don't want this to go anywhere. I did what asked because I want my [crew] to know I can do my job when the time comes, but training like this is going to lead me [to] being out of work. All I ask is you talk to him on my days off. My days off should be sufficient to heal from my soreness to attend my next shift. I don't want to be off of work for this. Please.

12. Captain Seth S[Redacted] was the claimant's direct supervisor in April 2018. At the time of his testimony, Captain S[Redacted] was no longer employed by the employer. Captain S[Redacted] specifically testified that he worked as the employer's training officer at the time of the alleged April 29, 2018 injury. He also testified that the claimant did not communicate to him that she had worsening symptoms related to the August 2016 lumbar strain.

13. Captain S[Redacted] testified that on April 29, 2018, the claimant did not go on any calls or participate in any fire-related activities. Captain S[Redacted] oversaw the training exercises conducted on April 29, 2018. He further testified that the claimant may have flipped the tire a maximum four times. He explained that this was a relay drill, with each team member taking a turn to flip the tire until it reached the necessary distance. No team member flipped the tire the entire distance. Captain S[Redacted] testified that he did not require the claimant to engage in this specific drill. Captain S[Redacted] personally observed the claimant engage in these training exercises. During that time, Captain S[Redacted] did not observe the claimant engaging in pain behaviors, and the claimant did not report any pain during the training. In addition, although they worked together over the next 24 hours, the claimant did not report any pain or injury to Captain S[Redacted].

14. Deputy Chief Kevin R[Redacted], was the employer's Deputy Chief of Operations and EMS at the time of the alleged April 29, 2018 incident. At the time of his testimony, Chief R[Redacted] was no longer employed with the employer. Chief R[Redacted] testified that on April 29, 2018 there were no fire calls prior to the physical training exercises. With regard to the claimant's August 2016 injury, Chief R[Redacted]

testified that after returning to full duty, the claimant did not report any worsening problems.

15. The April 29, 2018 shift log was entered into evidence and is consistent with the testimony of Captain S[Redacted] and Chief R[Redacted].

16. On April 30, 2018, the claimant sought treatment with her chiropractor, Dr. Jeremy Rowse at La Mesa Chiropractic Center. At that time, the claimant reported worsening right upper back pain and left and right neck pain due to training at work. In addition, the claimant reported a decrease in her SI joint pain. There is no report of low back or knee issues having occurred on April 29, 2018.

17. On May 1, 2018, the claimant was seen by Wendy Stevens, NP with Animas Surgical Hospital Urgent Care. At that time, the claimant reported back pain. The medical record of that date also lists a report of “chronic knee pain” that was “aggravated”. Specifically, the claimant’s “knees give her pain off and on in general.” In addition, the claimant reported that her “back hurts more than normal but she does take Ultram 2x/ day for chronic low back pain”.

18. On May 10, 2018, the claimant sought treatment with her primary care provider (PCP), Dr. Daniel Sabol. At that time, the claimant reported flipping a tire “8 times” and having to lift 150-pound weights and while doing so, she experienced severe pain in her low back. The claimant also reported a “hostile work environment and unnecessary overworking”.

19. On May 14, 2018, the claimant returned to Dr. Sabol, and reported knee pain. However, the claimant did not relate her knee symptoms to a specific incident or injury.

20. On May 16, 2018, x-rays of the claimant’s bilateral knees showed degenerative changes in both knees that included mild to moderate narrowing of the patellofemoral joint space and the medial and lateral knee joint compartments. The x-rays also showed “tiny” patellar and osteoarthritic spurs.

21. Also on May 16, 2018, the claimant was seen at Animas Surgical Hospital by Robert Hill, PA. Mr. Hill diagnosed a lumbar strain and bilateral knee pain. Mr. Hill noted that the knee x-rays showed arthritis. Mr. Hill opined that the claimant’s knee pain was “ultimately [a] secondary effect of osteoarthritis”. He also noted that although it could have been exacerbated by the claimant’s “recent injury”, the “osteoarthritis cannot be really considered caused by work itself”.

22. Mr. Hill and Dr. Alexander Shermer with Animas Occupational Medicine³ are the claimant’s authorized treating providers (ATPs) for the April 29, 2018 incident.

23. On July 19, 2018, Dr. Patrick McLaughlin administered a sacroiliac (SI) joint injection. However, the claimant later reported that the injection did not provide any relief.

³ It appears that Animas Occupational Medicine is part of Animas Surgical Hospital.

24. On June 25, 2018, magnetic resonance imaging (MRI) scans were performed on both of the claimant's knees. The results of both of the MRIs showed no acute injury.

25. On August 21, 2018, Dr. McLaughlin administered a lumbar transforaminal epidural steroid injection (TFESI) at the L4-L5 and L5-S1 levels. This injection did not provide the claimant with any relief.

26. On September 5, 2018, the claimant was seen by Dr. Garreth Hammond, an orthopedic surgeon, who reviewed the MRI scans and noted that the meniscal tears were not large enough to warrant surgery. At that time, Dr. Hammond recommended a formal rheumatology consultation.

27. On November 15, 2018, the claimant underwent surgery to her left knee with Dr. Jay Lucas.

28. Throughout 2018 and 2019, the claimant continued to seek treatment with her PCP, Dr. Sabol. During this time, the claimant reported a variety of issues that included knee, hand, shoulder, back and hip pain; pain and swelling of the left knee; depression; "on and off lower back pain"; runny nose, sneezing, and cough; SI joint pain. During this period, Dr. Sabol diagnosed knee pain, lumbar degenerative disc disease, right sided sciatica, and chronic pain.

29. In a medical record dated November 13, 2019, Dr. Sabol noted that the claimant "had an ablation on October 31 at the L3-4 and L5 areas. She has not necessarily felt a difference yet."

30. On September 24, 2018, the claimant attended an independent medical examination (IME) with Dr. Elizabeth Bisgard. In connection with the IME, Dr. Bisgard reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In her September 30, 2018 report, Dr. Bisgard listed the claimant's diagnoses as: L4-5 minor degenerative disc disease at the L3-4 through L5-S1 with low grade posterior disc protrusions at each level; chondromalacia, bilateral knees with evidence of bilateral meniscus tears; stress, anxiety, and depression.

31. Dr. Bisgard opined that the onset of bilateral knee symptoms was not due to an occupational injury. In support of this opinion, Dr. Bisgard noted that the claimant did not experience knee issues until the middle of the night. Dr. Bisgard noted that the timing of the onset of symptoms is not consistent with a work related injury. In addition, Dr. Bisgard opined that the claimant did not sustain a work injury on April 29, 2018. Dr. Bisgard further opined that this is "an issue of fitness for duty rather than a work injury."

32. In her report, Dr. Bisgard also noted that the claimant shows a pattern of psychological driven pain. This would account for the failure of injections in providing the claimant with pain relief. Dr. Bisgard further explained that with psychologically driven pain the underlying issue is not addressed by injections and medications. Dr. Bisgard recommended the claimant seek counseling outside of the workers' compensation system.

33. Based upon the opinions of Dr. Bisgard, the respondents denied liability for the alleged April 29, 2018 injury.

34. On October 12, 2018, Dr. McLaughlin authored a letter following his review of Dr. Bisgard's IME report. Dr. McLaughlin noted that the claimant's injection treatment had ruled out sacroiliac (SI) joint strain, lumbar radiculitis, and lumbar disc pain. However, the claimant's pain generator has not been determined. Dr. McLaughlin also noted that it does not appear that the claimant was injured at work on April 29, 2018. In support of that statement, Dr. McLaughlin noted the lack of MRI findings and the lack of response to treatment for lumbosacral and bilateral knee etiologies. Dr. McLaughlin recommended that the claimant undergo formal psychological and psychiatric evaluation. In addition, he recommended rheumatologic testing.

35. On February 23, 2019, Dr. Bisgard authored a letter after she was asked to review additional medical records. Dr. Bisgard stated that these additional documents did not change the opinions expressed in her September 30, 2018 report.

36. On March 2, 2020, the claimant filed an Opposed Petition to Reopen the August 7, 2016 claim. In that Petition, the claimant marked that the reason she was requesting that her claim be reopened was due to a change in medical condition.

37. The claimant argues that because the respondents admitted liability for the August 7, 2016 training/lifting incident, then they should also be liable for the alleged April 29, 2018 incident.

38. Dr. Bisgard's testimony was consistent with her written reports. Dr. Bisgard testified that the claimant was appropriately placed at MMI on November 15, 2016 for the August 7, 2016 injury. Dr. Bisgard further testified that the claimant's 2016 condition was completely resolved. In support of this statement, Dr. Bisgard noted that the claimant had returned to full duty with no maintenance medical treatment and no permanent impairment rating.

39. Dr. Bisgard testified that based upon her review of the claimant's medical records, there has been no worsening of the claimant's condition related to that 2016 injury. In fact, in comparing the August 25, 2016 and May 10, 2018 MRIs, imaging shows the claimant's condition has actually improved. Dr. Bisgard explained that the claimant does not have disc herniations. Rather, the claimant has disc protrusions, which are anatomically different.

40. Dr. Bisgard also testified that the condition of the claimant's knees is not related to her work activities on April 29, 2018. In addition, that work training did not aggravate the preexisting condition of the claimant's knees. The claimant has discoid meniscus in both knees. This is an anatomical anomaly that is prone to meniscus tears. Dr. Bisgard testified that she agreed with Dr. Hammond's statement that the condition of the claimant's knees is age appropriate, and not work related.

41. The claimant's employment with the employer was terminated on May 13, 2019. The claimant testified that she did not work between April 29, 2018 through May 13, 2019.

42. Laura X[Redacted], Administrative Manager for the employer testified that the employer did not provide the claimant with health insurance.

43. During her testimony, the claimant alleged that some medical records are missing or have been omitted. However, she was unable to communicate what specific documents she believes are missing. She also alleged that her medical providers have falsified records.

44. With regard to the development and timing of her symptoms, the ALJ does not find the claimant to be credible or persuasive.

45. The ALJ specifically credits the opinion of Dr. Bisgard that the condition of the claimant's knees was not caused by her working conditions. The ALJ finds no persuasive evidence on the record that the claimant's current knee conditions are in any way related to her August 7, 2016 injury. Additionally, the ALJ is not persuaded that the claimant's knees were injured on April 29, 2018.

46. With regard to the August 7, 2016 injury, the ALJ credits the medical records and the opinions of Dr. Bisgard. The ALJ finds that the claimant has failed to demonstrate that it is more likely than not that she has experienced a worsening of her condition to warrant the reopening of the 2016 workers' compensation claim.

47. With regard to the alleged April 29, 2018 incident, the ALJ credits the medical records and the opinions of Drs. Bisgard and McLaughlin. The ALJ also credits the testimony of Captain S[Redacted] and Deputy Chief R[Redacted] over the contrary testimony of the claimant. The ALJ finds that the claimant has failed to demonstrate that it is more likely than not that on April 29, 2018, she suffered an injury arising out of and in the course and scope of her employment with the employer. The ALJ also finds that the claimant has failed to demonstrate that it is more likely than not that her work activities on April 29, 2018 aggravated, accelerated, or combined with any preexisting condition to produce a disability requiring medical treatment.

CONCLUSIONS OF LAW

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

2. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the

reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

3. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

WC 5-024-075

4. Section 8-43-303(1) provides that "any award" may be reopened within six years after the date of injury "on the ground of fraud, an overpayment, an error, mistake, or a change in condition." Reopening for "mistake" can be based on a mistake of law or fact. *Renz v. Larimer County School District Poudre R-1*, 924 P.2d 1177 (Colo. App. 1996). A claimant may request reopening on the grounds of error or mistake even if the claim was previously denied and dismissed. *E.g., Standard Metals Corporation v. Gallegos*, 781 P.2d 142 (Colo. App. 1989); see also *Amin v. Schneider National Carriers*, W.C. No. 4-81-225-06 (November 9, 2017). The ALJ has wide discretion to determine whether an error or mistake has occurred that justifies reopening the claim. *Berg v. Industrial Claim Appeals Office*, 128 P.3d 270 (Colo. App. 2005); *Travelers Ins. Co. v. Industrial Commission*, 646 P.2d 399 (Colo. 1981).

5. A change in condition refers to "a change in the condition of the original compensable injury or to a change in the claimant's physical or mental condition which can be causally connected to the original compensable injury." *Heinicke v. Industrial Claim Appeals Office*, 197 P.3d 222 (Colo. App. 2008). The ALJ is not required to reopen a claim based upon a worsened condition whenever an authorized treating physician finds increased impairment following MMI. *Id.* The party attempting to reopen an issue or claim shall bear the burden of proof as to any issues sought to be reopened. Section 8-43-303(4), C.R.S.

6. As found, the claimant has failed to demonstrate by a preponderance of the evidence that her condition, as related to the admitted August 7, 2016 injury, has changed and/or worsened. Therefore, that claim shall not be reopened. As found, the medical records and the opinions of Dr. Bisgard are credible and persuasive.

WC 5-075-911

7. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. See *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); see also *Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it

“aggravates accelerates or combines with a preexisting disease or infirmity to produce disability or need for treatment.” See *H & H Warehouse v. Vicory, supra*.

8. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that she suffered an injury arising out of and in the course and scope of her employment with the employer on April 29, 2018. As found, the claimant has failed to demonstrate by a preponderance of the evidence, that her work activities on April 29, 2018 aggravated, accelerated, or combined with any preexisting condition to produce a disability requiring medical treatment. As found, the medical records, the opinions of Drs. Bisgard and McLaughlin, and the testimony of Captain S[Redacted] and Deputy Chief R[Redacted] are credible and persuasive.

ORDER

It is therefore ordered:

1. The claimant’s request to reopen the August 7, 2016 claim is denied and dismissed.
2. The claimant’s claim related to an alleged date of injury of April 29, 2018 is denied and dismissed.

Dated this 31st day of December 2020.



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts** 1525 Sherman St., 4th Floor, Denver, CO 80203, or via email at oac-ptr@state.co.us. Use of this email address constitutes filing with the Denver Office of Administrative Courts and therefore complies with Section 8-43-301(2), C.R.S. and OACRP 26. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S.

ISSUES

- Did Claimant prove by a preponderance of the evidence his claim should be reopened based on fraud or mutual mistake of material fact?

FINDINGS OF FACT

1. Claimant worked for Employer as a Special Finance Manager. He suffered admitted injuries on March 31, 2009 when he was hit in the head with a garage door. Claimant had gone to Auto Trim Specialists to obtain a repair estimate. The entrance to the shop was a garage door that opened manually. When Claimant opened the garage door and stepped into the shop, the door came back down and hit him on the head. Claimant did not fall or lose consciousness, although he claimed to be “dazed” momentarily. Claimant suffered no lacerations, bruises, or other visible trauma from the accident.

2. Claimant reported the injury to his manager but did not seek medical attention for three days.

3. Claimant was evaluated by Lisa Keller, PA-C on April 3, 2009. He reported a dull headache and neck soreness. Ms. Keller observed no lacerations, contusions, or swelling to Claimant’s skull. Ms. Keller ordered imaging studies, which showed degenerative changes in Claimant’s neck but no fractures or other acute injuries. A head CT showed a small old infarct but no acute findings. Ms. Keller referred Claimant to Dr. Van Sickle, a neurosurgeon.

4. Dr. Van Sickle ordered another cervical MRI, which showed multilevel degenerative changes, primarily at C4-5 and C5-6. Dr. Van Sickle saw no evidence of trauma to the cervical spine. He thought Claimant was suffering from very mild post-concussive syndrome. He diagnosed degenerative disc disease without myelopathy and opined Claimant was not a surgical candidate.

5. Claimant was referred to Dr. McNutt for evaluation of headaches. The headaches were described as bioccipital, temporal, and frontal region “squeezing” cephalgia. Claimant also reported about six episodes of paroxysmal dizziness with or without activity but more often with movement, more “orthostatic” in nature. Dr. McNutt diagnosed a concussion with very mild post-concussive syndrome. Dr. McNutt concurred with Dr. Van Sickle’s opinion Claimant was not a surgical candidate for his neck. He referred Claimant to physical therapy to work on cervicogenic issues with some vestibular rehab work.

6. Claimant saw Dr. Jason Peragrine on June 30, 2009. Dr. Peragrine diagnosed cervical facet and degenerative disk disease and cervical spondylosis. He

treated Claimant with a series of injections. Claimant reported limited benefit from the injections.

7. Claimant participated in physical, therapy, occupational therapy, and speech therapy with some benefit. Claimant attended cognitive therapy from June 19, 2009 to August 6, 2009. The records indicate he made no improvement and was noncompliant with his homework.

8. Claimant had an IME with Dr. Victor Chang, a physiatrist on September 8, 2009. Dr. Chang opined Claimant suffered a concussion and met the criteria for post-concussive syndrome. He opined Claimant's ongoing cognitive symptoms were more likely related to factors other than the concussion. He noted mild left cerebellar deficits that were unrelated to the work injury but might contribute to Claimant's balance problems. He "suspected" vestibular involvement from the injury.

9. Claimant underwent neuropsychological testing with Dr. Michael Greher on September 17, 2009. Claimant's performance suggested a possible mild decline from his presumed premorbid levels. His primary deficit was with processing speed. Claimant was also experiencing significant depression and anxiety, emotional lability, and a tendency to dwell on physical complaints and health concerns. Dr. Greher opined Claimant had a "handful" of frank cognitive deficits. This was characterized as a possible mild traumatic brain injury, a.k.a. concussion. Dr. Greher recommended psychotherapy and referral to a psychiatrist for psychotropic medications. He recommended continuing speech/cognitive rehabilitation therapy, if it was helpful, but with the caveat that cognitive symptoms were more likely a function of factors such as depression rather than the possible concussion. He doubted Claimant would have permanent cognitive or emotional deficits, or permanent vestibular impairment.

10. On October 23, 2009, Claimant saw Dr. Janice Birney for evaluation of bilateral hearing loss and tinnitus, as well as in balance problems. Dr. Birney indicated audiometric testing performed on September 28, 2009 showed evidence of hearing loss at the bottom end of the normal range, but no significant asymmetry.

11. Dr. Jill Castro took over as Claimant's primary ATP in November 2009. She made several referrals including: to physical therapy to work on balance, coordination, and myofascial pain in the neck; to Dr. Kenneally for cognitive training; to Dr. Politzer for evaluation of vision treatment; massage therapy; follow up with Dr. Peragrine; and referral to Dr. Howard Entin, a psychiatrist.

12. Claimant started treating with Dr. Entin in December 2009. Claimant denied mood swings despite having been treated for depression and bipolar disorder for nearly 10 years. Dr. Entin diagnosed cognitive disorders, pre-existing insomnia, depressive disorder, and post-concussive syndrome.

13. Claimant had continued working after the injury but left his job in a fall of 2009. He was offered COBRA. Insurer initially admitted for TPD. Dr. Castro took Claimant

off work on January 4, 2010 and Insurer admitted for TTD. Based on Claimant's average weekly wage, Insurer paid TTD at the maximum rate based on Claimant's date of injury.

14. In January 2010, Dr. Castro referred Claimant to Dr. William Choi for a surgical consultation regarding his neck. Dr. Choi initially saw Claimant in January 2010. Dr. Choi did not recommend surgery at that time.

15. Claimant had a follow-up IME with Dr. Chang on April 15, 2010. Dr. Chang noted overall improvement since the last IME. He noted Claimant's head cognitive, emotional, and physical symptoms, all of which were intertwined. Neuropsychological testing had shown deficits consistent with a concussion, although emotional and characterological factors were contributory. Dr. Chang thought Claimant's depression and anxiety issues were more consistent with an adjustment disorder as opposed to being related to the concussion. The headaches were consistent with tension-type and cervicogenic headaches which probably contributed to, and were worsened by, Claimant's emotional state. He recommended repeat neuropsychological evaluation with an expanded evaluation of Claimant's emotional state, because he suspected much of Claimant's remaining cognitive and physical symptoms were secondary to his ongoing emotional issues. Dr. Chang noted a prior left cerebellar infarct with examination findings consistent with residual deficits. Claimant also had obstructive sleep apnea. Dr. Chang opined these conditions are unrelated to the work injury but may be contributing to Claimant's dizziness and imbalance, daytime fatigue, and concentration difficulties. He expected Claimant would reach MMI within the next 3-4 months, but would likely require maintenance treatments afterwards, particular for his emotional issues.

16. Dr. Douglas Scott performed a record review for Respondents on April 22, 2010. He noted many inconsistencies in the records regarding Claimant's history. Dr. Scott saw no indication of any acute injury to either Claimant's head or neck. He opined Claimant's neck condition was chronic and pre-existing. He was skeptical about the plausibility of the described mechanism of injury because there was no sign of external injury to Claimant's scalp. He noted Claimant was not knocked unconscious, not knocked to the ground, and did not need emergency care. Dr. Scott opined the described biomechanical force did not correlate with the multiple symptoms reported by Claimant.

17. Claimant returned to Dr. Entin on June 14, 2020. Dr. Entin and noted improvement in Claimant's headaches since a recent rhizotomy. Claimant reported some decreased balance but "minimal" vertigo. Claimant's moods were improved, and his anxiety was manageable. Under "Goals/Plan," Dr. Entin wrote "maintenance care," terminology commonly used by providers to identify treatment after MMI.

18. Claimant mentioned to his PCP he had been experiencing erectile dysfunction (ED) since the injury. Claimant was referred to a urologist on September 13, 2010. The urologist concluded the ED issues were caused by blood flow, and not related to the industrial injury. At some point, Dr. Entin advised Claimant to seek treatment for this condition under his private health insurance because it was not injury-related. Claimant strongly disagreed with Dr. Entin, based on a Google search.

19. Claimant returned to Dr. Choi in late 2010. Dr. Choi ordered a cervical MRI, which showed only degenerative changes, unchanged from the previous MRIs. Dr. Choi recommended a C5-7 fusion to treat pain related to Claimant's DDD. Dr. Choi's office requested authorization for surgery on November 3, 2010. Respondents timely denied the request and applied for a hearing. On November 9, 2010, Dr. Choi's then obtained authorization for surgery from Claimant's private health carrier, Blue Cross/Blue Shield.

20. Dr. Choi performed the surgery on November 16, 2010. He removed osteophytes and addressed other degenerative changes. No acute or traumatic abnormalities were found. In his deposition, Dr. Choi confirmed the surgery showed only degenerative changes.

21. Claimant saw Dr. Douthit for an IME at Respondents' request on December 13, 2010. Dr. Douthit opined the indications for surgery had been "marginal." He opined Claimant's cognitive issues were a sign of symptom magnification. He opined the DDD and foraminal stenosis was consistent with Claimant's age and preexisted the March 31, 2009 work accident. Dr. Douthit concluded the surgery was not related to the industrial accident.

22. ALJ Bruce Friend presided over a hearing regarding the neck surgery on April 12, 2011. Judge Friend issued Findings of Fact, Conclusions of law, and Order dated May 25, 2011 finding the surgery was not reasonably necessary or related to the industrial injury. Judge Friend found the opinions of Dr. Scott and Douthit credible and persuasive. Judge Friend found there was no sign of any acute injury to Claimant's neck from the work accident.

23. Claimant followed up with Dr. Castro on April 18, 2011. Dr. Castro noted Claimant was 85% improved and recommended he wean from his medications. She indicated she would see Claimant back in the clinic "as needed."

24. On September 23, 2011, Dr. Castro completed a WC164 form and listed Claimant's only treatment as "maintenance meds for pain/HA/sleep [illegible]."

25. Claimant filed a *pro se* Petition to Review Judge Friend's Order. The ICAO affirmed the Order on November 7, 2011. The ICAO found no error in Judge Friend's credibility determination and held his findings and conclusions were supported by substantial evidence. Claimant did not appeal to the Court of Appeals, and ALJ Friend's Order became final.

26. Daniel Galloway, Esq. entered his appearance on behalf of Claimant. In late 2011. Mr. Galloway also represented Claimant in a third-party personal injury suit against the property owner of Auto Trim Specialists. Respondents intervened in the third-party litigation to advance and protect its subrogation interest. Tom Condas, Esq. represented Respondents in the third-party case.

27. The third-party case went to mediation before Judge Sandy Brooke on January 28, 2012. Mr. Galloway represented Claimant. The suit settled for \$110,000.

Insurer's lien at that time was \$200,000, but it agreed to compromise its subrogation claim for \$20,000.

28. Mr. Galloway referred Claimant to Dr. David Zierk for an integrated psychological and vocational evaluation. Dr. Zierk evaluated Claimant on December 7, 2011 and January 4, 2012. Dr. Zierk noted an extensive list of conditions Claimant attributed to the work accident including "dizziness, headaches, diminished mental functioning, and neck pain." Claimant also reported "fatigue, vestibular-related nausea, lightheadedness, and dizziness, tinnitus, visual problems, depression, anxiety, irritability, and difficulties performing complex cognitive tasks and mental functioning." Dr. Zierk opined Claimant was "struggling with anxious depression with an underlying stress-related condition, confounded by labyrinthine concussion with peripheral vestibulopathy and somatic preoccupations." He opined these conditions were related to the work accident. He opined Claimant displayed "persistent problems with perceptual processing, memory, information processing abilities, concentration, and executive functioning and sustained mental energy that undermine his ability for adaptive functioning in vocational and avocational settings." He opined these limitations were related to the work accident. Zierk concluded, "when the perplexing and multidimensional nature of [Claimant's] medical condition is carefully evaluated, it becomes clear that he can no longer effectively and dependably sustain work performance in any capacity."

29. On December 11, 2011, Respondents' counsel wrote to Dr. Castro to ask about her current treatment recommendations and whether Claimant was at MMI. The letter also enclosed copies of primarily pre-injury medical records and a copy of Judge Friend's final Order.

30. Dr. Castro responded on January 10, 2012. She stated, "he is at MMI and has been followed in our clinic for medical maintenance. As of our clinic visit of April 18, 2011, he was 85% improved overall. He still required medications to maintain that, but was able to reduce the use of those. He has completed his cognitive therapy and biofeedback therapy. He still reports headaches on a daily basis, and occasional word finding or memory problems." Dr. Castro noted Claimant's diagnosis was "closed head injury and associated headaches." She assessed a 10% whole person rating under the "Episodic Neurological Disorders" section of Table 1 on page 106 of the *AMA Guides*. She recommended 2-4 office visits per year "for medical maintenance of medications of allowed him to maintain improved function." She opined Claimant had no permanent work restrictions and could work "as tolerated." She concluded, "as [Claimant] has completed the recommended medical treatment for his work-related injury, no further medical interventions are recommended." Dr. Castro completed a WC164 form stating Claimant had reached MMI on "4/18/01." Dr. Castro did not complete any rating worksheets.

31. After receiving Dr. Castro's response, Respondent's counsel wrote to Dr. Entin to inquire about psychiatric MMI. Dr. Entin provided a lengthy narrative report dated April 2, 2012. He opined Claimant sustained a mild traumatic brain injury with post-concussive syndrome. He felt Claimant was consistent in his reporting of post-injury headaches, visual problems, vertigo, neck pain, and cognitive difficulties. Dr. Entin opined "I originally placed him at MMI on June 14, 2010. I believe this is a reasonable date to

have placed him at psychiatric MMI and note that all treatment since then has been part of Maintenance Care.” Dr. Entin completed a Mental Impairment Worksheet and explained his rationale for the various components in the narrative report. Dr. Entin assessed a 5% whole person psychiatric impairment. He did not believe there was sufficient evidence to support apportionment.

32. Claimant’s counsel was copied on the letters to Dr. Castro and Dr. Entin regarding MMI.

33. Respondents filed a Final Admission of Liability (FAL) on April 11, 2012 based on Dr. Castro and Dr. Entin’s reports. The FAL adopted Dr. Castro’s April 18, 2011 MMI date. The FAL computed the value of the impairment ratings as \$35,849.35 (10% physical) and \$17,924.68 (5% psychiatric). However, the FAL also noted benefits were capped at \$75,000 pursuant to § 8-42-107.5, and Claimant had already been paid \$107,139.96 in TTD and TPD. The FAL claimed an overpayment of \$38,775.87 which “will be applied towards any future benefits.” The complete reports of Dr. Castro and Dr. Entin were attached, including Dr. Entin’s mental impairment worksheets.

34. Respondents’ Exhibit S is an indemnity payment log regarding Claimant’s claim. Eli Jackson, Insurer’s claim representative, credibly testified the ledger shows all indemnity payments made to or on Claimant’s behalf, including the final settlement. No indemnity checks are outstanding. Mr. Jackson explained two payments for Respondents’ vocational evaluator were inadvertently coded as indemnity payments and captured on the payment report. Excluding the two erroneous entries and the final settlement payment, the indemnity payments shown on the log total \$107,139.96, which exactly matches the amount of TTD and TPD shown on the FAL.

35. Claimant testified he could not accurately recall all payments he received during his claim. Claimant presented no persuasive evidence to dispute the indemnity log.

36. Claimant timely objected to the April 11, 2012 FAL and initiated the DIME process. The DIME Application listed the body parts to be evaluated as “Neck, Back, Shoulders, Brain, Psychiatric and all conditions related to brain/psychiatric injuries. Neurological disorders.” The Application also listed other issues for the DIME to address as: “Permanent impairment for neck condition. Neck related to initial accident, but ALJ determined neck surgery not reasonable and necessary. Impairment for brain injury. Ongoing care for psychiatric and physical conditions. Restrictions from psychiatric and physical perspective.” Claimant’s filings in response to the FAL reflect his disagreement with the FAL and the ratings from Dr. Castro and Dr. Entin.

37. Claimant applied for a hearing simultaneously with his DIME Application. The parties subsequently agreed to hold all issues in abeyance pending completion of the DIME process.

38. The Division issued a DIME Panel composed of Dr. Jade Dillon, Dr. Jeffrey Raschbacher, and Dr. Marc Steinmetz. Dr. Steinmetz was selected as the DIME

physician. Claimant did not schedule the DIME. Instead, Claimant abandoned the DIME and applied for a hearing on permanent total disability (PTD) benefits.

39. On June 18, 2012, Claimant counsel wrote to Respondents' counsel to note Claimant's disagreement with April 18, 2011 MMI date and request an amended FAL. Mr. Galloway stated, "Dr. Castro makes it clear [Claimant] was not at MMI in April 2011."

40. Claimant was awarded Social Security disability benefits in June 2012.

41. Claimant saw Dr. Lynn Parry for an IME on July 4, 2012. Dr. Parry documented a lengthy history of Claimant's treatment and cataloged numerous ongoing problems he believed were related to the accident. Dr. Parry noted "two major residual problems secondary to his industrial accident that have not been adequately addressed. Primarily his nausea and vestibular dysfunction." Dr. Parry opined Claimant was not at MMI and recommended he return to vestibular therapy.

42. Dr. Henry Roth performed an IME for Respondents on March 4, 2013. Dr. Roth had previously issued several Rule 16 reports on the claim. Claimant completed a lengthy questionnaire before the evaluation. Dr. Roth spent one hour and 43 minutes with Claimant conducting the interview and examination. Dr. Roth also reviewed hundreds of pages of medical records and ultimately issued a 94-page report. Claimant's chief complaints were headaches, facial pain, neck pain, problems thinking, changed behavior, depression, sleep disturbance, nausea, and vision problems. Claimant complained "bitterly" about headaches and his vision. Dr. Roth opined none of Claimant's ongoing complaints were related to the accident. He opined the injury mechanism was minor and insufficient to injure Claimant's visual system, auditory system, vestibular system, or cause cognitive impairment.

43. Dr. Chang issued a supplemental IME report on March 18, 2013. He opined Claimant suffered a concussion and the accident, "but his ongoing symptoms should not be considered as a manifestation of the concussion itself." He noted Claimant's presentation was "atypical for MTBI," and concluded, "[Claimant's] symptoms are not related to the concussion. It is more probable than not that his ongoing symptoms are related to mental/behavioral and/or motivational factors." He also opined Administrative issues commonly seen in litigation" were also likely contributing to Claimant's presentation. He did not think Claimant had any permanent impairment related to a concussion but agreed with Dr. Entin's decision to provide a 5% rating for "a mental/behavioral condition related to the work injury." He opined any residual symptoms of the MTBI had resolved and no further treatment was expected to improve Claimant's condition. Dr. Chang disagreed with Dr. Zierk's conclusion Claimant could not work in any capacity. He also commented,

[Claimant] has previously submitted 2 large binders that detailed his treatment since his injury. At first, I thought these binders were prepared by an attorney's office, as the contents were very organized and had numerous cross-references. I later discovered that these binders had been prepared by [Claimant] himself, which I found to be quite impressive for any person.

The ability for a layperson to obtain, organize, cross-reference, draw conclusions, and rebut opinions made by medical providers and legal experts was, in my professional opinion, something that would be difficult for any non-legal professional to complete. This compilation of work submitted by [Claimant] demonstrated a high degree of cognitive functioning, including attention to detail, organizational skills, and complex deductive reasoning. These abilities would indicate readiness to perform in a competitive workplace.

44. The parties attended a settlement conference with PALJ Sue Purdie on March 26, 2013. Both parties were represented by counsel at the settlement conference. A hearing was pending on the issues of PTD, medical benefits after MMI, waiver, overpayment, and offsets. The parties agreed to settle the claim for a lump sum of \$182,500 plus a contingent Medicare Set-Aside (MSA). The parties agreed to leave the medical portion of the claim open pending a response from the Centers for Medicare and Medicaid Services (CMS) regarding the proposed MSA. Respondents retained the right to fund an MSA per CMS requirements or leave Claimant's medical benefits open indefinitely.

45. The settlement documents stated

Claimant sustained or alleges injuries or occupational disease as arising out of and in the course of employment with the employer on or about March 31, 2009 including, but not limited to, head, neck, shoulder, back, knee, psychological, cognitive, and G.I. System. Other disabilities, impairments and conditions that may be the result of these injuries or diseases but that are not listed here are, nevertheless, intended by all parties to be included in and resolved FOREVER by this settlement.

Respondents waived any overpayments and agreed to pay \$182,500 "in addition to all benefits that have been previously paid to or on behalf of the Claimant." Consistent with requirements of the Act, the settlement agreement provided it could only be reopened on the grounds of "fraud or mutual mistake of material fact." The agreement also stated, "Claimant has reviewed and discussed the terms of the settlement with claimant's attorney, has been fully advised, and understands the rights that are being given up in this settlement."

46. Claimant executed the agreement on April 26, 2013, and it was approved by the Division on May 9, 2013. Respondents paid a lump sum of \$182,500.

47. Guy Easton prepared a MSA proposal for submission to CMS. The total proposed MSA was \$32,178. Claimant had the opportunity to review the MSA before submission to CMS and raised no objections. CMS issued an approval letter on June 27, 2013. CMS determined the proposed MSA was insufficient and required a total of \$102,126 to protect Medicare's interests. Insurer exercised its rights under the settlement to not fund the MSA at that time.

48. Insurer continued covering medical care rendered by ATPs. Ultimately, Respondents agreed to fund a self-administered structured MSA under the terms required by CMS. The MSA was funded with a lump sum payment \$8,881 for “seed money,” plus \$4,238 per year for 22 years, if Claimant is living. The parties’ filed a Joint Motion to Amend the Settlement Documents on April 29, 2015, which was approved by the Division on May 21, 2015.

49. If the settlement is reopened, Claimant will owe Respondents at least \$214,639.96 (\$107,139.96 TTD/TPD paid – \$75,000 “cap” = \$32,139.96 overpayment + \$182,500 lump sum = \$214,639.96), plus the cost of the MSA. Respondents can also pursue an additional overpayment based on Claimant’s receipt of SSDI benefits.

50. Claimant treated with Dr. Entin over the next several years after settlement. In January 2020, Claimant contacted Dr. Entin and demanded he change the rating. Dr. Entin noted Claimant “seems manic and paranoid.” Claimant believed Dr. Entin was “the cause of his current suffering because I did not rate his sexual dysfunction, and that would have given him \$100K more.”

51. On February 4, 2020, Dr. Entin documented Claimant “continues to harass [my] office – accusing me of ‘lying.’” Dr. Entin called Claimant and asked him to refrain from further contact. Dr. Entin noted Claimant “has grandiose notions that he can get \$100K more if I fill out forms ‘correctly’ from 10 years ago.” Dr. Entin told Claimant he was willing to speak to an attorney about Claimant’s work-related injuries but would no longer speak with Claimant directly. Claimant continued to make threats and Dr. Entin hung up.

52. On February 10, 2020, Dr. Entin spoke with Mr. Galloway regarding Claimant’s behavior. Mr. Galloway indicated Claimant had been harassing and threatening him too. Dr. Entin suggested Mr. Galloway speak with Claimant and provide “a reality check that an increased impairment rating would not have changed his settlement and therefore we have nothing further to offer him.” Dr. Entin and Mr. Galloway agreed they would notify the police if Claimant continued his harassing and threatening behavior.

53. On February 24, 2020, Dr. Entin received a copy of a letter Claimant had sent to Mr. Galloway. Dr. Entin described the letter as “abusive, threatening, full of lies and misconceptions, paranoid, rambling.” He and Mr. Galloway filed police reports.

54. Dr. Roth persuasively testified that, even though he thinks Claimant should have received no rating, Dr. Castro appropriately applied the *AMA Guides*, Level II training, and Division guidance to rate the impairment *she* believed Claimant had. Dr. Roth offered similarly persuasive opinions regarding Dr. Entin’s rating. Dr. Roth’s persuasively opined Claimant has no ratable permanent impairment beyond that rated by Dr. Castro and Dr. Entin.

55. Claimant was represented by counsel through much of his claim, including from April 2012 (when the FAL was filed) through the date of the settlement. Claimant neither argued nor suggested he was not adequately informed of the progress of his case.

In fact, the record documents several instances of communication between Claimant and his counsel. Additionally, Claimant previously prepared two cross-referenced binders with medical documentation for Dr. Chang. The persuasive evidence shows Claimant was aware of and participated in the tactical and strategic decisions regarding his case through the time of settlement.

56. Claimant alleges multiple instances of “fraud, misrepresentation, or concealment,” including:

- “Someone had to cut and paste Claimant’s name” onto another patient’s medical record and gave it to Dr. Douthit for his IME.
- Respondents “manufactured” evidence, including a prescription made by a physician who never treated Claimant, “with the intent Dr. Roth would act upon false information and produce opinions and reports.”
- Judge Friend’s May 25, 2011 FFCLC was “altered and falsified by a second author.” This allegedly falsified Order was then allegedly used to influence and limit benefits that might otherwise have been available to Claimant.
- Respondents’ counsel “recklessly” misrepresented to Dr. Castro that Judge Friend found “the neck is not a compensable component” of his claim.
- Respondents did not regularly send copies of Claimant’s medical records to Dr. Castro or Dr. Entin.
- Respondents intentionally presented “incomplete” medical files to ATPs and IMEs to induce them to act to Claimant’s detriment.
- Respondents concealed medical records from Claimant’s attorney.
- Dr. Roth produced reports for Respondents without having “all medical records.”
- Respondents violated *Samms* by corresponding with Claimant’s ATPs.

57. None of these allegations are supported by persuasive evidence.

58. The report from Dr. Stagg was merely an error. Dr. Roth noted in his IME it “was probably in reference to the wrong patient,” because it described Claimant as five-months post-surgery in September 2010, two months before his surgery date. There is no persuasive reason to believe Dr. Douthit relied on that erroneous report.

59. There is no persuasive evidence Respondents “manufactured” the prescription from Dr. Daeke or otherwise played any part in its generation.

60. Claimant refers to multiple “versions” of Judge Friend’s May 25, 2011 Order. Claimant believes the version at Ex. 18-1 to 18-4 is the “real” Order. The ALJ disagrees.

The version referenced by Claimant is incomplete and contains no findings pertinent to the issue being decided, *i.e.*, Respondents' liability for the surgery recommended by Dr. Choi. Judge Friend's true order is located at multiple places in the exhibits and pleadings, including at 18-5 through 18-15. It is then reproduced twice at 18-16 through 18-40, with slightly different formatting. At the time of Judge Friend's FFCLO, the OAC served its orders electronically in Word format. The small formatting differences in the multiple copies of the Order were probably the result of the document being opened and printed on a computer with a different version of Word, or different installed fonts. There is no persuasive evidence anyone "altered" or "falsified" Judge Friend's Order.

61. Respondents' counsel did not "misrepresent" Judge Friend's order to Dr. Castro. More important, counsel gave Dr. Castro a copy of the order, allowing her to make her own determination regarding its content and significance. It was reasonable for Respondents' counsel to provide Dr. Castro a copy of the Order because a work-related neck surgery would typically entitle Claimant to an automatic cervical spine rating. Claimant's counsel was copied on correspondence from Respondents' counsel to Dr. Castro and Dr. Entin.

62. Respondents had the right to send written correspondence to Dr. Castro and Dr. Entin. Respondents' counsel followed the established and appropriate practice of sending written correspondence to Claimant's ATPs, with copies to Claimant's counsel. The rule in *Samms* prohibits *ex parte* verbal communication with a treating physician without notice to the claimant's attorney. Furthermore, § 8-42-107(8)(b)(II)(C)(2009) requires the respondents to "*request in writing* that an authorized treating physician determine whether the employee has reached maximum medical improvement," before it can invoke an 18-month DIME. Respondents' IMEs had opined Claimant was at MMI and Respondents planned to request an 18-month DIME had Dr. Castro and Dr. Entin not declared Claimant at MMI. Accordingly, Respondents were following a process specifically mandated by the Act to obtain Dr. Castro and Dr. Entin's opinions regarding MMI. Claimant presented no persuasive evidence of any improper communication between Respondents and any ATP.

63. Claimant argues Respondents fraudulently concealed material information regarding his medical condition by failing to timely exchange medical records. Even assuming there were instances where Respondents neglected to send copies of medical records to Claimant's counsel within fifteen days of receipt as required by WCRP 5-4, there is no persuasive evidence any such failures were intentional. In fact, on January 26, 2012, Claimant's counsel advised Insurer's claims adjuster she was sending records to an outdated mailing address. The most reasonable inference is that the adjuster simply made a mistake. Claimant repeatedly assumes Respondents actions were intentional and motivated by malice but presented no persuasive evidence to support his supposition. And while the exchange of some medical records may have been inadvertently delayed, there is no persuasive evidence any important records remained unexchanged by the time the parties entered into the settlement agreement. Accordingly, untimely exchange of records during the claim could have played no role in Claimant's decisionmaking process when negotiating and agreeing to the settlement.

64. No statute or procedural rule requires Respondents to routinely provide copies of medical records to any ATP.

65. Dr. Roth reviewed hundreds of pages of medical records and authored a 94-page report. The fact his report may contain some minor errors or omissions is neither surprising nor suggestive of any material mistake that would warrant reopening Claimant's settlement.

66. Claimant alleges Respondents erroneously relied on Dr. Castro's reports and filed a FAL based on an incorrect MMI date. This argument lacks merit. Respondents accurately interpreted Dr. Castro's reports as determining MMI as of April 18, 2011. Dr. Castro's April 18, 2011 narrative report states Claimant was 85-95% improved and was advised to wean off narcotics. Dr. Castro recommended no additional treatment reasonably intended to improve Claimant's condition, and no follow-up appointment was scheduled. Dr. Castro indicated she would only see Claimant in the future "as needed." In her January 10, 2012 report, she indicated Claimant "is at MMI and *has been* followed in our clinic for medical *maintenance*. As of our clinic visit of April 18, 2011, he was 85% improved overall. He still required of medications to *maintain* that but was able to reduce the use of those." (Emphasis added). She also completed a WC164 form stating Claimant had reached MMI on "4/18/01" and required maintenance medications. The date of "4/18/01" was probably an error because it would be impossible for Claimant to have reached MMI eight years before his work injury. The most reasonable inference is that drawn by Respondents—Dr. Castro determined Claimant at MMI as of April 18, 2011.

67. Claimant also disputes the underlying premise that he was at MMI on April 18, 2011. Although a mutual mistake about MMI could be sufficient to reopen a claim depending on the circumstances,¹ Claimant presented no persuasive evidence to show Dr. Castro was wrong about MMI. To the contrary, Dr. Castro persuasively opined Claimant had completed therapy and other active treatment and had transitioned into "maintenance" mode with medications.

68. The primary treatment recommendations after April 18, 2011 were made by Dr. Parry, who saw Claimant from July 2012 through February 2013. On July 4, 2012, Dr. Parry opined, "[Claimant] has two major residual problems secondary to his industrial accident that have not been adequately addressed. Primarily his nausea and vestibular dysfunction. . . . He needs to return to vestibular therapy to work on his visual sensitivity as well as his visual dependents. . . . He is really not at maximum medical improvement until he has been adequately treated for all the components of his traumatic brain injury, of which the vestibular/ocular components are a significant contributor." Contrary to Dr. Parry's assertions, the persuasive evidence fails to demonstrate additional vestibular therapy would reasonably have been expected to improve Claimant's situation. Claimant had previously participated in vestibular therapy with minimal improvement. There is no persuasive reason to expect a different outcome from a return to therapy. More important, Claimant failed to prove his ongoing dizziness and nausea were causally related to the

¹ *E.g., Berg v. Industrial Claim Appeals Office*, 128 P.3d 270 (Colo. App. 2005); *Jaterka v. Johnson & Johnson*, W.C. No. 4-984-216-02 (March 22, 2017).

work accident. Dr. Scott and Dr. Roth persuasively explained there was no biologically plausible mechanism by which the minor head trauma would have damaged Claimant’s visual, auditory, or vestibular systems. Claimant was diagnosed with endolymphatic hydrops, which was not related to the injury. Dr. Roth and Dr. Chang persuasively opined no further treatment after April 18, 2011 was reasonably expected to improve any injury-related medical condition. Claimant failed to prove the parties were mutually mistaken about MMI.

69. More important, even if Dr. Castro’s MMI date were a “mistake,” it was not mutual because Claimant disagreed with MMI all along.

70. Claimant argues Dr. Castro’s rating was incorrect and he should have received a 95% whole person rating for his headaches. He also believes he should have received a cervical spine rating. Claimant’s arguments regarding Dr. Castro’s rating fail for multiple reasons. Dr. Castro appropriately used the Episodic Neurological Disorders table from the AMA Guides to rate Claimant’s headaches. The pertinent sections provide:

| Description | % Impairment of the Whole Person | Episodic neurological disorders |
|--|----------------------------------|---|
| 1. An episodic neurological disorder is of slight severity and under such control that most of the activities of daily living can be performed | 5-15 | Slight interference with daily living 5-15 Moderate interference with daily living 20-45 |
| 2. An episodic neurological disorder is of such severity as to interfere moderately with the activities of daily living | 20-45 | Requires constant supervision or confinement 50-90 |
| 3. An episodic neurological disorder is of such severity and constancy as to limit activities to supervised or protected care or confinement | 50-90 | Totally incapacitated for daily living 95 |
| 4. An episodic neurological disorder is of such severity and constancy as to totally incapacitate the individual in terms of daily living | 95 | |

71. The Division’s Impairment Rating “Tips” state, “if the individual has a closed head injury the highest applicable rating from this table is the only rating used.” Claimant misinterprets this to mean an individual with a head injury must always receive the highest possible rating under Table 1. As Dr. Roth explained, the provision in the Tips means the physician *can give only one* rating from that table, and it must be the *highest applicable rating appropriate to the individual case*. In Claimant’s case, that was 10%. The highest rating of 95% applies to an individual who is “totally incapacitated for daily living,” which clearly would not apply to Claimant.

72. Claimant argues he should have received a cervical impairment rating. However, Dr. Roth persuasively opined Claimant suffered no cervical injury that caused

any ratable impairment. But, even if we assume Claimant could have qualified for a Table 53 rating for “six months of medically documented pain and rigidity,” the nonwork-related cervical fusion performed by Dr. Choi permanently altered his anatomy and superseded any potential impairment caused by the work accident. And it would have been impossible to obtain cervical range of motion measurements unaffected to the loss of motion inherently caused by the fusion. Dr. Castro’s decision not to provide a cervical rating was reasonable in light of Judge Friend’s order finding the cervical fusion was not work-related.

73. Claimant’s arguments regarding Dr. Entin’s rating are similarly without merit. Dr. Entin’s April 2, 2012 report thoroughly and persuasively explained the basis for his rating. Moreover, Dr. Chang persuasively opined Dr. Entin’s rating was appropriate.

74. More important, Claimant was fully aware of Dr. Castro and Dr. Entin’s ratings and had lodged his disagreement long before the settlement. Claimant had timely contested the FAL based on those ratings. Even if there were a mistake regarding Dr. Entin’s rating, it was not mutual.

75. Contrary to Claimant’s argument, the FAL was not defective merely because there were no attached worksheets relating to Dr. Castro’s rating. Dr. Castro completed no worksheets, and the respondents are only required to attach worksheets *if they exist*. *E.g., Stolz v. IBM Corporation*, W.C. No. 4-845-221 (October 3, 2012); *Aguilar v. Colorado Flatwork, Inc.*, W.C. No. 4-741-897 (August 3, 2009), *aff’d Aguilar v. Industrial Claim Appeals Office*, 09CA1792 (Colo. App. May 20, 2010)(NSOP) (insurer under no obligation to demand that the ATP prepare worksheets, which otherwise did not exist, so they could be attached to an FAL). Dr. Castro and Dr. Entin’s complete reports were attached to the FAL.

76. Claimant failed to prove fraud or any mutual mistake of material fact to justify reopening the settlement.

CONCLUSIONS OF LAW

The Workers’ Compensation Act permits injured workers to settle all or part of their claim. Section 8-43-204(1), C.R.S. (2009). But all final settlements are subject to reopening “on the ground of fraud or mutual mistake of material fact.” The party seeking to reopen a settlement bears the burden of proof by a preponderance of the evidence. Section 8-43-303(4), C.R.S.

To prove fraud, it must be shown that (1) the party misrepresented or concealed a material existing fact that in equity and good conscience should be disclosed; (2) the party knew it was making a false representation or concealing a material fact; (3) the other party was ignorant of the existence of the true facts; (4) the party making the representation or concealing a fact did so with the intent to induce action on the part of the other party; and (5) the misrepresentation or concealment caused damage to the other party. *Morrison v. Goodspeed*, 60 P.2d 458 (Colo. 1937); *Ingels v. Ingels*, 487 P.2d 812, 815 (Colo. App. 1971); *Beeson v. Albertson’s, Inc.*, W.C. No. 3-968-056 (April 30, 1996). To succeed on

a claim for fraudulent concealment or nondisclosure, a party must show the other party had a duty to disclose material information. *Poly Trucking, Inc. v. Concentra Health Servs., Inc.*, 93 P.3d 561, 563–64 (Colo. App. 2004).

As found, Claimant failed to prove fraud relating to the settlement or any other aspect of his claim. There is no persuasive evidence of any intent on Respondents' part to deceive, misrepresent, or conceal material information. Claimant has misinterpreted many events, and otherwise relies solely on supposition and unfounded assumptions that any technical mistake in the handling of his claim by Respondents must have been deliberate with intent to harm him.

A mistake is "mutual" if it is reciprocal and common to both parties. *Maryland Casualty Co. v. Buckeye Gas Products Co.*, 797 P.2d 11 (Colo. 1990); *Cary v. Chevron U.S.A., Inc.*, 867 P. 2d 117 (Colo. App. 1993). A mistake is "material" when it goes to "the very basis of the contract." *England v. Amerigas Propane*, 395 P.3d 766, 771 (Colo. 2017). "In other words, the mistake of fact must relate to a material aspect of the contract such that, but for the mistake, the party seeking rescission would not have entered the contract." *Id.* The mistake must pertain to a past or present fact not an opinion or prophecy about the future. *Gleason v. Guzman*, 623 P.2d 378 (1981). A mistake may be found where parties settle a claim without being fully informed concerning the "extent, severity and likely duration" of the injury. *Id.* The mistake must not relate to a fact regarding which the party seeking relief bears the risk.

Claimant has presented multiple issues on which he believes Respondents were mistaken. But regardless of Respondents' perspective on those issues, there is no persuasive evidence Claimant was affected by any of the alleged "mistakes." One need only review Dr. Zierk and Dr. Parry's detailed reports to appreciate the wide variety of symptoms and diagnoses Claimant attributed to his accident long before the settlement was consummated. Claimant never believed Judge Friend's determination regarding causation of the neck surgery was correct. Claimant never believed Dr. Castro's MMI and impairment determinations were correct. Claimant never agreed with the MMI date on the FAL. Claimant never agreed with Dr. Entin's rating. Claimant never agreed with Dr. Douthit or Dr. Roth's opinions. Far from relying on their assessments, Claimant actively disputed them throughout his claim. As noted by Dr. Chang, Claimant compiled two binders of cross-referenced medical records regarding his case. Claimant was intimately familiar with his medical condition and probably understood his case better than anyone else. He has presented no persuasive new evidence that was unavailable or unknown to him when he agreed to settle. At most, Claimant has shown unilateral mistakes by Respondents, but nothing that can reasonably be deemed mutual.

Disagreements regarding the medical conditions caused by the accident, the nature and duration of injury-related treatment, and the extent of Claimant's injury-related disability drove the parties to the negotiating table and ultimately toward settlement. The settlement was a compromise to resolve disputes over whether Respondents were liable for the wide range of conditions Claimant sought to have covered under his claim. The present litigation is essentially an attempt to relitigate disputes that were well-known to both parties before the claim settled. After considering the entire record, the ALJ

concludes Claimant failed to prove fraud or a mutual mistake of material fact to support reopening the settlement.

ORDER

It is therefore ordered that:

1. Claimant's request to reopen his settlement denied and dismissed.

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

DATED: December 31, 2020

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUE

1. Whether Claimant established by a preponderance of the evidence that she was the common-law spouse of Decedent, and therefore entitled to death benefits.

PROCEDURAL MATTERS

Prior to hearing, Respondents moved for the appointment of a guardian ad litem (GAL) for Decedent and Claimant's minor son, pursuant to § 8-43-207(1)(I), C.R.S. Respondents' motion was addressed in a pre-hearing conference before ALJ Sandberg on August 10, 2020. On August 10, 2020, ALJ Sandberg denied Respondents' motion without prejudice, finding no apparent conflict and no showing that Claimant was not able to appropriately serve in her capacity as mother and guardian of the Son.

At the August 25, 2020 hearing, Respondents renewed their motion. The ALJ found no evidence to demonstrate the existence of a present conflict of interest between Claimant and the Son, or that Claimant, as the biological mother and legal guardian of the Son, is unable to serve in those capacities. The ALJ therefore found no basis for the appointment of a GAL and denied Respondents' motion.

FINDINGS OF FACT

1. While in the course and scope of his employment with Employer, Decedent died on August 29, 2019 as the result of an electrical accident.
2. Respondents admitted liability to dependent death benefits for the Son, Decedent's biological son, who was born on September 29, 2018. Claimant and Decedent are the biological parents of the Son.
3. Decedent was undocumented and used several different names, including [Decedent's names and aliases redacted].
4. Claimant alleges she was Decedent's common-law spouse and seeks death benefits under the Colorado Workers' Compensation Act.
5. Claimant's Exhibit 5 is a handwritten note (partially in Spanish and partially in English) dated March 3, 2018. Claimant testified that the handwritten note was written by Decedent and given to Claimant. The letter includes the question "Te casarias conmigo" – Spanish for "will you marry me." Claimant circled the answer "Si" (Spanish for "yes")
6. On September 29, 2018, the Son was born. (Ex. 1).
7. On approximately May 14, 2019, Decedent completed an employment application for Employer, and identified his address as "105 Longs Peak, Unit [illegible], Brighton

Colorado, 80601. On his “New Hire Form,” Decedent identified Claimant as his spouse and provided her telephone number for his “emergency contact.” Also, on May 14, 2019, Decedent completed an Employment Eligibility Verification in which he listed his address as 9743 WCR 16, Apt. 8, Ft. Lupton, CO 80601. Decedent’s paycheck stubs from Employer indicated his address was 105 Longs Peak, Brighton, CO 80601. (Ex. 2).

8. On May 24, 2019, Decedent completed a Form W-4 for Employer. On the Employee’s Withholding Allowance Certificate, Decedent marked his marital status as “Married.” (Ex. 2).

9. On June 31, 2019, Claimant received a Notice of Tenant Rent Change from the Jefferson County Housing Authority, which indicated Claimant’s address was 5354 Allison St., #B24, Arvada, CO 80002. (Ex. A).

10. On July 9, 2019, Decedent completed an additional Form W-4 for Employer. On the Employee’s Withholding Allowance Certificate, Decedent marked his marital status as “Married, but withheld at higher Single rate.” (Ex. 2).

11. On August 5, 2019, Claimant wrote a handwritten letter to Jefferson County Human Services, which states:

To Whom it May Concern: I [Claimant] am requesting my Medicaid’s household to be ended as I got a better job and my husband and I are moving in since we’ll have 2 incomes we won’t be able to qualify. Please send any further correspondent to my new address 1870 Eaton St., Lakewood, CO 80214.”

(Ex. 6).

12. On August 29, 2019, the Decedent died in a work-related accident.

13. On September 5, 2019, a Certificate of Death was completed, which identified Claimant as Decedent’s spouse. Claimant was identified as the “informant” indicating she provided the information contained within the Certificate of Death. (Ex. 1).

14. In conjunction with Decedent’s funeral, Claimant authored an Obituary for Decedent, which indicates that Claimant and Decedent were married “on October 29, 2017 in Brighton, Colorado.” (Ex. 7).

15. Claimant’s Exhibit 8 consists of six photographs, including photographs of Decedent with the Claimant and their Son on Father’s Day, and photographs of Claimant, Decedent, the Son and Claimant’s three other children. (Ex. 8).

16. On December 9, 2019, Ms. G[Redacted] wrote a letter in which indicated that she knew Claimant and Decedent to be a married couple. (Ex. 9).

17. Decedent’s father, Luis R[Redacted] and mother-in-law Griselda R[Redacted] created a gofundme.com page in which the Son’s name is incorrectly stated. (Ex. 10).

18. At hearing, Claimant testified regarding her relationship with Decedent. Claimant testified that she considered herself to be the common-law spouse of Decedent. Claimant testified that she and Decedent did not have a formal marriage ceremony and did not obtain a marriage certificate. Claimant did not change her name or use Decedent's surname. Claimant testified that her social media accounts did not list her as married.

19. Claimant testified that she and Decedent lived together from March 2018 until the time of his death. Claimant testified that in late 2018, Decedent worked out-of-state, in South Dakota, and they communicated during those times. Claimant testified that although they lived together, at times she would kick him due to drinking and going out with his friends.

20. Breanna F[Redacted] testified at hearing and is friend and former co-worker of Claimant. Ms. F[Redacted] testified she formerly worked with Claimant at a law firm ending in approximately October 2018. At the time, Ms. F[Redacted] saw Claimant daily at work, and approximately once per month on weekends. Ms. F[Redacted] indicated she would see Claimant outside of work in social settings, and at Claimant's home. She testified that until Claimant met Decedent, Claimant lived alone with her children. She testified that both Claimant and Decedent would attend social gatherings, including at Ms. F[Redacted]' home and Claimant's mother's home. She testified Claimant introduced Decedent as Claimant's "husband." Ms. F[Redacted] testified that she did not see Claimant wear a wedding ring. Ms. F[Redacted] understood Decedent to be Claimant's husband.

21. Dominique G[Redacted] testified at hearing and was a former co-worker and friend of Claimant. Ms. G[Redacted] testified she saw Claimant and Decedent together at dinners and family events at Claimant's mother's home that Ms. G[Redacted] attended. She testified Decedent was present at a gender reveal party for the Son at a park. She testified that Claimant's mother was at the gender reveal party, and that she had not met Decedent's parents other than at Decedent's funeral. She testified that Claimant and Decedent lived together at an apartment in Arvada or Westminster, Colorado. Ms. G[Redacted] understood Decedent to be Claimant's husband.

22. Decedent's step-mother, Griselda R[Redacted], testified at hearing. Ms. R[Redacted] testified that her address is 7678 Weld County Road, Ft. Lupton, Colorado. Ms. R[Redacted] has been married to Decedent's father since November 2015 and did not meet Decedent before she married Decedent's father. Ms. R[Redacted] testified she first learned of Claimant in December 2018, when Decedent informed her that he was going to be a father. Ms. R[Redacted] testified that after the Son was born, Decedent stated he was going to move in with Claimant. Ms. R[Redacted] testified Decedent referred to Claimant by her first name, or as the mother of his baby. Ms. R[Redacted] testified Decedent did not tell her that he was married or that he had proposed. Ms. R[Redacted] testified Decedent only lived with Claimant for approximately one week. Ms. R[Redacted] testified she has met Claimant approximately 4 times, at Ms. R[Redacted]'s home. Ms. R[Redacted] has not attended or been invited to the Son's birthday parties, and other than buying clothes for the Son when he was born, has not sent birthday cards or birthday gifts to the Son. Ms. R[Redacted] testified that following Decedent's death,

she, and Decedent's father created a fund-raising page on the website gofundme.com. (Ex. 10).

23. Decedent's father, Luis R[Redacted], testified at hearing. Mr. R[Redacted] testified his address is 7678 Weld County Road, #17, Thornton, Colorado. Mr. R[Redacted] testified he had a good relationship with Decedent before he passed away and that they talked nearly every day on the phone. Mr. R[Redacted] testified Decedent was open with him and he knew of Decedent's relationship with Claimant, but that he did not meet Claimant in person until shortly after the Son was born.

24. Mr. R[Redacted] testified that Decedent moved out of Mr. R[Redacted]'s home approximately 8 months after Mr. R[Redacted] married Ms. R[Redacted] in November 2015 and would occasionally stay at Mr. R[Redacted]'s home after that for 1-2 weeks at a time. He testified Decedent lived for a time with a friend named Sergio Dominguez (although the time frame was not clear). He also testified Decedent lived with a different friend at 9743 Weld Count Road 16, Apt. 8, Ft. Lupton, Colorado. He did not testify as to the timeframe when Decedent lived at this address. Mr. R[Redacted] testified Decedent did not tell him he was married and referred to Claimant by her first name or as "the mother of my son." He testified Decedent did not refer to Claimant as his "wife" or "girlfriend."

25. Mr. R[Redacted] testified that the address 105 Longs Peak, Brighton, Colorado 80601 was an address where he lived with Decedent and Mr. R[Redacted]'s other child for five years before he married Ms. R[Redacted] In 2015. Mr. R[Redacted] testified that Decedent did not invite him or Ms. R[Redacted] to gatherings with Claimant and that he and not socialized with Claimant and Decedent together. Mr. R[Redacted] testified that he did not live at 105 Longs Peak in 2019.

26. Mr. R[Redacted] testified that he is familiar with Decedent's handwriting, and that he does not believe the handwriting on Exhibit 5 was Decedent's.

27. Claimant testified in rebuttal that she had been to Decedent's parents' home with Decedent and the Son, and Ms. R[Redacted] would not come out of her room the visit. Claimant also testified that she had asked Decedent to invite his family to gatherings. Claimant testified that she was not aware that Decedent had stayed at his father's house after arguments.

CONCLUSIONS OF LAW

EVIDENTIARY ISSUES

Application of § 13-90-102, C.R.S.

At trial, Respondents objected to Claimant's testimony based on the application of Colorado's so-called "Dead Man's Statute," which places limitations on the testimony that an witness may provide as it relates to oral statements made by a deceased person. Specifically, § 13-90-102, C.R.S., provides:

Subject to the law of evidence, in any civil action or proceeding in which an oral statement of a person incapable of testifying is sought to be admitted into evidence, each party and person in interest with a party shall be allowed to testify regarding the oral statement if:

- (a) The statement was made under oath at a time when such person was competent to testify.
- (b) The testimony concerning the oral statement is corroborated by material evidence of a trustworthy nature.
- (c) The opposing party introduces uncorroborated evidence of related communications through a party or person in interest with a party; or
- (d) Such party or person testifies against his or her own interests.

Respondents contend that Claimant's testimony on three oral statements by Decedent should be excluded under the Dead Man's Statute:

- 1) That Decedent asked Claimant to marry him, talked about wanting to marry her, and said they were married.
- 2) That Decedent told Claimant's work friends they were married.
- 3) Statements about Decedent's relationship with his father and step-mother.

Such statements are to be excluded unless one of the conditions set forth in 13-90-102(1)(a-d) apply. Here, only section (b) is applicable. Under the statute, "Corroborated by material evidence" means corroborated by evidence that supports one or more of the material allegations or issues that are raised by the pleadings and to which the witness whose evidence must be corroborated will testify. Such evidence may come from any other competent witness or other admissible source, including trustworthy documentary evidence, and such evidence need not be sufficient standing alone to support the verdict but must tend to confirm and strengthen the testimony of the witness and show the probability of its truth. § 13-90-102 (3)(a), C.R.S. The Dead Man's Statute does not require that a decedent's statements be overheard by a disinterested party, but only requires that "the corroborating evidence be material to the underlying issue and tend to confirm, strengthen and show the probable truthfulness of the party's testimony." *In re Claim of Botello*, W.C. No. 4-962-974-01 (ICAP, Nov. 13, 2017).

With respect to Claimant's testimony that Decedent talked about wanting to marry her, and told Claimant they were married, the ALJ ruled at hearing that Claimant's testimony that Decedent verbally asked her to marry him was inadmissible. With respect to the remaining issues, Claimant's Exhibit 2 consists of forms completed by Decedent in which he expressly stated that Claimant was his spouse, and forms completed prior to any controversy in which Claimant indicated he was married. Next, Exhibit 5 is a handwritten note Claimant testified was written by Decedent in which he asked Claimant to marry him in Spanish, and indicated he would be the "best friend" to Claimant's children. Given Decedent's representation to Employer that Claimant was his spouse, and the marriage request in Exhibit 5, (both of which were created before Decedent's

death, and before any controversy arose concerning their purported marital status), the ALJ finds that Claimant's testimony that Decedent said they were married to be corroborated by material evidence of a trustworthy nature.

With respect to Claimant's testimony that Decedent told Claimant's work' friends that they were married. The record does not reflect that Claimant testified specifically that Decedent told her work friends they were married, and the ALJ's findings do not rest on any such testimony. Instead, Ms. F[Redacted] who testified that she interacted with both Decedent and Claimant, and that Decedent was introduced as Claimant's husband. Accordingly, any objection

Claimant's testimony regarding Decedent's statements about his relationship with his father and step-mother, on the other hand, are not admissible. Such statements are not corroborated by other material evidence of a trustworthy nature. Claimant's statements in this regard were offered in rebuttal to the testimony of Decedent's father and step-mother, however, those statements do not constitute "uncorroborated evidence of related communications through a party or person in interest with a party." Although Decedent's father's and step-mother's testimony was uncorroborated, neither the father or step-mother are "persons in interest with a party," as they have no direct financial interest in the outcome of this proceeding and have no other significant and non-speculative financial interest that makes their testimony, standing alone, untrustworthy." As such, the ALJ does not consider the Claimant's testimony regarding Decedent's statements of his relationship with his father to be admissible. However, Claimant's testimony of her observations of those relationships is admissible.

APPLICABLE LEGAL STANDARDS

The purpose of the Workers' Compensation Act of Colorado (Act) §§8-40-101, *et seq.* C.R.S., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. §8-40-102(1), C.R.S. The claimant bears the burden of proving by a preponderance of the evidence that she is entitled to death benefits. § 8-43-201(1), C.R.S.; *Faulker v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of a claimant nor in favor of the rights of respondents. §8-43-201, C.R.S. A workers' compensation claim is decided on its merits. §8-43-201, *supra*.

In accordance with section 8-43-215, C.R.S., this decision contains specific findings of fact, conclusions of law and an order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible, or implausible testimony or unpersuasive arguable

inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice, or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16.

Under § 8-42-115, C.R.S, where death proximately results from an industrial injury, the decedent's dependents are entitled to receive the decedent's workers' compensation benefits. Where one or more dependent is entitled to receive a decedent's benefits, the benefits are to be apportioned in a "just and equitable" manner. § 8-42-121, C.R.S. According to § 8-41-503, C.R.S., dependency shall be determined as of the date of the industrial injury. Under section 8-41-501(1)(a), C.R.S., a widow is presumed wholly dependent unless it is shown that she was voluntarily separated and living apart from the spouse at the time of the injury or death or was not dependent in whole or in part on the deceased for support. Such presumptions may be rebutted by competent evidence. § 8-41-501(1), C.R.S.

Claimant bears the burden of proof to establish, by a preponderance of the evidence, that a common-law marriage existed between her and Decedent. *Valencia v. Northland Ins. Co.*, 514 P.2d 789, 790 (Colo. App. 1973). "A common law marriage is established by the mutual consent or agreement of the parties to be husband and wife, followed by a mutual and open assumption of a marital relationship." *Estate of Wires v. Medina*, 765 P.618 (Colo. App. 1988). "The determination of whether a common law marriage exists turns on issues of fact and credibility, which are properly within the province of the finder of fact." *Id.* Courts consider myriad factors in determining whether a common-law marriage exists. The two most important factors include "cohabitation and reputation among persons in the community that the parties hold themselves out as man and wife." *In re Claim of Botello, supra*. Other relevant evidence includes maintenance of joint bank accounts, use of a common surname, joint ownership of property, filing joint tax returns, representation of marital status on tax documents, evidence that the decedent provided financial support to claimant and children. *People v. Lucero*, 747 P.2d 660, (Colo. 1987) (citations omitted); *In Re Claim of Ramos*, WC No. 4-439-791 (ICAP Jan. 31, 2002); *Marquez v. LVI Environmental Services, Inc.*, W.C. No. 4-425-155 (April 5, 2001); *In re Claim of Ortega*, W.C. No. 4-661-263-02 (ICAP, Apr. 17, 2018). There is, however, "[t]here is no determinative single form of evidence required. The ultimate determination 'turns on issues of fact and credibility, which are properly within the trial court's discretion.'" *Lucero, supra*. Ultimately, the question is whether the parties agreed to be married, and that agreement is evidenced by actual behavior. *Marquez, supra*.

The very nature of a common law marital relationship makes it likely that in many cases express agreements will not exist. The parties' understanding may be only tacitly

expressed, and the difficulty of proof is readily apparent. Courts have recognized that “the agreement need not have been in words.” *Smith v. People*, 64 Colo. 290, 293, 170 P. 959, 960 (1918); see also *Rocky Mountain Fuel Co. v. Reed*, 110 Colo. 88, 130 P.2d 1049 (1942). Then the issue becomes what sort of evidence is sufficient to prove the agreement. If the agreement is denied or cannot be shown, its existence may be inferred from evidence of cohabitation and general repute. See, e.g., *Graham v. Graham*, 130 Colo. 225, 227, 274 P.2d 605, 606 (1954); *James v. James*, 97 Colo. 413, 414, 50 P.2d 63, 64 (1935).

Claimant has established by a preponderance of the evidence that she and Decedent agreed to be married. Claimant testified that Decedent gave her the letter admitted as Exhibit 5, in which Decedent posed the question “Te casarias conmigo?” (Spanish for “will you marry me?”). Claimant accepted this proposal. Although Mr. R[Redacted] testified that he did not believe the handwriting was his son’s handwriting, the ALJ does not find his testimony on this issue persuasive. Consequently, Claimant has established the first element of a common law marriage.

The second factor, the “mutual and open assumption of a marital relationship” is the subject of conflicting evidence. Claimant testified she and Decedent lived together beginning in March 2018 and except for times when Decedent worked out-of-state, and when he left the home due to arguments, they cohabitated. Claimant’s testimony was corroborated by the testimony of Ms. G[Redacted], who testified that Claimant and Decedent lived together in an apartment in Arvada or Westminster. (Claimant’s apartment was located in Arvada). Ms. F[Redacted] testified that Claimant lived in alone with her children until she met Decedent, after which she lived with him. Both Ms. G[Redacted] and Ms. F[Redacted] testified that Decedent was present at social functions with Claimant, and their son’s gender reveal party, and that they both understood them to be married.

In employment paperwork, Decedent listed his address in May 2019 as 105 Longs Peak, Brighton, Colorado. Mr. R[Redacted] testified that Claimant lived at this address with Mr. R[Redacted] prior to Mr. R[Redacted]’ marriage to Ms. R[Redacted] in 2015. Mr. R[Redacted] did not live at 105 Longs Peak in May 2019, and no evidence was admitted indicating Decedent lived at this address in May 2019. Mr. R[Redacted] testified Decedent moved from that address approximately eight months after he married Ms. R[Redacted] and moved into various residences with friends. In his employment paperwork, Claimant also listed his address as 9743 WCR 16, Apt. 8, Ft. Lupton, CO 80601, which Mr. R[Redacted] testified was an address of one of Decedent’s friends. However, Respondents offered no persuasive evidence to indicate that Decedent did not cohabitate with Claimant after March 2018.

The evidence also shows Decedent and Claimant represented to others that they were married. In his May 2019 employment paperwork, Decedent identified Claimant as his “spouse,” and listed her as one of his emergency contacts. On tax documents, Decedent twice checked boxes indicating he was “married.” In paperwork submitted to the Jefferson County Human Services, Claimant referenced her “husband” whom she

identified in testimony as Decedent. Ms. F[Redacted] testified that Claimant introduced Decedent as her “husband.” Additionally, Claimant testified that Decedent provided financial support for their son and for rent. Claimant testified, credibly, that Decedent was not included on her lease and that they did not have a joint bank account due to Decedent’s legal status in the United States.

Decedent apparently did not inform his father and mother-in-law that he considered Claimant to be his spouse. The ALJ, however, does not find this evidence dispositive. The evidence demonstrated only that Decedent did not affirmatively represent himself as married to them. Such evidence does not contradict the evidence that Decedent held himself out as married to others, including his employer and the IRS. Moreover, Claimant’s friends believed Claimant and Decedent to be married, based on their interactions with both. Based on this evidence, Decedent’s financial support for his son and Claimant, and the couple’s cohabitation, the ALJ finds it more likely than not that Claimant and Decedent were common-law married.

Based on the totality of the evidence, Claimant has established by a preponderance of the evidence that she and Decedent were common-law spouses under Colorado law. Accordingly, the ALJ finds that Claimant was a dependent of Decedent at the time of Decedent’s work-related death and is therefore entitled to Decedent’s death benefits.

Apportionment of Death Benefits

Where one or more dependent is entitled to receive a decedent’s benefits, the benefits are to be apportioned between such dependents in a “just and equitable” manner. § 8-42-121, C.R.S. Based on the totality of the evidence, the ALJ apportions Decedent’s death benefits twenty-five percent (25%) to Claimant, and seventy-five percent (75%) to the minor child. Pursuant to § 8-42-122, C.R.S., the ALJ may provide for the manner and method of safeguarding payments due to dependents who are not capable of fully protecting their own interests. Although no GAL is appointed in this case, the ALJ directs that the benefits due to the minor child, Ian Elias R[Redacted], shall be deposited into and remain in a separate and distinct savings account in a national or state bank insured by the federal deposit insurance corporation or its successor, and may only be used for the benefit of the minor child, as directed, and determined by Claimant, the minor child’s legal guardian. Benefits due to the Minor Child shall not be comingled in with other funds in said account, including the benefits payable to Claimant.

ORDER

It is therefore ordered that:

1. Claimant has established by a preponderance of the evidence that she was the common-law spouse of Decedent at the time of Decedent’s work-related death.

2. Claimant was a dependent of Decedent and entitled to death benefits due to Decedent.
3. Decedent's death benefits are apportioned 25% to Claimant and 75% to Ian Elias R[Redacted].
4. Benefits for the minor child, Ian Elias R[Redacted], shall be deposited into and remain in a separate and distinct savings account in a national or state bank insured by the federal deposit insurance corporation or its successor, and may only be used for the benefit of the minor child, as directed, and determined by Claimant, the minor child's legal guardian. Benefits due to the Minor Child shall not be comingled in with other funds in said account, including the benefits payable to Claimant.
5. Respondents shall pay statutory interest at the rate of 8% per annum on compensation benefits not paid when due
6. All matters not determined herein are reserved for future determination.

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

DATED: October 5, 2021



Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

- I. What is Claimant's Average Weekly Wage, insofar as it might affect her TTD payments?

STIPULATIONS

The parties have agreed that the sole issue before the ALJ is AWW, and not any issue of overpayments.

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

1. Claimant worked for Employer as an emergency room nurse. She began her employment on April 1, 2019. She sustained an admitted injury on June 26, 2019. Respondents then admitted to an AWW of \$1,181.09. (Ex. A, p. 1). Claimant worked up until the date of her injury on June 26, 2019.

2. Claimant was placed at MMI on August 4, 2020. (Ex. B, p. 5). She was paid temporary total disability (TTD) benefits from June 27, 2019 through August 3, 2020, based upon the admitted AWW of \$1,181.09. *Id.* Respondents filed a Final Admission of Liability on August 13, 2020, alleging an overpayment of \$787.39, to be credited against future benefits. (Ex. B, p. 6). Claimant timely objected, and filed this Application for Hearing.

3. Claimant testified at hearing. She said she was hired to work full-time, with a typical schedule of 3 days per week, 12 hours per shift. She earned \$35.59 per hour. Claimant also earned shift differential for working nights and evenings, which is apparently at a rate of \$3.40 on her paystubs. (Ex. 3, p. 9). Claimant testified she did not recall her date of her termination. She testified she did not return to work at any time after her date of injury.

4. Claimant was paid in bi-weekly intervals. Claimant testified that she missed one week of work for the pay period with a paycheck date of May 17, 2019. She testified during that week she had to take care of her mother in California. She took the week of leave without pay, designated in paycheck records as 35.5 hours of "LWOP." (Ex. C, pp. 28, 33). She testified she did not remember if she did not have enough PTO to cover her leave, or if she took LWOP because she would not have enough to "cover it in the long run." She later clarified, by a question by the ALJ, that she had not worked long enough to accrue PTO sufficient to cover her time off at that time. She further testified if she had kept working through the time she was placed at MMI, she would

have had accrued sufficient time to cover her time off.

5. Claimant was, however, uncertain of the precise accrual method of PTO utilized by Employer. She did not know exactly how much PTO the Employer would provide. She further admitted that when she earlier testified she would have accumulated enough time to cover a week off with PTO had she worked longer past the date of injury, she was in fact guessing based upon “other employers.” She stated she was “shooting in the dark” by assuming as much for Employer.

6. Claimant did not have a written contract stipulating how many weeks she was to work per year; merely that she was hired as a full time employee. Claimant testified she did not have memory of taking paid sick leave time off during her employment, but she did not dispute she had that option, since it is listed on her paychecks. She also stated that having PTO was “part of the package” of her employment at Parkview. She admitted that when she was hired she knew she had PTO, paid sick leave, and LWOP she could take.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

1. The purpose of the “Workers’ Compensation Act of Colorado” (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers’ Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers’ Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers’ Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The ALJ’s factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. See *Magnetic Engineering, Inc. v. ICAO*, 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness’s testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d

1205 (1936); CJI, Civil 3:16 (2007). In this instance, the ALJ finds Claimant's testimony to be sufficiently credible, and consistent with the documents submitted by the parties. The ALJ will not require a written contract of employment outlining the precise accrual methods of time off (whether paid or not), nor does her lack of precise memory on such methods preclude Claimant from putting forth a sufficient case.

Average Weekly Wage, Generally

4. Where the Claimant is earning an hourly wage at the time of the injury, the AWW is to be determined by multiplying the hourly rate by the number of hours in a day the claimant would have worked but for the injury, then multiplying that sum by the number of days in a week the Claimant would have worked. Colo. Rev. Stat. § 8-42-102(2)(d) (2003). However, 8-42-102(3) provides that an ALJ may diverge from the statutorily-prescribed methods of calculating the AWW if, for any reason, they will not fairly compute the AWW. The ALJ has wide discretion to decide whether the statutorily-prescribed methods will fairly calculate the AWW, and if not, to devise a method which will fairly determine the AWW. Because the ALJ's authority is discretionary, appellate courts may not interfere with the AWW determination unless there is an abuse of discretion. An abuse occurs if the order is beyond the bounds of reason, as where it is contrary to the law or not supported by substantial evidence. *Pizza Hut v. Indus. Claim Appeals Office*, 18 P.3d 867 (Colo. Ct. App. 2001). *Vance v. The Brown Schs/Cedar Springs Behavioral Health*, W.C. No. 4-558-130 (I.C.A.O. Aug. 17, 2004).

Average Weekly Wage, as Applied

5. The facts in this case are not in serious dispute. The wage records submitted by the parties agree with one another. The parties agree (with the ALJ's concurrence - now that there is no issue of enhanced earnings potential between injury and MMI, such as in the *Pizza Hut* case) that today's task is to determine AWW *on the date of injury*. Claimant is requesting her AWW be set at \$1,333.77. Claimant's calculation is based upon using her entire wages from the start of her employment through the pay period with a paycheck date of July 12, 2019. The total wages she earned was \$14,671.46. The wages were earned over six pay periods, or 12 weeks. Claimant is requesting her AWW be calculated dividing her total wages by 11 weeks to specifically exclude the one week of work she took off without pay. [$\$14,671.46 / 11 \text{ weeks} = \$1,333.77$].

6. Respondents argue that utilizing Claimant's wages earned over the entirety of her employment should be considered the best approximation her current AWW. If her entire \$14,671.46 in gross earnings are divided by the 12 weeks over which she worked, her AWW would be \$1,222.62. Respondents dispute Claimant's contention that a whole week should be removed from the calculation to account for Claimant's one week leave without pay.

7. The ALJ in this case will focus on Claimant's *average earnings at the time of injury*. As such, Claimant has the better argument. Although Claimant could not

specifically articulate the exact method of accruing paid time off vs. unpaid time off, an examination of Respondent's Exhibit C, pages 28, 29, 30 provide a more readable summary. As time went on, Claimant indeed did *accrue paid time off*, the longer she worked there. This is consistent with most any employment arrangement, the lack of a formal document admitted for the record notwithstanding. As but one example, Claimant utilized 10 hours of *paid time off*, for the period ending 5/31/19 (Ex. C, p. 28, towards the bottom of the page).

8. Thus, like any new employee with insufficient leave accrued in the bank, Claimant was vulnerable to being docked without pay early in her tenure. Whether it was voluntary on her part to forego the 35.5 hours pay, or go "in the hole" and make it up later is not necessary to determine here. Either way, that lost week was an aberration in earnings, wrought solely by her lack of sufficient tenure to accrue the needed *paid* time off. That unpaid week aside, an examination of the remaining pay periods show a reliably tight pattern of hours worked, and resultant pay. And, it is noted, Claimant had begun to accrue *paid* time in her bank by the time she got hurt.

9. Taking Respondents' argument to an extreme, consider the following hypothetical: Claimant worked for one week only, then took the following week without pay (due to a family emergency), then became injured *immediately* upon returning to begin her third week on the job. This would result in her AWW being effectively cut in half, if one were to divide by both weeks on the payroll. As such, this would not be the best approximation of her wages at the time of injury. The ALJ further finds that there is insufficient evidence to infer that Claimant demonstrated a *regular pattern* of taking unpaid leave, such as would reduce her earnings rate on an ongoing basis. The unpaid leave week was an aberration in her weekly earnings; therefore, it will be disregarded, resulting in an AWW of \$1333.77.

ORDER

It is therefore Ordered that:

1. Claimant's Average Weekly Wage is \$1,333.77.
2. Respondents shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.
3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory

reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: <http://www.colorado.gov/dpa/oac/forms-WC.htm>. *In addition, it is recommended that you send a copy of your Petition to Review to the Colorado Springs OAC via email at oac-csp@state.co.us.*

DATED: December 31, 2020

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

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| STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 222 South 6th Street, Suite 414, Grand Junction, CO 81501 | <input type="checkbox"/> COURT USE ONLY <input type="checkbox"/> |
| In the Matter of the Workers' Compensation Claim of: [REDACTED] , Claimant, vs. [REDACTED] , Employer, and [REDACTED] , Insurer, Respondent. | |
| FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER | |

CASE NUMBER:

WC 4-950-946-002

In this order, [Redacted], will be referred to as “the claimant”; and [Redacted], will be referred to as “the employer” or “the respondent”. Also in this order, “the ALJ” refers to the Administrative Law Judge; “C.R.S.” refers to Colorado Revised Statutes; “OACRP” refers to the Office of Administrative Courts Rules of Procedure, 1 CCR 104-1; and “WCRP” refers to Workers’ Compensation Rules of Procedure, 7 CCR 1101-3.

ISSUES

1. Whether the claimant has demonstrated, by a preponderance of the evidence, that she is entitled to post-maximum medical improvement (MMI) maintenance medical treatment to prevent further deterioration to her physical condition pursuant to *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988).
2. The issue of disfigurement was endorsed for hearing. However, at the December 2, 2020 hearing, the claimant withdrew the issue on the record.

PROCEDURAL HISTORY

1. This matter was set for hearing pursuant to the claimant’s August 26, 2020 Application for Hearing.
2. A telephonic hearing regarding this matter commenced on December 2, 2020 before ALJ Cassandra M. Sidanycz. On that date, the claimant participated and proceeded *pro se*. The respondents were represented by [Redacted], Esq.
3. The claimant did not offer exhibits. The respondent offered exhibits A through C.

4. The claimant notified the ALJ that she had not yet received the respondent's exhibits. The claimant asserted that she has difficulty with proper delivery of her U.S. Mail.

5. The ALJ determined that the respondent had acted reasonably in mailing the proposed exhibits to the claimant in advance of the hearing.

6. As the claimant did not have the exhibits to effectively make any objections, the respondent's counsel agreed to immediately email the exhibits to the claimant. However, the claimant was utilizing her cellular phone to participate in the hearing and asserted that she could not review the exhibits while also participating in the hearing.

7. The ALJ determined that a continuance was necessary to allow the claimant adequate time to review the respondent's exhibits.

8. Although this was the claimant's Application for Hearing, counsel for the respondent agreed to confer with the claimant to find an agreeable hearing date and file a hearing confirmation. The ALJ instructed the parties to set the hearing on the December 2020 Grand Junction docket.

9. A hearing confirmation was filed by the respondent's counsel on December 7, 2020, which confirmed a hearing date and time of December 30, 2020 at 8:30 a.m. The ALJ notes that the certification of mailing states that a copy of the hearing confirmation was emailed to the claimant.

10. On December 8, 2020, the Grand Junction Office of Administrative Courts (OAC) emailed a Notice of Hearing to the parties. That notice identified the hearing date and time to be December 30, 2020 at 8:30 a.m. The notice also informed the parties that the hearing would be held "via telephone or Google Meets".

11. On December 28, 2020, the Grand Junction OAC emailed the parties a Google Meets invitation. Again, the hearing was set for December 30, 2020 at 8:30 a.m.

12. At 4:08 p.m. on December 29, 2020, the claimant emailed all recipients of the Google Meets invitation. In that email, the claimant requested that the hearing be vacated.

13. Due to the late nature of this communication, the ALJ determined that the claimant's communication would be interpreted as a motion, and addressed at the hearing.

14. On December 30, 2020, at 8:30 a.m., counsel for the respondent appeared in the Google Meet. The claimant did not appear. As the prior December 2, 2020 hearing was conducted via telephone, the ALJ attempted to reach the claimant by telephone.

15. The ALJ tried the claimant at two different telephone numbers and made a total of three attempts to reach the claimant. The claimant did not answer.

16. The ALJ determined that the claimant failed to appear for the hearing.

17. The ALJ considered the claimant's motion to vacate the hearing. The ALJ was not persuaded by the reasons outlined in the claimant's December 29, 2020 email. Absent any further clarifying information from the claimant, that motion was denied.

18. The respondent's exhibits A through C were admitted into evidence. No witnesses were called to testify.

FINDINGS OF FACT

1. The claimant suffered an injury at work on October 8, 2013. The respondent admitted liability for this injury.

2. On June 26, 2020, Dr. David Elfenbein performed a Division-sponsored independent medical examination (DIME). In his July 8, 2020 report, Dr. Elfenbein opined that the claimant reached maximum medical improvement (MMI) on October 3, 2018. Dr. Elfenbein assessed a permanent impairment rating of 11 percent for the claimant's right upper extremity. Dr. Elfenbein further opined that no maintenance medical treatment was necessary.

3. On July 28, 2020, the respondent filed a Final Admission of Liability (FAL) admitting for the MMI date of October 3, 2018 and the scheduled impairment rating of 11 percent for the claimant's right upper extremity.

4. In the FAL, the respondent denied post-MMI medical treatment.

5. On August 26, 2020, the claimant filed an Application for Hearing endorsing the issues of post-MMI medical treatment and disfigurement.

6. The claimant did not appear at the December 30, 2020 hearing.

7. There is no persuasive evidence in the record to support a finding that the claimant is in need of post-MMI maintenance medical treatment to prevent further deterioration to her physical condition. The ALJ finds that the claimant has failed to demonstrate that it is more likely than not that she is entitled to post-MMI maintenance medical treatment

CONCLUSIONS OF LAW

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

Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

4. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; see *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). The need for medical treatment may extend beyond the point of maximum medical improvement where a claimant requires periodic maintenance care to prevent further deterioration of his physical condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Section 8-42-101, C.R.S., thus authorizes the ALJ to enter an order for future maintenance treatment if supported by substantial evidence of the need for such treatment. *Grover v. Industrial Commission, supra*.

5. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that she is entitled to post-MMI maintenance medical treatment.

ORDER

It is therefore ordered:

1. The claimant's request for post-MMI maintenance medical treatment is denied and dismissed.
2. The endorsed issue of disfigurement is hereby withdrawn.

Dated this 31st day of December 2020.



Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

ISSUES

1. Whether Claimant established by a preponderance of the evidence that his right upper extremity scheduled permanent impairment rating should be converted to a whole person impairment rating.
2. Whether Claimant established by a preponderance of the evidence that he is entitled to receive reasonable, necessary, and related medical maintenance benefits designed to relieve the effects of his work-related injury or prevent further deterioration of his condition pursuant to *Grover v. Industrial Comm'n*, 795 P.2d 705 (1988)
3. Whether Claimant established by a preponderance of the evidence an entitlement to a disfigurement award pursuant to § 8-42-108, C.R.S.
4. Whether Respondents established by a preponderance of the evidence that they are entitled to an overpayment in the amount of \$282.42 for payment of temporary total disability (TTD) benefits.
5. Whether Respondents established by a preponderance of the evidence an entitlement to reimbursement for Claimant's failure to attend a scheduled IME exam.

FINDINGS OF FACT

1. On October 2, 2018 Claimant sustained an admitted industrial injury in the form of a right rotator cuff tear. Claimant underwent surgical repair for this injury on December 26, 2018 performed by Garth Nelson, M.D.
2. On March 2, 2019 Claimant re-tore his right rotator cuff when he slipped on snow attempting to enter his car.
3. Respondents denied Claimant's re-injury to his right rotator cuff was related to his October 2, 2018 work-injury. The matter proceeded to hearing before ALJ Peter Cannici where the issue of relatedness of the surgery was addressed. On May 5, 2020, ALJ Cannici issued an Order finding the March 2, 2019 injury constituted a compensable consequence of Claimant's original industrial injury. (Ex. 6)
4. On May 19, 2019, Claimant underwent an independent medical examination at Respondents' request. The examination was performed by John Raschbacher, M.D. Dr. Raschbacher opined that Claimant was at MMI on October 2, 2019, and that his March 2, 2019 injury was not work-related. He opined Claimant did not require any maintenance care as a result of his October 2, 2018 injury, and that any impairment Claimant sustained was the result of his March 2, 2019 injury. (Ex. 4).

5. On July 10, 2019, Claimant underwent right rotator cuff repair performed by Dr. Nelson to address the re-tear of his right rotator cuff. The operative report indicates that a 4-inch coronal incision was made over Claimant's right shoulder. (Ex. 2).

6. After the July 10, 2019 surgery, Claimant received no post-surgical treatment beyond a home exercise program and follow-up visits with this authorized treating physicians. Claimant performed a home exercise program directed by Dr. Nelson. Dr. Nelson saw Claimant on July 18, 2019, August 29, 2019, September 26, 2019, October 24, 2019, November 21, 2019, December 17, 2019, January 21, 2020, February 28, 2020, March 24, 2020, May 5, 2020, and June 25, 2020. At these visits, Dr. Nelson assessed Claimant and directed Claimant's home exercise program (HEP). Dr. Nelson's records of these visits are sparse and provide very little information about Claimant's condition at these visits. (Ex. H).

7. On September 6, 2019, Claimant reported to Kimberley Siegel, M.D., his authorized treating physician, that he had not done physical therapy after his previous three rotator cuff surgeries performed by Dr. Nelson. Claimant reported he had done well in self-directed rehabilitation and had always returned to full activity after the surgeries performed by Dr. Nelson. On February 21, 2020, Dr. Siegel reported that Claimant had expressed no interest in attending physical therapy because he had rehabilitated following the prior surgeries on his own. (Ex. G).

8. Following his July 10, 2019 surgery, Claimant remained in an immobilizer for his right shoulder until approximately October 24, 2019. (Ex. G). Claimant completed pain diagrams during this time for Dr. Siegel, reporting pain in his anterior and posterior right shoulder and right trapezius areas. Dr. Raschbacher testified at hearing that pain complaints of this type are typical post-surgical complaints.

9. On January 31, 2020, Claimant saw Dr. Raschbacher again for a IME requested by Respondents. Claimant reported he did not do any physical therapy following his July 10, 2019 surgery, and was currently doing a home exercise program. Claimant reported increased pain with the use of his right, soreness when his right shoulder was away from his body, avoiding reaching and keeping his hand lower than his chest. Claimant reported that he sleeps without difficulty, as long as he does not lie on his right side. Dr. Raschbacher opined that Claimant's then-current condition was unrelated to his employment and his October 2, 2018 injury. Dr. Raschbacher opined that Claimant had not yet reached MMI and that no impairment rating could be done at that time. Dr. Raschbacher opined that Claimant's primary medical treatment at that time would include a home exercise program and orthopedic follow up. (Ex. 3).

10. On May 11, 2020, Claimant saw Dr. Siegel. Claimant reported burning and biting sensations in his shoulder for the previous three weeks after reaching to pick up a piece of paper. Claimant also reported that his shoulder pain intermittently interrupted his sleep. Dr. Siegel determined Claimant was at maximum medical improvement (MMI) on May 11, 2020 and assigned Claimant an 11% right upper extremity impairment for range of motion deficits, which converts to a 7% whole person impairment. Dr. Siegel did not normalize Claimant's range of motion measurements due to existing restrictions of motion in the left

shoulder. Dr. Siegel found no basis for apportionment of Claimant's injury and recommended permanent work/activity restrictions to include maximum lifting/carrying with the right arm of 10 pounds, with no overhead lifting of more than 3 pounds with the right arm, and 10 pounds with both arms, and no forceful pulling or pushing with the right arm. Dr. Siegel did not recommend maintenance medical care after MMI and indicated that "no additional medical treatment [was] reasonably expected to improve his condition at [that] time." (Ex. 1).

11. On May 20, 2020, Respondents filed a Final Admission of Liability admitting for Dr. Siegel's 11% upper extremity impairment rating. Claimant was paid temporary total disability ("TTD") from May 11, 2020 through May 12, 2020, at an average weekly wage of \$987.84. The FAL notes an overpayment of \$282.24, which equates to two days of TTD benefits. (Ex. A).

12. On June 25, 2020, Claimant saw Dr. Nelson for a follow up visit. Claimant reported difficulty shifting his car. Dr. Nelson agreed with Dr. Siegel's MMI opinion and with permanent restrictions limited to light lifting. He indicated that he did not anticipate any further surgeries and had no further appointments scheduled. Dr. Nelson's medical record does not indicate that further maintenance treatment was recommended. (Ex. 3).

13. Respondents scheduled a follow-up IME with Dr. Raschbacher on August 4, 2020. Notice of the IME was sent to Claimant's counsel by email (pleadings@kaplanmorrell.com) on July 28, 2020, at 4:18 p.m. (Ex. N). Claimant did not attend the appointment, and Respondents incurred a no-show expense of \$1,122.00. (Ex. O, P). On October 21, 2020, PALJ Sandberg issued a Prehearing Order granting Respondents' request to add this issue to the present hearing. (Ex. D).

14. On October 6, 2020, at a one-year surgical follow-up, Dr. Nelson noted that Claimant continued to experience pain/weakness with reaching – right worse than left. He noted again that Claimant was at MMI with permanent restrictions with minimal reaching/lifting, and that Claimant had moderate LOM (loss of motion) of the right shoulder vs. full range of motion (FROM). Dr. Nelson's medical record from that date does not include any recommendation for further treatment of Claimant's right shoulder (Ex. H).

15. On October 13, 2020, Claimant again saw Dr. Raschbacher for an IME requested by Respondents. On his pain diagram for this IME, Claimant indicated pain on the outside of his right shoulder, his right scapula, right trapezius, and right chest area. Dr. Raschbacher also opined that "it is more likely than not that Mr. Newton has been coached with respect to location of pain in order to further a contention that his shoulder rating should be converted to a whole person impairment." He further opined that Claimant had no neck pathology or significant pathology medial, as it were, to the shoulder joints that would provide a basis for conversion from scheduled upper extremity to whole person impairment." Finally, Dr. Raschbacher opined that Claimant did not need maintenance care and Claimant should be well versed in a home-exercise plan. (Ex. 3).

16. Claimant testified at hearing that he continues to experience limitations in the use of his right arm and shoulder. Specifically, Claimant has difficulty reaching overhead to put on clothes, which causes pain on the outside of his shoulder, he cannot push a shopping cart with his right arm and cannot open or close heavy doors with his right hand. Claimant also testified he has difficulty holding his right arm at an angle to the side or backward and can hold it straight overhead without significant difficulty. Claimant testified that he believes his right shoulder continues to degrade and he is concerned that it will continue to do so. Claimant testified that he did not learn that he was scheduled for an IME with Dr. Raschbacher on August 4, 2020 until the evening of August 4, 2020, and that he had not been on his email for the previous few days.

17. Dr. Raschbacher was qualified as an expert in the field of occupational medicine and testified at hearing. Dr. Raschbacher testified that the shoulder joint is made up of four different components – the sternoclavicular joint (“SC” joint); acromioclavicular joint (“AC” joint); glenohumeral joint; synovial joint. He testified that the trapezius is not part of the shoulder musculature. He testified that Claimant did not have any complaints outside the shoulder, into his back or neck.

18. Claimant called Sander Orent, M.D., in rebuttal to Dr. Raschbacher’s testimony. Dr. Orent testified that the shoulder consists of a “ball-and-socket” joint which is the glenoid and the humeral head, the labrum, and surrounding the joint capsule. He testified that the AC joint and SC joint, and not the articulation of the scapula and the ribs. He further testified that the trapezius is a part of the shoulder girdle.

19. As the result of his work injury, Claimant underwent two surgeries on his shoulder on December 26, 2018 and July 10, 2019. As a result of these surgeries, Claimant has two surgical scars on his right shoulder. One scar measures approximately four and one-quarter inches long. The scar is visibly distinct from the surrounding skin. Claimant’s second scar is approximately one inch in length and is visibly distinct from the surrounding skin. The ALJ finds that Claimant should be awarded \$1,100 for disfigurement.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers’ Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. See § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. See § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers’ compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers’ compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id.* at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Conversion of Scheduled Impairment to Whole Person Impairment

Section 8-42-107(1)(a), C.R.S. limits medical impairment benefits to those provided in §8-42-107(2), C.R.S. when a claimant's injury is one enumerated in the schedule of impairments. The schedule includes the loss of the "arm at the shoulder." See §8-42-107(2)(a), C.R.S. However, the "shoulder" is not listed in the schedule of impairments. See *Bolin v. Wacholtz*, W.C. No. 4-240-315 (ICAO, June 11, 1998).

When an injury results in a permanent medical impairment not set forth on a schedule of impairments, an employee is entitled to medical impairment benefits paid as a whole person. See §8-42-107(8)(c), C.R.S.

Because §8-42-107(2)(a), C.R.S. does not define a "shoulder" injury, the dispositive issue is whether a claimant has sustained a functional impairment to a portion of the body listed on the schedule of impairments. See *Strauch v. PSL Swedish Healthcare*, 917 P.2d 366, 368 (Colo. App. 1996). Whether a claimant has suffered the loss of an arm at the shoulder under §8-42-107(2)(a), C.R.S., or a whole person medical impairment compensable under §8-42-107(8)(c), C.R.S., is determined on a case-by-case basis. See *DeLaney v. Industrial Claim Appeals Office*, 30 P.3d 691, 693 (Colo. App. 2000).

The ALJ must thus determine the situs of a claimant's "functional impairment." *Velasquez v. UPS*, W.C. No. 4-573-459 (ICAO Apr. 13, 2006). The situs of the functional

impairment is not necessarily the site of the injury. See *In re Hamrick*, W.C. No. 4-868-996-01 (ICAO, Feb. 1, 2016); *In re Zimdars*, W.C. No. 4-922-066-04 (ICAO, Feb. 4, 2015). Pain and discomfort that limit a claimant's ability to use a portion of the body is considered functional impairment for purposes of determining whether an injury is off the schedule of impairments. *In re Johnson –Wood*, W.C. No. 4-536-198 (ICAO, June 20, 2005); *Vargas v. Excel Corp.*, W.C. 4-551-161 (ICAO, Apr. 21, 2005). However, the mere presence of pain in a portion of the body beyond the schedule does not require a finding that the pain represents a functional impairment. *Lovett v. Big Lots*, WC 4-657-285 (ICAO, Nov. 16, 2007); *O'Connell v. Don's Masonry*, W.C. 4-609-719 (ICAO, Dec. 28, 2006).

Claimant bears the burden of proof by a preponderance of the evidence to establish functional impairment beyond the arm at the shoulder and the consequent right to PPD benefits awarded under § 8-42-107(8)(c), C.R.S. Whether Claimant met the burden of proof presents an issue of fact for determination by the ALJ. *Delaney v. Industrial Claim Appeals Office*, 30 P.3d 691 (Colo. App. 2001); *Johnson-Wood v. City of Colorado Springs*, W.C. No. 4-536-198 (ICAO June 20, 2005). *In re Claim of Barnes*, 042420 COWC, 5-063-493 (ICAO, April 24, 2020).

Claimant has established by a preponderance of the evidence that his right upper extremity rating should be converted to a whole person impairment. Section 8-42-107(2)(a), C.R.S., provides that a loss of use of the “arm at the shoulder” is a scheduled impairment, but does not include the shoulder itself. In other words, the section 8-42-107(2)(a) defines the anatomical extent of the arm. If an impairment extends beyond the proximal termination of the arm into the shoulder, Claimant is entitled to whole person impairment. Claimant's medical records and testimony, demonstrate that Claimant has intermittent difficulty sleeping due to his right shoulder, has difficulty pushing and pulling objects, and difficulty dressing and difficulty using his shoulder joint to move his arm overhead, and to the side. Additionally, Claimant's medical records demonstrate issues with his trapezius and scapular area. The situs of these impairments extend is beyond arm, and into the shoulder, trapezius, and scapular areas. Accordingly, the ALJ finds that Claimant has established by a preponderance of the evidence that his scheduled right upper extremity permanent impairment rating should be converted to a whole person impairment.

Grover Medical Benefits

Respondents are liable to provide such medical treatment “as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury.” § 8-42-101(1)(a), C.R.S. Colorado courts have ruled that the need for medical treatment may extend beyond the point of MMI where the claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or prevent further deterioration of her condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995).

An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that the claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1999); *Hastings v. Excel Electric*, W. C. No. 4-471-818 (ICAO, May 16, 2002). The claimant must prove entitlement to *Grover* medical benefits by a preponderance of the evidence. *Lerner v. Wal-Mart Stores, Inc.*, 865 P.2d 915 (Colo. App. 1993); *Mitchem v. Donut Haus*, W.C. No. 4-785-078-03 (ICAO, Dec. 28, 2015). An award of *Grover* medical benefits should be general in nature. *Hanna v. Print Expeditors Inc.*, 77 P.3d 863 (Colo. App. 2003); *Anderson v. SOS Staffing Services*, W. C. No. 4-543-730, (ICAO, July 14, 2006).

Claimant has failed to establish by a preponderance of the evidence he is entitled to reasonable, necessary, and related medical maintenance benefits designed to relieve the effects of his work-related injury or prevent further deterioration of his condition pursuant to *Grover v. Industrial Comm'n*, 795 P.2d 705 (1988). Claimant's authorized treating physicians, Dr. Siegel and Dr. Nelson did not recommend additional treatment after Claimant reached MMI. Dr. Siegel specifically noted that Claimant no additional medical treatment was reasonably expected to improve his condition. Claimant's fear of degeneration of his shoulder is not sufficient, in and of itself, to establish that it is more likely than not that additional treatment will either relieve the effects of this work injury or prevent further deterioration. Given that no treating provider has recommended or suggested the possibility of additional treatment, the ALJ finds that Claimant has failed to establish by a preponderance of the evidence and entitlement to *Grover* medical benefits.

Disfigurement

Section 8-42-108(1) provides that a claimant is entitled to additional compensation if he is "seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view." As found, Claimant has sustained disfigurement as a direct and proximate result of the October 2, 2018 injury. Claimant should be awarded \$1,100 for disfigurement.

Respondent's Entitlement to Repayment of Disability Benefits

Pursuant to § 8-43-303(1) C.R.S., upon a *prima facie* showing that the claimant received an overpayment in benefits, the award shall be reopened solely as to overpayments and repayment shall be ordered. No such reopening shall affect the earlier award as to moneys already paid except in cases of fraud or overpayment. *Id.* In 1997, The General Assembly amended subsections (1) and (2)(a) of § 8-43-303 to permit reopening of an award on grounds of fraud and overpayment, in addition to the already statutory reopening methods of error, mistake, or change in condition. *Haney v. Shaw, Stone, & Webster*, W.C. No. 4-796-763 (ICAO July 28, 2011), *citing Simpson v. Industrial Claim Appeals Office*, 219 P.3d 354 (Colo. App. 2009), *rev'd on other grounds Benchmark/Elite, Inc., v. Simpson*, 232 P.3d 777 (Colo. 2010).

The 1997 amendments also provide that no such reopening shall affect the earlier award as to moneys already paid except in cases of fraud or *overpayment*. *Haney*, at *1. The 1997 amendments added § 8-40-201(15.5) defining “overpayment” to mean:

[M]oney received by a claimant that exceeds the amount that should have been paid, or which the claimant was not entitled to receive, or which results in duplicate benefits because of offsets that reduce disability or death benefits payable under said articles. For an overpayment to result, it is not necessary that the overpayment exist at the time the claimant received disability or death benefits under said articles.

There are thus three categories of possible overpayment pursuant to §8-40-201(15.5). *In Re Grandstaff*, No. 4-717-644 (ICAP, Mar. 11, 2013). An overpayment may occur even if it did not exist at the time the claimant received disability or death benefits. *Simpson v. ICAO*, 219 P.3d 354, 358 (Colo. App. 2009). Therefore, retroactive recovery for an overpayment is permitted. *In Re Haney*, W.C. No. 4-796-763 (ICAP, July 28, 2011).

Respondents have established by a preponderance of the evidence an entitlement to repayment of \$282.24 for overpayment of TTD benefits. Claimant was placed at MMI on May 11, 2020, and his right to TTD benefits thus terminated on that date pursuant to § 8-42-105 (3)(a), C.R.S. Respondents paid Claimant TTD benefits for both May 11, 2020 and May 12, 2020, dates for which Claimant was not entitled to TTD benefits. Respondents appropriately withheld \$282.24 from Claimant’s payment of PPD benefits.

Payment Of IME No-Show Fees

Neither the Workers Compensation Act, nor the WCRP rules require a claimant to reimburse a respondent for a cancellation fee associated with a missed IME appointment. Respondents incorrectly contend that § 8-43-404, C.R.S., permits the employer to recover the costs paid should a claimant fail to attend an examination. Section 8-43-404 (1)(b)(I), requires an employer or insurer request an examination to pay a claimant’s estimated costs of attending the examination. Section 8-43-404 (1)(b)(II), C.R.S., provides: “If an employer pays estimated expenses under this paragraph (b) and the claimant does not attend the examination, the employer or insurer may recover the costs paid for the employee's expenses from future indemnity benefits.” Thus, the Act only permits the employer to recover amounts paid to the claimant for attendance, and do not address the charges for a missed IME appointment. The Act does not address recovery of costs for payment of cancellation charges by the physician in the event of a cancelled or no-show examination.

This issue was addressed in *In re Claim of Fahler*, W.C. No. 5-111-049 (ICAO, Aug. 17, 2020), as follows:

“Here, we agree with the ALJ that §8-43-404(1)(b)(II), C.R.S. does not require the claimant to reimburse the respondents for the \$917.50 cancellation fee associated with a missed IME appointment. To interpret §8-

43-404(1)(b)(II), C.R.S. as the respondents are proposing, would require us to read words into the statute. However, we are precluded from reading nonexistent provisions into the Act. *Archuletta v. Industrial Claim Appeals Office*, 381 P.3d 374, 377 (Colo. App. 2016). The clear intent of §8-43-404(1)(b)(II), C.R.S. is to allow the employer or insurer to recover the advanced expenses made specifically to the claimant for his or her lodging, travel, and hotel costs associated with attending an IME, when the claimant misses such IME. Additionally, as found by the ALJ, we too are unaware of any Workers' Compensation Rule of Procedure that requires the claimant to reimburse the respondents for the costs of the missed IME." (Additional citations omitted).

Respondents argue that repayment of the IME cancellation fee is also warranted under C.R.C.P. 37 as a discovery sanction. The ALJ finds no discovery violation in this instance. No evidence was presented to indicate whether the IME date had been coordinated with Claimant's counsel prior to sending the notice or if the IME was unilaterally scheduled by Respondents. Respondents sent notice of the August 4, 2020 IME on July 28, 2020 at 4:18 p.m. to Claimant's counsel at pleadings@kaplanmorrell.com (the ALJ notes that Claimant's counsel's direct email address is britton@kaplanmorrell.com according to the certificate of service). Claimant's counsel was effectively provided four business-days-notice. Claimant credibly testified that he had not checked his email for a few days before the evening of August 4, 2020, and thus did not receive notice of the IME until after it was scheduled. When Claimant received notice of the re-scheduled IME he attended. The evidence does not demonstrate that Claimant knowingly or intentionally missed the August 4, 2020 IME with Dr. Raschbacher. The ALJ finds no discovery violation and the evidence demonstrates only a miscommunication. The ALJ finds no discovery violation or other legal basis for ordering Claimant to pay the cancellation fee for the missed August 4, 2020 IME. Respondent's request for reimbursement of the IME cancellation fee is denied.

ORDER

It is therefore ordered that:

1. Claimant's 11% permanent impairment rating for the right upper extremity is converted to a 11% whole person rating.
2. Claimant's request for a general order of medical maintenance benefits is denied and dismissed.
3. Respondents shall pay Claimant \$1,100.00 for disfigurement.
4. Respondents appropriately asserted a \$282.24 overpayment of Claimant's TTD benefits.

5. Respondent's request for reimbursement of \$1,122.00 for the August 4, 2020 IME cancellation fee is denied and dismissed.
6. Respondents shall pay statutory interest at the rate of 8% per annum on compensation benefits not paid when due.
7. All matters not determined herein are reserved for future determination.

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



DATED: December 31, 2020.

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203